REFERENCE AND TERMINOLOGY UNIT
please return to room

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/248
6 March 1984

28300

ORIGINAL: CHINESE/ENGLISH
RUSSIAN/SPANISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Seventeenth Session
New York, 25 June - 13 July 1984

DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES AND DRAFT CONVENTION ON INTERNATIONAL CHEQUES:

Analytical compilation of comments by Governments and international organizations

Report of the Secretary-General

CONTENTS

	Page
INTRODUCTION	2
PART I. DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES	3
A. General comments on the draft Convention	3
B. Specific comments on individual articles	22
PART II. DRAFT CONVENTION ON INTERNATIONAL CHEQUES	124
A. General comments on the draft Convention	124
B. Specific comments on individual articles	134

V.84-83103

INTRODUCTION

1. In accordance with a decision of the United Nations Commission on International Trade Law taken at its fifteenth session (26 July - 7 August 1982), 1/ the text of the draft Convention on International Bills of Exchange and International Promissory Notes 2/ and the draft Convention on International Cheques, 3/ together with a commentary thereon, 4/ was transmitted to Governments and interested international organizations for their comments.

2. In its decision the Commission also requested the Secretary-General to prepare a detailed analytical compilation of these comments and to distribute it well in advance of the seventeenth session of the Commission to be held in 1984.

3. This report has been prepared in response to that request. It reproduces the comments received by the Secretary-General, as at 31 December 1983, from the following Governments and international organizations: Australia, Austria, Botswana, Canada, China, Cyprus, Czechoslovakia, Denmark, Finland, German Democratic Republic, Germany, Federal Republic of, Hungary, Indonesia, Japan, Mexico, Netherlands, Norway, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia, and the International Monetary Fund. 5/

4. Part I of this report reproduces the comments on the draft Convention on International Bills of Exchange and International Promissory Notes and Part II the comments on the draft Convention on International Cheques.

5. An in depth analysis, identifying the key features and major controversial issues that may be inferred from the comments reproduced in this report, is contained in document A/CN.9/249.

1/ Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17 (A/37/17), para. 50.

2/ A/CN.9/211.

3/ A/CN.9/212.

4/ A/CN.9/213: Commentary on the draft Convention on International Bills of Exchange and International Promissory Notes. A/CN.9/214: Commentary on the draft Convention on International Cheques.

5/ The following official language of the United Nations is the original language of the comments received:
Chinese: comments by China;
English: comments by Australia, Austria, Botswana, Canada, Cyprus, Czechoslovakia, Denmark, Finland, German Democratic Republic, Germany, Federal Republic of, Hungary, Indonesia, Japan, Netherlands, Norway, Sweden, United Kingdom, United States, Yugoslavia, International Monetary Fund;
Russian: comments by USSR;
Spanish: comments by Mexico, Spain, Uruguay.

PART I. DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

A. General comments on the draft Convention

AUSTRALIA

The Australian Government generally supports the draft Bills and Notes Convention and the draft Cheques Convention as a uniform optional scheme in respect of international negotiable instruments and sees the Conventions as a reasonably workable compromise between two basically different legal systems - civil law and common law.

The draft Conventions embody certain legal principles that are characteristic of civil law systems such as the continental concept of a guarantee (the '*aval*') and rules relating to forged indorsements and material alterations and the protest and dishonour of negotiable instruments. While these concepts may create some difficulties in adapting the draft Conventions to Australian commercial and legal practice, these difficulties are not seen as major obstacles to the acceptance by the Australian legal and commercial community of the underlying scheme of the draft Conventions.

The draft Conventions do not significantly weaken the rights and obligations of parties to international negotiable instruments and Australian banking practice should be capable of adapting readily the handling of international negotiable instruments under the Conventions which generally simplify the issue, negotiation and payment of such instruments.

The following comments are not intended as an exhaustive analysis of the two draft Conventions, but rather provide a discussion of the main areas of concern to the Australian business, banking and legal communities that are raised by the draft Conventions.

Conflict of laws:

The choice of law governing the formal validity of a bill of exchange is governed in Australia by s.77(a) of the Bills of Exchange Act 1909 ('BEA') which also applies to cheques and promissory notes. This section provides that the validity of a bill as regards requisites of form is determined by the law of the place of issue, and the formal validity of supervening contracts by the law of the place where they are made. Section 77(b) provides that 'the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill' is determined by the law of the place where the contract is made. Under Australian law, the law of the place where such contract is made is the law of the place where the last act necessary to render a party liable took place - in the case of a bill of exchange, normally delivery. Accordingly, each contract on the bill may have to be interpreted according to the law of the place where the bill was delivered.

The duties of a holder of a bill with respect to such matters as presentment, protest, notice of dishonour, are governed by the law of the place 'where the act is done or the bill is dishonoured' (s.77(c)). This

itself may present some problems of interpretation. Where a bill is drawn in one country but is payable in another, the due date of payment is determined according to the law of the place where it is payable.

Australian conflicts rules, supplemented by the provisions of the BEA, can, therefore, require Australian traders and financers to have a familiarity with the negotiable instrument laws of many jurisdictions, as well as dexterity in the application of the conflicts rules.

The approach of the draft Conventions to notice of dishonour and protest are entirely different from the BEA scheme. The rules under the draft Conventions are intended to apply universally - there is no question of the need to search out and apply the rules of the national laws of individual countries. Australia generally supports the scheme under the draft Conventions in this respect and mentions that an amendment of s.77 of the BEA would be necessary to take account of the rules under that scheme.

AUSTRIA

Efforts to reach a compromise between the main bill of exchange laws and to promote in such a way international business transactions by a unification of laws are welcomed by Austria. The Draft Convention is a remarkable attempt toward such a unification. Apart from certain exceptions which will be discussed in detail later on - the result brought about by the Draft Convention may be considered a viable compromise. The envisaged convention, however, will fulfill its purpose only if it is internationally accepted and applied which, in turn, will be the case only if the regulations are clear, unambiguous and distinct. This is the only way to secure that the Convention will be applied in practice. This point of view may even be more important than certain legal policy considerations, e.g. whether and how a person who lost a bill of exchange has to be given particular protection.

Unfortunately, the Draft Convention does, in general, not meet these requirements. The structure of the regulations is very complicated, the multitude of their interactions is not clearly distinguishable (the Geneva Convention shows that complicated regulations and a complicated system need not necessarily be the result of the complexity of the matter to be regulated). Therefore, it is not difficult to foresee that the business circles involved will have little ambition to subject themselves to such a system.

If one is aware of the fact that even conventions which are clear and distinct in their contents and the quality of which has been generally recognized, like the UN Convention on Contracts for the International Sale of Goods for instance, are being ratified only with reluctance and enter into force only after many difficulties have been overcome the chances of success of a convention having the mentioned drawbacks must be rated very low. Therefore, it should be a consideration of principle whether it is reasonable to draw up a convention which - in the form currently proposed - has hardly any chances to ever enter into force.

BOTSWANA

We have carefully studied the document and we have nothing useful and original to say about it.

CANADA

Canada generally approves the draft Convention on International Bills of Exchange and International Promissory Notes and the draft Convention on International Cheques and is of the view that appropriately revised, they should be adopted as multilateral treaties.

With the exception of the points addressed subsequently, Canada finds that the texts of the draft Conventions are, in terms of organization, detail, relevance to modern business practices and clarity of expression, a distinct improvement upon the Geneva Convention on International Bills of Exchange and Promissory Notes that the new drafts will replace.

Matters not addressed by the Conventions: Questions may arise concerning the selection of the appropriate domestic law from among those which might claim to govern the obligations contained in the instrument by providing the supporting subsystem of law required to resolve collateral issues that are not covered by the Convention. Canada believes without making any specific recommendations as to substances or form, that a provision similar in purpose to subsection 97.(2) of the United Kingdom Bills of Exchange Act or Section 10 of the Canadian Bills of Exchange Act would enhance the draft Conventions.

Section 10 of the Canadian Act reads:

"10. The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes and cheques.

CHINA

With the steady growth of world trade, bills and notes have been used increasingly as means of payment in international settlement. They are circulated internationally on an extensive scale, which has long transcended national boundaries, as is determined by their nature and functions. In order to safeguard their use and circulation and settle international disputes arising from the differences in national negotiable instruments laws and from the invocation of different laws by the parties to an instrument to interpret their rights and liabilities or as the basis of their actions, it is imperative and necessary to make a uniform, universally accepted law on negotiable instruments.

The two drafts as they now stand are the products of nine years' efforts and 11 Working Group meetings, starting from 1973. They have paid attention to the characteristics and customs of both the Anglo-American system of law and that of Continental Europe, summed up the views of different quarters, and adopted a new and realistic course of action. While taking into consideration the difference in national laws on negotiable instruments, they have

endeavoured to seek common ground and reserve the differences for further study. Therefore, the two drafts are suited to present conditions and have a certain mass basis.

But they have shortcomings too, which are manifested mainly in the following aspects:

1. Considering the many new circumstances, experiences and problems that have emerged in the circulation of international instruments since the war we recommend as a guiding principle for drawing up the two drafts that they should be "fair and reasonable, clear-cut in defining the rights and liabilities, and easy to apply." While maintaining a certain continuity by assimilating the essence of the two major systems of law and discarding what has become outmoded in them, it is necessary to sum up the new experiences in the circulation of international instruments and fill up deficiencies scientifically and appropriately to ensure greater accuracy and perfection of the two drafts and make them easier to apply.

2. Some of the articles and paragraphs in the two drafts are rather redundant, some are incomplete, and some lack clear-cut stipulations. In the Draft Convention on International Bills of Exchange and International Promissory Notes, for example, the provisions governing endorsement are scattered in Chapter Two ("Interpretation"), Chapter Three ("Transfer") and Chapter Four ("Rights and Liabilities"), making it inconvenient to invoke them; on the other hand, some of the questions relating to endorsement are left out, e.g., the effect of alteration, obliteration and forgery of an endorsement on an instrument, and the liability of the alterer, obliterator and forger. Another example is the interpretation of terms, such as "holder", "protected holder", "a holder who is not a protected holder", "qualifying as a holder", etc. These terms are used at different places in the draft, but are not interpreted one by one in Chapter Two ("Interpretation"), which has thus failed of its purpose as a chapter specially devoted to interpretation. In addition, some of the terms that have been left without interpretation may cause a divergence of view in the course of application. Moreover, there should be explicit provisions in Chapter Four ("Rights and Liabilities") about the rights, obligations and liabilities relating to an instrument at each stage of the whole process from drawing, circulation to payment, so as to avoid or reduce disputes in the course of application and enable the instrument to play its due role. But the provisions about liabilities in that chapter are incomplete. For example, there are no provisions about the liability of the holder or the endorsee (the collecting bank or the paying bank) arising from a forged endorsement on an instrument, thus failing to give due protection to the banks either as collecting banks or as paying banks.

3. Some of the articles and paragraphs in the two drafts are highly elastic and leave quite a few gaps in them. It is hardly avoidable that such elasticity would lead to increased disputes and differences in their application and affect the solution of problems; and the many gaps are liable to induce parties to invoke their own national negotiable instruments laws and thus create more conflicts of laws, even leading to such disputes as have developed around the application of municipal law in private international law. All this would have an adverse effect on the circulation of international instruments.

CYPRUS

In Cyprus the Bills of Exchange Law, Cap. 262, deals with Bills of Exchange and Promissory Notes. As with the Draft Convention on International Cheques so here, in case the Convention is adopted by Cyprus, the existence of two different sets of rules, the one applicable to International Bills and International Promissory Notes and the other to all other Bills and Promissory Notes might lead to confusion. To avoid this, adequate publicity must be given to the Convention and the domestic law as well as the Draft Convention if possible must be changed as regards a number of their provisions.

CZECHOSLOVAKIA

The Draft Convention on International Bills and Notes can be considered as a suitable basis for discussion on uniform rules intended for universal international use.

FINLAND

International unification has been notably successful in the field of international payments. The objective of the present drafts is to bridge divergences between the 1930 Geneva Conventions and Anglo-American law. This is clearly a useful objective. The Draft Convention on International Bills of Exchange seems to form a good basis for the envisaged unification.

On the other hand, it is doubtful whether there is a genuine need for a Convention on International Cheques based on the assumption that the cheque as a document is transmitted from one country to another. It would seem that the need to regulate such international cheques is diminishing and that future efforts should be directed towards electronic transfer of funds.

GERMAN DEMOCRATIC REPUBLIC

The Government of the German Democratic Republic welcomes the elaboration of the Draft Convention on International Bills of Exchange and International Promissory Notes and the Draft Convention on International Cheques. By the elaboration of these two Draft Conventions two important steps have been initiated towards the further unification of bill and cheque law. The Government of the German Democratic Republic supports such further unification, because it may facilitate and simplify the use of bills of exchange/promissory notes and cheques in international economic relations. Bills of exchange/promissory notes and cheques have considerable significance in handling and securing payments in international transactions. Therefore, it seems necessary to establish, as far as possible, uniform and simple juridical bases for the practical use of bills of exchange/promissory notes and cheques. The Government of the German Democratic Republic considers it an advantage of the two Draft Conventions submitted that it has been possible to combine two different conceptions of bill and cheque law: the conception reflected in the Geneva Convention providing a Uniform Law for Bills of

Exchange and Promissory Notes dated 7 June 1930 and in the Geneva Convention providing a Uniform Law for Cheques dated 19 March 1931, as well as the conception based on Common Law. In the view of the Government of the German Democratic Republic, the compromise found in the two drafts offers acceptable, fair and practicable solutions to all states which intend to become parties to the Conventions.

The Government of the German Democratic Republic considers the elaboration of conventions containing a coherent set of direct regulations and to which states may become parties, to be an adequate approach. It can be expected that in this way the effect of the envisaged unification is greater than would be the case if a convention, accompanied by a model law, would be recommended to states to regulate the matters in question at the national level. Taking into consideration the different economic and legal nature of bills of exchange/promissory notes and cheques, it was in its opinion indispensible to take as a basis in the drafting process the option of two separate conventions to which states may become parties. It is advantageous in the interest of achieving maximum universality for both Conventions, if both of them have the same structure and if the provisions on bills of exchange/promissory notes and cheques are as uniform as possible, while making allowance for their different functions.

In both Conventions the effort is obvious to adapt the structure of the Conventions to the practical sequence of steps in dealings using bills of exchange/promissory notes and cheques which may prove to be favourable for the practical application of the two Conventions. The two Conventions are based on the conception that all legal problems related to bills of exchange/promissory notes and cheques shall be regulated as far as possible by the texts of the Conventions themselves. This obviously explains why no reference has been made to subsidiary applicable law. However, the intention of avoiding reference to subsidiary applicable law should, under no circumstance, lead to a further expansion of the draft provisions. The present volume is completely sufficient for covering the legal aspects of all typical processes related to bills of exchange/promissory notes and cheques. Besides, the pertinent commentary will be an important aid in the practical use of bills of exchange/promissory notes and cheques as well as in future jurisdiction.

FEDERAL REPUBLIC OF GERMANY

The UNCITRAL Draft Convention on International Bills of Exchange and International Promissory Notes provides for the creation of a new law on bills of exchange which is to be applied exclusively to international transactions.

The Geneva Conventions have already brought about a far-reaching unification of the law on bills of exchange which has proved good for more than half a century. However, groups of important states have kept aloof from these Conventions. It would be desirable to include these states in the unification, even if no significant difficulties have arisen up to now in international commercial transactions because of the different systems of law on bills of exchange.

The solution offered by the Draft to create an international bill of exchange as an alternative to the commercial papers already existing cannot serve the objective of promoting global unification as to the law on bills of exchange. It would, on the contrary, rather bring about the danger of impairing the uniformity achieved. In practice, the system proposed would for a long time entail considerable legal uncertainty and difficulties which, in the opinion of all groups concerned in the Federal Republic of Germany, would not be balanced by substantial advantages.

UNCITRAL's efforts towards further unification of the law on bills of exchange should therefore not be directed towards introducing a new legal system beside the old one, but should strive towards making the Geneva Conventions acceptable to the Anglo-American legal systems as well as towards further developing them in accordance with the requirements of modern transactions, if necessary. For this purpose, it should first be clarified which provisions of the Geneva Conventions are in need of amendment.

HUNGARY

According to the opinion of the Government of the Hungarian People's Republic the Draft Conventions on International Bills of Exchange and International Promissory Notes as well as on International Cheques reach the purpose of unification that have been aimed at by UNCITRAL in the sphere of negotiable instruments.

The Draft Conventions are acceptable and satisfying as regards their contents, structures and forms. The Hungarian Government agrees with the facultative methods of the regulations and with the system that on the international negotiable instruments not only one, but two separate Conventions should be established namely one on Bills of Exchange and Promissory Notes and another one on Cheques. The Drafts contain a successful compromise between the Geneva and English Bill of Exchange system; the Drafts apply a solution convenient to practice regarding the divergence between the conceptual views of the two systems. The Bill of Exchange and Cheque systems established by the Drafts are sovereign and independent.

The Draft Conventions are basically suitable to solve the well-known problems, arising from the difference between English and Geneva systems. According to the conviction of the Hungarian Government they are apt to the unification in the field of bills and cheques in such a manner as is achieved in the area of documentary credit.

In Hungary there is no theoretical and practical obstacle to the widespread application of the Convention on International Bills of Exchange and Promissory Notes as well as International Cheques.

INDONESIA

The Indonesian Commercial Code covers the law on Bills of Exchange, Promissory Notes and Cheques, which are derived from the Uniform Law for Bills of Exchange and Promissory Notes (ULB) and the Uniform Law for Cheques (ULC) adopted by the Geneva International Conventions of 1930 and 1931.

The ULB and ULC came into force in the Netherlands and, based upon the principle of concordance, were adopted through the Netherlands Indies, which became Indonesia in 1945. They came into force as of January 1, 1936 for Bills of Exchange and Promissory Notes (State Gazette 1934/562 and 1935/351), as of January 1, 1936 for Cheques (State Gazette 1935/77 and 562). The draft Convention on International Bills of Exchange and Promissory Notes, and the draft Convention on International Cheques are not merely based upon the ULC and the ULB but also upon the Bills of Exchange Act of 1882 (BEA) and the Uniform Commercial Code (UCC).

The two draft conventions cover materials originating from two different systems of laws namely the civil law and the common law system. Therefore these two drafts contain a broader substance than the Indonesian Commercial Code.

Considering that the two draft conventions which provide rules for settling problems concerning international payments are in line with the Indonesian Commercial Code (subject to a reservation concerning provisions on "signature"), they are acceptable and would be taken into consideration by the Government of the Republic of Indonesia.

JAPAN

It will be very meaningful to create, in addition to the existing negotiable instruments governed by conventions and domestic laws, a new bill of exchange or promissory note to be issued only for international transactions. The Japanese Government supports the idea of adopting a new multilateral convention creating such an instrument. The present texts of the Draft Convention on International Bills of Exchange and International Promissory Notes, the product of discussion in the Working Group on International Negotiable Instruments of UNCITRAL, provide an excellent basis for achieving a good compromise between the Anglo-American and Geneva systems, and the Japanese Government (and Japanese banking and trading circles) finds the basic principles on which the texts are drafted acceptable.

NETHERLANDS

The Netherlands expresses its appreciation to the UNCITRAL Working Group on International Negotiable Instruments for having finalized two draft conventions designed to establish uniform provisions governing international bills of exchange and international promissory notes, and international cheques. Though the draft Conventions in certain respects fundamentally change basic rules of the civil law system of negotiable instruments, as

indeed also of the common law system, it is realized that the proposed uniform provisions are the outcome of carefully worked out compromises. The Netherlands, therefore, is in favour of continuing work on the basis of the draft Conventions if there were sufficient support among member states of UNCITRAL for the adoption of uniform provisions in the form of either a convention or a model law.

Though the Netherlands thus expresses its willingness to cooperate actively with other Governments, it must at the same time express its doubts whether the establishment of a third system of negotiable instruments law would add measurably to legal certainty in the area under discussion. The fact that the two major systems of negotiable instruments law differ in important aspects has not, to any significant extent, impeded the use of negotiable instruments in settling international payments. Having regard to the large volume of payment transactions by means of such instruments, one cannot help but note the paucity of court decisions. It is arguable that an untried third system, because of the unfamiliarity of many of its provisions and the absence, at least initially, of their uniform interpretation, might well have a detrimental effect on the degree of legal certainty that currently exists.

Since bills of exchange and promissory notes are more widely used in international transactions than are cheques, the Netherlands would prefer that further work be focused on the draft convention on international bills of exchange and international promissory notes and that, consequently, work on international cheques be deferred if not abandoned. For this reason, the comments of the Netherlands are largely directed to that draft Convention though they apply equally to the draft Convention on International Cheques to the extent that the provisions of the two draft Conventions are similar.

The Netherlands, at this stage, does not pronounce itself on the question whether uniformity of law would better be achieved through the adoption of a convention or a model law. In this respect it notes that the large measure of uniformity found in the legislation of civil law countries is the result not so much of ratification by States of the Geneva Conventions of 1930 and 1931, as of the use by States of these Conventions as models for domestic legislation.

NORWAY

1. The Government of Norway approves of the proposal for two separate, independent conventions on international bills of exchange and international promissory notes and on international cheques.

We acknowledge the high quality of the UNCITRAL Draft Convention on International Bills of Exchange and International Promissory Notes. We also approve of the thoroughness of the Draft Convention and its systematic structure. The UNCITRAL Working Group has reached good compromises between civil and common law and has, from a practical point of view, proposed a sound and workable regulation.

2. The Norwegian Government supports the adoption of the Draft Convention as a binding multilateral treaty. The Draft ought not to be adopted only as a model for enactment. This approach would invite deviations from the Convention during the different national enactment processes.

3. It seems to us that the contracting States to the Convention providing a uniform law for bills of exchange and promissory notes, Geneva June 7th 1930 (Norway included), will not be able to ratify an UNCITRAL Convention without denouncing the Geneva Convention. Norway will support proposals for an amendment to the Geneva Convention allowing the contracting States to ratify the UNCITRAL Convention and make it applicable to international bills of exchange and international promissory notes.

4. From a practical point of view, it is obviously a complicating disadvantage at the same time to have two different sets of rules regulating in essence the same kind of negotiable instruments for international purposes. From our point of view, there seems to be nothing in the Draft itself that makes it unacceptable as a general regulation common to all kinds of international bills of exchange and promissory notes. If the UNCITRAL Draft Convention meets with a wide approval, the Norwegian Government is therefore inclined to support a revision of the Geneva Convention by the States parties to that Convention and with a view to harmonize it with the UNCITRAL Convention.

5. We emphasize that the Draft Convention does not prohibit the application of the Convention to bills of exchange and promissory notes (instruments) outside its own scope of application as defined in articles 1 and 2. Without contradicting the Convention, a contracting State may thus in its own legislation prescribe for the application of the Convention notwithstanding the fact that the words "international bill of exchange (Convention of ..)" or "international promissory note (Convention of ..)" are missing in the text of the instrument and notwithstanding that all the places listed in article 1 (2)(e) or (3)(e) are situated in the same country. In the future, these possibilities might be exploited for the purpose of harmonizing different national laws.

6. A higher degree of correspondance between the articles of the two Draft Conventions would have been an advantage, in particular as regards the more general rules and principles of the first parts of the Drafts. Full correspondance between articles 1 to 33 inclusive of the Draft on bills of exchange and promissory notes and articles 1 to 35 inclusive of the Draft on cheques could easily be achieved:

i. Articles 3 and 4 of the Draft on cheques could either be included in article 1 or 6, or be totally deleted. As the articles now read, they seem superfluous, and the Working Group has not found it necessary to propose similar rules in the Draft on bills and notes.

ii. Articles 8 and 9 of the Draft on cheques correspond to article 8 of the Draft on bills and notes and are easily combined in one article.

iii. Articles 9 and 10 of the Draft on bills and notes correspond to article 12 of the Draft on cheques. The rules in article 10 of the Draft on bills and notes are conveniently transferred to article 9 as a new paragraph (4).

7. The comments and examples to the Draft Convention have been most useful. We recommend that a similar thorough commentary accompany the final Convention.

SPAIN

Our initial position in making these remarks on the draft Convention on International Bills of Exchange and International Promissory Notes, submitted for comment, is one of praise and approval for the idea on which it is based, for the objective sought and for the steps taken to date towards that objective within the United Nations Commission on International Trade Law (hereafter UNCITRAL).

It is unquestionably desirable that there should be suitable instruments for documenting international economic operations and that there should be uniform regulations governing these instruments.

To further the purpose of making international economic, commercial and financial exchanges possible, the law must provide appropriate legal means for making these international economic relations possible and ensuring their security.

Instruments such as the bills of exchange and promissory notes discussed here are traditional instruments for the exchange of goods and services. They are used to document economic operations, which are basically contractual, and facilitate the fulfilment of the obligations deriving from them.

However, these instruments are at present governed by differing sets of regulations. Supranational uniformity has been achieved in some areas, but in any case there are still two major systems which are quite different, the Anglo-American system and that established under the Geneva Convention. Spain is a signatory to that Convention but it has not incorporated the Uniform Law into Spanish law; the legislation in force, with minor amendments in this area, is the Commercial Code of 1885.

The fact that there is no uniform legislation governing the above instruments hinders their use in international trade, not merely because of differences in the principles implemented, but also because of ignorance and consequent mistrust of the relevant legislation in other countries.

It is therefore a praiseworthy endeavour to overcome these difficulties by establishing a uniform set of regulations for these international instruments; accordingly, the main objective of the regulations should be to achieve consistency in the formulation, interpretation and implementation of the rules. The idea of providing potential users with an instrument they may use optionally, if they see fit, is also a good one. The issuer can choose to

have the instrument governed by the Convention by referring to it explicitly, or choose not to. However, even within these optional regulations, the Convention will make it possible to set up a uniform system that overcomes the existing divergences. Its ultimate success will depend on the degree of acceptance it achieves. To achieve the maximum possible acceptance, solutions must be sought that make a compromise between the systems currently in force. Each country will have to relinquish part of what it considers characteristic in its legal code. The present draft Convention is examined in this spirit, recognizing both the desirability and the difficulty of the task.

It should be noted before reading these comments that the Spanish Government submitted the draft Convention for examination and comments by organizations associated with the circles concerned by the proposals. The present document contains quotations from the opinions given by the Consejo Superior Bancario (Higher Council on Banking; hereafter CSB) and the Consejo Superior de Cámaras de Comercio de España (Higher Council of Spanish Chambers of Commerce; herafter CSCC).

As stated above, the main concern is to work towards consistency in the formulation, interpretation and implementation of regulations. In view of this objective, we would make a very general initial remark applying to the draft Convention as a whole, a remark which may appear superficial but which is of extreme importance. It concerns the drafting, terminology and syntax used in the draft, which, in the Spanish version at least, give cause for serious reservations. It is paradoxical that the Commentary annexed to the draft Convention (A/CN.9/213, hereafter Commentary), which is a translation from an English original, should be more correctly written than the original Spanish version of the draft Convention. This is not the place for a detailed analysis of this aspect of the draft Convention; the purpose of our comment is simply to stress the importance of this matter and to suggest that the draft should be completely revised, in consultation with all countries having Spanish as an official language.

Other characteristics of the draft Convention, which may also be considerd "formal" but do not constitute drafting defects in one specific version, also make these provisions difficult to read and understand. We refer to the excessive use of definitions, which often bring confusion rather than clarity (see for example the remarks in article 4) and to the continual qualifications and cross-references (some of which will be pointed out below) which, as the CSCC states in its opinion, make the text exceptionally difficult to read.

In view of the international scope of the draft Convention, great care is necessary to avoid all such defects, which are obstacles to its interpretation. Similarly, because the Convention is to be implemented in different countries by people whose legal conceptions are different, it is especially important to avoid using any vague concepts or subjective or ambiguous interpretation criteria.

At this point we shall merely endorse the opinion given to this effect by the CSB, and point out the danger that phrases, concepts and criteria may be interpreted in different ways. Specific references to this will be made further on.

Conclusions

ONE. The Spanish Government approves of UNCITRAL's draft Convention on International Bills of Exchange and International Promissory Notes, which is an important stage in UNCITRAL's work on standardizing international trade laws.

The use of these instruments in international trade has a long history, but it is impeded at the present time by the diversity of the legal systems. The attempt to overcome these differences by means of an optional, uniform set of regulations, based on a compromise between the two great legal systems now predominant in the world, deserves our praise and support, because it represents an endeavour to remove existing obstacles to the normal use of such instruments in international trade.

TWO. In a spirit of co-operation to promote this initiative, the Spanish Government considers it appropriate to make use of the comments procedure in order to put forward some views aimed at improving the draft Convention and ensuring its future acceptance. They are proposed subject to any subsequent developments that the Spanish delegation to UNCITRAL may make at later stages in the drafting or at the diplomatic conference on the draft Convention, if convened.

THREE. The Spanish Government's first general comment is that the present Spanish version of the draft Convention requires thorough revision to correct not only the technical terminology relating to bills and notes but also the actual grammatical drafting. The "Spanish original" displays serious defects which indicate that it was originally a translation from a text drafted in another language. The Spanish Government attaches great importance to this issue; it considers that these shortcomings should be remedied by means of a revision carried out by a group within UNCITRAL, to include representatives of all delegations having Spanish as an official language, and it offers to make Spanish representatives available as of now for participation in this task.

FOUR. Another general comment relates to the method of presentation: the Spanish Government suggests that it would be desirable to simplify the text of the draft Convention so that it is easier to read and understand, and ultimately to interpret and implement. The technical difficulties inherent in so complex a subject are recognized, but it is desirable to have a clearer presentation with, if possible, fewer definitions and cross-references than in the present version. Similarly, it would be desirable, to ensure wider acceptance of the future international instruments, for the text to be more specific and avoid the use of imprecise or ambiguous legal concepts.

FIVE. The Spanish Government notes the omission from the draft Convention of two fundamental issues on which, in view of their importance, basic provisions should be expressly formulated:

1. The procedural treatment of recourse on bills and notes; the practical success of these instruments depends to a great extent on such regulation.

2. The connection between the instruments and the underlying transactions. As this is not regulated, the isolated reference to a specific theme, the assignment of funds made available for payment, appears strange and incongruous.

SWEDEN

1. The Working Group has had as its aim to harmonize the Anglo-Saxon Common Law system and the European Civil Law system -- the latter represented by the Geneva Convention providing uniform laws for bills of exchange and promissory notes. It is the opinion of the Swedish Government that the Draft Convention on International Bills of Exchange and Promissory Notes is well elaborated and that it represents a workable compromise between the two legal systems.

2. However, the Working Group has confined the Convention to be applicable only to negotiable instruments of an international character. Consequently, the Convention is not intended to replace the national legislation in this field. This could imply that States Parties to the intended Convention would have double legislations for bills of exchange and promissory notes. For several reasons, such a situation could not be deemed to be very appropriate, at least not as far as Sweden is concerned.

3. Apart from the inevitable complications in having two parallel systems with differing provisions, it may be observed that there would still exist bills of exchange of an international character which would not be covered by the Draft Convention. This is the case regarding e.g. bills which are drawn and payable in the country were both the drawer and the drawee have their residence but which are later endorsed to a person in another country.

4. For the reasons mentioned, the need for conventions concerning only international negotiable instruments may be questioned. In the view of the Swedish Government it must be deemed more important to strive for harmonizing the legislations concerning national negotiable instruments. If such a harmonization is achieved, this would also solve the problems as regards international payments.

5. The Geneva Convention has to a considerable extent meant a harmonization of the national legislations in this field. However, many states have chosen not to become Party to this Convention. Besides, development has made some of its provisions unsuitable or at least impractical.

In a document elaborated for the attention of the Council of Europe the Swedish Government has raised the question whether time has not come to make a general revision of the Geneva Convention. As stated in the said document, such a revision should be undertaken on a universal basis. In the view then expressed by the Swedish Government, some organ within the United Nations, e.g. UNCITRAL, would be the appropriate forum.

6. A revision of the Geneva Convention would of course not be required if the work already undertaken by UNCITRAL should result in uniform laws for both international and national instruments. Thus, an alternative to revising the Geneva Convention could be to enlarge the scope of the present Draft Convention.

7. The present Draft Convention is now to be discussed at the seventeenth session of the UNCITRAL. It has been decided that this discussion should concern key features and major controversial issues. The Swedish Government proposes that this discussion include the question of amending the present Draft Convention in such a way as to make the Convention acceptable also as regards national instruments. It is obvious that such a revision would strongly benefit from the work which has already been carried out in the UNCITRAL Working Group.

8. Considering its principal attitude as regards the present Draft Convention the Swedish Government does not at present wish to make detailed comments on the particular articles. It may be noted, however, that the draft texts apparently solve all the problems pointed out in the document that Sweden presented to the Council of Europe, as far as international instruments are concerned. This is satisfactory. In comparison to the Geneva Convention, the present Draft Convention is more flexible as regards the proceedings for recourse. This also seems expedient.

9. On the other hand, the Swedish Government would like to express its doubts as to the rules in the present Draft concerning the rights of the holder of an instrument and the defences of a party against the holder, especially when it comes to the effects of forged signatures or other unauthorized acts.

The proposed rules, apparently motivated by the concept that a party should know his endorser, may have certain disadvantages. For instance, they would probably make people less inclined to receive endorsed instruments, especially in commercial relations. However, the Swedish Government is aware of the fact that the proposed rules are part of the compromise between the two legal systems. Applied on international instruments only, the provisions seem acceptable from a Swedish point of view.

UNION OF SOVIET SOCIALIST REPUBLICS

From the point of view of their content, structure and form the Draft Conventions are, on the whole, satisfactory and acceptable, as is the method of presentation, i.e. regulation of international bills and notes and of international cheques in two separate documents.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The general observation that Her Majesty's Government would like to make in respect of the above draft Convention is that to be effective such a Convention has to be mandatory. The only other general point is that this branch of the law is becoming less important and that real interest is shown in the law relating to international payments made by electronic transfer of funds.

UNITED STATES OF AMERICA

The United States generally approves the draft Convention on International Bills of Exchange and International Promissory Notes. The United States supports the proposal that the Convention be adopted as a multilateral treaty, but is doubtful of the utility of adopting these provisions as a model law. The United States regards this draft convention as a workable compromise between two fundamentally different legal systems. Therefore, these comments are directed primarily toward implementing the compromise policy decisions of the Working Group rather than toward reopening them.

The draft Convention on International Bills of Exchange and International Promissory Notes is an attempt to establish a settled body of law to govern items of international commercial paper that are expressly designated on their face as controlled by the Convention. These items would not be subject to the uncertainties of conflict of law decisions. The draft Convention proposed by the Working Group does not, therefore, attempt to reform the laws applicable to domestic paper, or even the laws applicable to all international commercial paper. Rather, the draft Convention provides rules for a restricted category of international paper - rules which are certain and which are adapted to the practices of the commercial community in states with different legal systems. To accomplish this goal, the Working Group had to reach a compromise between fundamentally different sets of legal rules concerning commercial paper. The United States believes that the draft Convention has successfully achieved such a compromise and that the rules established are adaptable to commercial practices in the United States. The United States thus supports the draft Convention as a means of furthering certainty in the rules applicable to international commercial transactions.

The United States believes that the proper use of the draft rules to further certainty in international commercial transactions is through the adoption by states of a convention applicable to designated international commercial paper. The use of this draft as a "model" for enactment by states would invite its amendment during the enactment process, detracting from uniformity and creating uncertainty. Parties to instruments would still feel a need to learn foreign law and consult foreign counsel, and the major potential benefits of the Convention would be lost. Use as a model law would also retain all the present problems and perhaps even exacerbate them by adding yet another system of rules to be considered. Furthermore, promulgation as a model would be perceived as the weakest possible endorsement of the draft.

The current draft Convention is a compromise between two basically different systems of domestic law on commercial paper: civilian and common law. Each of these systems now has several variations as implemented in different states. In many respects, the compromise in the draft Convention is fundamentally different from current United States law on commercial paper. Examples include omission of the entire concept of "negotiation" in Article 12; giving the status of "holder" to a person in possession of an instrument through a necessary, but forged, endorsement in Article 14; and relieving of liability a payor who pays an instrument bearing a forged necessary endorsement in Article 23. Other examples include creating in Articles 42 and

43 the concept of a "guarantor" who has characteristics of both the civil law avaliste and the common law guarantor and accommodation party; and requiring protest as a condition precedent to liability of secondary parties in Article 55, while not requiring notice of dishonour as a condition precedent to liability of secondary parties in Articles 60 and 64. These differences will create difficulty in adapting the draft Convention to our commercial practices in the United States. However, these rules seem adaptable to United States commercial practices. Thus, in the spirit of compromise, the United States is favourably disposed to the present draft, even though some difficulties can be anticipated.

The article-by-article comments of the United States are directed primarily to improving the drafting of the Working Group and carrying out its decisions, rather than seeking to overturn or reopen the compromises struck. Although the comments make some important proposals, the proposals seek to clarify the draft and to eliminate problems which would otherwise arise in common law courts.

The United States strongly urges that a commentary accompany the final text. The existing commentary has been prepared at the request of the Secretariat and has thus far accompanied the draft Convention as an explanation of its provisions. It has proved most helpful to bank counsel, practitioners and law professors in the United States who have studied the draft Convention. A commentary on the Convention finally adopted would facilitate efforts to have the Convention accepted by states. As the draft Convention contains a number of concepts which are unknown in common law systems, a commentary would be of special importance to a common law country such as the United States.

The United States proposals have been prepared with considerable restraint. In view of the limited time for consideration of the draft Convention at a diplomatic conference, the already long period of work on the draft by the experts on UNCITRAL's Working Group, and the complexity of the subject matter, it seems desirable that the number of proposals made to UNCITRAL at this stage and ultimately at a diplomatic conference be kept to a minimum.

URUGUAY

The draft Convention under consideration creates new types of negotiable instruments, the international bill of exchange and the international promissory note, which are suitable and appropriate instruments for international trade and are governed by an international trade convention. This Convention will obviate conflicts of interpretation regarding the applicable law and will therefore facilitate trade.

The text of the draft Convention on International Bills of Exchange and International Promissory Notes does not give rise to any general objection. On the contrary, it appears to offer an excellent and appropriate set of rules suitable for application in different countries, notwithstanding differences in their international legislation.

Some of the solutions adopted in the draft Convention differ from those adopted in our internal law, but they are not incompatible to the extent of their approval being inadvisable.

YUGOSLAVIA

1. Yugoslavia commends the results of the Working Group on International Negotiable Instruments of the United Nations Commission on International Trade Law (UNCITRAL) and considers it to be a considerable effort toward the unification of the existing legal rules of the common law system and the system based on the Geneva conventions in the field of the bills of exchange and cheques.

The Draft Conventions take more account of the needs of contemporary financial transactions than the laws and practices existing in the world today. The general impression is however that both Draft Conventions pay attention to the interests of the creditors rather than those of the debtors, which is not in the interest of developing countries.

2. Although the drafts took note of the solutions offered by the two legal systems in the world, there prevail, nevertheless, concessions to the common law system, a difficulty which the jurists and businessmen of the so-called system of Geneva conventions will have to encounter. This general impression can be illustrated by the fact that, under the Draft Convention, a bill is linked to the underlying transaction (which is the attitude of the common law States), turning thus from an abstract to a causal transaction.

3. The decision to include promissory notes in the Draft Convention on International Bills of Exchange was a good one. Promissory notes are not only more frequently used in the world today but they are more effective (there is no need for acceptance or protest, etc.) and they ensure greater legal security. In this respect, the Draft Convention marks a progress in comparison with the instruments which have not given this type of a bill due attention.

4. The texts of the Draft Conventions on International Bills of Exchange and Promissory Notes and on International Cheques are very similar, even in cases when a distinction should have been made between them. International transactions in recent years have offered ample proof of the important differences between the two negotiable instruments (a bill is a form of credit and a cheque a form of payment). Therefore, it was expected that the two drafts would differ much more. The application of the provisions relating to bills of exchange to cheques can have adverse effects in practice. Consequently, it is necessary that the Draft Convention on International Cheques be thoroughly reviewed, having in mind the purpose of the cheque in international transactions.

5. Despite the intention of the Draft Conventions to deal with international bills of exchange and international cheques in a comprehensive manner, it is hard to imagine that they have managed to settle all the problems which may arise as a result of the use of these instruments in international transactions. Hence, it would be advisable either to amend the Draft Conventions so as to include the provisions concerning the conflict of laws, or to prepare another draft convention to regulate the matters pertaining to International Private Law.

B. Specific comments on individual articles

CHAPTER ONE. SPHERE OF APPLICATION AND FORM OF THE INSTRUMENT

SPAIN

The chapter heading seems unfortunate; the first phrase applies to the Convention and the second applies to the two instruments which it regulates.

ARTICLE 1

SPAIN

Sphere of application of the Convention: there are two separate provisions applying to this, article 1, paragraph (1), and article 2; these might be rewritten.

An essential characteristic of the Convention is its optional nature. It applies to those bills and notes called international only if the drawers or makers decide that they shall be subject to the Convention.

Therefore, although the Commentary on the draft Convention states that paragraphs (2) and (3) of article 1 make this optional nature clear, it would seem advisable for it to be made explicit in the provision defining the Convention's sphere of application. As it stands, article 1 (1) merely states that "This Convention applies to international bills of exchange and international promissory notes"; paragraphs (2) and (3) establish what international bills of exchange and promissory notes are by listing the requirements, the first of which is that the text should include the words "international bill of exchange. Convention of ...", by which the issuer opts to make the instrument subject to the Convention. Thus, the adjective "international" is reserved exclusively for bills and notes that are subject to the Convention. In view of the fact that the Convention is optional and, consequently, that not all international bills and notes will be within its sphere of application, it would be preferable for paragraph (1) to refer explicitly to its optional nature, and for paragraphs (2) and (3) to establish the requirements that instruments have to meet in order to be considered international and to be covered by the Convention, instead of attempting a comprehensive definition of "international" instruments ("An international bill of exchange/promissory note is a written instrument which: ...").

UNITED STATES

For common law nations there is an important problem if they become a party to the Convention on International Bills of Exchange and International Promissory Notes but not to the Convention on International Cheques. In the common law system a cheque is considered a particular type of bill of exchange and therefore the Convention on International Bills of Exchange and International Promissory Notes could be regarded as applicable to cheques if no other convention applies, unless the Convention on International Bills of

Exchange and International Promissory Notes provides that it does not apply to international cheques. The United States therefore recommends that Article 1 include a provision to the effect that the Convention does not apply to international cheques.

Article 1(2)

SPAIN

Form of the instrument: The parts of the definition contained in paragraphs (2) and (3) are the formal requirements for the instrument. The list should reflect this, and not be formulated in the definition style used in the present draft.

UNITED STATES

Paragraphs (2) and (3) of Article 1 state that a qualifying bill or note must be a "written instrument". The term "written" is not defined in the Convention, and Comment 4 indicates that the draftsmen deliberately omitted such a definition. The United States proposes that such a definition be added to Article 1. In particular, the definition should require that any "Signed writing" meets several tests, including that the writing be permanent and capable of physical transmission between parties, that it be signed in a manner which prevents tampering, and that it contain the signature of the issuer.

Article 1(2)(a)

CANADA

Words of invocation: In the opinion of Canada, each of the Conventions might be deficient in stipulating that instruments be governed by its text if the text contains certain words invoking the Convention. We note, for example, that the Convention will be enacted in Chinese and Russian as well as English, French and Spanish. There may be simple human problems of recognizing instruments that are to be governed by the international Convention if the key phrase appears in Chinese or cyrillic text. It would be desirable if some symbol, or abbreviation that is readily reproducible by normal typewriters could be devised or adopted to aid the process of recognition of the instruments requiring special treatment under the Conventions.

CHINA

Paragraph (2)(a) of article 1: "Contains, in the text thereof, the words 'international bill of exchange (Convention ...)'."

Recommendation: This be changed into "Contains, in the text thereof, the words 'international bill of exchange (Convention of ...)', or 'bill of exchange' if the places indicated on the bill show that it is an international bill of exchange."

CZECHOSLOVAKIA

The important question arises whether the drawer of a bill (or the maker of a note) when using the words "International Bill of Exchange" or "International Promissory Note (Convention of ..)" has thereby indicated either a choice of law or a choice of the legal regime of the bill (note) in compliance with the Convention. The effects of such a choice should be specified in the text of the Convention, as follows: article (1)(2)(a) should be amended to the effect that this designation by the drawer (maker) constitutes also an indication of the legal regime of the Convention; at some proper place, the Convention should specify that clauses according to article 1(2)(a) or (3)(a) inserted in the bill (note) by the drawer (maker) subject the instrument to the regime of the Convention and bind all holders who took it, and all subsequent parties.

It would be expedient to specify that the words mentioned in paragraph (2), letter "a" and in paragraph (3), letter "a", and any bill (note) on the whole may be filled in any language (in more languages also), i.e. that the mentioned expressions may be written in corresponding expressions of different languages.

JAPAN

In view of the fact that a bill of exchange or promissory note covered by the Draft Convention would be issued for optional use in international transactions, it is essential to ensure that the bill or note shall be clearly distinguishable from other existing instruments as an international bill of exchange or promissory note governed by the Convention. The ideal solution would be to require persons choosing to issue an instrument subject to the Convention to use a universally standard form for the bill or note, which may be attached to the Convention as an annex. Limiting the languages which may be used in the text of the bill or note might be another useful solution. If these ideas are judged to be impractical, it would be worth considering requiring that the words contained in Article 1(2)(a) or (3)(a) be written in certain specified languages, say, English or the U.N. official languages, in addition to the original language.

NORWAY

According to subparagraphs (2)(a) and (3)(a) the words "international bill of exchange (Convention of ...)" or "international promissory note (Convention of ...)" must appear in the text of the instrument. In the practical handling of the instruments it is important that these words are easily recognized. The Convention ought to require that the words are conspicuous in the text.

The maker or the drawer can ensure that the requirement is met. One should also consider to require the use of a conspicuous short-title in the text of the instrument, e.g. "UNCITRAL Convention" or the like. Furthermore, it should be considered to work out a standard form to be annexed to the Convention.

UNITED STATES

Paragraphs (2)(a) and (3)(a) of Article 1 state that the words "international bill of exchange (Convention of ...)" or "international promissory note (Convention of ...)" must appear in the text of the instrument. This provision is intended to make it difficult subsequently to alter the instrument by adding the required language. However, the required language may be buried in a mass of printed terms and may not be conspicuous. Thus, a bank employee might not recognize the instrument as subject to the Convention and requiring special handling. The United States submits that the language required by Article 1(2)(a) and (3)(a) also be "conspicuous".

Article 1(2)(b)

CZECHOSLOVAKIA

This provision should state specifically that a "definite sum of money" includes an amount expressed in two or more currencies with their conversion rates.

Article 1(2)(c)

MEXICO

The expression "at a definite time" is inadequate; all obligations must be met at a definite time. It is more consistent with legal usage to speak of a bill being payable on demand or on a specific day.

Suggested wording: "Is payable on demand or on a specific day."

SPAIN

It seems inaccurate to use the phrase "at a definite time", which is intended to include both maturity "on a stated date" and maturity "by instalments at successive dates", or any other method given in article 8. It would be sufficient for subparagraph (c) to say "maturity" which is defined in article 4 with a cross reference to article 8. Such is the wording of the French version of the draft ("échéance").

Article 1(2)(e)

CZECHOSLOVAKIA

Paragraph (2) and paragraph (3) contain, apparently, necessary requisites of an instrument even in the absence of an express provision that the instrument is not an international instrument when a requisite is missing. The position under the provisions under letter "e" is still more indistinct. To set up the international character of the instrument the drawer or maker is required to situate two specified elements of his written declaration into two different States, but there is not any provision whether all these elements must be included, at one same time, in the bill (the note); in other words it is not clear if the place of drawing, the address of the drawee, the address of the payee, the place of payment are the indispensable requisites of the bill (note). We are observing that the address of the drawer has not been mentioned usually. Perhaps the address of the drawer and the place of payment are not indispensable requisites of a bill (note), if Art. 51, letter "b" of the Draft Convention is taken into respect. Art. 11 which explains the above said indistinctness, to some degree, might be included into Art. 1.

JAPAN

In (2)(e), a bill of exchange covered by the Convention is required to show that at least two of the places listed in 2(e) are situated in different States. It is questionable whether a bill should qualify as an international bill of exchange merely because it shows that the place indicated next to the name of the drawee and the place of payment are situated in different States. The Japanese Government proposes that the places listed in (2)(e) be grouped (e.g. (i) and (ii); (iii) and (v); (iv)) and that (2)(e) should provide that an international bill of exchange governed by the Convention shall show that at least one of the places in one group and one of the places in another group are situated in different States.

In order to determine whether places shown on the instrument are situated in different States, it would be necessary to require that the instrument indicate the names of the States in which the places are situated. The text of the Convention should state this clearly.

According to Article 1(2)(e) or (3)(e), an instrument showing that only two of the places listed there are situated in different States shall qualify as an international bill of exchange or promissory note governed by the Convention. Thus, an instrument which shows neither the place where it is drawn or made nor the place of payment can qualify as such under Article 1. However, these two places are regarded as essential factors determining the law applicable to issues that are not covered by the Convention. Therefore, the Japanese Government proposes requiring that these two places be stated in the text of the instrument as indispensable requisites.

SPAIN

One of the "requirements" stands out because it is more a substantive than a formal one; it determines when an instrument is international and may be subject to the Convention. It is dealt with in the subparagraphs (e) under paragraphs (2) and (3), and it would seem to be out of place among the other requirements. This provision states that a bill of exchange/promissory note is an instrument which "shows that ... two of the following places are situated in different States", but it does not specify the form in which this information must be shown.

The statement of these requirements should be stricter, and it should also explain the form in which the different places are described: whether the State alone is sufficient - as stated in the Commentary - or whether, where appropriate, the city, domicile or street address must be specified. As it stands, article 1 does not say what "places" or domiciles have to be shown on an instrument for it to be complete, and this is critical in view of the distinction in article 4 between a protected holder and an unprotected holder.

Once the mandatory data and the form in which they are to be shown have been specified, it will be possible to establish that an instrument is international by reference to places located in different States.

Article 1(2)(f)

SPAIN

As regards the formal requisite of the signature, see the comments on article 4.

Article 1(3)(a)

CHINA

Paragraph (3)(a) of article 1: "Contains, in the text thereof, the words 'international promissory note (Convention of ...)."

Recommendation: This be changed into "Contains, in the text thereof, the words 'international promissory note (Convention of ...)', or 'promissory note' if the places indicated on the note show that it is an international promissory note."

Article 1(4) and Article 2

SPAIN

Two qualifications relating to the internationality of instruments are contained in article 1 (4) and article 2.

The former provision carries the formal aspect too far as a test of the internationality of an instrument; it leaves room for the Convention to apply even when it is untrue that the places shown on the instrument are in different States. This has been pointed out by the CSCC, which claims that the drawer is thus enabled to escape regulation by the national law of his State, on his sole initiative, merely by falsifying the fact of internationality. It would be desirable for the Convention to specify more strictly the exact consequences of false statements regarding places, and of an instrument having no real international character.

Article 2 introduces another qualification relating to "internationality", namely that the Convention applies even when the States shown on the instrument are not contracting States. This provision could have been made directly in the previous article, after the reference to different States, thus making article 2 unnecessary. Although the Commentary gives a detailed discussion of the matter, arguing that the solution in the draft Convention is the most appropriate one for developing the use of such instruments, the problems of conflict of law raised by this formulation should not be passed over; for this reason, the CSB has suggested that a fuller treatment of this issue would be advisable.

ARTICLE 2

FINLAND

According to this article the Convention would be applicable without regard to whether the places indicated on an international bill of exchange are situated in Contracting States. Obviously, this would not cause difficulties insofar as cases concerning such bills of exchange are brought before the courts of a Contracting State. One may assume that a State ratifying the new Convention would not apply the 1930 Convention to a document called an "international bill of exchange" although the title of the document would also correspond to the prescription of a bill of exchange under the 1930 Convention. One might ask, however, what happens if such a case is brought to a court in a non-contracting State bound by the 1930 Geneva Convention. The document could then satisfy the requirements of the Geneva Convention in employing the term "bill of exchange", even if also containing further language, i.e. the word "international". If the court applied the Geneva Convention or corresponding legislation, this would imply an alteration in the legal effects of the document. As a whole, however, such changes would seem to be of a fairly minor importance.

CHAPTER TWO. INTERPRETATION

ARTICLE 3

DENMARK

This provision seems malapropos and could be used to explain away provisions of the Convention. Similar provisions are not found in other Conventions and should therefore be deleted.

SPAIN

Article 3 reaffirms a principle already expressed in other UNCITRAL conventions, and one which should be maintained. However, this provision concerns more the objectives to guide interpretation than the criteria to govern it.

ARTICLE 4

(The comments relating to paragraph (7) of this article (definition of a "protected holder") are set forth under articles 24, 25 and 26, under the heading "holder and protected holder".)

AUSTRALIA

Article 1 of the Bills and Notes Convention and the Cheques Convention specifies certain conditions that need to be satisfied before a negotiable instrument can be regarded as an international bill, note or cheque, as the case may be. However, the draft Conventions do not define all of the terms so specified, e.g., 'unconditional order' and 'unconditional promise'. While the BEA similarly does not define such terms for the purposes of Australian law, problems that have arisen over the years in Australia as to the meaning of those terms in the BEA could be overcome in the context of the draft Conventions if the draft Conventions contained appropriate definitions. Australia, therefore, sees merit in having terms such as those defined in the draft Conventions to avoid, as far as possible, problems of interpretation.

SPAIN

Article 4 gives a long list of definitions. The procedure is not usual in Spanish statutes, but must be accepted in the case of an international convention. However, some of the definitions appear obvious and unnecessary (e.g. Nos. 1, 2 and 9, the content of which is obvious from other articles in the draft Convention - articles 1 and 8 for example).

UNITED KINGDOM

It is strongly felt that the list of definitions should be extended to include for example all parties and relevant terms such as "drawer", "endorser", "endorsee", "guarantor", "acceptor", "visa", "endorsement", "acceptance", "delivery".

UNITED STATES

Although Article 1 requires that an International Bill of Exchange and an International Promissory Note contain an unconditional promise or order to pay, Article 4 does not define these terms. There are many standard problems in this area which have been resolved by statutes and case law, and they should not be subject to re-opening through the omission of such a definition. A minimum definition of unconditional promise or order to pay should have two elements. One is the exclusion of promises or orders to pay only from a particular fund; the other is the exclusion of instruments which are "subject to" other documents (though not of instruments that merely refer to other documents). The United States proposes that Article 4 be amended to add such a definition of "unconditional promise or order".

The draft Convention uses the term "person" throughout, but there is no definition of the term. The United States proposes that Article 4 be amended to add a definition of "person" which would include individuals, corporations and other juridical entities, and instrumentalities of a state.

URUGUAY

Article 4 contains definitions of certain terms. We note that it omits to define the drawer of the bill of exchange and the signatory of the promissory note. We suggest that the following definitions be included: "'Drawer' means the drawer of an international bill of exchange", "'Maker' means the signatory of an international promissory note".

Article 4(6)

MEXICO

The reference to article 14 appears to imply that anyone receiving an instrument legitimately through a means other than endorsement could not be regarded as the holder, which is an inadmissible position. Consider, among others, the case of transfer *mortis causa*.

Article 4(10) and Article (X)

CANADA

Reservations: There are two very significant provisions in the drafts that Canada considers give unjustifiable scope for variation of the text of the Convention by domestic law. In Article (X) in the Bills of Exchange Convention and Article 36 in the Cheques Convention very dangerous scope is provided for local variation. The former would vary the effect of unwritten signatures appearing in some printed, stamped, embossed or mechanical medium; the latter would vary the legal effect of a certification of an international cheque. It appears to us that the considerable advantages of uniformity of international legislation would be very significantly eroded if signatory states were permitted to vary the legal significance of unwritten signatures and certified cheques by local law. Both provisions are of unquestionable importance to the validity and practical value of instruments affected. The scope of the power that the drafts presently propose to give to contracting states and the significance of the Conventions' provisions dealing with these two points appear to Canada to run strongly contrary to the principle that reservations of ratifying or acceding states may not destroy fundamental obligations of a treaty. Therefore Canada strongly objects to the introduction of those provisions in the draft Conventions and calls for their removal or, in the event that these powers must, in the interest of compromise, be maintained, that they be sharply curtailed.

CZECHOSLOVAKIA

Though we are in favour of retaining paragraph (10), we recommend to place the word "also" after the word "includes" in the first line so as to make clear that the manual signature is to be regarded as the signature of preference.

DENMARK

For reasons of safety it does not seem reassuring that signatures on cheques and bills of exchange can be affixed either by a stamp or other mechanical means.

GERMAN DEMOCRATIC REPUBLIC

It is considered appropriate to formulate Article (X) proposed in connection with paragraph (10) along the same lines as those followed in Article 12 of the United Nations Convention on Contracts for the International Sale of Goods.

FEDERAL REPUBLIC OF GERMANY

On account of the increased dangers of forging signatures no substitute of signature should be permitted beside facsimile signatures. To permit other substitutes of signatures could also lead to difficulties in business life because each kind of signature of a person liable on a bill of exchange would have to be examined as to its validity.

HUNGARY

The Hungarian Government is of the opinion that Article (X) should harmonize with Article 12 of the UN Convention on Contracts for the International Sale of Goods.

INDONESIA

Article 4, paragraph (10) of the draft Convention on International Bills of Exchange and International Promissory Notes lays down the meaning of "signature" which includes a signature by stamp, symbol, facsimile, perforation or other mechanical means.

In this connection, a reservation is entered to the above mentioned article to the effect that a signature placed on an international bill of exchange or a promissory note in Indonesia must be handwritten.

JAPAN

Article 4(10) is acceptable, but it is not clear what will be the consequences of the application of Article (X). What would be the consequences if a signature were affixed on an instrument by some means other than handwriting in the territory of a Contracting State which had made the declaration in accordance with Article (X)? Is it only that the signature would not impose any liability on the person who affixed the signature (see Article 29(1)) or that any subsequent party who received the instrument could not become a holder since the instrument would not show an uninterrupted series of endorsements (see Article 14(1)(b))?

MEXICO

The definition of "forged signature" is confusing in its reference to "wrongful or unauthorized use".

In principle, wrongful use means illegal use. If what is understood is the lack of legal authorization to make use of mechanical means, the situation is one of no signature, not of a forged signature. If the person who signed (used the mechanical means) was not empowered to do so, which appears to be the premise of "unauthorized use", it would seem to be excessive that a

forgery of this kind should affect third parties in good faith. Anyone having the facilities and the legal entitlement to sign using mechanical means must be responsible for safeguarding these facilities and must bear the corresponding risk.

NORWAY

The concept of "forged signature" is dealt with both in article 4(10) and in article 23(3). We suggest article 23(3) be deleted and the rule be transferred to article 4(10).

We will at this stage neither support nor oppose the inclusion of article (X) in the final text. However, we call attention to the difficulties which may arise from reservations according to the article.

SPAIN

The definition of "signature" gives cause for concern. We are obliged to state our serious reservations about a provision under which a statement of will used to establish such rigorous legal effects of obligation and liability as those relating to bills of exchange may be expressed by the means specified in article 4 (10). This was the opinion submitted by the CSB. Although article (X) of the Convention, resorting to the reservation mechanism, does provide that States may require the signature to be handwritten, that option does not circumvent the problem. The uncommon variety of the methods of signing gives added importance to the issue of forgery. The term "forged signature" is also defined in paragraph (10). In regulating endorsement (article 23), the draft Convention relates the issue of forgery to that of an agent or representative acting without authorization, and there is also reference to this area in articles 30 and 32. It would be desirable for the definition of a forged signature and for the applicable regulations to be revised jointly.

UNION OF SOVIET SOCIALIST REPUBLICS

Article (X) proposed in connexion with paragraph (10) would enable those States under whose legislation the validity of a contract requires a handwritten signature on the instrument, or where the word "signature" traditionally implies handwriting, to participate in the Convention. For the purpose of securing recognition by other Contracting States of the declaration provided for in this Article, it would be desirable to include in the Draft an article similar in sense to Article 12 of the United Nations Convention on Contracts for the International Sale of Goods. It might also be necessary to introduce into the text of Article (X) clarifications in respect of the signatures to which the declaration will refer.

UNITED STATES

There are definitions of "forged signature" in both Article 4(10) and Article 23(3). The definition in Article 23(3) is illustrative only and incomplete. It seems to be both correct and of general applicability, but is limited by its terms to "the purposes of this article" - a limitation which the United States finds unncessary and confusing. The limitation suggests that this definition is inaccurate in other contexts. The United States therefore proposes that Article 4 be amended to provide a complete definition of "forged signature," which would include both unauthorized signatures and those beyond the scope of an agent's authority, and would be used consistently throughout the Convention. Such a definition should include the concepts from Articles 4(10) and 23(3) and make their separate provisions unnecessary.

YUGOSLAVIA

The answer to the question whether a bill should insist on a handwritten signature or should it be interpreted, as in article 4(10), in broader terms, is not a simple one. This is all the more so, since it is difficult to prove, by virtue of article 23(3), that an unauthorized person has signed the instrument if facsimile is used instead of signature.

Article 4(11)

CZECHSOLOVAKIA

We would agree to this provision, provided that the notion of fictitious currency established by intergovernmental institutions or intergovernmental treaties will be specified with greater precision.

DENMARK

We support the inclusion of article 4(11) in the final text.

FINLAND

This provision is considered useful and its retention is therefore supported.

GERMAN DEMOCRATIC REPUBLIC

The proposal to add a new paragraph (11) concerning the inclusion of a monetary unit of account in the terms "money" or "currency" is acceptable. If such a provision is adopted, it will be necessary, however, to refer to a monetary unit of account also in Article 71.

UNION OF SOVIET SOCIALIST REPUBLICS

It appears that acceptance of paragraph (11) would extend the scope of use of international instruments by making it possible to draw instruments in transferable roubles and other units of account. The use of a unit of account to express the sum payable by an instrument or the currency of payment does not in principle conflict with the other provisions of the Draft Convention pertaining to the sum payable by an instrument (Articles 6, 7 and 71).

UNITED STATES

The Article includes only a partial definition of "money" and "currency" - one relating only to SDR's. The partial definition does not make clear whether it refers only to official physical currency of a state (such as dollar bills), but in Article 71 on payment it seems to be used in a broader sense so as to include immediately available credit. The United States therefore proposes that Article 4(11) be amended to include in the definition of "money" and "currency" both official physical currency and immediately available credit.

The United States supports the inclusion in the final draft of the Convention of the language of Article 4(11) which is now in brackets.

INTERNATIONAL MONETARY FUND

We note that Article 4(11) of the bills and notes convention and Article 6(9) of the cheques convention contain a proposed definition of "money" or "currency" which reads:

> "'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."

It occurs to us that this definition might be improved. For this purpose we would suggest:

> "'Money' or 'currency' includes a monetary unit of account which is established by an intergovernmental institution and which is transferable among the members of this institution or other entities as the institution may prescribe."

An important effect of this provision would be to make it clear that instruments could be drawn or made subject to the conventions that call for payment in a specified currency while being denominated in special drawing rights. It would also permit participants in the Fund's Special Drawing Rights Department and other holders prescribed by the Fund to avail themselves of the rules of the conventions, should they find this to be of advantage, in respect of instruments that they might issue that are both denominated and payable in special drawing rights. These effects are explained in the commentary at paragraphs 24 and 25.

We note that the proposed definition of "money" or "currency" is still tentative. We would urge that it be adopted substantially in the form that we have suggested and that consequential amendments to the conventions be made accordingly.

ARTICLE 5

DENMARK

According to this provision a person is also in bad faith if he could not have been unaware of the existence of a fact. In English, the correct term for this concept is "constructive knowledge" the implication of which would seem to be that a person wilfully seeks not to acquire knowledge of some specific issue. A person should also be seen as acting in bad faith if he ought to have acquired a special knowledge.

FEDERAL REPUBLIC OF GERMANY

According to this provision, "knowledge" is considered to be present not only in the case of positive knowledge but also in the case, in which a person could not have been unaware of the existence of a fact. According to the Commentary, this wording implies a presumed knowledge. This might lead to the objectionable conclusion that the person concerned has the burden to prove his ignorance. Moreover, this definition does not make quite clear whether it corresponds to "gross negligence" under Article 16, para. 2 of the Geneva Law on Bills of Exchange or to "knowingly acting" under Article 17 of the Geneva Law on Bills of Exchange. It is to be feared that with that unprecise clause the courts in the various states would arrive at completely different requirements as to the element of the knowledge of a fact.

SPAIN

The "general provisions" on interpretation end with article 5, which interpretes what is understood by having knowledge of a fact. The first part of the provision is unnecessary; there is no need to say that "a person is considered to have knowledge of a fact if he has actual knowledge of that fact". The second part of the article establishes a presumption: a person is considered to have knowledge of a fact if he could not have been unaware of its existence. In view of the great importance that knowledge or unawareness of a fact will in many cases assume under the draft Convention, this presumption should clearly be more carefully refined and regulated. The CSCC made this point and recommended greater clarity as to the meaning of the presumption.

It must be borne in mind that the holder's protection will fundamentally depend both on the instrument's being complete and on the knowledge we are discussing here. This system is in conflict with the Spanish one, which is based on the presumption of "bona fides".

ARTICLE 6

Article 6(a)

CZECHOSLOVAKIA

We recommend that this provision should include the provision set forth in article 7(4) according to which it is necessary to indicate in the instrument the rate of interest, and that otherwise the interest clause is to be regarded as not written.

SPAIN

Articles 6 and 7 establish, at some length, the provision that instruments may be paid with interest. Such provision does not exist in Spanish law. It does in the Geneva system, but in a more restricted form. This is a laudable innovation, but the regulations are not entirely satisfactory.

UNITED STATES

Article 6 provides that an instrument is deemed to be payable for a definite sum even though it is to be paid with interest. There is significant statutory and case law in the United States that the interest rate must be stated, though the modern commercial tendency is to issue "floating rate" notes in which no fixed rate is stated. This tendency is reflected in the recent modification of UCC Section 3-106 in Louisiana to permit "floating rate" notes to be negotiable. The United States therefore suggests that Article 6(a) be amended to clarify whether interest rates must be fixed or not and suggests that the amendment permit "floating rate" notes to be negotiable. Such an amendment would ensure wider application and greater use of the Convention.

Article 6(b) and (c)

SPAIN

The provision in article 6 for instruments with successive instalment dates appears to us to raise serious problems. This provision may prove to be well-inspired, but it requires greater development in the Convention of specific requirements regarding acceptance, payment, regularity of payment, etc. For example, article 69, which states that the holder is not obliged to take partial payment, should provide an exception for instruments with successive instalments. In any case, we believe that the provision for instalments, combined with that for two or more jointly and severally liable parties, could make the discharge mechanism for bills of exchange exceptionally complicated.

YUGOSLAVIA

An instrument payable by instalments is not provided for under the Geneva conventions, and is contrary to the notion of the instrument as an abstract transaction. If this draft article is accepted, an instrument payable by instalments will create problems with respect to protest and presentment for payment.

ARTICLE 7

Article 7(1)

CHINA

Paragraph (1) of article 7: "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."

Recommendation: This be supplemented by adding "...in case there is a mistake in the amount expressed in words, too, the instrument should be dishonoured."

The reason: It is impossible to deal with an instrument in which the amount expressed in figures is 500,000 and the amount expressed in words is FIVE HUNDRED AND FIVE HUNDRED, with the word "THOUSAND" missing.

CZECHOSLOVAKIA

We recommend that this provision specify that the lowest amount be retained in those cases where the amount is expressed several times in words or several times in figures and there is a discrepancy between them.

Article 7(2)

CZECHOSLOVAKIA

It should be clarified whether the sum payable by an instrument is a "definite sum of money" for the purposes of article 1(2)(b) in those cases where the currency indicated has the same description in different States but is not the currency of the place of payment (e.g. payment is to be made in Switzerland in dollars).

Article 7(4)

CHINA

Paragraph (4) of article 7: "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."

Recommendation: This be supplemented by adding "... or indicates that interest is to be paid at international market rate at a definite time and place."

The reason: Considering the constant changes in international market rates, it is hardly possible to fix the interest rate for a time-bill in advance; sometimes the interest rate is to be calculated at a floating rate, i.e., according to the international market rate on the day of payment.

NORWAY

According to paragraph (4), a stipulation in the instrument stating that the sum is to be paid with interest, is without effect unless it indicates the rate at which interest is to be paid. It is unclear whether a reference to a rate of interest extrinsic to the instrument (for example to a certain rate in a certain market) will be recognized. We suggest that paragraph (4) be drafted in the same way as article 6(d) according to which the instrument may refer to an extrinsic rate of exchange.

SPAIN

Regarding article 7 (4), under which the interest clause is deemed not to have been written unless it indicates the rate of interest, we feel it would be preferable to establish a presumption, rather than giving scope for inadequate statement by the drawer.

YUGOSLAVIA

Under articles 6 and 7, all instruments, not only those payable at sight, bear interest. If such a broad conception is accepted, there may be difficulties in case of the failure to indicate the date of the instrument or the date of payment. Therefore, it is not clear how the interest on such instruments will be calculated.

ARTICLE 8

JAPAN

Article 8 is generally acceptable. However, in view of the following points, it needs further study.

(1) Article 8(2) is not sufficiently clear as regards the endorser. It is unclear whether or not this provision imposes a secondary liability on an endorser making an endorsement after maturity.

(2) The Convention should provide in its text rules on the calculation of time and the treatment of holidays additional to Article 8(8).

Article 8(1)

CHINA

Paragraph (1) of article 8: "An instrument is deemed to be payable on demand: ...(b) If no time of payment is expressed."

Recommendation: There should be an express stipulation on how to determine the period of its circulation or validity (i.e., prescription).

DENMARK

We find it undesirable, as these rules are international, that according to paragraph (1)(a) it is sufficient that the bill of exchange contains "... words of similar import ...". It seems most practical to use a uniform terminology on the time for payment. The said provision might therefore appropriately conclude with the words "... at sight or on demand or on presentment".

Article 8(2)

CANADA

Canada believes the words "acting after maturity" should be added to the end of the section as presently drafted to ensure that the instrument is only regarded as being payable on demand as regards those persons who become parties to it by their signature after maturity.

Article 8(3)

MEXICO

See comments on article 1(2)(c) regarding the expression "at a definite time".

Article 8(4)

CHINA

To be amended as follows: "The time of payment of an instrument payable at a fixed period after date starts at the date of the instrument and ends at the date when payment becomes due."

Article 8(5)

MEXICO

The text should state that the maturity of a bill payable at a fixed period after sight is determined by the date of its presentation for acceptance. What happens if the instrument is not accepted?

Suggested wording: "The maturity of a bill payable at a fixed period after sight is determined by the date on which it is presented for acceptance."

Article 8(7)

MEXICO

The date of presentation should be indicated on the note. It is suggested that this paragraph be brought into line with the solution given in connection with article 38, paragraph (3).

ARTICLE 9

Article 9(1) and (2)

INDONESIA

The Indonesian Commercial Code does not contain a provision whereby a bill or note may be drawn or made by two or more drawers or makers or may be payable to two or more payees.

It is to be noted that if the drawers/makers or payees are regarded as a unity, it is not contrary to the civil law system which considers the issuance of a bill or note as an underlying transaction between the drawer and the payee.

URUGUAY

We suggest an improvement in the drafting so that the text would read as follows:

(1) "A bill may:

(a) Designate two or more payees"

....

(2) "A note may:

....

(b) Designate two or more payees".

DENMARK

The provisions of paragraph (2)(b), allowing payment to be made to two or more payees, may prove impractical where the addresses of all payees are not known, except where in the alternative the instrument is payable to any of them.

Article 9(3)

CZECHOSLOVAKIA

The final sentence is not clear. Payment to all holders to be made at the same time will be difficult from the technical point of view unless divisible payment would be split in equal portions among all holders.

SPAIN

Article 9 raises an interesting problem by providing that, when there are two or more payees, they must exercise their rights jointly unless they are designated in the alternative. It would seem that the rule should be the reverse, as suggested by the CSCC. Similarly, it would be desirable to indicate that the parties are jointly and severally liable when, for example, there are two or more drawers.

That the parties are jointly and severally liable is clear from article 65, but problems may arise between this and the requirement for holders to exercise their rights jointly. Thought should be given to the case of a co-payee-endorser, with joint and several liability, who makes payment to a subsequent holder and who later, when he wishes to recover from those liable to him under article 67, is unable to do so without co-operation from the other co-payees; or again, the case of two or more drawers of whom one makes payment to redeem the instrument and has later to recover from the acceptor.

URUGUAY

The rule in article 9, paragraph (3) is clear, but is perhaps lacking in that it does not refer to the case where the instrument is drawn in favour of A and/or B, as mentioned in the commentary (paragraph 6).

We suggest that the following text be added:

"If it is indicated on the instrument that it is payable to alternative or joint payees, it shall be understood to be payable to all those designated".

ARTICLE 10

Article 10(a)

CHINA

Article 10: "A bill may: (a) Be drawn by the drawer on himself;"

Recommendation: This be supplemented by adding "and regarded by the holder as an international promissory note;"

The reason: A bill drawn by the drawer on himself is by nature a promissory note, so the holder may treat it in pursuance of the regulations governing international promissory notes.

Article 10(b)

CANADA

This paragraph may only be properly construed if read in conjunction with paragraph (a) of the same Article. On the principle that independent provisions of a statute should stand alone, paragraph (b) should be amended to read "be drawn payable to the drawer's order".

ARTICLE 11

CHINA

Paragraph (1) of article 11: "An incomplete instrument which satisfies the requirements set out in subparagraphs (a) and (f) of paragraph (2) ... may be completed and the instrument so completed is effective as a bill or a note."

Recommendation: The article be deleted.

The reason: According to article 1, an international bill of exchange and an international promissory note are written instruments which must satisfy the requirements set out in subparagraphs (a), (b), (c), (d), (e) and (f) respectively of paragraphs (2) and (3). The stipulation that a written instrument which satisfies only the requirements set out in two of the six subparagraphs is an "incomplete instrument" which may be completed contradicts the spirit of article 3. At the same time, by accommodating itself to unreasonable circumstances, thus reducing the quality of an international instrument, and by failing to specify who is to complete an "incomplete instrument", the article may give rise to unnecessary disputes.

CZECHOSLOVAKIA

We suggest that it be specified whether the completion of an instrument is effective "ex tunc" or "ex nunc". Solution of this question may often be of importance in practice.

YUGOSLAVIA

An incomplete instrument is often used in international transactions, therefore it is commendable that the provisions relating to such an instrument were included in the draft Convention. Here, it is proposed that the draft provisions concerning such instruments be amended. In order to ensure legal security, it is necessary to specify, in addition to the requirements set out in article 11, that an incomplete instrument should bear the signatures of the drawer and the acceptor or the endorser. In other words, the Convention should provide that only certain persons may complete an incomplete instrument.

A distinction between an incomplete instrument and an ineffective instrument is not clear. The Convention should stipulate that in the case of an incomplete instrument one or more essential elements are "deliberately" omitted so that they may be completed later on by an authorized person /indicating the authorized persons/.

Under the draft Convention, the holder of an incomplete instrument is not a protected holder, which means that defences based on the underlying transaction may be set up against him. This solution is not advisable as it may slow down the circulation of an instrument.

CHAPTER THREE. TRANSFER

SPAIN

We propose that the chapter heading in the Spanish version be changed to "Transmisión", which is the more correct legal term when referring to bills of exchange.

ARTICLE 12

MEXICO

The transfer of instruments other than by endorsement is not regulated. This omission suggests the impossibility of transferring the instrument by means other than through negotiation, which is inadmissible. It is suggested, therefore, that the opening phrase read: "For the purposes of this Convention, an instrument is transferred:".

URUGUAY

We should like to see added to article 12 a provision establishing clearly that the instrument is transferred by endorsement even if it does not contain the words "to order".

The absence of a requirement that these words be entered on the instrument is due to the context and is explained in the commentary thereon (especially the commentary on article 16), but the clarification would in our view be desirable.

ARTICLE 13

SPAIN

The most important point to make about this chapter, regulating endorsement, is that it enables the instrument to be converted into a bearer instrument. Although the payee has to be specified in person when the instrument is issued, the endorsement provided for in the Convention not only makes it possible, but apparently normal practice, to transfer the instrument to bearer; article 13 provides that an endorsement may be special, in which case the endorsee is identified, or in blank. The usual endorsement would thus appear to be in blank; it may indicate that the instrument is payable to any person in possession (art. 13), but if there is no indication the signature is sufficient to make the person in possession a legitimate holder (art. 14). Thus endorsed, an instrument functions as a bearer instrument and may be retransferred "by mere delivery" to a new transferee (art. 12). Moreover, since a bill may be drawn to the drawer's own order (art. 10), it can be established as a bearer instrument by the drawer himself.

The ease with which instruments can be transferred and transferees legitimated under these provisions might prove excessive. The facility for these instruments to be issued and transferred as bearer instruments may cause them to be regarded with greater mistrust. For example, the danger which Italian law attempts to meet by the prohibition in article 2004 of the "Codice Civile" might prove a more serious one in the sphere of banking; banks would be provided with a valuable tool which could be used, for example, for collecting funds through branches or subsidiaries abroad by issuing bearer instruments, and this could be seriously detrimental to the financial system of a particular State.

The facilities provided for in this chapter are in conflict with the present legislation on bills of exchange in Spain, which does not allow bills to be made payable to bearer; blank endorsement is provided for and the "bearer" of a bill may retransfer the instrument but he may not exercise the rights conveyed unless the endorsee's name is specified.

Other brief comments will now be made on this chapter.

The provision that endorsement and mere delivery should be means of transfer omits any reference to the possibility that an instrument may be transferable by other means provided for in national legislations, although such transfers place the transferee in a similar position to the transferor.

As the CSCC has pointed out, it would be desirable for article 13 to require the date of endorsement to be specified; it could be relevant in establishing the protected holder's status and it would also clarify the time at which a mere signature on an instrument becomes effective as a blank endorsement. Although this requirement is stated later with respect to the guarantee, the right place for it to be stated is here.

Article 13(2)(a)

CZECHOSLOVAKIA

We recommend an amendment to this provision to the effect that an endorsement in blank consisting of a mere signature must be written on the back of the instrument, or on its allonge.

ARTICLE 14

(The comments relating to article 14(1)(b) are reproduced under article 23.)

Article 14(1) and (2)

CZECHOSLOVAKIA

This provision proceeds from the difference between "holder" and "protected holder". It would be possible to employ its paragraphs (1) and (2) for a formulation of who is to be considered as a protected holder, provided that such holder did not obtain the instrument in the manner indicated in paragraph (3). In addition, the provision of paragraph (3) as now drafted appears unsuitable, since article 15 grants certain rights also to a person who did not obtain the instrument in such manner.

Article 14(3)

CHINA

Paragraph (3) of article 14: "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."

Recommendation: This be changed into "A person who obtained the instrument bona fide is not prevented from being a holder by the fact that the instrument was obtained under circumstances, of which he had no knowledge, including incapacity or fraud, ..."

The reason: A holder must be a person who obtained the instrument bona fide and who had nothing to do with those circumstances.

MEXICO

The proposed wording is pedestrian. The following text is suggested in its place:
"A person does not lose his status as a holder even when he has obtained the instrument under circumstances that would give rise to a claim to, or to a defence upon, the instrument, including incapacity or fraud, duress or mistake of any kind."

ARTICLE 16

CZECHOSLOVAKIA

It should be specified that the type of clause referred to in article 16 makes further transfer impossible. Since the transferee is placed in the position of a mere collection agent, the clauses are improperly confused with collection endorsements under article 20.

DENMARK

From the point of view of Danish law the proposed provisions of the Conventions would seem to hamper transactions involving bills of exchange and cheques by introducing some kind of "second-class" bills of exchange and cheques which are non-negotiable but more or less simple claims. The rule has broader scope than its Danish equivalents as we bypass the rules on simple claims. The rule appears to be practical, however, seeing that it is part of an international code.

NETHERLANDS

Where the drawer or the maker indicates on the instrument that it is "not transferable", "not negotiable", "not to order", etc., the instrument is, under Article 1(2) or (3) of the Draft Convention, apparently still a negotiable instrument. If this interpretation is correct, the rule in Article 16, that the transferee does not become a holder, is acceptable. To the words "except for purposes of collection" should be added the words "if the instrument has been so endorsed to him."

The consequences of the prohibition of further transfer by an endorser are, under Dutch law (Art. 114K) and the ULB (Art. 15), different from those obtaining under Article 16. When the endorser prohibits further transfer, the instrument may be further negotiated, but the endorser does not then guarantee acceptance or payment to persons to whom the instrument is endorsed subsequently. In other words, an endorsement prohibiting further transfer does not destroy negotiability, but the endorser excludes his own liability to persons subsequent to his endorsee.

It is suggested that this kind of restrictive endorsement, if retained in the draft Convention, should be dealt with separately, e.g. in Article 40 (2).

The endorsement which prohibits further transfer with the effect that the transferee does not become a holder except for purposes of collection belongs more properly in article 20 and should therefore not be dealt with in Article 16.

NORWAY

The article deals with two somewhat different situations: on the one hand a restrictive statement included into the instrument by the maker or the drawer and on the other hand a restrictive endorsement. We question the convenience of combining the two situations and suggest that restrictive endorsements are entirely dealt with in article 20.

The payee of an instrument into which the drawer or the maker has inserted a restrictive statement, may not further transfer the instrument, not even with the effects of an ordinary assignment. This is different under the Geneva Convention, cf ULB article 11. We are not convinced that the solution of the Draft Convention is the best one.

SPAIN

Article 16 raises two issues: first, there is no reason why the person holding a document which is not to be transferred should not still be known as the holder, even if he is subject to that prohibition; second, the nontransferability clause should have different effects according to whether the person who stipulates it is the drawer (or maker) or an endorser, since this affects the position of any person to whom the instrument is transferred in spite of the prohibition (if the clause has been added by an endorser, a holder in that position must retain all his rights against previous endorsers and against the drawer).

UNITED STATES

This Article provides that words prohibiting negotiation prevent a transferee from becoming a holder "except for purposes of collection," whether these words are added by the drawer at issuance of the instrument or by the endorser later. The Convention thus combines and confuses two situations: (1) that in which the drawer or maker issues an instrument which does not have the normal transfer characteristics of negotiability, and (2) that in which an endorser makes a restrictive endorsement. The United States thus proposes that the Article be amended to delete any reference to words added by an endorser (delete "or an endorser in his endorsement") and limit the Article to words originally placed on the instrument by the issuer. If necessary, the deleted language can be transferred to Article 20.

URUGUAY

The intent of article 16 is not clear.

In the situation referred to in the provision, we understand that collection by the holder is not allowed unless the latter can prove that he is authorized by the drawee or by a banking or financial institution the latter has designated for purposes of collection or unless the instrument has been endorsed for collection in the manner provided for in article 20.

We believe that the wording would be improved by a reference to article 20, even if only in brackets.

ARTICLE 17

CANADA

By providing that an endorsement must be unconditional, this provision appears to us capable of bearing the interpretation that a conditional endorsement is no endorsement at all. Canada supports the policy of the amendment as far as it is explained in paragraph 191 of UNCITRAL document A/CN.9/210 of 12 February, 1982. But we believe the policy could be better

implemented if a provision in the terms of United Kingdom Bills of Echange Act, section 33 (Canadian Bills of Exchange Act, section 66) were substituted.

S. 66 of the Canadian Act reads as follows:

"66. Where a bill purports to be endorsed conditionally, the condition may be disregarded by the payer and payment to the endorsee is valid, whether the condition has been fulfilled or not."

CHINA

Article 17: "(1) An endorsement must be unconditional.
(2) A conditonal endorsement transfers the instrument whether or not the condition is fulfilled."

Recommendation: The two paragraphs seem to be contradictory. If an endorsement must be unconditional, it is essential to state clearly whether or not a conditional endorsement is binding on the parties to the instrument when the endorsement is made and the instrument transferred.

HUNGARY

According to paragraph (2) - at first sight surprisingly - the conditional endorsement transfers the bill of exchange whether the condition is fulfilled or not. Examining more thoroughly the reason of this rule, it is probable that it has the same meaning as expressed by the Geneva Convention, that the endorsement can be considered as non-written. It appears to be an ambigious drafting.

NORWAY

Article 17 (2) deals with the conditional endorsement. With reference to paragraph 2 of the commentary to article 17, we call attention to the concept of the "protected holder", cf. articles 4 (7) and 5, and the requirement of the holder having no knowledge of claims to or defences upon the instrument. The inclusion of the condition into the endorsement may prevent a holder from qualifying as a protected holder.

SPAIN

A condition attached to an endorsement is ineffective but it does not invalidate the endorsement. This provision in article 17 would appear debatable and in conflict with article 18, which makes ineffective an endorsement in respect of part of the sum.

ARTICLE 18

MEXICO

The solution proposed in this article is inadmissible: one party is the material holder of the instrument, and the other party is the one authorized to exercise the rights which derive from the instrument; if there is a partial endorsement and the instrument is transferred, since the endorsement is ineffective the holder cannot exercise his rights, and the endorser, for his part, is similarly unable to do anything, since he has parted with the instrument.

Suggested wording: "Partial endorsement coupled with the transfer of the instrument has the same effect as full endorsement; otherwise the endorsement is regarded as not having been placed on the instrument."

SPAIN

In view of the prohibition of partial endorsement, it should be remembered that the draft Convention makes provision, firstly, for instruments to mature by successive instalments (art. 6) and, secondly, for them to be endorsed after maturity (art. 22) and, *a fortiori*, after any of the instalment dates. Presumably, endorsement in respect of part of the sum is permissible when it applies to the total of the outstanding instalments. In any case, this provision might be clarified.

UNITED KINGDOM

A minor criticism in relation to the commentary in respect of partial endorsement is that what does or does not create a partial endorsement does seem to be somewhat excessively refined.

ARTICLE 20

CZECHOSLOVAKIA

It should be specified that a case where a court authorizes recovery on an instrument is covered by this provision.

UNITED STATES

This Article does not clearly require that the endorsement of a collection endorsee be a collection endorsement, i.e., one that contains the words mentioned in the first paragraph. It now simply says that the purpose must be "for purposes of collection" and this can be done without using the form of a collection endorsement. The United States therefore proposes that the Article

be amended to clarify the requirement that any taker after a collection endorsement is bound thereby, regardless of intervening ordinary endorsements, by deleting the words "purposes of" from article 20(1)(a).

YUGOSLAVIA

Under article 20(1)(b), the endorsee "may exercise all the rights arising out of the instrument" which is a broadly-based authorization, in particular when an instrument is transferred to the endorsee by an endorsement "through an agent".

ARTICLE 21

CHINA

Article 21: "...qualifying as a holder ...."

Recommendation: The term "qualifying as a holder" should be defined or revised.

The reason: A legal term has a definite meaning and should be used uniformly in the two drafts. Terms that are not the same should be defined clearly to avoid confusion.

CZECHOSLOVAKIA

The draft Convention does not contain a general provision on cancelling endorsements and on the effects of such cancellation.

SPAIN

The method and effects of transferring an instrument to a prior party or to the drawee requires more detailed treatment than it is given in article 21. In any case, mere delivery hardly seems adequate. For this reason the CSCC invoked the principle of literality and advised that endorsement should be required for transfer to a prior party.

ARTICLE 22

DENMARK

The provision is vague on whether transfer after maturity is invalid.

NETHERLANDS

This provision deals with the transfer of an instrument after maturity: an overdue instrument may be transferred in accordance with Article 12. Article 22 does not state the effects of such a transfer. One must therefore look to other provisions of the draft Convention, in particular Article 4(7)(b). That provision denies protected holder status to a holder who takes the instrument after the time limit provided by Article 51 for presentment for payment has expired.

If follows that the taker of an overdue instrument, being a holder, takes it subject to the claims and defences specified in Article 25 except where his transferor is a protected holder (cf. shelter rule of Article 27(1)). The policy underlying such a result is presumably that the fact that the instrument is overdue is evident from the face of the instrument and that consequently the taker is put on notice.

The above interpretation depends on whether the words "after maturity" (used in Article 22) mean the same as the words "after the time-limit for presentment for payment has expired" (used in Article 4(7)(b)).

(a) In respect of instruments not payable on demand the "time-limit for presentment for payment" is the date of "maturity" or the business day which follows (Art. 51(e)). "Maturity", according to Article 4 (9), "means the date of payment referred to in Article 8." Article 8 specifies the "time of payment" of an instrument payable at a fixed period after date, the "maturity" of a bill payable at a fixed period after sight and the "maturity" of a note payable at a fixed period after sight.

It may be assumed that in respect of instruments not payable on demand and for the purposes of Article 4 (7)(b) and Article 22, the "time-limit for presentment for payment" coincides with "maturity," except for the business day which follows maturity. The inconsistency, as noted, could be removed by the use of one term only.

(b) In respect of instruments payable on demand the "time-limit for presentment for payment" is up to one year from the date of the instrument (Art. 51(f)). The "maturity" of such instruments is the date on which they are presented for payment (Art. 8(6)). The draft Convention does not state clearly whether the holder of a demand instrument must effect protest of non-payment when the instrument is dishonoured upon first presentment, on pain of losing his right of recourse against secondary parties, or whether he is entitled to re-present it for payment, provided he does so within one year of its date.

In the first eventuality the "maturity" of a demand instrument which is presented for payment before the expiry of the time-limit of one year does obviously not co-incide with the "expiration of the time-limit for presentment for payment" to which Article 4(7)(b) refers. In such a case, can the holder who takes after maturity but before the expiration of the one year period qualify as a protected holder? It is arguable that, if the holder took the instrument without notice of the fact that he took it after maturity (and

of the fact that it was dishonoured by non-payment) he is, if he otherwise complies with Article 4(7), a protected holder. This would appear to be the approach of Section 3-302(1)(c) of the UCC.

In the second eventuality the "maturity" of a demand instrument, under the current definition of Article 8(6), would correspond to the date on which the time-limit for presentment for payment expired only if the date of presentment for payment coincides with the last day of the time-limit of one year.

It is suggested, therefore:

(i) that the issue of the transfer of a demand instrument after "maturity" be re-examined;

(ii) that the use in the draft Convention of the terms "expiration of the time-limit for presentment for payment", "maturity", "time of payment" be reviewed;

(iii) that the rights of a taker of overdue instruments be specified in Article 22.

It may be noted that the issue of presentment for payment of a demand instrument within the time-limit of one year of its date also arose at the Conference which adopted the Geneva Uniform Laws. The issue was resolved in favour of the rule (not reflected in the uniform law) that renewed presentment and timely protest for non-payment may be made during the one-year period. The Conference approved the interpretation given by the Netherlands delegation in a written observation, as follows (C.360.M.151, 1930.II, p. 284)

"Article 19"*

(*Article 19, now Article 20 ULB, reads as follows:

"An endorsement after maturity has the same effects as an endorsement before maturity. Nevertheless, an endorsement after protest for non-payment, or after the expiration of the limit of time fixed for drawing up the protest, operates only as an ordinary assignment .. .")

"Article 19 regards an endorsement after the expiration of the time-limit fixed for drawing up the protest as a cession.

"Let us suppose that payment has been demanded without success on a sight bill, that protest has not been made, that the time-limit laid down in Article 33 has not yet expired and that the bill of exchange is then endorsed.

"When the endorsee presents the bill for payment, can the plea be advanced against him that the endorsement was made 'after expiration of the limit of time fixed for drawing up' the protest and that consequently the rigorous provisions of Article 19 are applicable to it. If so, the endorsee would be the victim of circumstances which he could not have known from the bill of exchange. Nevertheless, a decree by the Egyptian Mixed Tribunal, published in

the Journal des Tribunaux mixtes d'Egypte on February 5th/6th, 1930, adopted this unfortunate conclusion in a similar case.

"The Netherlands delegation is of the opinion that such an interpretation is contrary to that of the Uniform Regulation. It considers that when a sight bill has been presented for payment and when, on refusal of payment, protest has not been made, the time-limit fixed for drawing up the protest has not expired within the meaning of Article 19.

"If this is the Conference's opinion on these matters, the Netherlands delegation will propose no amendment.'

URUGUAY

Article 22 allows transfer by endorsement after maturity. We feel that this is not desirable because it implies the circulation of an instrument after its maturity. It also implies a solution that is in conflict with our internal system.

We suggest that, after maturity, endorsement should be allowed only for judicial or extra-judicial collection.

FORGED ENDORSEMENTS

ARTICLE 23
(and references to article 14(1)(b))

AUSTRALIA

A legal principle of general application is that a person whose signature is forged on a negotiable instrument is not liable on the instrument. The draft Conventions confirm this principle (article 30 (Bills and Notes Convention), article 32 (Cheques Convention)). However the draft Conventions, and the BEA differ in relation to the effect of a forged indorsement on the liability of other parties on the instrument.

The BEA renders a forged indorsement wholly inoperative and no rights may be obtained through or under it. Under the Act, a holder or a holder in due course has no rights against persons who signed before the forgery and payment of the holder of the instrument will not discharge the payer if the holder claims through a forged indorsement.

Under the draft Conventions, however, a person who acquires an instrument after a forgery is nevertheless a holder and has all the rights conferred on holders by the Conventions (article 14(1)(b) (Bills and Notes Convention), article 16(1)(c) (Cheques Convention)). Such a person will be able to sue all parties to the bill, whether they became parties before or after the forgery (article 68 (Bills and Notes Convention), article 61 (Cheques

Convention)). However, the draft Conventions provide a statutory right to compensation in favour of any party for damages that the party may have suffered because of the forgery (article 23 and 25 respectively). In short the bona fide holder is protected and may sue any party to the instrument notwithstanding the forgery.

Although the principles relating to the consequences of taking a forged instrument differ under the draft Conventions, Australia does not see the Convention provisions as posing any major barrier to the acceptance of the scheme contained in the Conventions. The problem of forged indorsements arises only rarely in relation to trade bills, which, in most cases, pass directly from the drawer to the collecting bank and there is generally an absence of intervening parties.

DENMARK

It should be clearly specified whether the right to recover compensation for any damage suffered because of forgery shall be upheld against other endorsers, cf. the principle laid down in section 10 of the Danish Cheques Act and section 7 of the Danish Bills of Exchange Act.

INDONESIA

This article, as does the Indonesian Commercial Code, lays down the legal effect of a forged endorsement on a bill or note. The two legal systems are in disagreement as to the legal consequence of such forged endorsement.

In this connection we are in agreement with the conclusion of the Working Group, set forth in the commentary, which establishes a compromise between the two legal systems:

(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 to damages against the forger and the person to whom the forger directly transferred the instrument.

JAPAN

The formulation of Article 23, which would certainly be one of the essential provisions of the Convention, is acceptable as a compromise between the two different systems. However, it needs further study, in view of the following problems:

(1) Under paragraph (1), those having the right to recover compensation are limited to the parties. Thus, this right is not conferred upon a person from whom the instrument was stolen and whose signature was later

forged since he is not a party (see Article 4(8)). However, this is not a sound approach. Such a person should also be entitled to recover compensation under this provision. Therefore, the Japanese Government proposes that the words "and any person whose endorsement is forged" be added after the words "any party" in Article 23(1).

(2) The present text sets no limit for the amount of compensation for damages recoverable under Article 23. However, in view of the limit set for the amount recoverable under Articles 41 (2), 64 and 75 (3) of the Draft Convention, the amount recoverable under Article 23(1) from a person to whom the instrument was directly transferred by the forger should be limited to the amounts stipulated in Article 66 and Article 67.

NORWAY

The Norwegian Government is satisfied with the compromise of article 23 between civil law and common law.

The person who acquires the instrument from the forger may qualify as a protected holder although he is liable to any party for the loss caused by the forgery, cf article 4 (7) and example H in the commentary to article 14. This construction is somewhat surprising. It is unclear whether the liability may be set up as defence against the protected holder, cf article 26 (1) (b). The answer might be that the claim for compensation were to be regarded as a counter-claim and not as a defence. The implications of such a construction would ultimately depend upon the applicable national law. Anyway, as a natural consequence of the compromise in article 23, we suggest that article 26 (1) in a new subparagraph (d) state that a claim for compensation under article 23 may be set up against a protected holder as a defence to his claim on the instrument.

Paragraph 24 of the commentary says that article 23 (1) does not apply in cases where the person whose signature is forged, is liable on the instrument according to article 30. We suggest that this be explicitly stated in article 23.

Article 23 (1) leaves several questions to the applicable national law, cf paragraph 25 of the commentary. We understand that the liability under article 23 (1) is a strict liability and that it is not left to national law to decide whether negligence is a condition.

Under Norwegian law, however, the employer may in some circumstances be liable for damage caused by his employees by forgery. This may more generally be the case if an employee exceeds his authority, cf article 23 (3). We presume that such application of national law on vicarious liability will not be contrary to the Convention.

Regarding article 23 (3), we refer to our comment to article 4 (10).

SPAIN

With respect to article 23, we have already mentioned in our comments on article 4 the desirability of attempting a unified treatment of the issue of forgery. Furthermore, it seems unsuitable to bring together the issue of forgery and that of unlawful conduct by an agent, acting without authority or exceeding his authority. This was the opinion of the CSCC.

The identification of the person liable for compensation also raises some doubts. Under article 23, the person to whom the instrument was directly transferred by the forger is liable for payment of compensation, even if he is unaware of the fact of forgery (he is liable even without guilt, or else the guilt is presumed "juris et de jure"). On the other hand, the direct transferee is not liable if he is an endorsee for collection (against whom there would be an even easier presumption of "consilium fraudis"), even if he has knowledge of the forgery (paragraph 2), and nor is a subsequent transferee with knowledge of the forgery.

In short, the risk of forgery has to be borne by the person who acquires the instrument (in accordance with Anglo-American law) and not by the person whose signature is forged or whose instrument is stolen.

UNITED STATES

This article embodies an important compromise and the United States supports paragraphs (1) and (2) as they are now drafted.

Article 23(1)

FINLAND

Under this provision a person acquiring a bill of exchange has to ascertain the endorsement not to be a forged one. If he fails to do so, he runs the risk of facing - together with the forger - claims of compensation for the damages suffered by any party because of the forgery.

The proposed solution would, in the first place, mean that a person acquiring a bill of exchange is required to ensure himself of the identity of the endorser. This would seem to be a generally acceptable requirement. Only in the case where he has made an effort to this effect but has been mislead, would he be exempted from responsibility for damage arising from the forgery. Although it is felt that the rules of the 1930 Convention would better serve commercial needs, the proposed rule might be acceptable as a reasonable compromise.

MEXICO

The person receiving the instrument should not be liable, unless he has acted in bad faith.

Suggested wording: "If an endorsement is forged, any party has against the forger, and against the person who, in bad faith, received the instrument directly from the forger, the right to recover compensation ...."

Article 23(1) and (2)

CZECHOSLOVAKIA

Paragraph (1) should provide that the drawee or the endorsee "by procuration" are liable because of a forged endorsement only in the case that they knew of the forgery.

In our view the provision in the second paragraph is of declaratory significance only.

Article 23(2)

AUSTRIA

Art. 23 (2) says that the liability of a party or of the drawer who pays, or of an endorsee for collection who collects, an instrument on which there is a forged endorsement is not regulated by the Convention. This means that such liability must be judged according to the specific applicable national law.

(a) This, as such, is in contravention of the idea of law unification. The draft Convention creates another sphere which remains reserved to the national law. This criticism has all the more significance as it relates to an important question.

(b) Moreover, the provision is not clear and gives rise to many questions. It is not easy to see what kind of liability it could be, in respect of whom and what for. This would in any case have to be stated.

(c) The provision also raises doubt with regard to the effect of a forged endorsement as referred to in the Draft Convention. The question arises whether the regulation is not in contravention of the principle that a forged endorsement does not prevent a valid transfer of the instrument (Art. 14 (1)(b)). Because the provision of Art. 23 (2) seems to be meaningful only if it has a scope of application, i.e. if liability within the meaning of the provision is conceivable. Such liability, however, can

only be based on the fact - as, for instance, under US law - that due to a forged endorsement the holders succeeding the forger derived no rights from the instrument, since a bill of exchange bearing a forged endorsement is not transferable. It is only then that the predecessor of the forger can still derive rights from the instrument and may demand payment; in such case it is meaningful to make every party liable to its successor for the authenticity of the signatures, i.e. to let it assume the liability for a forged signature.

If, however, it is possible to make a valid transfer of the bill of exchange despite a forged endorsement, the person which had derived rights from the bill of exchange before it was forged can no longer raise claims based on the instrument. The bill debt is discharged by payment. Given this situation, it is hard to see why a party which paid the bill of exchange can be liable on ground of a forged endorsement.

(d) If one starts from the assumption, however, that liability as referred to in Art. 23 (2) is conceivable within the framework of the Draft Convention, the difficulties - apart from the fact that the effect of the forged endorsement does not seem to be clarified - in international business transactions caused by the different bills of exchange laws would be prolonged: the US banks collecting an instrument drawn in favour of an American would continue to demand guarantees from the European bank tendering the bill in respect of a possible liability because under American law they themselves are not authorized to collect the instrument in the event of a forged endorsement due to the lack of authority of the endorser for collection and thus would have to compensate the authorized person or the person having indemnified such other person for the collected amount. The guarantee demanded from the European banks tendering the bill because they are not subject under the Geneva system to liability corresponding to that of the American law on bills of exchange could be advanced within the American period of limitation of six years although a recourse by the European bank tendering the bill against its customer may be subject to a considerable shorter period of limitation due to the relevant national law.

CANADA

We have previously referred to the desirability of amending the Conventions to provide, in the fashion of subsection 97(2) of the United Kingdom Bills of Exchange Act (section 10 of the Canadian Bills of Exchange Act) that issues affecting bills, cheques and notes that are not resoluble by the application or construction of the text of the Act shall be determined in accordance with the principles of the common law including the law merchant. Article 23(2) is an example of a type of section demonstrating the importance of the point and the value of such an express invocation of supplementary sources of law available for the resolution of disputes. It does not appear to Canada to be an adequate discharge of the functions of the Convention merely to state that the liability of a party in particular circumstances "is not regulated by the Convention", without going forward to provide an indication of the source of law by which that liability may be determined.

Even if it were intended by the draftsmen that such liabilities would be determined in accordance with generally accepted international principles of conflicts of law, a statement to that effect would be of assistance, e.g., in curbing the perhaps unjustified application of peculiar domestic rules of conflicts sponsored by individual domestic tribunals.

HUNGARY

This convention might regulate the consequences arising from payment of an instrument which contains a forged signature by providing a rule under which the drawee who pays an instrument to the person who forged the endorsement or the endorsee for collection who collects such an instrument is only liable for damages in case he knew of the forgery.

MEXICO

It is not clear why the Convention does not regulate the liability of the drawee who pays an instrument on which there is a forged endorsement. The circulation of bills of exchange is based on the principle that exempts the drawee from the obligation (indeed, even denies him the authority) to establish the legitimacy of the endorsements.

Suggested wording: "The party paying an instrument is not obliged to establish the authenticity of the endorsements, nor does he have the power to require that the authenticity be verified; he must, on the other hand, authenticate the identity of the person presenting the instrument as the last holder, and also the continuity of the endorsements thereon."

UNION OF SOVIET SOCIALIST REPUBLICS

In paragraph (2) it would be desirable to regulate the question of consequences arising from payment of an instrument by the drawee directly to a person who has forged an endorsement, or from the taking by the endorsee for collection (usually by a bank) of an instrument from such a person, by establishing a rule under which a drawee who pays on an instrument to a person who has forged an endorsement, or an endorsee for collection who collects such an instrument, is liable for damages only if he was aware of the forgery.

Article 23(3)

MEXICO

The first line of the Spanish version should read "estampado en un título" instead of "estampado en un instrumento."

UNITED STATES

Article 23(3) provides a definition of "forged endorsement" which seems to be both correct and of general applicability. However, as was mentioned earlier in connection with Article 4(10), that definition is expressly limited to "the purposes of this Article," a limitation which the United States finds unnessary and confusing. The limitation suggests that this definition is inaccurate in other contexts. The United States therefore proposes that Article 4 be amended to provide a complete definition of "forged signature," which would include both unauthorized signatures and those beyond the scope of an agent's authority, and would be used consistently throughout the Convention. Such a definition should include the concepts of Articles 4(10) and 23(3) and make their separate provisions unnecessary.

The Convention makes no exception to general rules applicable to forged endorsements in situations where the instrument is issued as part of a fraudulent scheme by an employee of the drawer, who causes the instrument to be issued in the name of some person, real or fictitious, with the intention of signing that person's endorsement. Since such fraud can best be prevented, and insured against, by the drawer, the United States proposes that Article 23 be amended to place the loss on the drawer and not on the person who takes from the forger in such a case.

CHAPTER FOUR. RIGHTS AND LIABILITES

HOLDER - PROTECTED HOLDER

ARTICLES 4(7), 24, 25 and 26

AUSTRALIA

Articles 25 and 26

A fundamental concept in any law on negotiable instruments is the protection that is given to a person who acquires a negotiable instrument in the ordinary course of business, in good faith and without notice of any defects in title of the person from whom the instrument was acquired.

Like the position under the BEA, the draft Conventions distinguish between a 'holder' and a 'protected holder' of a negotiable instrument. However, while the definition of a holder in the BEA and the draft Conventions (article 14 (Bills and Notes Convention), article 16 (Cheques Convention)) is similar, the concept of a 'holder in due course' (under the BEA) and that of a 'protected holder' (the draft Conventions) are not identical.

In s. 34 of the BEA, a holder in due course is defined as a holder who has taken a bill, complete and regular on the face of it, if he became a holder before it was overdue and without notice that it had been previously dishonoured, and if he took it in good faith and for value and without notice at the time it was negotiated to him of any defect in the title of the person

who negotiated it. Once a bill has come into the hands of a holder in due course, any subsequent holder is entitled to the same protection as the holder in due course even though he himself was not a holder in due course, unless the subsequent holder was party to any fraud or illegality affecting the bill.

Under the draft Conventions, the protected holder is defined as a holder of an instrument that was complete and regular on its face when he became a holder if he was at that time without knowledge of any claim or defence to the instrument that would be valid under the Conventions against ordinary holders (article 26 (Bills and Notes Convention), article 27 (Cheques Convention)) or of the fact that the instrument had been dishonoured by non-payment, and if the time limit for presentment of the instrument had not expired.

It appears that the holder in due course and the protected holder differ in two respects. Firstly, there is no requirement under the draft Conventions as there is under the BEA that a protected holder must take a bill for value. Secondly, whilst a holder in due course is required to be 'without notice' of previous dishonour of defects in title, the protected holder is required to be 'without knowledge' of previous dishonour or claims. The draft Conventions appear to introduce an element of constructive knowledge (Bills and Notes Convention (article 5), Cheques Convention (article 7)). Under the BEA, however, 'notice' means actual notice and there is no room for the operation of the doctrine of constructive notice. Insofar as a bank may be a protected holder in many cases, the question is raised of the extent of knowledge that can or should be attributed to a bank.

So far as the privileged position of the holder in due course and the protected holder is concerned, a protected holder may in fact be in a slightly weaker position than the holder in due course. Under s.43(1)(d) of the BEA, a holder in due course holds a bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and is entitled to enforce payment against all parties liable on the bill. On the other hand, under article 26 of the Bills and Notes Convention and article 27 of the Cheques Convention, certain specific defences can be raised against the protected holder e.g. that the instrument was unsigned, that the signature was forged or unauthorized, that there had been a material alteration, that there had been a lack of presentment, that time limits had elapsed, that the party lacked capacity to incur liability on the instrument or the plea of non est factum.

Moreover, a party may raise against the protected holder defences based on the underlying transaction between himself and that holder or arising from any fraudulent act on the part of that protected holder in obtaining the signature of that party on the instrument.

It may be possible, therefore, in comparing the legal position of the holder in due course and the protected holder, to provide examples of where the holder in due course would take an unqualified title to the bill whilst the protected holder would not. Australia intends to give this matter further consideration.

AUSTRIA

Articles 25 and 26

(a) One of the main reasons for the lack of clarity and the complexity of the system is the differentiation between holder and protected holder because this differentiation has the result that there are two different groups of defences:

Article 27 makes the system even more unclear, by providing that a holder may, under certain conditions, assume the legal position of his predecessor who had been a protected holder. Although, in general, this may be welcomed because it strengthens the formalism of the bill of exchange and thus the legal position of the holder, the manner in which this is achieved seems to be much too complicated.

Another major drawback is that the Draft Convention offers no regulation for the question of claims to the instrument against the holder, so that for solving this problem the applicable national laws have to be used. Because of this, the difficulties generally arising in connection with questions of international private law and the application of foreign law will remain in this field as well.

(b) On the other hand, the complexity of the system is not offset by an improved protection against the formalization of the bill of exchange or against its misuse:

It is unfair, for instance, that a defense based on the underlying transaction (legal relationship between predecessors) cannot be set up against a protected holder or a holder put on the same footing as a protected holder under Article 27, even if such holder acted deliberately to the disadavantage of the debtor when acquiring the instrument (cf. Art. 17 of the Uniform Law on Bills of Exchange and Promissory Notes). It is equally unfair that no defense based on an underlying transaction may be set up against the protected holder (or a holder of equal footing under Art. 27), even if such holder had acquired the bill of exchange in bad faith or may be blamed of gross negligence when acquiring the instrument (cf. Art. 16 para.2 of the ULB).

While this provides strong protection for the protected holder (or holder of equal footing), protection of the holder seems to be unduly weak. A defense based on the underlying transaction may even be set up against such holder if he neither knew of such defense nor was obliged to know and did not act to the disadvantage of the debtor when acquiring the instrument.

This shows that the generalizing differentiation between holder and protected holder is not suited for arriving at just solutions in this respect. It would be different if - like in the Geneva system - the defense and/or the claim to the instrument against the respective holder were made dependent on his good faith (bad faith) vis-a-vis the debtor and/or in relation to the title of the predecessor.

(c) It serves business transactions best if the rights from a bill of exchange can be realized rapidly. The system of the Draft Convention, however, gives rise to the concern that the realization of rights will meet with particular difficulties in practice and that delays will therefore occur.

The point is that it will not be possible to judge, on the basis of the instrument alone, what rights are vested in the respective holder and what defenses may be set up against him; rather, the question will have to be solved first whether the holder is just a holder or a protected holder (or a holder of equal footing). For this purpose it may still be easy to ascertain whether the time limit for presentment of the instrument had already expired when the instrument was acquired by the holder; it will be more difficult, though, to determine whether the holder knew of a defense under Art. 25 or a claim to the instrument when acquiring the bill of exchange.

In practice, there will also be the negative effect that the defenses which may be set up against a holder are not enumerated in a final list as in the case of the protected holder (Art. 26), but that Art. 25 contains - apart from some explicitly mentioned defenses - only a general reference to "any defence available under this Convention".

CANADA

Article 26(2)

Canada does not see the utility of the phrase "to an instrument" that has been introduced in the first line of this subsection. It appears to us that the intent of the section is that no right of a protected holder shall be qualified in the manner described in the section. By making reference "to an instrument" the section raises a doubt whether rights of action derived from the instrument or "under the instrument" are impliedly excepted. If the subsection referred only to "rights of a protected holder" this ambiguity would not arise.

CHINA

Article 25(1)

Article 25: "... a holder who is not a protected holder ...."

Recommendation: The term be defined.

The reason: The article affirms the legal rights to be exercised by a party to an instrument against "a holder who is not a protected holder", while limiting the legal rights of "a holder who is not a protected holder". Therefore, the term should be clearly defined to facilitate its application.

CZECHOSLOVAKIA

Articles 4(7) and 25

Article 25 is included because of the difference between "holder" and "protected holder". In our view it contains a needlessly complicated formulation and we recommend adoption of the more simple regulation of the Geneva Uniform Law which is based upon the premise that any holder of an instrument who evidences his right in the way regulated by the Geneva Uniform Law is not obliged to hand over the instrument to a person who lost it, unless the holder obtained the instrument in bad faith or was guilty of gross negligence in obtaining it. The fundamental provision upon which the importance of a negotiable instrument must be founded should be constituted by the principle that he who is sued on an instrument may not set up against the holder defences that are based upon his own relations with the drawer or with prior holders unless the suing holder when obtaining the instrument knowingly acted to the detriment of the debtor. This formulation is simple and corresponds better to the economic function of the bill or note. On the other hand, the definition of "protected holder" in Article 4 (7) is cumbersome and complex in view of its reference to article 25, and it specifies certain requirements the non-fulfilment of which cannot be regarded as obtaining an instrument in bad faith or to the detriment of the debtor.

DENMARK

Article 26(1)(b) and (c)

It seems a rather drastic step that a person as a defence may invoke the acts referred to under (1)(b) in both Conventions. In Danish law this would be equivalent to elimination of part of the negotiability of cheques and bills of exchange.

At the same time it appears odd that a person's statement to the effect that he was unaware of signing a cheque/bill of exchange, cf (1)(c) in both Conventions, is admissible evidence.

FINLAND

Article 4(7) and 26(1)

Under Article 4 (7) a holder of an instrument is not a "protected holder" if the instrument was incomplete at the time of his becoming a holder, even if the instrument had since been completed in accordance with an agreement, as envisaged in Article 11. This would also apply to features of the instrument other than the one introduced later on. Such a solution would seem to interfere with the present practices and is not supported. It would mean that the holder would not be protected against any defence based on the underlying transaction even if not related to the feature left incomplete in the bill of exchange, vide Article 25 (1).

Under sub-paragraph (c) of Article 26 (1) a party may set up defences against a protected holder if based on his incapacity to incur liability on the instrument or on the fact that he has signed the document without knowledge that his signature had made him a party to the instrument and provided that such absence of knowledge was not due to his negligence. Whilst the former defence seems to be reasonable, it is feared that the latter might give rise to conflicts. The "example H", referred to in paragraph 6 of the Commentary to this provision, rather strengthens these fears. It is therefore proposed that the latter part of the provision be deleted (starting with "or on the fact ...".

FEDERAL REPUBLIC OF GERMANY

Articles 25 and 26

According to the rules suggested, in practice all imaginable defences may be invoked against the holder of a bill of exchange who is no protected holder. A protected holder, however, becomes a holder who is not protected if only he did not have knowledge of a defence due to gross negligence. That restriction of trade protection as opposed to the Geneva system will most likely impair the negotiability of the international bill of exchange substantially; it is therefore doubtful if such a commercial paper would attain practical importance.

JAPAN

Article 4(7)

The definition of "protected holder" as set out in Article 4 (7) is not sufficiently comprehensive. Particularly, the factor of regularity as referred to in the definition is confusing. According to the example given in paragraph 13 of the commentary (A/CN.9/213, page 21), a bill shall not be regular when the name of the first endorser does not correspond to the name of the payee. However, a person who was in possession of such a bill would not even be a 'holder', since he was not in possession of a bill on which there appears an uninterrupted series of endorsements (see Article 14 (1)). Consequently, the definition as set out in Article 4 (7) needs further study.

NETHERLANDS

Articles 25 and 26

The draft Convention, in Chapter Four, Section 1, deals with the central question of negotiable instruments law: in what circumstances should the person in possession of an instrument be protected against a claim to the instrument and be able to cut off defences raised by prior parties, and which defences?

The legislative technique employed in the draft Convention, by the use of the concepts of holder and protected holder and the so-called shelter rule, is inspired by the Anglo-American systems.

Like the English and American statutes which protect only the "holder in due course", the draft Convention protects only the protected holder and adopts the single concept of "protected holder" for the purpose of protecting such holder against both claims and defences.

Dutch law on the other hand, in accordance with Articles 16 and 17 of the ULB, differentiates between protection against claims and protection against defences. In order to cut off claims of ownership, the holder must be free from bad faith and gross negligence (Article 115K, Art. 16 ULB) and in order to cut off defences he must not, in acquiring the instrument, have acted to the detriment of the obligor (Art. 116K, Art. 17 ULB).

Like the English and American statutes, the draft Convention denies the status of protected holder to a holder who, when he became a holder, knew (Art. 4 (7)) or ought to have known (Art. 5) of "a claim or a defence affecting the instrument" (cf. Commentary, page 21, para. 14).

The treatment of defences under the draft Convention is complex and leads to results that are different from those obtaining under Dutch law and the Geneva Conventions.

The differences may be illustrated by using the example discussed at the Geneva Conference in 1930 (C. 360.M.151, 1930.II, p. 292) and also used during the deliberations of the UNCITRAL Working Group (see A/CN.9/77, para. 81(b)).

The purchaser of goods accepts a bill of exchange drawn on him by the seller to his (seller's) order. Seller subsequently delivers defective goods. The acceptor-purchaser may therefore, in an action against him by the drawer-seller, set up as a defence the fact that the goods were defective. Suppose the bill is endorsed to A who takes it with knowledge of the defence which the acceptor may set up against the drawer.

Under the draft Convention, A is not a protected holder: when he took the bill, he had knowledge of a defence referred to in Article 25. Under Article 25(1)(b), the acceptor may set up the defence (based upon the underlying transaction between himself and the drawer) against A.

Under Dutch law, A will cut off the defence raised by the acceptor if, in acquiring the bill, he did not knowingly act to the detriment of the acceptor. Mere knowledge by the holder of existence of a personal defence available to the obligor does not therefore impair the protection a holder enjoys under Dutch law (Art. 116K) or the ULB (Art. 17).

In respect of personal defences the Geneva Uniform Law would thus give greater protection to the holder since he may be protected against personal defences even when he had notice of them.

It is however relevant to note that the courts of contracting parties to the Geneva Convention have given divergent interpretations of Article 17 ULB. Some courts have held that knowledge of a persoal defence available to the obligor amounts to acting knowingly to the detriment of the obligor.

In the Netherlands, the doctrinal view is generally that the transferee of an instrument who knew or ought to have known of the obligor's defence does not deserve the protection which Article 17 of the ULB, on a strict interpretation, grants him, even though he did not knowingly act to the detriment of the obligor.

Professor Molengraaft, a Netherlands delegate to the 1930 Geneva Conference, was opposed to Art. 17 ULB. He said the following (C.300, M. 151, 1930, II, p. 292):

> "The text now proposed, while requiring that the holder should have knowingly acted to the detriment of the debtor, involved the protection of a holder in bad faith. In other words, it protected a person who, in acquiring the bill of exchange, knew that the previous claimant was liable to be met by a defence which could be set up by the person sued by the holder. That principle was contrary to the law of bills of exchange.... This law was based on the protection of the rights of third parties "in good faith". It did not sanction the possibility of a bill of exchange becoming an instrument for the unfair enrichment of a person who had acquired it in bad faith. Such enrichment would, however, be encouraged if the debtor of the bill of exchange were refused the right to set up the defence of bad faith, and if the burden of proof were put on him that there was an intention to defraud him to his detriment."

It is suggested, therefore, that Article 25, in this particular respect, is acceptable.

The meaning of Article 25(1) is less clear. Whereas Article 26 sets out, by cross references to other provisions, the defences that may be raised against a protected holder, Article 25(1) merely refers to "defences available under this Convention." The provision would gain in clarity if it specified which defences are referred to.

It is true that, under the draft Convention, the situation of a mere holder is akin to that of an assignee. However, under Article 28, a holder is presumed to be a protected holder. Consequently, the burden of proof that the holder, when taking the instrument, had knowledge or constructive knowledge of a defence, falls on the obligor. This presumption and the shelter rule set forth in Article 27(1), though not known in civil law jurisdictions, should ensure that the conditions pertaining to the circulation of an international instrument are not less favourable than those obtaining under the Geneva system.

Article 26

Article 26 (1)(c) lists the defences of incapacity and non est factum as defences that may be raised against a protected holder. It is suggested that the issue of defences based on circumstances which render the obligation of a party null and void be either spelled out in Article 26 or be left to the applicable national law.

The current listing of only two such defences might be interpreted as an exhaustive listing. Yet, obligations that are illegal or undertaken on the instrument as a result of physical duress (vis absoluta) may not be enforceable on grounds similar to those obtaining in respect of incapacity or non est factum.

Preference is expressed for leaving the matter of what constitutes real defences to the applicable national law.

NORWAY

Article 4(7)

1. The concept of "protected holder" is defined in article 4 (7). The definition requires i.a. that the instrument was complete when the holder acquired it. Even if the instrument is later completed in accordance with article 11, the holder will not qualify as a protected holder in respect of the features in which the instrument was complete upon delivery. We suggest that paragraph (7) be amended in order to avoid the consequence.

2. An essential part of the definition of "the protected holder" is the requirement that the holder upon delivery had no knowledge of a claim to or a defence upon the instrument. A holder who knows of any one claim or any one defence and therefore is not protected against it, will neither be a "protected holder" in respect of claims and defences of which he had no knowledge, cf paragraph 14 of the commentary to the article. We would prefer the solution that knowledge of one claim or one defence did not preclude the holder from protection against other claims and defences.

Articles 25 and 26

1. The articles deal with i.a. the defences which may be set up against a holder and a protected holder.

2. With reference to our comment to article 23, we suggest that there be inserted in article 26 (1) a new subparagraph (d) stating that a protected holder's liability according to article 23 may be set up against him as a defence to his claim on the instrument.

3. Article 26 (1)(b) contains two alternatives, "defences based on the underlying transaction..." and "(defences) arising from any fraudulent act ..". If it is agreed that the second alternative only is a subcategory of the first one, the former might be deleted.

4. With exception to these few comments, the Norwegian Government is satisfied with articles 25 and 26.

However, the Norwegian Civil Proceedings Act provides for some special arrangements in cases where the plaintiff relies on a bill of exchange or a promissory note. The defendant is precluded from invoking several kinds of defences at the first stage of the trial. The court may order him to pay although he has a valid defence. The defence may be tried in a second stage of the trial or in a new case. The court may then reverse the original order or order the plaintiff to pay back if he has already received payment. We presume that this procedural arrangement will not be contrary to the Convention.

SPAIN

Holder - protected holder: general observations

The issue of the position of the holder in relation to the defences available to the various parties consitutes the "cornerstone of the draft Convention", as the CSCC puts it. However, serious reservations may be expressed as to the method by which this aspect should be regulated. The draft Convention makes an initial distinction between a holder and a protected holder, which is explained in the definitions of these terms. The difference between the two is based, among other criteria, on "knowledge" of certain facts, that is to say on a criterion which is subjective and uncertain. In order to simplify it, presumptions are used which may in some cases have the reverse effect (cf. articles 5 and 28). The defences available are listed by means of cross-references, and we shall return to this later on.

The complexity of the system is the result of its initial tenet, the distinction between a protected holder and an unprotected holder. To start with, the terminology seems inappropriate; a person cannot be qualified as unworthy of legal protection. On the other hand, if the system is to be based on the above distinction, both concepts must be clearly specified; a reading of article 4 reveals that this has not been done (see the comments to this article). The concept of a protected holder is defined basically by one objective criterion - inaccurately formulated - and, more especially, by his unawareness of certain facts. This means that the qualification of holders as protected holders must be pronounced on a case-to-case basis and cannot be pronounced before the event. It would appear a simpler solution to establish how the knowledge of certain specified acts affects the system of available defences, removing the need to set up any initial distinction. These thoughts must suffice for this section.

In short, the subject of grounds for dishonour should be regulated with much greater clarity and simplicity. The system proposed in the draft Convention is very different from the Geneva system, provided for under article 17 of the Uniform Law; but, far from being a step forward, it introduces imperfections which suggest that the advisability of staying closer to the Geneva model should be considered.

Article 4(7)

The definition of most consequence is, no doubt, that of a "protected holder", a concept which it is absolutely necessary to define since, as we stated above, one of the cornerstones of the Convention rests on the distinction between a protected and an unprotected holder. However, the definition is not satisfactory. The basic definition, that of a holder in subparagraph (6), consists of a reference to article 14, and then an unprotected holder is defined in an excessively imprecise, complicated and ambiguous manner, although the subject calls for the greatest clarity and objectivity.

First of all, the definition speaks of the "tenedor de un título que a simple vista parecía completo y en regla ...". The expression "a simple vista" ("at first sight" or "at a glance") is unacceptable. Happier expressions are used in the English version ("on its face") and in the French version ("d'aprés son contenu"). The explanation in the Commentary (paragraph 13), "según lo indicado en el cuerpo de éste" (English: "on the face of it" (the instrument)), is also better than the phrase used in the text of the draft. The reference should be to the literal content of the document.

It is also unclear what is understood by an instrument which is complete. It should presumably be one that meets all the requirements in article 1; however, the subparagraphs (e) under paragraphs (2) and (3) mention five different places of which two must be in different States. They do not explicitly require that for the title to be complete all five must be shown, nor do they state clearly the manner in which these entries are to be made.

Also, as the CSCC has pointed out, there is no clear reason why a person receiving an incomplete bill should not be a protected holder if he completes it in accordance with the relevant agreement. Furthermore, it may be difficult to establish whether an instrument was completed before or after a person became the holder. Besides, provision is made for the omission of one requirement: if the date is missing, the Convention provides that the instrument shall be considered payable on demand. It makes no sense for its holder not to be "protected".

Some negative "conditions" also attach to the status of a "protected holder". One is that he must be "without knowledge" - a subjective, negative condition complicated by a set of presumptions - of certain specified facts:

First of all, those referred to in article 25; that is to say, we have another complicated reference making the provision still harder to understand, since article 25 refers to "any defence available under this Convention".

Secondly, the fact that the instrument has been dishonoured by non-acceptance or non-payment. It is hard to understand why a holder who knows that an instrument has been dishonoured by non-acceptance should not be a protected holder. It is also hard to understand why knowledge of dishonouring by non-payment should affect qualification of the holder, since, as provided by the following subparagraph (b), he may on no account be a protected holder if the time-limit has expired for presentment of the

instrument for payment. As the CSCC has pointed out, the importance of distinguishing clearly between the concepts of a "protected" and an "unprotected" holder within the system in the draft Convention makes its comprehension and delimitation difficulties the more serious.

Articles 24, 25 and 26

Section 1, entitled "The rights of a holder and of a protected holder", contains one of the essential cornerstones of this draft: regulation of the defences available against a holder.

An initial distinction is made in this area between a protected holder and an unprotected holder; in our general remarks on the draft Convention we outlined our serious doubts and reservations about a system which appears imprecise and ambiguous.

We shall now make a few more specific comments. First of all, it seems somewhat inappropriate to place these provisions in this section. True, the holder's rights are affected by the defences described, but the main emphasis is on the right of liable persons to use such defences against his claims.

Article 24, the first in the section, makes reference to the rights of a holder. Paragraph (1) establishes his rights by means of a comprehensive cross-reference ("those conferred on him by this Convention") and by reference to the persons against whom his rights may be exercised: "the parties to the instrument". It must be remembered that there are parties without liability (arts. 34 (2) and 40 (2)) and liable persons who are not parties to the instrument (art. 4). Paragraph (2) indicates the right of transfer by means of another cross-reference, this time to article 12.

After this purely introductory article, we come to the issue of defences; article 25 concerns those available against an unprotected holder and article 26 those against a protected holder. Before commenting on substantive issues, and whether or not the proposed system is acceptable, it would be advisable, most particularly in this context, to avoid a number of defects to which general reference has been made above.

An example of the poor drafting in the Spanish version is to be found in article 25 (1) (b). Also, the continual use of cross-references makes understanding of the provisions over-complicated. Article 25 starts with a general cross-reference and article 26 with a reference to a specific list of articles and paragraphs.

As pointed out by the CSCC, it might be better to reverse the order of these two provisions; in other words, it would be preferable to establish first of all the defences available against any holder and then those that may be invoked only against an "unprotected" holder.

It might also be desirable to deal separately with defences and with claims on an instrument; these issues are intermingled in articles 25 and 26 of the draft ("rights" and "claims" on an instrument).

UNITED STATES

Article 4(7)

A "protected holder" is a holder who takes an instrument complete and regular on its face and not overdue without knowledge of a claim or defense "referred to in Article 25". Knowledge of a defense not referred to in Article 25 (such as known defects in the transaction which caused the issuance of the instrument) will not prevent a subsequent transferee from becoming a protected holder. This limitation on the knowledge requirement of Article 4(7)(a) is not clear, nor is it sound policy. It does not seem that knowledge of a defense under Article 25(1)(b) or (1)(c) would ever be significant, since both of those provisions refer to transactions "between himself" (presumably the person acquiring the instrument) and another party. If this is so, however, a person can attain the status of a protected holder even though he knew of breach of contract defenses or fraud in the inducement in the transaction underlying the original issuance of the instrument. The United States believes that protected holder status should not be extended to parties who know of defenses, except under the shelter provisions of Article 27. The definition of "protected holder" should therefore be amended by deleting the phrase "referred to in Article 25" from the present knowledge requirement in article 4(7)(a).

Article 25

Under Article 25(1)(a), a holder is subject to any defense available under the Convention. Under the comparable provision for protected holders --Article 26(1)(a)--there are specific cross references to articles furnishing such defenses. The United States suggests that these two paragraphs in Articles 25 and 26 be conformed, preferably by adding to the text of Article 25(1)(a) a list of specific cross references to other articles furnishing such defenses.

YUGOSLAVIA

Article 4(7)

Article 4(7) defines the term "protected holder" which is quite distinct from the term "legal" holder of an instrument or a holder in "good faith" under Yugoslav law. The institute of the "protected holder" sets more requirements than is required in the case of a "holder in good faith". The application of this institute may pose problems in practice, especially in the case of an incomplete instrument (article 38).

The requirements enumerated in article 25 and more specifically defining those set out in article 4(7) in respect of claims and defences will be a serious obstacle to a speedier circulation of an instrument, primarily because of the fact that a bill is based on an underlying transaction.

Articles 25 and 26

These articles are an illustration of the aforementioned statement that the Working Group has viewed a bill as a causal transaction, which is unacceptable because it does not meet the needs of the present transactions and will not facilitate the circulation of an instrument. Namely, article 25(1)(b) and article 26(1)(b) stipulate that a party may set up against a holder who is not a protected holder "any defence based on an underlying transaction".

ARTICLE 27

CZECHOSLOVAKIA

The provision of paragraph (1), because of its wording "by a protected holder", leads to the interpretation that for the purpose of a person to be a "protected holder" it is not sufficient if he complies with the terms of Art.4, paragraph (7), but that in addition, his predecessor must be a "protected holder".

NORWAY

The implications of "the shelter rule" in article 27 are explained in several examples. We strongly oppose the solution outlined in example C. There are no good reasons why the person C in the example should obtain the rights of a protected holder. We suggest that article 27 be amended in order to avoid the consequence.

SPAIN

Article 27 makes the system even more complicated; it is an obstacle to understanding the characteristics of a protected holder and the already complex definition of him in article 4.

Article 27(2)

DENMARK

According to the provisions of paragraph (2) a party who pays an instrument 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. The situations envisaged in this context are not easily understandable.

ARTICLE 28

SPAIN

Article 28 has further resort to presumptions. These are used, in principle, to facilitate the implementation of legislation, but in this case the conflicting effects of articles 5 and 28 may increase the complexity of the system.

ARTICLE 29

NORWAY

A reference to articles 30 and 32 seems to be equally relevant to paragraph (2) as to paragraph (1), cf our comment to article 23. The final text may read:

Article 29

Subject to the provisions of articles 30 and 32:
(a) A person is not ...
(b) A person who signs ...

SPAIN

Section 2, on the liability of the parties, contains some general provisions which, curiously, start with a negative formulation (art. 29 (1)), whereas it would be more logical to have a positive one specifying when a person is liable on an instrument, to whom he is liable and the nature of his liability.

ARTICLE 30

CZECHOSLOVAKIA

For the purpose of legal certainty we recommend to delete the implied approval of the forged endorsement.

GERMAN DEMOCRATIC REPUBLIC

This Article introduces the notion of "implication". An implication is "a state of mind or facts which is deduced".

In view of the special nature of bills of exchange/promissory notes as negotiable instruments, the contents of which should be fully comprehensible for everybody and presented with clarity, use must be made, as a matter of principle, of explicit statements only. Otherwise, dealings using bills of exchange/promissory notes may involve some uncertainty and their negotiability may be considerably limited or affected. These remarks also apply to the use of the term "implication" in Articles 52, 58 and 63.

JAPAN

Article 30 provides that a person whose signature was forged is liable where he has represented that the signature is his own. However, according to paragraph 2 of the commentary (A/CN.9/213, page 61), he is not liable if the person to whom the affirmative representation was made knew of the forgery. However, it would be inappropriate to provide that the person who has represented that the signature was his own is not liable at all to any subsequent holder if the person to whom the affirmative representation was made knew of the forgery. If, however, the Commission decides to adopt such a principle, the text of the Convention should state such rule expressly.

NORWAY

The word "represented" in article 30 is to be interpreted according to Anglo-American tradition, cf paragraph 2 of the commentary. Preserving the rule, article 30 ought to be drafted in a way more open to a direct translation into the languages of non-common-law countries.

UNION OF SOVIET SOCIALIST REPUBLICS

The reference to the possibility of an "implied" acceptance by the person whose signature was forged on the instrument to be bound by such a signature should be deleted from the text of this Article in view of the vagueness of the term and of the fact that it is known only to one legal system (Anglo-American law).

UNITED STATES

Article 30 provides that a forged signature does not impose liability on the person whose signature was forged, unless "he has, expressly or impliedly, accepted to be bound by the signature" or represented it to be his own. The concepts of express adoption and misrepresentation cause no problems. However, the concept of implicit "acceptance to be bound" is not clear, although it seems to suggest that the person whose signature was forged is precluded from asserting the forgery. The United States proposes that this concept be expressly stated in Article 30, to make it clear that if a person's failure to exercise due care substantially contributes to the making of a forgery of his signature, he will be precluded from asserting the fact of the forgery.

ARTICLE 31

AUSTRALIA

A further divergence between the BEA and the draft Conventions concerns the effect of material alterations to an instrument. Under the draft Conventions, while parties who sign an instrument subsequent to any alteration will be liable on the instrument as altered, parties who sign before the alterations will be liable only according to its original terms (article 31 (Bills and Notes Convention), article 33 (Cheques Convention)). However under s.69 of the BEA, where a bill is "materially" altered the parties who signed it prior to the making of the alteration are discharged from liability on the bill except to a holder in due course for the original amount, and then only if the alteration is not apparent. Australia accepts the Convention provisions despite the differences with the position under the BEA.

NORWAY

An instrument may be altered more than once. We suggest article 31 be amended to take account of the possibility.

UNITED KINGDOM

A major point is made that this Article does not say whether there is to be any difference between the treatment of alterations which are apparent and those which are not, as provided by the Bills of Exchange Act 1882, s.64. It is felt that a material alteration should not be apparent for the provisions of the Article to apply. On the other hand it is felt that a person who knowingly takes a materially altered bill should not be able to enforce it against any prior holder or the alterer.

Article 31(1)

DENMARK

While the provisions of paragraph (1)(b), first sentence do match the rules of section 13 of the Danish Cheque Act and section 10 of the Danish Bills of Exchange Act it might be expedient to insert a clause that the holder of the instrument must be in good faith if he is to repudiate the objections of a party who has signed the instrument.

FINLAND

In sub-paragraph (b) of this provision a situation is envisaged where the instrument in question has been once altered. It is understood that where a bill of exchange has been altered twice, reference should be made to the terms

of the text as it was when the party concerned first signed the bill of exchange, even if that were not the original text.

Article 31(2)

YUGOSLAVIA

Paragraph (2) of article 31 may create difficulties in practice and prevent the circulation of an instrument. A strict application of the provision of paragraph (2) of this article would mean that all parties would be liable even for an obvious error in material alteration. Therefore, one may wonder whether the parties who have signed the instrument shall also be liable for any subsequent alteration.

ARTICLE 32

URUGUAY

Article 32 lacks a rule concerning signature by juridical persons, especially commercial corporations. It would be desirable to include a provision on this matter.

Article 32(4)

NORWAY

Paragraph 6 of the commentary suggests that paragraph (4) of the article will be overriding articles 25 (1)(c) and 26 (1)(b) in a conflict between the agent or the principal and his immediate transferee. However, there seems to be no need for such a deviation from the main principles of articles 25 and 26. We propose that either paragraph (4) of article 32 be deleted or a reservation be included regarding the immediate transferee of the agent. As far as subsequent protected holders are concerned, article 32 (4) is superfluous in addition to article 26, cf article 32 (3).

ARTICLE 33

CANADA

Canada does not see the utility of the verb "made" in the last complete line of this Article. It appears to direct attention rather too pointedly to funds that may have been specifically deposited with the drawee. We consider

that the intent of the Article extends to all funds in the hands of the drawee for the account of the drawer and this meaning would be clarified if the verb "made" were deleted.

DENMARK

Presumably the rules of Art. 35 of the Cheques Convention and Art.33 of the Bills and Notes Convention shall be taken to mean that a bank may refuse to pay without specifying the grounds for the refusal, even though there may be sufficient funds in the account. This is not considered sufficiently clearly formulated for the Cheques Convention and its commentary on Art. 35. By contrast, the problem seems to have been solved in Art. 33 where a parenthesis in the commentary contains the passage "unless the drawee has accepted". A similar parenthesis or passage ought to be inserted in the Cheques Convention.

SPAIN

This section ends with a provision, in article 33, which appears out of place in the system proposed in the draft Convention; the draft contains no general regulations concerning the relations between the instrument and the underlying transactions. This isolated reference to the assignment of funds made available for payment therefore seems strange.

ARTICLE 34

Article 34(1)

CANADA

Canada does not see the utility of the word "subsequent" in the third line of this section. It is difficult to give it a sensible meaning. Every party is a subsequent party to the drawer; no party is a subsequent party to the holder who is paid. The U.K. and Canadian statutes refer to holder or any subsequent endorser, but Article 34(1) would be satisfactory to us if the word "subsequent" were simply deleted.

Article 34(2)

DENMARK

The provision in paragraph (2) differs radically from the Danish provision in section 9 of the Bills of Exchange Act if it is to be inferred from paragraph (2) that the drawer may also limit his liability to pay the bill. This makes the B/E system highly recondite for those using the system. A stringent rule corresponding to that in subsection 2 of section 9 of the Danish Bills of Exchange Act (and Art. 35 of the Convention) is preferable.

SPAIN

The provision that the drawer may exclude or limit his liability invites comment. The CSCC could not see the purpose of this provision and recommended its deletion, since the possibility of excluding liability is not made subject to the existence of other liable parties. The maker of a promissory note may not exclude or limit his own liability (art. 35). This difference between bills of exchange and promissory notes clearly rests on the fact that, in the latter case, the maker's liability is primary (as explained in the Commentary). In any case, for the sake of consistency, the existence of a party with primary liability (the acceptor's signature) should be a prerequisite for allowing the drawer to exclude or limit his liability.

URUGUAY

Article 34, paragraph (2), is in complete conflict with our internal law and we see no international need for it. Traditionally, a bill must be paid by the drawer in the event of non-acceptance or non-payment by the drawee. If the drawer is to be allowed to be exempted, this would allow the circulation of an instrument lacking any debtor or person liable for payment.

YUGOSLAVIA

It is not clear why the provision of paragraph (2) of article 34 stipulating that the drawer may exclude or limit his own liability by an express stipulation on the bill has been included in the Draft Convention. The assumption is that the Working Group meant only a bill since such a stipulation of paragraph (2) would be absurd in the case of promissory notes under which the maker undertakes to pay a definite sum. Or how can he guarantee to pay a definite sum /which is the purpose of a note/ if he excludes or limits his own liability /article 34 (2)/. Paragraph (2) of article 34 indicates that the Working Group probably had a bill in mind but the wording implies all instruments. Therefore, it should be reworded for the sake of clarity.

ARTCILE 35

Articles 35(2) and 36(2)

HUNGARY

It is logical, that the maker of a promissory note can not exclude his obligation, since he promises his own payment. But, if it seems necessary to put it in express wording, then why is it not declared regarding the acceptor, too, in Article 36(2). It might be believed by an erroneous "a contrario" conclusion, that the acceptor may exclude his responsibility.

Article 36(1)

MEXICO

In the Spanish version, the use of the word "hasta" is clearly incorrect. The Spanish text should read: "El librador no quedará obligado por la letra entre tanto no la accepte."

ARTICLE 37

Article 37(b)

FEDERAL REPUBLIC OF GERMANY

No convincing reason can be ascertained for evaluating the mere signature by the drawee on the reverse side of the bill of exchange as a declaration of acceptance. That rule may result in confusions with respect to endorsements and seems to be particularly dangerous in those cases in which a bill of exchange is endorsed in blank before the name of the drawee is inserted.

HUNGARY

It has not been specified that the mere signature of the drawee has to be on the face of the bill of exchange. This becomes only evident from Article 42(4)(b) (in chapter F: The "guarantor"). This is unfortunate because everybody would look for it logically in chapter D: "The drawee and acceptor".

ARTICLE 38

Article 38(3)

MEXICO

A broader formulation should be used. Any holder must be able to insert the date of acceptance. It is undesirable that this right should be reserved solely to the drawer, who is not a suitable person for presenting the bill for acceptance. Moreover, how is a third party to know who inserted the date of acceptance?

Suggested wording: "When a bill drawn payable at a fixed date after sight, ...; failing such indication by the acceptor, the holder may insert the date of acceptance."

ARTICLE 39

SPAIN

As regards the acceptor's liability, article 39 requires that this be unconditional or "unqualified". "Qualified" acceptance is considered to be "non-acceptance", but the drawee is nevertheless bound according to the terms of his "acceptance". The principle defined here appears sound, aside from drafting considerations, but it is not in line with the principle applied to conditional endorsement, mentioned above (art. 17; the endorsement is valid and the condition ineffective). Here, too, greater consistency would seem to be required.

<u>Article 39(1)</u>

CHINA

Paragraph (1) of article 39: "An acceptance must be unqualified. An acceptance is qualified if it is conditional or varies the terms of the bill."

Recommendation: This be changed into "An acceptance ought to be unqualified, but allowances are made for conditional acceptance."

CZECHOSLOVAKIA

We recommend that the notion "variation of the terms" of the instrument be clarified, especially how it differs e.g. from the notion "material alteration" as used in Art. 31.

<u>Article 39(3)</u>

CANADA

This Article introduces a concept which is both intricate and impractical. We are aware that many bills of exchange Acts in force in the world today contemplate a partial acceptance. We are, however, not aware of any practical signifance to these provisions. Furthermore, statutes such as the Canadian Bills of Exchange Act, in making provision for such rare possibilities, go a great deal further than the draft Conventions in working through the implications for the parties of a partial acceptance. If Article 39(3) were to be accepted, it would be necessary to give further consideration to articles such as Article 55 which at present refers only to dishonour by non-acceptance and perhaps would require an amendment to refer to partial dishonour by partial acceptance. If the point were of any practical significance we would untertake that exercise and suggest the appropriate amendments.

However, we consider that partial acceptance is a rare and undesirable phenomenon which should not be condoned or promoted by the draft Convention. Canada objects to the introduction of this concept in a final draft of the Convention and strongly requests its deletion since there is now not the time or the business purpose for taking the effort to assimilate it properly within the text of the draft Convention.

MEXICO

Partial acceptance must be regarded as non-acceptance. This is not the traditional solution; see, for example, article 99 of our law LTOC and article 26 of the Geneva Uniform Law. But under that solution how can the non-accepted part of the bill be protested or returned?

Suggested wording: "Partial acceptance is regarded as refusal of acceptance."

ARTICLE 40

UNITED STATES

The United States suggests that this Article be clarified by an amendment which would expressly state that an endorser does not have to be in the chain of title and that an anomalous signer has the liability of an endorser.

Article 40(2)

MEXICO

The limitation of liability to a part of the amount of the instrument raises the following question: How, with respect to the exercise of the rights of both, is the instrument to be divided by the endorser who pays partially and the holder from whom part of the payment is withheld?

On the other hand, the stipulation remains valid since it is authorized by the Convention. It is improper to say that is has effect only with respect to that endorser.

Suggested wording: "The endorser may exclude his own liability by an express stipulation on the instrument. Such stipulation has effect only with respect to the endorser who placed it."

ARICLE 41

CZECHOSLOVAKIA

In our view this provision is needlessly complicated. For example it is not quite clear why the holder of an instrument in these cases, irrespective of his good faith, should be responsible for the fact that some signature on the instrument was forged. Apparently, it would be sufficient and would comply with trade intercourse that the holder who does not sign the instrument and transfers it by mere delivery is not liable according to the Convention on the instrument, but according to general provisions of the applicable law; i.e. he would be responsible to the person who took the instrument, on the basis of their relationship, possibly not even contractually, including his responsibility towards subsequent acquirers of the instrument, provided that he acted intentionally or negligently to their detriment.

DENMARK

Presumably the provision refers to a person transferring an instrument on which his name has not been written. In view especially of the fact that we are dealing with international rules it will be complicated to apply this rule in practice. The Danish Government therefore recommends deletion of the said provision.

FINLAND

Under this provision any person who transfers an instrument by mere delivery is liable to any holder for damages. Liability is thus not limited to those transferors whose names appear on the bill of exchange. It may be doubted whether this is a technically sound solution, even if one may assume that the burden of proving that a certain person has transferred the bill of exchange rests on the party claiming liability on this ground.

FEDERAL REPUBLIC OF GERMANY

Article 41 imposes upon the person who transfers a bill of exchange by mere delivery an extensive liability towards all subsequent holders with regard to defects in preceding signatures, material alterations or other defects in the bill of exchange. This provision seems to go too far and will most likely not promote the negotiability of international bills of exchange.

JAPAN

The liability which is imposed under Article 41 on a person who transfers an instrument by mere delivery is liability off the instrument. It is questionable whether rules on such liability should be included in the Convention.

If, however, the Commission decides to include such rules in the Convention, the requirements for such liability should be carefully reexamined. According to the present text, a holder is entitled to claim damages from the person who transfers an instrument by mere delivery without the presentment and protest which are stipulated as necessary conditions for liability when the holder makes a claim against an endorser under Article 40 (cf. Articles 49, 53 and 55). There seems to be a lack of consistency here. Furthermore, it is not clear whether a holder making a claim under Article 41 is considered theoretically to receive damages when he is able to make a claim against another party or parties on whom primary or secondary liability is imposed.

NETHERLANDS

According to Article 41, a person who transfers an instrument by delivery alone is liable to any subsequent holder for damages such holder suffered because of the fact that prior to such transfer there was a forged or unauthorized signature or a material alteration, or a claim or defence may be set up against him, or the instrument was dishonoured by non-acceptance or non-payment.

The Netherlands would prefer to see this provision deleted. It has no counterpart, neither in Dutch law nor in the Geneva Uniform laws. Nor does the provision quite square with the warranty provisions of the UCC which apparently inspired the provision of Article 41: according to Section 3-417(2), the warranty given by a transferee who transfers the instrument by delivery alone runs only to his immediate transferee.

It is submitted that Article 41, if retained, would impair the circulation of international instruments and run counter to the fundamental principle, laid down in Article 29(1), that a person is not liable on an instrument unless he signs it. The fact that the commentary to Article 41 states that the liability under the article is "off the instrument" is not convincing. Moreover, the provision as currently drafted would seem to impose greater liability on transferors by mere delivery than on transferors by endorsement and delivery. Whereas presentment and protest are conditions precedent to the liability of endorsers, the liability of transferors by delivery alone "materializes the moment the instrument is transferred, regardless of its date of maturity" (cf. Commentary, para. 2). Furthermore, whereas under Article 40(2), the endorser may exclude or limit his own liability by an express stipulation on the instrument, the transferor by delivery alone has no such faculty.

If deletion of Article 41 were not acceptable, the provision should be reexamined with a view to extending the liability contemplated in Article 41 to both types of transferor.

NORWAY

1. An endorser has liability only under article 40, a transferor by mere delivery only under article 41. The liability of an endorser is thus in several respects less than that of a transferor by mere delivery. This is an anomaly. We suggest article 41 be amended to apply to all transferors, both endorsers and transferors by mere delivery.

2. Article 41 (1) (a) interferes with the compromise of article 23 (1) in respect of forged or unauthorized endorsements. The deviation from the compromise seems unjustified. We suggest that subparagraph (a) of article 41 (1) be restricted to the forged signature of, or the unauthorized signature on behalf of, the drawer or the maker.

SPAIN

Concerning the liability of the endorser, it is suprising that, under article 41, liability is assigned to a person who transfers an instrument by mere delivery; that is, without his being an endorser and without his signature appearing on the instrument. He is liable for compensation to any person who has suffered damages as a result of events in which he had no hand, and of which he may even be unaware (see the comments above to art. 23).

UNITED STATES

This Article applies only to those who transfer by "mere delivery" (i.e., without endorsing). An endorser has liability only under Article 40. Therefore, the liability of an endorser is less, in many circumstances, than the liability of a transferor by mere delivery. The endorser could escape all liability on the instrument if the instrument is not correctly protested, regardless of forgery, alteration, etc. The United States proposes that Article 41 be amended to apply to all transferors by deleting the words "by mere delivery" from the first line of Article 41.

The purpose of such an amendment would be to make Article 41 liability applicable to both endorsers and nonendorsers. (This warranty liability applies primarily in situations involving alterations and forged signatures of a drawer or maker. Under Article 23 it seems not to apply in forged endorsement cases, for no damages result.) The proposed amendment would clarify the position of the anomalous endorser and of the transferor who adds an endorsement after a prior blank endorsement. Under the current language their liability appears to be determined by Article 40 and not by Article 41. If so, the current language allows them to escape liability for forgery, alteration, and valid defenses against them if the instrument is mistakenly paid or even if it is dishonoured and not duly protested. The United States believes that liability for damages caused by forgeries of an issuer's signature and material alterations should be imposed on both endorsers and nonendorsers, at least if not disclaimed.

ARTICLE 42

JAPAN

(1) No provision of the present Draft Convention makes clear whether an incomplete instrument may be guaranteed or not, while it is clearly provided that a incomplete instrument satisfying the requirements set out in article 1 (2) (a) or (3) (a) may be accepted by the drawee (see article 38 (1)). It is, however, difficult to see any reason why guarantee should be treated in a manner different from acceptance. The Japanese Government proposes that a provision be added stating that such an instrument may be guaranteed before it has been signed by the drawer or maker, or while otherwise incomplete.

(2) With the present text of article 42 (4), it is not clear what the effect of the drawee's signature alone on the back of the instrument is considered to be. Additional rules would appear to be necessary.

Article 42(1)

MEXICO

The objections raised against the possibility of partial liability for an instrument apply here also. Again, in the case of partial performance, how are the parties to divide the instrument?

Suggested wording: "Payment of an instrument may be guaranteed for the account of any party. A guarantee may be given by any person who may or may not already be a party."

YUGOSLAVIA

Under article 42 (1) "A guarantee may be given by any person who may or may not already be a party". Such a broadly formulated provision is unacceptable since aval, as is known, cannot be given by the primary parties of an instrument (acceptor of a bill or the maker of a note), because they are already bound to all parties who have signed the instrument.

Article 42(4)(a)

MEXICO

Our law LTOC (article 111) contains a more logical solution, which is recommended and according to which whenever a signature cannot be given another meaning, that signature constitutes a guarantee.

Article 42(4)(b)

MEXICO

This provision should be brought into line with article 37, subparagraph (b).

Article 42(4)(c)

MEXICO

This may lead to absurd solutions. If on the back of the instrument there is a signature which is not that of the drawee and the latter has not been the legitimate holder of the instrument, how can it be considered an endorsement? It is suggested that this subparagraph be deleted.

Article 42(5)

FEDERAL REPUBLIC OF GERMANY

The irrefutable presumption that the guarantee for a bill is deemed to have been given for the drawee or the acceptor if the guarantor made his declaration of guarantee by his mere signature on the bill is very often not in conformity with the true will of the parties. This will is usually expressed by the fact that the guarantor's signature is right beside that of the person for whom the guarantee is given.

SPAIN

The provisions regulating the guarantee call for a comment on a substantive issue: the nature of this legal transaction. The guarantee is presented as applying to payment of the instrument (art.42 (1)), and it may or may not specify the person for whom it is given. If it does not, there is a presumption that the guarantee is given for the acceptor or the drawee (the maker in the case of a promissory note). Although the Commentary states that in respect of the liability of a guarantor the Convention follows in substance the provisions of the Geneva Uniform Law, this provision allows the guarantee to be given for the drawee, who is not liable on bills (cf. art. 36 (1)). What is more, if nothing is specified and if the bill is not accepted, the presumption is that the gurantee is for the drawee, whereas the presumption in the Geneva Uniform Law is that it is for the drawer. It would appear that the characteristics of a guarantor for the drawee are different from those of any other guarantor, and he is therefore not subject to the same regulations. For example, the provision in article 43 (1) - that a guarantor is liable to the same extent as the party for whom he has become guarantor - does not apply to a guarantor for the drawee (cf. art. 43 (2)). This seems to indicate that the concept of a guarantor for the drawee bears more resemblance to that of an

acceptor than to that of a true guarantor. His liability is that of an acceptor who is not the drawee, who is not specified in the instrument as an alternate acceptor and who is not the acceptor by intervention who comes forward after a protest.

ARTICLE 43

Article 43(1)

DENMARK

It seems odd that under this Article a guarantor may limit his liability to something other than part of the amount of the bill.

ARTICLE 44

UNITED KINGDOM

A minor criticism is that it appears that the special right of the guarantor is not sufficiently specified.

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

ARTICLE 45

NETHERLANDS

Though a bill payable on demand is not usually presented for acceptance, article 45(1) permits presentment for acceptance of such a bill and, according to article 47(e), presentment is then to be made within one year of the date of the bill.

Article 45(2)(c) states that a bill drawn payable elsewhere than at the residence or place of business of the drawee must be presented for acceptance, but makes an exception in respect of the demand bill. It is noted that paragraph 6 of the commentary of article 45 sets forth an explanation. However, the reason why a domiciled bill payable at a definite time must be presented for acceptance is equally valid in respect of a bill payable on demand.

ARTICLE 46

INDONESIA

The stipulation on a bill whereby the drawer prohibits presentment for acceptance, permitted by this article, is also set forth in the Indonesian Commercial Code.

However, the draft Convention provides for the possibility that such a bill is presented for acceptance, notwithstanding the prohibition of such a presentment, and regulates its legal consequences.

The Indonesian Commercial Code does not regulate such possibility nor does it regulate the legal consequences. We would therefore consider that the provision stated in the draft Convention corresponds to the needs of international payments.

Article 46(1)

CHINA

Paragraph (1) of article 46: "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."

Recommendation: This be supplemented by adding "But this article does not apply to the presentment for payment."

The reason: In actual business operations, presentment for acceptance "not ... before the occurrence of a specified event" is sometimes mixed up with presentment for payment. For example, in D/P-demand collection, the payment should be made immediately when the bill is presented and the document should be handed over to the payer. But, if a payer says that the bill must be presented for payment after the occurrence of a specified event (e.g., arrival of a ship or goods), this would delay the payment. Since a bill of exchange is an unconditional order to pay, the conditions required of presentment for acceptance are not applicable to presentment for payment.

HUNGARY

For clearer drafting it is suggested to begin paragraph (1) of Article 46 instead of the words "Notwithstanding the provisions of article 45" by the wording "in case of paragraph (1) of Article 45".

SPAIN

The provision in article 46 that the drawer may "stipulate on the bill that it must not be presented for acceptance" seems badly worded. To begin with, it is not strictly speaking a matter of "stipulation" (estipular in Spanish). Moreover, the apparent intention of article 46 is not to prohibit the presentment of the bill for acceptance, since acceptance is effective if granted, but to provide for all liable persons to be freed from any liability that might result from dishonour by non-acceptance. The provision would be better stated thus. It is a logical provision for the Convention to make, since it allows total exclusion of liability on the part of the drawer and endorsers.

UNION OF SOVIET SOCIALIST REPUBLICS

The provision of paragraph (1) may, in practice, cause difficulties in that it gives the drawer the right to prohibit presentation of a bill for acceptance in those cases where, according to Article 45 (2), a bill must be presented for acceptance.

This is especially evident if we take the example of a bill of exchange drawn payable at a fixed period after sight and with the drawer's stipulation prohibiting presentation of the bill for acceptance. If such a bill is not presented for acceptance or the drawee refuses to accept it, it would be impossible to determine the date of payment on the bill and, thus, the time when the party's liability on the bill arises. The objective of this rule is, apparently, to deprive the holder of the right to immediate recourse, i.e. to recourse before the date of payment, if the bill is dishonoured by non-acceptance (Article 46(2)). However, this objective can be achieved in a simpler way that has already been provided for in the Draft Convention, by the drawer's stipulation on the bill of exchange excluding his own liability for acceptance (Article 34(2)).

We accordingly believe that the drawer's right to prohibit presentation of a bill of exchange for acceptance provided for in Article 46(1) should apply only to paragraph (1) of Article 45.

UNITED STATES

This Article permits drawers to stipulate that a bill of exchange may not be presented for acceptance. Especially as to time bills of exchange, the holder may need to know whether the drawee will pay the instrument before the payment date. Denying this information to the holder may make the instrument of less value. The United States proposes that this Article be deleted.

ARTICLE 47

HUNGARY

Without modifying the text of Article 47 it would be suggested to insert in the commentary an explanation to the effect that the holder of a bill may present it to the acceptor by proxy without endorsing the bill to this person.

SPAIN

The rules governing presentment for acceptance contain no reference to place, such as that given in article 51 relating to presentment for payment. Although this omission is justified in the Commentary (para. 3 under art. 47), it might be preferable for the place to be indicated.

UNITED STATES

Although Article 51 on presentment for payment has several paragraphs on where presentment must be made, Article 47 on presentment for acceptance has no such paragraphs. The omission could be confusing, and these two Articles should be conformed. Therefore, the United States proposes that Article 47 be amended to add two new paragraphs modeled on Article 51(g) and (h).

<u>Article 47(a)</u>

FINLAND

The expressions "business day" and "reasonable hour" both appear rather imprecise. It is proposed to replace them by "banking day" and "banking hour" or by adding a provision according to which a State may in its national legislation determine the appropriate time for a bill's presentation.

NORWAY

1. The terms "business day" and "reasonable hour" are imprecise. We suggest that the Convention authorize the contracting States to define these terms more precisely in their national legislation.

2. The bill must be presented for acceptance to the drawee or his agent at the place where they are at the moment, cf subparagraph (a) and paragraph 3 of the commentary. Presentment for payment is "local". The bill may thus have to travel a long distance in a short time if the drawee is not resident in the place of payment. The holder may easily go astray. We suggest that the bill may be presented for acceptance at the places designated in article 51(g) for presentment for payment. If the drawee or his agent cannot be found at that place, the bill is considered to be dishonoured by non-acceptance.

UNION OF SOVIET SOCIALIST REPUBLICS

Subparagraph (a) provides that for a bill to be duly presented for acceptance it must specifically be presented by the holder. Since in today's international practice bills are presented for acceptance by banks, which are not holders within the meaning of the law on bills of exchange, since they act in accordance with a general civil contract of agency and not on the basis of some special endorsement, a provision should be added to this subparagraph specifying that bills can also be presented for acceptance on behalf of the holder. The rule would, in principle, be in keeping with the basic Geneva and Anglo-American system of the law on bills of exchange.

Article 47(c)

CANADA

Canada considers that a rule which would validate an acceptance by a person and in a name other than that of the drawee is likely to create confusion and foster uncertainty. We are uncertain what entities might properly be described as "authorities" within the meaning of the subsection, but even if situations exist in individual contracting states where official, semi-official or governmental agencies have authority to accept bills of exchange drawn on resident nationals of the contracting state, it would be preferable, in our view, for the Convention to require the acceptance to be in the name of the drawee even though some additional text may be added to show that it is by the authority of the intervening agency.

Article 47(e)

CZECHOSLOVAKIA

Seen through the needs of trade, it appears necessary to extend the one year period mentioned.

ARTICLE 48

NORWAY

We suggest the expression "reasonable diligence" be worked out in some detail in the proposed commentary to the final text.

SPAIN

Article 48 raises problems. An optional presentment of a bill for acceptance cannot be said to be "dispensada" (i.e. "excused" or "not

required"), since it was never a requirement. What is intended in the Convention is that in some cases, although the bill has never even been presented for acceptance, dishonour by non-acceptance should produce the effects described in article 50(2) and render liable the persons referred to in article 48. The content of this article might be incorporated in article 50(1)(b).

UNITED STATES

This Article establishes conditions under which presentment for acceptance can be excused but does not provide for delay in presentment for acceptance, even in circumstances involving "vis major." In this omission, Article 48 is at variance with Articles 52, 58 and 63, which deal with delays in presentment for payment, protest, and notice of dishonor. The United States proposes that Article 48 be amended to add a new paragraph, modeled on Article 52(1), which would allow delay in presentment for acceptance on the ground of "vis major."

Articles 48 and 50

GERMAN DEMOCRATIC REPUBLIC

Regrettably, no provision has been made for the holder to exercise, prior to maturity, his right of recourse against the parties liable upon such recourse, if the drawee is bankrupt or has suspended payments. There is no reason to regulate the case of bankruptcy or suspension of payments in a different way from that of a juridical person in liquidation as regards their effects on recourse. Practically, it is not acceptable for the holder of a bill of exchange/promissory note that he should have the right of recourse before maturity, if the drawee has no longer the power freely to deal with his assets by reason of his insolvency. The present version needs to be revised in order to provide also those possibilities for exercising the right of recourse before maturity which are based on the Geneva Convention and have proved their practical effectiveness in many countries.

UNION OF SOVIET SOCIALIST REPUBLICS

The general approach of the draft Convention is that immediate recourse on a bill can be obtained only in cases where a bill is dishonoured by non-acceptance. In contrast to the Geneva Convention (ULB, Article 43) the present draft Convention does not envisage the possibility of claiming against all the parties liable on the bill (drawer, endorsers and their guarantors; or against the acceptor and his guarantor) before maturity in the event of the drawee's insolvency or in the event of a suspension of payments on his part or where execution has been levied against his goods without result. This approach infringes substantially on the interests of the holder, who should in these circumstances be entitled to expect immediate satisfaction of all his demands, in particular from the guarantor of the acceptor or drawee, who in the case of international payments is normally a bank. It would thus be useful to provide for the holder's right to immediate recourse in the event that the drawee or the acceptor goes bankrupt or suspends payments.

Articles 48 and 52

JAPAN

Articles 48 and 52 set out the cases where presentment may be dispensed with. The Japanese Government suggests that the text should state clearly that any stoppage of payment on the part of the drawee is included in the grounds listed in articles 48 (a) and 52 (2)(d), instead of using the term "insolvency".

Articles 48, 52, 58 and 63

UNITED STATES

There is no general provision in the Convention concerning the ability of the parties to vary the provisions or waive the requirements of the Convention by agreed-upon terms. The resulting ambiguity is particularly troubling in relation to waivers of presentment, notice of dishonour, and protest, which are commonly used in the United States. It would be desirable to amend Articles 48, 52, 58, and 63 (which deal with dispensation of presentment, notice of dishonor, and protest) to allow waivers.

ARTICLE 49

NORWAY

The article sets out due presentment for acceptance of a bill as a condition precedent to the liability on the bill of the drawer, the endorsers and their guarantors. According to article 53, due presentment for payment of an instrument is a condition. If the instrument is not duly protested, the drawer, the endorsers and their guarantors are no longer liable thereon, cf article 59. If the holder loses his right of recourse on the instrument according to these articles, a drawer or an endorser may make an inequitable gain. The right of recourse being a right on the instrument, it seems unclear whether it will be contrary to the Convention if national law would furnish the holder with a claim off the instrument to such an inequitable gain. Anyway, the Convention ought to state explicitly that the contracting States are free to furnish the holder with such a claim, cf the Geneva Convention Annex II article 15.

Articles 49 and Article 50

HUNGARY

It would be desirable to provide for the holder's right to immediate recourse in the event the drawee or the acceptor goes bankrupt or stops payment - as is provided for by the Geneva Convention Article 43.

ARTICLE 50

HUNGARY

See comments by Hungary under article 49.

NORWAY

1. The alternative "acceptance cannot be obtained with reasonable diligence" in subparagraph (a) of paragraph (1) is superfluous in addition to subparagraph (b) and should be deleted.

2. The alternative "when the holder cannot obtain the acceptance to which he is entitled under this Convention" ought to include a reference to article 39.

SPAIN

The range of cases classed as dishonour by non-acceptance seems too wide; this makes the position of prior parties insecure (cf. article 50 (1) (a), to which drafting amendments should also be made).

Article 50(1)

UNITED STATES

Article 50(1) states that dishonor occurs when "acceptance cannot be obtained with reasonable diligence" and when "the holder cannot obtain the acceptance to which he is entitled." Neither of these specifications is clear. If the latter specification refers to qaulified acceptances, it is merely repetitive but would need a reference to Article 39 to limit it properly. If the former specification includes, in addition to the situation where the drawee hides, the situation where the drawee is available but the holder is delayed beyond the time limit by "vis major," it is objectionable. It would be improper to give the holder recourse against the drawer or an endorser because the holder failed to perform (even if due to impossibility), when the drawee was willing to perform. The United States therefore suggests that Article 50(1) be redrafted for greater clarity, with commentary to explain the purpose of different specifications.

ARTICLE 51

INDONESIA

Presentment of an instrument for payment, as provided in this article, is also covered in the Indonesian Commercial Code. However the provision of the

draft Convention is broader, i.e.:

(1) Presentment for payment of a bill drawn upon or accepted by two or more drawees or of a note signed by two or more makers;

(2) Presentment for payment in case the drawee or the acceptor or the maker is dead;

(3) Presentment for payment to a person or authority, other than the drawee, the acceptor or the maker, entitled under the applicable law to pay the instrument.

The provisions mentioned above give the holder more advantages in solving problems relating to presentment for payment.

SPAIN

Section 2, "Presentment for payment and dishonour by non payment", seems to provide too wide an area in which presentment for payment is dispensed with (art. 52), for in many cases the parties will become liable for the dishonour by non-payment of an instrument which has not even been presented for payment (art. 54). This is the same comment as was made above to article 50.

Specifically, it seems strange that article 51 should make presentment of the instrument an obligation when the drawee, acceptor or maker is dead, while article 52 dispenses with that obligation if the same persons lose the power freely to deal with their assets by reason of insolvency. The reference to the drawee's being "a corporation, partnership, association or other legal entity which has ceased to exist" also seems inappropriate. Similarly, it is hard to see why presentment for payment loses relevance when a bill has been protested for dishonour by non-acceptance.

UNITED STATES

This Article is similar to Article 47 on time of presentment for acceptance, but there are several unexplained differences from Article 47. These differences appear in paragraphs (c), (g), and (h). The United States proposes that Article 47 conform to Article 51, and in particular that paragraphs modeled on Article 51(g) and (h) be added to Article 47.

Article 51(a)

CZECHOSLOVAKIA

It is suggested that presentment for payment is due presentment if it is made within the two business days that follow the date of maturity.

HUNGARY

Under Article 51(a), a bill of exchange is to be presented for payment on a business day. Under paragraph (e) a bill of exchange expiring on a fixed day must be presented either on the date of the maturity or on the business day which follows. From the comparison of these two paragraphs and even considering article 8, it is ambiguous what the situation is if the maturity day is not a business day. Does paragraph (e) concern this very case? It is contradicted by the fact that paragraph (e) does not limit the utilization of the one day extension in the case where the maturity day is not a business day. But it has been nowhere declared that the generally accepted rule is that, if the maturity of any fixed day is not a business day, then the expiry date is the next following business day and not the previous one.

NORWAY

Regarding the terms "business day" and "reasonable hour" in paragraph (a), we refer to our comment to article 47.

Article 51(c)

NORWAY

According to paragraph (c), if the drawee, the acceptor or the maker is dead, the instrument must be presented to his heirs or to somebody entitled to administer his estate. The different national arrangements for succession upon death varying widely, we fear that paragraph (c) will be open to a plurality of questions of interpretation and of application in the different national contexts. A better solution would perhaps be to entirely dispense with presentment for payment in these cases.

Article 51(e)

DENMARK

In view of the fact that these are international rules and that many of the provisions on limitation in both Conventions often stipulate considerably longer time limits than those found in the corresponding Danish legislation it

seems incongruous to note that (e) allows only one day for presentment for payment where the equivalent Danish provision (subsection 1 of section 38 of the Danish Bills of Exchange Act) allows a limit of two days.

JAPAN

Article 51 (e) provides that 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. The Japanese Government proposes that the words "on the business day which follows" be replaced by the words "on one of the two business days which follow", since the latter would be more appropriate if due consideration is given to the provisions of the Draft Convention regarding protest for dishonour (Article 57) and notice of dishonour (Article 62) and to the relevant provision of the Geneva Uniform Law (Article 38 (1)).

NORWAY

As we understand paragraph (e), the holder may choose between the date of maturity, provided that this day is a business day, and the following business day. Thus, if the instrument matures on a Friday, Saturdays and Sundays not being business days at the place of presentment, the holder may present the instrument either on the Friday or on the following Monday. If the instrument matures on a Saturday or a Sunday, the holder has only the following Monday at his disposal. The last implication seems to be too demanding. We suggest that, the day of maturity not being a business day, the holder has the two following business days at his disposal. Anyway, the proposed commentary to the final text ought to explain paragraph (e) in some detail.

Article 51(g)

YUGOSLAVIA

It is unclear whether the place of payment specified on the instrument is an essential element or not. Under most European systems, for instance, if the place of payment is not specified on the instrument, the instrument is presented for payment at the address of the drawee. If no place of payment is specified and the address of the drawee or the acceptor or the maker is not indicated, the instrument is deemed to be ineffective since it lacks an essential element. Furthermore, there is an impression that article 51(g) does not fully conform to article 1 of the Draft Convention.

Article 51(h)

CANADA

Canada believes that the amendments to permit presentment of international instruments at clearing houses are an improvement to the draft Conventions. However, in both cases it may be necessary for the Conventions to include provisions in order to preserve and give paramountcy to the local rules of the clearing house. In other words, international instruments should only be presentable through domestic clearing facilities if they comply with the technical or legal requirements imposed by the clearing authorities for domestic instruments. Rules to the opposite effect in the Convention would be potentially disruptive of local clearing arrangements. We suggest that article 51(h) be amended by adding at the end thereof the words "if in conformity with the rules of that clearing house".

UNITED KINGDOM

It is felt that the position as to presentment to a clearing house should be clarified because Article 51(g) and Article 51(h) appear to be at variance. It is suggested that this position could be clarified by amending Article 51(h) to read as follows:

"Notwithstanding Article 51(g), an instrument may be presented for payment to the representative or authorised agent of the drawee or the acceptor or the maker at a clearing house."

Presentment for payment at a clearing house has not been taken into account in Articles 68(4)(a); Article 70; Article 71(2)(b)(i), (2)(b)(ii) and (4), and Article 72(2)(a).

ARTICLE 52

UNITED STATES

See comment by the United States under article 48.

Article 52(1)

CANADA

This Article excuses delay when caused by circumstances which are beyond the control of the holder. The resources of large international banks are considerable. The obstacles which they could overcome by the full application of those resources might include many that it would not be commercially reasonable for anyone to expect them to avoid or overcome on behalf of a customer in a purely routine transaction. In commercial agreements entered

into by Canadian banks it is customary to refer to circumstances which are not reasonably within the control of the party to avoid or overcome. We consider that this terminology introduces a test which is sensitive to the costs and benefits to be obtained from action. Canada recommends that the Convention be amended to reflect this more lenient test.

Article 52(2)(a)

HUNGARY

There should be excluded from paragraph (2)(a) the possibility that the drawer and indorser or guarantor may waive presentment of the instrument for payment by "implication". It is suggested that the waiver must be expressed.

UNION OF SOVIET SOCIALIST REPUBLICS

For the reasons set forth in the remark on Article 30, it would be desirable to delete the reference in paragraph (2) (a) to the possibility that the drawer, an endorser or guarantor may waive presentment of the instrument for payment "by implication". Besides it is not clear how a waiver "by implication" can be made on the instrument (the Commentary does not cite a relevant example). From a practical point of view it would be sufficient if the Convention, in addition to providing for a waiver made expressly on the instrument, also provided for a waiver made expressly outside the instrument.

Article 52(2)(c)

CANADA

The combined effect of this paragraph and paragraph (f) of Article 51 will be that instruments payable on demand may validly be presented to the drawee or acceptor one year and thirty days after their date of issue. Of course, the drawee will not have any way of ascertaining whether presentment for payment was validly extended by *vis major*. As a result, it will be difficult for the drawee to ascertain its duty with respect to the instrument. Canada considers that it would be preferable for the one year time limit established in paragraph 51(f) to be a maximum, not extendable by any circumstances.

ARTICLE 53

NORWAY

See comment by Norway under article 49.

Article 53(3)

DENMARK

Apparently failure to protest and present for payment has the effect of wiping out all claims except those on the parties listed under paragraph (3). From a Danish legal point of view there should be recourse to file a claim under the doctrine of unjustified enrichment, as specified in Danish Cheques Act sections 57 and 74, compare draft Convention on International Cheques Articles 45 and 52.

ARTICLE 54

DENMARK

As we are dealing with international rules it would seem appropriate to lay down rules specifying when non-payment has taken place.

Article 54(2)

CANADA

Canada is aware of the distinction in some legal systems between rights of action on bills of exchange and rights of recourse on the same instruments, but the distinction is not so well established that we can satisfy ourselves that this section might not be open to misinterpretation. We think that no ambiguity in drafting ought to create a risk that the obligations of the acceptor in Article 36(2) and of any guarantor for the acceptor in Article 43(2) are in any way qualified by Article 54(2). Canada therefore suggests that the section be revised to refer to an "immediate right of action against the acceptor and any guarantor for him, and rights of recourse against the drawer, the endorsers and their guarantors."

Article 54(2) and (3)

MEXICO

It would be better to speak of exercising the appropriate rights rather than a right of recourse.

Suggested wording: "if a bill is dishonoured ..., the appropriate rights against the endorsers and their guarantors."

SPAIN

Paragraphs (2) and (3) of article 54 should provide for the holder to exercise a right of recourse against all the parties, including the acceptor and the maker, who are omitted in the present text.

ARTICLE 55

CZECHOSLOVAKIA

The article should be completed by giving the holder a right of immediate recourse in cases where the drawee, acceptor or maker declares bankruptcy or ceases payment, or where bankruptcy or liquidation proceedings upon the property of these debtors are opened. This right of immediate recourse should not depend on observance of the provisions of Articles 48 to 50.

DENMARK

It is a cumbersome procedure that one's rights of recourse can be exercised and the instrument be protested only after it has been dishonoured in conformity with the provisions of article 54.

MEXICO

On the grounds put forward in commenting on the previous article, the following wording is suggested: "If an instrument has been dishonoured by non-acceptance or by non-payment, the holder may exercise the appropriate rights only after the instrument has been duly protested for dishonour in accordance with the provisions of articles 56 to 58."

SPAIN

Section 3, "Recourse", begins by regulating protest. The categorical statement in article 55, "... the holder may exercise a right of recourse only after the instrument has been duly protested ...", is not in complete accordance with the rest of the regulations on protest. It is in conflict, particularly, with article 56 (3) which allows the protest to be replaced by a declaration written on the instrument, unless there is a stipulation to the contrary. True, sub-paragraph (4) removes the inconsistency by providing that a declaration of this kind is deemed to be a protest. But it would, in any case, be desirable to amend article 55, which also conflicts with the wide range of cases in which protest is dispensed with under article 58, although this range itself seems excessively wide. For example, subparagraph (2)(d) provides that protest is dispensed with in all cases where presentment of the instrument is also dispensed with. This increases still further the insecurity of liable persons whose liability becomes effective, as mentioned above. The reasons for the dispensation in all these cases are really not

clear, for the protest could serve to prove dishonour regardless of whether or not the instrument was presented.

On the other hand, the flexibility characterizing the protest regulations, and specifically the provision for the protest to be replaced by the declaration mentioned above, deserves approval. The CSB welcomed this provision, "since there can be no better evidence of the refusal to accept or to pay than a declaration by the liable persons themselves". This declaration may not be made in a separate document, but it should perhaps be allowed on a sheet attached to the instrument.

URUGUAY

We suggest that it be explained in the draft text that the recourse allowed by the instrument is executory, using appropriate wording to indicate that it allows summary enforcement proceedings.

ARTICLE 56

Article 56(1)

NORWAY

Under paragraph (1) a protest may be made in the form of a statement by a "person authorized in that respect by the law of that place". We presume that it will not be contrary to the Convention to authorize other than public bodies, e.g. banks, to certify dishonour.

Article 56(2)

UNITED STATES

Article 56(2) allows a protest to be made on the instrument itself, on an affixed slip ("allonge") or on a separate document. Article 56(3) allows replacement of protest by a signed, dated declaration of dishonor by the drawee, acceptor or maker, but requires that this declaration be written on the instrument itself. As it is doing with respect to Article 49 of the draft Convention on International Cheques, the United States proposes that Article 56(3) be amended to allow the drawee bank's declaration of dishonor to be written "either on the instrument itself or on a slip affixed thereto ("allonge")." Such an amendment would be in accordance with banking practices and would give the banks greater flexibility.

Article 56(2)(b)

MEXICO

The instrument itself should bear an indication of the fact that it was protested.

Article 56(3)

NORWAY

According to paragraph (3), if a protest is replaced by a declaration of non-acceptance or non-payment, the declaration must be written on the instrument. We suggest the alternatives (a) and (b) of paragraph (2) also be allowed to achieve greater flexibility.

ARTICLE 57

HUNGARY

In order to determine clearly the time-limits for making protest it seems to be more appropriate to include a provision similar to Article 44 of the Geneva Convention.

INDONESIA

The time limits within which an instrument must be protested for dishonour, provided in this article, are also found in the Indonesian Commercial Code.

The draft Convention stipulates a shorter time limit within which the instrument must be protested so as to enable the holder to execute his right of recourse against the parties liable. Therefore the draft Convention gives legal assurance to the holder.

UNION OF SOVIET SOCIALIST REPUBLICS

This Article relates the time-limits for making protest to the time when the bill was dishonoured by non-acceptance or non-payment. However, these times cannot be determined exactly in all cases, especially in the case of bills payable on demand or payable at a fixed period after sight, and this may cause disputes between the parties and thereby in itself delay the bill recourse. Therefore, in determining the time limits for making protest for non-acceptance or non-payment it would seem more acceptable to include a provision corresponding to the Geneva Convention (ULB Article 44), viz.:

"1. Protest for dishonour of a bill by non-acceptance must be made within the time-limits fixed for presentation for acceptance ((Article 47 (d), (e) or (f)) and if presentment for acceptance is made on the last day of the time allowed, protest must be made on one of the two business days following it.

2. Protest for dishonour on a bill by non-payment must be made within the time-limits fixed for presentment for payment in accordance with Article 51 (e) or (f) or on one of the two business days following it and if a bill payable on demand is presented on the last day of the time allowed under Article 51 (f), protest must be made on the first business day following it".

ARTICLE 58

UNITED STATES

See comment of the United States under article 48.

Article 58(2)(a)

CZECHOSLOVAKIA

Implied waiver of protest may give rise to considerable trouble in practice and in the interpretation of the Draft Convention.

A similar problem may occur with articles 30 and 52.

HUNGARY

As a consequence of our comments to article 52 (2) (a) above it is suggested to delete the reference to waiver by implication.

UNION OF SOVIET SOCIALIST REPUBLICS

For the reasons set forth above it would be desirable to delete from this article the reference to a waiver by implication.

Article 58(2)(f)

CANADA

In earlier drafts, an Article 61(f) was included at the end of what is now Article 58(2) which provided:

"If the person claiming under Article 80 (the old Article dealing with lost instruments) cannot effect protest by reason of his inability to satisfy the requirements of Article 83".

We cannot locate a similar ground for dispensing with protest for dishonour by non-acceptance or non-payment in the current draft. We consider that the holder of a lost instrument should not be prejudiced by failing to protest a lost instrument. The U.K. and Canadian Bills of Exchange Acts provide that where a bill is lost or destroyed or wrongly detained or accidentally retained in a place other than where it is payable, protest may be made on a copy or written particulars of the bill. Canada recommends that consideration be given to an express provision of this nature in the draft Convention.

ARTICLE 59

NORWAY

See comment of Norway under article 49.

ARTICLE 60

FEDERAL REPUBLIC OF GERMANY

The suggested extension of the duties to give notice which is different from the Geneva system seems hardly to be practicable: on the one hand, it may lead to all persons concerned being given notice by all others; on the other hand, the persons party to a bill of exchange often only know their immediate previous holder.

MEXICO

Although it may be thought that, with the provisions of article 63, this is enough, it would be useful to specify that the obligation to give notice only exists when the domicile of the persons to be notified appears on the instrument, or when the holder knows the domicile.

It is suggested that a paragraph (5) be added with the following wording: "In the case of a person whose domicile is not indicated on the instrument there is no obligation to give this notice, unless the person who is to give it knows the said domicile."

NORWAY

With reference to paragraph (3) and the example in the commentary, we mention that according to the language of paragraph (3), the person B in the example must give notice of dishonour to A when he is notified by C.

SPAIN

With regard to the regulations on notice of dishonour, the following points must be made: first, notice is not dispensed with, as is protest, whenever the requirement to present the instrument for acceptance or payment is dispensed with; second, the combination of requirements for notice in paragraphs (1) and (3) of article 60 may be excessive (to the CSCC, the relationship between these two paragraphs was unclear); third, too much freedom is allowed as to the form of notice, for even oral notice would meet the requirement of article 61 (CSB opinion); fourth, failure to meet the requirements for notice does not "impair" the instrument, but merely makes the party who failed to give notice liable for the damages resulting from such failure.

ARTICLE 63

Article 63(2)(b)

HUNGARY

See comment of Hungary under article 58(2)(a).

UNION OF SOVIET SOCIALIST REPUBLICS

See comment of the USSR under article 52.

ARTICLE 64

YUGOSLAVIA

Articles 64 and 66 provide for strict sanctions against the holder of an instrument who fails to give notice of dishonour. If he fails to give such notice, he shall be liable for any damages which a party who is entitled to receive that notice may suffer from such failure, including the amount of the instrument. If this paragraph is retained, then a party who has a right of recourse may be unjustly enriched. This is obviously a question of direct and indirect damages. The Draft Convention should adopt a stand that failure to give a notice renders a person who is required to give such notice liable only for direct damages.

ARTICLE 65

SPAIN

Article 65, which directly concerns the general issue of recourse, seems out of place in section 4. Reference has been made in our general remarks to the fact that there is no specification of the nature of the claims, and to the procedural problems to which they might give rise. It must also be pointed out, with reference to article 65, that the joint and several nature of the parties' liability is not established, and that the provision for the holder to proceed simultaneously against various liable persons may cause difficulties with regard to subsequent claims for final settlement of rights on a bill or note.

ARTICLE 66

Article 66(1)(b)

SPAIN

The last section in this chapter is section 4, "amount payable", which contains a set of requirements of great practical importance, regarding the method of establishing that amount in every case. Doubts will always arise as to whether the specified rates of interest are those most appropriate. With respect to the expenses referred to in article 66 (1) (b), the CSCC recommends that bank and collection costs be explicitly included.

Article 66(1)(b)(ii)

NORWAY

1. No. (ii) of subparagraph (b) of paragraph (1) specifies the rate at which interest is to be paid after maturity. Even if the instrument stipulates for a rate of interest to the date of maturity which is higher than the rate provided for in paragraph (2), the rate of paragraph (2) seems to apply after maturity. We suggest that if the rate of interest stipulated in the instrument is higher than the rate of paragraph (2), the rate of the instrument shall continue to apply.

2. In several countries, the general rate of delay interest is higher than the rate provided for in paragraph (2). In Norway, the general rate for the time being is 15 per cent per annum, and the rate according to paragraph (2) would have been about 10 per cent today. This seems too low and in any case anomalous. We suggest that paragraph (2) refer primarily to the general rate of delay interest in the country where the instrument is payable.

Article 66(1)(b) and (c) and Article 67(c)

MEXICO

There is no mention of the right to recover the costs incurred in collecting the instrument. Could this have been an oversight?

Article 66(2)

FINLAND

This provision would have the effect that the rate of interest on delayed payments would differ from the rate of interest on other obligations. It would seem more appropriate to refer in this paragraph first to the rate applied for interest on sums in arrears in (the main centre of) the country where the instrument is payable.

GERMAN DEMOCRATIC REPUBLIC

The rate of interest to be fixed in the last sentence of paragraph (2) should be such as not to constitute an incentive for the party liable to default at maturity. Taking into consideration the development of rates of interest for the main currencies, a rate of 9.0 per cent is proposed.

UNITED KINGDOM

As the United Kingdom has no official rate of interest a suitable formula would have to be provided to deal with this omission.

Article 66(2) and (3)

CZECHOSLOVAKIA

We recommend to fix, in a subsidiary way, the interest at the rate of 8%, at the minimum.

UNITED STATES

The numbers in brackets in paragraphs (2) and (3) are too low. The United States proposes that these figures be raised to the range of "[5]" or "[6]".

CHAPTER SIX. DISCHARGE

Section 1. Discharge by payment

AUSTRALIA

Discharge by payment is dealt with in the draft Conventions in considerably more detail and particularity than in the BEA. However, it does not appear that the Convention provisions will give rise to any difficulty and may even have the advantage of answering a number of questions that arise under the BEA system.

ARTICLE 68

Article 68(3)

NORWAY

Paragraph (3) deals with the problem of "_ius tertii_". The position of a party liable on the instrument may be rather delicate if a third party asserts a claim to it. The problem is not confined to bills of exchange and promissory notes and is in several countries dealt with by specific rules on discharge by paying the amount due into court or by other similar procedures. We suggest that paragraph (3) refer to the national law of the place of payment regarding such arrangements.

SPAIN

Section 1 of this short chapter entitled "Discharge" starts with the essential issue of the discharging effects of payment. The regulations on this issue revert to the distinction, commented on above, between a "protected holder" and an "unprotected holder", which again raises serious problems in connection with the discharging effects of payment. Particularly controversial is the assumption that the party liable for payment is aware that the holder has knowledge of certain facts and is therefore not "protected". The party may invoke this "knowledge" by the holder as a defence against the latter's claims.

UNITED STATES

Article 68(3) is the Convention's attempt to deal with the _ius tertii_ problem. The Convention protects any payor who pays a protected holder and any payor who pays a non-protected holder, so long as the payor does not know of a third party's claim, etc. The only situation in which the payor is not discharged is that in which he both pays a non-protected holder and knows of the third party claim, etc. However, a third party claimant should be

permitted to delay payment long enough to seek court resolution of competing claims if the claimant both notifies the payor and provides sufficient indemnity. The Working Group omitted the indemnity mechanism in Article 68, apparently deliberately, but used it extensively in Articles 74-79 on lost instruments. The United States proposes that Article 68 be amended to make an exception to discharge of the payor where the third party claimant both notifies the payor of its claim and provides security deemed adequate by the payor before the instrument has been paid by the payor.

Article 68(4)

CZECHOSLOVAKIA

We recommend the following formulation: "A person receiving payment of an instrument must, unless agreed otherwise, deliver to any person making such payment, the instrument, a receipted account, and any protest".

ARTICLE 69

INDONESIA

Partial payment, regulated by this article, is also covered in the Indonesian Commercial Code.

Article 69 provides for the possibility that the holder takes or refuses partial payment and regulates the legal consequences, whereas the Indonesian Commercial Code prohibits such refusal and does not regulate the legal consequences.

The draft Convention's concepts are described in more detail and would solve the problems that may arise.

YUGOSLAVIA

The wording that "The holder is not obliged to take partial payment" is too narrow and renders the position of the parties liable more difficult. A paragraph stipulating that "The holder cannot refuse partial payment" would be more acceptable since it will /even partially/ help attain the goal for which the instrument was drawn, and thus reduce the expenses of protest and of notices.

ARTICLE 70

INDONESIA

This article provides that the holder may refuse an offer that the instrument be paid in a place other than the proper place for due presentment for payment. If the holder refuses, the instrument is considered to be dishonoured by non-payment. The Indonesian Commercial Code does not contain such a rule. This provision has the advantage of enabling the holder to refuse or accept such an offer.

SPAIN

The provisions of article 70 are too severe and should perhaps be qualified somewhat.

ARTICLE 71

NETHERLANDS

Article 71 is concerned with instruments drawn or made in a currency other than the currency of the place of payment. The proposed rule is that such instruments are to be paid in the currency in which the amount of the instrument is expressed. In this respect Article 71 constitutes a departure from Dutch law (art. 140 K) and the Geneva Uniform Law (art. 41) which, in such a case, allow payment in local currency.

It is recognized that the rule proposed by Article 71 has the advantage of minimizing the risk of loss inherent in fluctuations in exchange rates. As such it would deserve support. But it is doubtful whether the rule is practicable: the foreign currency in which the amount is expressed may not be available in the place of payment or payment in the foreign currency may violate the exchange control regulations of the State in which the place of payment is situated.

Most of the concerns which legitimately occupied the UNCITRAL Working Group could probably be met by allowing conversion of the foreign currency into local currency (unless there is a stipulation on the instrument for effective payment in the foreign currency) and to specify along the lines of article 72 at what rate and on what date such conversion is to be made.

YUGOSLAVIA

Too detailed provisions of this article may be more confusing than simple general principles. It is suggested therefore that they be simplified and clarified, because the question of the currency in which an instrument may /the word "must" should be deleted/ be paid is extremely important for the parties.

INTERNATIONAL MONETARY FUND

Our final observation concerns the references to rates of exchange (Article 71 of the bills and notes convention, Article 64 of the cheques convention) and to rates of interest (Article 66 of the bills and notes convention). Each of the Contracting States to the conventions should be advised to assure itself, as well as UNCITRAL, that these references are sufficiently clear and appropriate to be readily ascertainable.

Article 71(2)

MEXICO

The reference to the drawer or maker is incorrect; it should be the acceptor. The drawer may make this indication only after the instrument has been presented to him, and in this case he must accept or refuse the instrument. In any event, if the drawer is accorded this right, it is not clear why it should not also be given to the acceptor.

On the other hand, it seems unjust to require the holder to accept a currency other than that specified on the instrument, since the alternative currency may be a weak one or subject to various taxes or to exchange control as is currently the case in Mexico.

Articles 71 and 72

SPAIN

Articles 71 and 72 contain provisions of the highest practical importance, in particular for international instruments.

This issue should be dealt with in conjunction with article 4 (11) whose content, as we have seen, is still under consideration.

ARTICLE 72

INDONESIA

Payment in a currency which is not that of the place of payment is subject to exchange control regulations.

Such provision is not regulated by the Indonesian Commercial Code. However, this provision is in line with the Indonesian exchange control regulations.

INTERNATIONAL MONETARY FUND

One important effect of this provision is to make clear the priority of members' obligations under Article VIII, Section 2(b) of the Fund's Articles of Agreement over other possibly conflicting obligations that might be undertaken by a Contracting State under the UNCITRAL conventions. We are glad to note the explanation of the commentary of this provision which reads in part:

> "*** 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.'"

Article 72(2)

CANADA

Canada notes and supports the amendment to this Article by which the holder is permitted to elect between the rate of exchange at the date of breach and at the date of payment. But we consider that some provision should be added limiting the time available to the holder in which to make his election. It would be obviously unjust to the defaulting party to permit the holder to conduct a prolonged foreign exchange currency speculation at his expense. The Convention ought to provide that the election ought to be made within a specified time or a "reasonable time".

ARTICLE 73

SPAIN

Section 2 is inappropriately entitled "Discharge of a prior party". The section consists of a single article (article 73). The first paragraph refers in far too general terms to "any party who has a right of recourse". The second paragraph should mention not only the drawee, but also the acceptor, since the two are usually mentioned separately by the draft Convention, and the guarantor for the drawee, in order to be consistent with the provisions relating to this curious concept.

CHAPTER SEVEN. LOST INSTRUMENTS

ARTICLE 74

CZECHOSLOVAKIA

With respect to the possibility that the obligation on an instrument is paid in instalments, it will be useful in practice that duplicates and copies of an instrument may be drawn or made. Therefore it would be convenient if the Draft Convention regulates these questions.

DENMARK

Both the Danish Cheques Act and Bills of Exchange Act contain provisions on cancellation, but the rules set out in article 74 are material and in conformity with banking practice.

INDONESIA

This article is conform to the Indonesian Commercial Code: the ex-holder retains his rights to payment of the instrument. In order to obtain payment, the Indonesian Commercial Code requires that the ex-holder is under the obligation to give security to the person from whom he claims payment for a period of 30 years. On the other hand, to exercise such rights, the draft convention requires the holder:

1. to give security, of which the nature and the terms are determined by an agreement between the holder and the payor;

2. to submit a written statement concerning the elements and the facts of the lost instrument.

JAPAN

The provisions of the Draft Convention referring to lost instruments are modelled on the Anglo-American System, but the Japanese Government is prepared to accept them in the spirit of compromise. However, the following suggestions for improvement might be made.

(1) Article 74 (1) provides that a person losing an instrument has, subject to the provision of paragraph (2), the same right to payment which he would have had if he had been in possession of the instrument. On the other hand, (2)(b) of the same article provides that a party from whom payment is claimed under a lost instrument may require the claimant to give security. It is not made clear by these provisions whether or not the party from whom payment under a lost instrument is claimed has to pay interest after maturity

before the security is given in response to the request made under Article 74 (2)(b). If clarity is desirable here, an additional provision would appear to be necessary.

NORWAY

1. We generally approve of the provisions on lost instruments. However, there will be cases where the ex-holder cannot comply with the requirements of subparagraph (a) of paragraph (2). For example, the ex-holder has forgotten the series of uninterrupted endorsements or the date of the instrument. In these cases, we presume it will not be contrary to the Convention to apply national law on cancellation of negotiable instruments.

2. As we understand subparagraphs (b), (c) and (d) of article 74 (2) and article 78, the ex-holder will not be personally liable to the payer in addition to the payer's access to the security or to the amount deposited. We would prefer that the ex-holder also were personally liable.

Articles 74 to 79

NETHERLANDS

The approach to lost instruments in Articles 74 to 79 of the draft Convention is similar to that followed by Dutch law (art. 167a and b K) in that the person who lost the instrument and thus cannot exhibit it when demanding payment may nevertheless claim payment though he may be required to give security to the party paying.

The provisions on lost instruments, it would appear, are drafted on the assumption that the instrument is lost before it becomes payable. They do not deal with the situation where the instrument has become due and was protested for non-acceptance or non-payment. In the latter event, article 74(2) should require that the person claiming payment of the lost instrument must also produce the protest, if it was made in a separate document, or, if made on the instrument itself, the elements of the declaration of protest on the instrument.

The provisions on lost instruments are also drafted on the assumption that the drawee will not pay a lost instrument since he is under no obligation to pay. The assumption is probably correct and it is probably not necessary to provide for the rare instance where the drawee does pay, though Dutch law (art. 167 a K) envisages this possibility.

SPAIN

Under article 74, a person who loses an instrument maintains the same rights as if it had stayed in his possession, provided that he states in writing the data listed in subparagraph (2) (a). Article 79 establishes a similar provision for a party who has paid a lost instrument. In the latter

case, however, the only explicit requirement is that he must be in possession of "the receipted written statement" (an unfortunate expression, in any case). It would appear that the written statement with the data specified in article 74 (2) (a) (referred to also in article 78) is likewise required. The connection between articles 74 and 79 is not clear from the draft.

YUGOSLAVIA

These articles introduce new rules applicable in cases when an instrument is lost, whether by destruction, theft or otherwise. It is not in the interest of the bill to delete the rules governing cancellation and instead to introduce these rules.

ARTICLE 75

INDONESIA

This article deals with "notification" which is not regulated by the Indonesian Commercial Code. The purpose of the notification is to enable the ex-holder to assert a claim against a subsequent holder.

The provision would benefit any holder who lost his instrument.

Article 75(1)

MEXICO

The party who has paid may not know the domicile of the person he paid.

Suggested wording: "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 whom he paid of such presentment, unless he is ignorant of his domicile."

Article 75(2)

MEXICO

The procedure for giving notification is very briefly described, especially if compared with the text of article 61, although notification would seem more important in the latter case.

Suggested wording: "Such notification must be given in the manner prescribed in article 61."

ARTICLE 76

NORWAY

We refer to our second comment to article 74.

Paragraph (2) of article 74 deals with release of the security. We suggest a parallel provision on release to the ex-holder of an amount deposited.

SPAIN

A safety system is established for the case where a "party" is forced to make payment twice (art.76 (1), first part). The system seems adequate as far as the deposit is concerned, but inadequate as regards "security", if there has been no agreement on this and the "party" has to accept such security as the judge may determine, even if it is not "to his satisfaction".

Article 76 also recognizes the right of a party "who by reason of the loss of the instrument, then loses his right to recover from any party ..." to realize the security or to reclaim the amount deposited. This article is also hard to understand and suffers, as does the whole chapter, from a lack of clarity and precision.

Article 76(2)

JAPAN

Article 76 (2) provides that where security is given in accordance with Article 74 (2) (b), the person who has given security 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. The Japanese Government suggests that a corresponding right be given under the same circumstances to the party for whom a deposit has been made in accordance with an order made under Article 74 (2)(d).

ARTICLE 77

NORWAY

The alternative of dishonour by non-acceptance is left out by mistake, cf paragraph 1 of the commentary.

ARTICLE 79

INDONESIA

This article lays down a provision regarding payment to the ex-holder of a lost instrument in accordance with article 74. Such party may acquire such rights of recourse against prior parties as the ex-holder would have had if he had been in possession of the instrument. In this connection the Indonesian Commercial Code sets forth the same rules, except for the right of recourse against the endorser.

NORWAY

Paragraph (2) seems too severe on the payer of a lost instrument. He ought to have an opportunity, parallel to article 74, of replacing the statement he received by a new written statement.

UNITED STATES

Article 79(1) provides a payor of a lost instrument with the rights of a payor in possession of a paid instrument, but paragraph (2) requires such a party to be in possession of the receipted writing referred to in Article 78 in order to obtain these rights. There is no explanation as to why the Convention requires actual possession of a particular piece of paper, rather than mere proof by the payor of his payment of a lost instrument. This imposes too harsh a penalty on the payor who loses the receipted writing. The United States therefore proposes that Article 79(2) be amended to require only that the payor of a lost instrument prove his payment in order to have the rights of a payor, and that possession of the receipted writing be presumptive proof of such payment.

CHAPTER EIGHT. LIMITATION (PRESCRIPTION)

ARTICLE 80

AUSTRALIA

The draft Conventions introduce special rules governing the period of time within which an action on the instrument must be brought and the point of time from which that period starts to run. The Conventions introduce a general period of limitation of four years for actions against any party, whether primarily or secondarily liable, subject to extensions where an action may be brought by a party secondarily liable against a party liable to him. This period of limitation is shorter than the general period specified for civil actions under the legislation of the Australian States (6 years). However, it is not felt that the reduction in the limitation period will cause any real difficulties for the Australian business community.

DENMARK

As we are dealing with international rules the period of limitation should reasonably exceed the six-month period of limitation stipulated in section 52 of the Danish Cheque Act. However, a four-year period of limitation, as laid down in the draft Conventions, seems entirely out of proportion.

FINLAND

It might be useful to add a provision to this article on possible interruption of the period of limitation.

INDONESIA

This article sets forth 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. This provision is also contained in the Indonesian Commercial Code.

However, the draft convention does not discriminate between the parties against whom recourse action is exercised, and stipulates a longer period of time.

The period of time provided by the draft convention is brought about by the international character of the instrument which involved many places in different countries.

JAPAN

The principle underlying Article 80 is acceptable. According to Example B, paragraph 2 of the commentary (A/CN.9/213, page 124), where a party who has paid within a year before the expiration of the period prescribed in Article 80 (1) exercises the right of recourse against a prior party in accordance with paragraph (2) of the same article, the prior party is given a full year from the date on which he paid the party exercising the right of recourse within which to bring an action against a party prior to him. However, the text itself does not make this clear. The Japanese Government suggests that the text state the rule expressly.

MEXICO

No limitation is foreseen on the right of action against the guarantor of the drawee.

NORWAY

The Norwegian Government favours a limitation period of three years.

SPAIN

The draft Convention ends with a chapter on "Limitation", consisting of a single article on which a few very specific remarks will suffice.

First of all, some comments on the terminology: the expression with which the provision begins is incorrect ("el derecho de acción derivado de un título no podrá ejercerse ..."); subparagraphs (1) (a) and (1) (b) speak [in the Spanish version] of the "firmante" (party) where the reference should be to the "maker" of a promissory note and not just to any "party" to an instrument. This terminology leads to confusion and should be carefully revised.

Secondly, no reference is made to the limitation or prescription of an action against the guarantor for the drawee.

Lastly, the reference to the date of dishonour in subparagraph (d) of paragraph (1) seems to be incomplete in the Spanish version; non-acceptance ("falta de aceptación") alone is mentioned, and a reference to non-payment would seem to be required also.

URUGUAY

We suggest a wording on the following lines:

"A right arising on an instrument shall cease to exist after four years have elapsed ..."

With the existing wording it may be understood that the passage of time terminates only the right to bring a claim.

YUGOSLAVIA

A period of four years for the holder of an instrument to exercise his right of action against the acceptor or the maker or the drawer or an endorser or their guarantor, or a period of one year for a party who has paid the instrument to exercise his right of action against a party liable to him is too long. Such long periods of limitation are contrary to the nature and purpose of an instrument designed to ensure a prompt and safe transaction, on the one hand, and to make the payments due and repay the debts incurred on an instrument as soon as possible, on the other.

PART II. DRAFT CONVENTION ON INTERNATIONAL CHEQUES

A. General comments on the draft Convention

AUSTRALIA

See the general comments of Australia in Part I, A *supra*.

AUSTRIA

The Draft Convention is based on the assumption that a unification of the law on international cheques will further international business transactions. The question, however, remains whether such an activity is really required because it is doubtful whether international cheques will be used in business transactions in the future at all. The point is that conditions have essentially changed since the start of UNCITRAL's work because of the introduction of electronic means of transfer.

Apart from this objection and concentrating on the contents of the Draft Convention one finds that the special function of the cheque has not properly been taken into account. While a bill of exchange is also a credit instrument, the cheque is only a means of payment. This difference in function must also be reflected in the legal regulation, which, however, is not the case. Under Art. 43 b, for instance, the cheque must be presented for payment within the long period of 120 days; Art. 47, moreover, provides that a cheque presented before its stated day will be due only after the stated day.

The function of a cheque as a means of payment furthermore gives rise to the necessity that a cheque law must contain particularly clear regulations which are easy to apply. The Draft Convention, however, has been modelled mainly on the Draft Convention on International Bills of Exchange. The essential criticism of the Bills of Exchange Convention therefore also applies to a particularly high degree to the Draft Convention on Cheques.

Because of the aforementioned reasons, this draft cannot be considered as a suitable basis for further activities in this field.

CANADA

See the general comments of Canada in Part I, A *supra*.

CYPRUS

See the general comments of Cyprus in Part I, A *supra*.

CHZECHOSLOVAKIA

The Draft Convention on International Cheques can be considered a suitable basis for consideration of uniform rules intended for universal international use.

FINLAND

See the general comments of Finland in Part I, A *supra*.

GERMAN DEMOCRATIC REPUBLIC

See the general comments of the German Democratic Republic in Part I, A *supra*.

FEDERAL REPUBLIC OF GERMANY

The UNCITRAL Draft Convention on International Cheques provides for the creation of a new law on cheques which is to be valid exclusively for international transactions.

The Geneva Conventions have already brought about a far-reaching unification of the law on cheques which has proved good for more than half a century. However, groups of important states have kept aloof from these Conventions. It would be desirable to include these states in the unification, even if no significant difficulties have arisen up to now in international commercial transactions because of the different systems of law on cheques.

The solution offered by the Draft to create an international cheque as an alternative to the commercial papers already existing cannot serve the objective of promoting global unification as to the law on cheques. It would, on the contrary, rather bring about the danger of impairing the uniformity achieved. In practice, the system proposed would for a long time entail considerable legal uncertainty and difficulties which, in the opinion of all groups concerned in the Federal Republic of Germany, would not be balanced by substantial advantages.

UNCITRAL's efforts towards further unification of the law on cheques should therefore not be directed towards introducing a new legal system beside the old one, but should strive towards making the Geneva Conventions acceptable to the Anglo-American legal systems as well as towards further developing them in accordance with the requirements of modern transactions, if necessary. For this purpose, it should first be clarified which provisions of the Geneva Conventions are in need of amendment.

HUNGARY

See the general comments of Hungary in Part I, A _supra_.

JAPAN

It will be very meaningful to create, in addition to the existing cheques governed by conventions or domestic laws, a new cheque to be issued only for international transactions. The Japanese Government supports the idea of creating such a cheque by adopting a new multilateral convention separate from the proposed convention governing an international bill of exchange or promissory note. The present texts of the Draft Convention on International Cheques, the product of discussions in the Working Group on International Negotiable Instruments of UNCITRAL, provide an excellent basis for achieving a good compromise between the Anglo-American and Geneva Systems, and the Japanese Government (and Japanese banking and trading circles) find the fundamental principles on the basis of which the texts are drafted acceptable.

However, where the Draft Convention on International Cheques adopts the same institutions as are adopted in the Draft Convention on International Bills of Exchange and International Promissory Notes, the comments made with regard to the latter Draft Convention apply.

NETHERLANDS

See the general comments of the Netherlands in Part I, A _supra_.

NORWAY

1. The Government of Norway approves of the proposal for two separate, independent conventions on international cheques and on international bills of exchange and promissory notes.

We acknowledge the high quality of the UNCITRAL Draft Convention on International Cheques. We also approve of the thoroughness of the Draft Convention and its systematic structure. The UNCITRAL Working Group has reached good compromises between civil and common law and has, from a practical point of view, proposed a sound and workable regulation.

2. We are not convinced of the need for a convention on international cheques. Secondly, while bills of exchange and promissory notes typically are being employed by the business community, the law on cheques also has an important consumer protection aspect. We have been unable to scrutinize the Draft in this respect. Thirdly, as far as we know the Draft Convention on International Cheques has been received with some hesitance. Wide acceptance ought to be a precondition for adoption of the Draft Convention as a multilateral treaty. For the time being, the Norwegian Government will therefore not commit itself to support the Draft. Nevertheless, we want to make comments upon it.

3. The Draft ought not to be adopted only as a model for enactment. This approach would invite deviations from the Convention during the different national enactment processes.

4. It seems to us that the contracting States to the Convention providing a uniform law for cheques, Geneva March 19th 1931 (Norway included), will not be able to ratify an UNCITRAL Convention without denouncing the Geneva Convention. Norway is inclined to support proposals for an amendment to the Geneva Convention allowing the contracting States to ratify the UNCITRAL Convention and make it applicable to international cheques. A revision of the Geneva Convention itself might be undertaken as a separate activity.

5. There is in Norway a great confidence in the cheque as an instrument of payment. It seems to be somewhat different elsewhere. The high degree of confidence is partly achieved through a criminal legislation which has some bearing on a few of the articles of the Draft. Even though a cheque drawn against insufficient funds is recognized as valid, it is a criminal offence to draw such a cheque, cf article 3 of the Draft Convention. It is also a criminal offence for the drawer without due reason, to withdraw his funds with the drawee or to countermand the cheque, to the detriment of the holder, cf article 66. Application of these provisions of criminal law in respect of international cheques will not be contrary to the Convention. Maintenance of the high confidence in cheques is of great importance to us.

6. A higher degree of correspondance between the articles of the two Draft Conventions would have been an advantage, in particular as regards the more general rules and principles of the first parts of the Drafts. Full correspondance between articles 1 to 33 inclusive of the Draft on bills of exchange and promissory notes and articles 1 to 35 inclusive of the Draft on cheques could easily be achieved:

i. Articles 3 and 4 of the Draft on cheques could either be included in articles 1 or 6, or be totally deleted. As the articles now read, they seem superfluous, and the Working Group has not found it necessary to propose similar rules in the Draft on bills and notes.

ii. Articles 8 and 9 of the Draft on cheques correspond to article 6 of the Draft on bills and notes and are easily combined to one article.

iii. Articles 9 and 10 of the Draft on bills and notes correspond to article 12 of the Draft on cheques. The rules in article 10 of the Draft on bills and notes are conveniently transferred to article 9 as a new paragraph (4).

7. There is in our opinion one serious weak point in the Draft as there is in the Geneva Convention (ULC): the Draft only confusingly deals with the problem of under what circumstances and to what extent a drawee who pays a cheque is discharged of his debt to the drawer. This is an important question, and an UNCITRAL Convention ought to establish beyond doubt which questions are settled under the Convention and which are referred to national law. The answers of those questions that are to be regarded as settled under the Convention ought to be reflected in the final text.

The problem is touched upon in article 25 and the commentary to that article. According to paragraphs 18 (last section) and 21 of the commentary, the drawee is discharged of his debt to the drawer upon payment of the cheque even if there is a forged endorsement on it. However, this solution is reflected in none of the articles of the Draft. According to article 25 (2), cf paragraph 28 of the commentary, the Draft Convention does not deal with the liability of a drawee who pays a cheque upon which there is a forged endorsement. This is confusing.

Article 25 (2) refers to articles 70 and 72 as exceptions to the general principle. Why does it not refer to article 66 too?

Article 66 rests on the underlying presumption that payment of the cheque by the drawee discharges him of a corresponding part of his debt to the drawer. To this principle, article 66 makes an exception as regards cheques which the drawer has countermanded. However, the general principle is not reflected in section 1 "Discharge by payment" of chapter six "Discharge". It seems unclear to what extent this general principle is meant to be subject to the qualifications of articles 61 following. Anyway, discharge of a party to the cheque, cf article 6 (7), of his liability on the instrument and discharge of the drawee vis-a-vis the drawer are two quite different kinds of discharge.

We strongly recommend that a new section 3, dealing with these questions, be included in chapter six of the Draft Convention. We do not refer to the problem in our article-by-article comments.

8. The comments and examples to the Draft Convention have been most useful. We recommend that a similar thorough commentary accompany the final Convention.

SPAIN

The main point which will be noted on reading the draft Convention on International Cheques is that instrument's extraordinary similarity to the draft Convention on International Bills of Exchange and International Promissory Notes. The similarity is such that the major part of the text is a literal repetition of the other draft Convention.

The fact that the rules proposed are basically identical might lead one to believe that the preparation of two separate texts serves no useful purpose. The wording of the two drafts is such that there is no more difference between the rules governing cheques and those governing bills of exchange than between those governing bills of exchange and those governing promissory notes. It might therefore be said that there are no reasons for regulating the last two types of instrument together and regulating international cheques separately and that it would be preferable to have a single regulation for all these instruments, subject to the establishment of special and specific rules for each one. This would avoid possibly excessive repetition.

The commentary on the draft Convention on International Bills of Exchange and Promissory Notes justifies the preparation of a separate draft Convention on International Cheques by indicating that it is a concession to the continental system embodied in the Geneva Laws which regulate these instruments separately. This does not, however, appear to be the main reason for the procedure adopted.

Although there are no reasons of legislative method which would justify preparation of two separate drafts, there are others of a pragmatic nature which make this advisable. The aim of achieving the maximum degree of uniformity and the greatest possible measure of acceptance of the draft juridical rules makes desirable this division of the subject under which each text is independent in itself, so that each one may be accepted and implemented independently. Thus, those States which wish to ratify or accede to one of the texts can do so and refusal to accept one of the sets of rules does not necessarily involve rejection of the other.

In any case, although the desire to achieve the greatest possible degree of unification justifies regulation of the matter of cheques in a separate instrument, it does not seem necessary or desirable that the two drafts should form separate conventions, since the contracting States, on ratifying or acceding to one convention, can exclude a part of its content. The reason for the submission of two separate texts is therefore understandable, but it is recommended that there be only a single convention, divided however into parts.

Since the draft Convention on International Cheques is very similar to - and largely identical with - the draft concerning bills of exchange and promissory notes it gives rise to substantially the same comments. The present report therefore can refer to the report on the draft Convention on International Bills of Exchange and Promissory Notes. The general comments made therein are fully applicable to the draft Convention on International Cheques. These include comments on deficiencies of drafting, terminology or syntax; on the excessive number of definitions, distinctions and references, on the danger of vague concepts and ambiguous and subjective interpretation criteria; the basic question of valid grounds for dishonour and the distinction between protected holders and non-protected holders; and the absence of a rule to resolve problems of a procedural nature and of a provision concerning the effects of the instrument on the transactions to which it applies.

Virtually all the spcific comments made concerning the text of the draft Convention on International Bills of Exchange and Promissory Notes apply also to the draft Convention on International Cheques. Consequently, in order to avoid unnecessary repetition, it has been considered sufficient simply to refer to those comments.

SWEDEN

In a separate document, the Swedish Government has submitted its comments on the Working Group Draft Convention on International Bills of Exchange and Promissory Notes. These comments are relevant also as regards the present Draft Convention on International Cheques.

For the reasons mentioned in the said document, the need for conventions concerning only international negotiable instruments may be questioned. The Swedish Government wishes to add that cheques apparently are becoming less frequent in international relations. Consequently, the need for a Convention on International Cheques is less accentuated also from this point of view.

UNION OF SOVIET SOCIALIST REPUBLICS

See the general comments of the USSR in Part I, A *supra*.

UNITED KINGDOM

The general observation in respect of the Convention on International Cheques is that there is a wide-spread lack of interest in it.

UNITED STATES

The draft Convention on International Cheques is an attempt both to provide a settled body of law for designated international cheques and to establish rules which are adaptable to the banking and commercial practices in many states. The United States would have greater difficulty adapting its banking and commercial practices to the Convention on Cheques as currently drafted, than it will to the Convention on Bills and Notes. First, the draft Convention on International Cheques has no provisions to require the orderly, speedy and efficient handling of cheques, such as those contained in Article 4 of the Uniform Commercial Code. Such provisions are necessary for processing large numbers of cheques and should be added to the Convention. Second, the use of crossed cheques and cheques payable in account is unknown in the United States, and the introduction of these specialized types of instruments would have disadavantages that would not be outweighed by their advantages.

The draft Convention on International Cheques is an attempt to establish a settled body of law to govern cheques used in international commerce that are expressly designated on their face as controlled by the Convention. The draft Convention proposed by the Working Group does not, therefore, attempt to reform the laws applicable to domestic cheques, or even the laws applicable to all international cheques. Instead, the draft Convention provides rules for a restricted category of international cheques -- rules which are certain and

are adapted to the practices of the commercial community in many states. These states have both different legal systems and different commercial practices in the use and handling of cheques.

Unlike other types of commercial paper, in the United States cheques are processed in bulk by machines. To accommodate these new cheque-handling processes, prior rules from a hand-processing age involving fewer pieces of paper have been expanded and modified in Article 4 of the Uniform Commercial Code. There is no equivalent expansion and modification of rules in the draft Convention on International Cheques. Thus, United States support of this draft Convention depends in good part on the adaptability of the Convention to present commercial practices of cheque processing by banks in the United States.

The rules set forth in UCC Article 4 provide for efficient processing of cheques by limiting the time during which collecting banks may send cheques forward to the drawee, or remit proceeds or notice of dishonor to prior parties. The rules also limit the time period for drawees to decide to pay or dishonor cheques and then to remit proceeds or notice of dishonor to prior parties. The draft Convention on International Cheques contains no such time limits for actions by drawees, and contains no time limits for collecting banks, except the requirement in Article 50 that a dishonored cheque must be protested within two business days after dishonor. That time period, however, commences with dishonor and not with receipt of notice of dishonor. Thus, that requirement is not particularly useful to efficient processing of cheques under practices in the United States. It is possible that Federal Reserve regulations may be able to provide sufficient control of those cheques which enter its system so as to provide useful time limits, but it would be preferable to incorporate the relevant rules in the draft Convention itself.

A second, and more important problem, concerns the specialized types of cheques created by Chapter Seven of the draft Convention -- crossed cheques and cheques payable in account. These specialized types of cheques are unknown in the United States. It is questionable whether persons in the United States would know how to handle these cheques properly. It is possible that bank employees who handle cheques in bulk could be educated to identify these unusual items and to refer them to knowledgeable superiors. However, that would still not protect members of the general public, who also handle cheques regularly but would not be aware of the specialized rules concerning these unusual items. Thus, crossed cheques would confuse an unsuspecting public if they were introduced into the United States.

Further, even proper use of crossed cheques or cheques payable in account would not provide in the United States the protection expected by the foreign drawer, because the bank-customer relationship is quite different in the United States than may be the case in countries where such instruments are in general use. Banks in the United States do not usually investigate the past history of deposit account customers, and some banks do not even investigate their identity, as long as collected funds are involved. Thus, the thief who steals a crossed cheque or a cheque payable in account in the United States would probably be able to establish an account and realize on the cheque. And, if he stole such a cheque before it reached the payee, the loss would fall on the foreign drawer who expected to be protected.

For these reasons, the use in the United States of crossed cheques and cheques payable in account would not protect parties and might even create new avenues for potential fraud. Favorable consideration by the United States of the draft Cheque Convention will therefore depend in some degree on whether a solution can be found to this problem. One possible approach to this problem might be to allow adopting states to treat Chapter Seven as optional, and to declare that it does not apply, while allowing them to adopt the balance of the Convention.

Many of the article-by-article comments of the United States on the draft Convention on International Cheques are adapted from the comments on the draft Convention on International Bills of Exchange and International Promissory Notes. They are directed primarily to improving the drafting of the Working Group and carrying out its decisions, rather than seeking to overturn or re-open the compromises struck. Although the comments make some important proposals, the proposals seek to clarify the draft and to eliminate problems which would arise in common law courts.

Two of the comments, however, are peculiar to the draft Convention on International Cheques. These are the comments on Article 49 and Articles 68-72. One relates to the problems of processing cheques in bulk, and the other to the specialized type cheques currently unknown in the United States. Both of these comments are important to the acceptability of the Convention to the United States.

The United States strongly urges that a commentary accompany the final text. The existing commentary has been prepared at the request of the Secretariat and thus far has accompanied the draft as an explanation of its provisions. Is has proved most helpful to practitioners and others in the United States who have studied the draft Convention. It can be expected that a commentary on the Convention finally adopted would facilitate efforts to have the resulting Convention accepted by states. Since the draft Convention contains a number of concepts which are unknown in common law systems, a commentary would be of special importance to a common law country such as the United States.

The following comments and proposals have been prepared with considerable restraint. In view of the limited time for consideration of the draft Convention at a diplomatic conference, the already long period of work on the draft by the experts on UNCITRAL's Working Group, and the complexity of the subject matter, it seems desirable that the number of proposals made to UNCITRAL at this stage and ultimately at a diplomatic conference be kept to a minimum.

URUGUAY

With respect to this draft Convention we would repeat the general comments made concerning the Draft Convention on Bills and Notes, because it does not give rise to any major objection and will certainly be a most useful instrument which will facilitate international trade.

YUGOSLAVIA

Most of the observations expressed with respect to the Draft Convention on International Bills of Exchange and Promissory Notes mutatis mutandis apply also to the Draft Convention on International Cheques.

B. Specific comments on individual articles

CHAPTER ONE. SPHERE OF APPLICATION AND FORM OF THE CHEQUE

ARTICLE 1

SPAIN

The first basic difference between the rules governing bills of exchange and promissory notes and those governing cheques is that cheques may be issued, when drawn, as bearer instruments. This is clear from the definition of a cheque contained in article 1, paragraph (2) (b): "... Order ....to pay ... a sum ... to the payee or to his order or to bearer" (in the Spanish text of the draft Convention the reference to the bearer is missing, probably through a typographical error, as it appears in the English and French versions and in the commentary on the draft). The possibility of drawing an international cheque to bearer is consistent with article 14 which specifies the manner in which such a cheque may be transferred, and with article 16, paragraph (1), which lists the characteristics of a holder. There is therefore no difference as regards the naming of the payee. All these instruments may be drawn in favour of the payee or to order and are subject to the same rules concerning transfer (articles 14 *et seq.*) and in each case there is the same possibility of using a "non-transferability" clause (article 18). There is consequently no distinction between instruments drawn to order and instruments specifically naming the payee.

According to article 1, paragraph (2) (c), a cheque may be drawn only against a banker. This follows the widespread practice which makes cheques purely banking instruments.

Article 1(2)

JAPAN

See the comment of Japan in Part I, B *supra* under article (1)(2)(a) and (e).

UNITED STATES

Paragraph (2) of Article 1 states that a qualifying cheque must be a "written instrument." The term "written" is not defined in the Convention and the United States proposes that such a definition be added to Article 1. Comment 4 indicates that the draftsmen deliberately omitted such a definition, but then states that the term would include "any mode of representing or producing words in visible form, such as handwritten, typed or printed." This comment definition could include some electronically reproduced "writings"

since they are not excluded, and the commentary definition is only inclusive. The United States therefore proposes that a definition be added to the text of Article 1. This definition should require that any "signed writing" must meet several tests, including that the writing be permanent and capable of physical transmission between the parties, that it be signed in a manner which prevents tampering, and that it contain the signature of the issuer.

Article 1(2)(a)

CZECHOSLOVAKIA

The important question arises whether the drawer of a cheque when using the words "International Cheque (Convention of ....)" has thereby indicated either a choice of law or a choice of the legal régime of the Cheque in compliance with the Convention. The effects of such a choice should be specified in the text of the Convention, as follows: Article 1(2)(a) should be amended to the effect that this designation by the drawer constitutes also an indication of the legal régime of the Convention; at some appropriate place, the Convention should specify that the clause according to article (1)(2)(a) makes the cheque subject to the régime of the Convention and binds any holder who took the cheque, and all subsequent parties.

NORWAY

See the comment of Norway in Part I, B supra under article (1)(2)(a).

UNITED STATES

See the comment of the United States in Part I, B supra under article (1)(2)(a).

Article 1(2)(b)

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B supra under article (1)(2)(b).

Article 1(2)(e)

CZECHOSLOVAKIA

Paragraph (2) contains, apparently, necessary requisites of a Cheque even in the absence of an express provision that the instrument is not an international Cheque if a requisite is missing. The provision of paragraph (2)(e) requires, in order to establish the international character of the

Cheque, that at least two of the specified places are situated in different States, but there is no provision indicating that all these elements must be included in the Cheque; in other words it is not clear whether the place of drawing, the address of the drawer, the address of the drawee and the address of the payee, the place of payment are indispensable formal requisites of the Cheque. We also note that the address of the drawer is usually not mentioned. Perhaps the address of the drawer and the place of payment are not indispensable formal requisites of a Cheque.

CHAPTER TWO. INTERPRETATION

ARTICLE 3

SPAIN

Under article 3 a cheque is considered valid even if it is drawn against insufficient funds. It would seem that the same solution should be adopted even for the case where funds are totally lacking. Article 66 provides that where a cheque is countermanded "the drawee is under a duty not to pay". These two rules relate to what is known as the "cheque contract" or international cheque law, but they do not affect the law on cheques as instruments of exchange and do not affect the situation of the holder of the cheque. It could therefore be decided to make no reference to these matters of internal relations between the persons involved in the cheque, because they do not affect the system of exchange obligations arising from the instrument. Alternatively, they could be included in the proposed rules, but in that case it would seem necessary to have a more comprehensive regulation than is contained in the present text.

ARTICLE 4

SPAIN

Article 4 allows a cheque to bear a date other than the true date of drawing and article 47 draws attention to a specific consequence of this; but here again the question of pre-dated and post-dated cheques deserves more comprehensive treatment.

URUGUAY

The substance of this article conflicts with our internal public law. To enter a date other than the date on which the cheque is drawn amounts to a false declaration which to make is a criminal offence.

Should the draft Convention be adopted without modification of this provision, appropriate reservations would have to be made if the Republic of Uruguay decided to accede to the instrument.

YUGOSLAVIA

The wording of draft article 4 is unsatisfactory since the date on which the cheque was drawn has not only a procedural but also a substantive effect on the rights and duties of the parties. Consequently, a rule should be established that a cheque must bear a date and that without such date it cannot be valid as a cheque.

ARTICLE 5

DENMARK

See the comment of Denmark in Part I, B supra under article 3.

ARTICLE 6

(The comments relating to paragraph (6) of this article (definition of a "protected holder") are set forth under articles 27 and 28, under the heading "holder and protected holder".)

UNITED KINGDOM

See the comment of the United Kingdom in Part I, B supra under article 4.

UNITED STATES

See the comment of the United States in Part I, B supra under article 4.

URUGUAY

A number of terms used in the Convention are defined in this article, but it fails to define the term "drawer". We suggest that the following definition be included:

"'Drawer' means the person who draws an international cheque".

Article 6(3)

CANADA

The draft Convention seems to presuppose that a cheque is by definition drawn on a bank. This is no longer the case in Canada where cheques may also be drawn on trust companies, loan companies or credit unions. Canadian legislation relating to cheques on a bank includes in the definition of a

"bank" any person or institution which "accepts deposits transferable by order to a third party". We are concerned that the definition of a "banker" in article 6 (3) of this draft Convention might be held not to include all persons or institutions in Canada which may legally issue cheques because the wording "assimilated to" in the definition does not appear to have any very precisely defined meaning in either a legal or financial context. Canada therefore strongly recommends that article 6 (3) be amended to read as follows:

> "'Banker' includes any person or institution that accepts deposits transferable by order to a third party."

DENMARK

Paragraph (3) of the Convention on Cheques provides a somewhat muddled definition of a bank ("banker"), and a more precise definition of the concept would be desirable.

NORWAY

Of the definitions in article 6, the definition of "banker" in paragraph (3) is the only one which refers to the applicable national law, cf paragraph 3 of the commentary to the article. We suggest that paragraph (3) explicitly refer to national law.

SPAIN

Article 6, paragraph (3), may complicate the determination of the possible drawees of a cheque as it allows cheques to be drawn against "any person or institution assimilated to a banker". Here it will be for the national law to establish such assimilation.

UNITED KINGDOM

It is strongly felt that the definition of banker is unsatisfactory. A better definition is that in section 2 of the Bills of Exchange Act 1882 namely "banker" includes a body of persons whether incorporated or not who carry on the business of banking.

<u>Article 6(4)</u>

GERMAN DEMOCRATIC REPUBLIC

The remarks made on Article 4 of the Convention on International Bills of Exchange and International Promissory Notes also apply to this Article. In addition, it is recommendable for the sake of greater clarity to add in paragraph (4) of Article 6 that the cheque may be drawn payable to order or to bearer. Otherwise, the possibility of drawing a cheque payable to bearer could only be deduced from Article 14.

Article 6(5)

JAPAN

See the comment of Japan in Part I, B supra under article 4(7).

Article 6(8)

DENMARK

See the comment of Denmark in Part I, B supra under article 4(10).

FEDERAL REPUBLIC OF GERMANY

See the comment of the Federal Republic of Germany in Part I, B supra under article 4(10).

HUNGARY

See the comment of Hungary in Part I, B supra under article 4(10).

Article 6(8) and (9)

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B supra under article 4(10).

Article 6(8) and Article (X)

JAPAN

See the comment of Japan in Part I, B supra under article 4(10) and article (X).

NORWAY

We will at this stage neither support nor oppose the inclusion of article (X) in the final text. However, we call attention to the difficulties which may arise from reservations according to the article.

UNION OF SOVIET SOCIALIST REPUBLICS

See the comment of the USSR in Part I, B *supra* under article 4(10) and article (X).

Article (6)(9)

UNION OF SOVIET SOCIALIST REPUBLICS

See the comment of the USSR in Part I, B *supra* under article 4(11).

ARTICLE 7

DENMARK

See the comment of Denmark in Part I, B *supra* under article 5.

FEDERAL REPUBLIC OF GERMANY

See the comment of the Federal Republic of Germany in Part I, B *supra* under article 5.

ARTICLE 8

SPAIN

Articles 8 *et seq.*, in prohibiting (ineffectively) the payment of interest, show a difference between the cheque, on the one hand, and the bill of exchange and the promissory note, on the other. This prohibition is understandable and seems appropriate since the cheque, in principle, is an instrument of payment and not a credit instrument and therefore matures immediately on sight. These features are not consistent, however, with the long period allowed for presentment for payment under article 43 (120 days).

ARTICLE 9

AUSTRALIA

The provision concerning stipulation of interest on cheques differs from that contained in the Bills and Notes Convention (article 6). Article 6 provides that a sum is deemed to be a definite sum even though it is to be paid with interest. This corresponds with section 14 of the BEA which also applies to cheques. However, article 9 of the Cheques Convention provides

that a stipulation on a cheque that it is to be paid with interest is deemed not to have been written and, therefore, is of no effect without affecting the validity of the cheque. The explanatory note to the article makes it clear that the rationale of this provision is that a cheque is a payment instrument, providing for payment on demand, and that such a stipulation of interest might lead to undesired late presentment. Having regard to the fact that this provision will apply only to international cheques which are deliberately brought within the Convention, it means that parties and their bankers in Australia will need to be made aware that such a provision for interest on an international cheque is of no effect.

CANADA

Canada agrees with the policy in the Convention that cheques ought not to bear interest and that any provision apparently encouraging such practice should be expunged.

ARTICLE 10

Article 10(2)

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B supra under article 7(2).

ARTICLE 11

URUGUAY

We feel that the wording of this article could be improved, as paragraph (1), subparagraph (b), seems to conflict with paragraph (2).

We suggest that the text be reworded as follows:

"A cheque is always payable on demand. Any stipulation to the contrary is deemed not to have been written".

Article 11(1)

SPAIN

Article 11, as it appears in the Spanish text submitted for comment, is incomplete. Paragraph (1) is missing. This is the provision to the effect that a cheque is payable on sight. As it appears in the commentary and in the French and English versions, the text is satisfactory.

Article 11(2)

UNITED KINGDOM

Article 11(2) is criticised because it appears to conflict in respect of post-dating cheques with Article 47. It is suggested that Article 11(2) should be deleted.

ARTICLE 12

CYPRUS

A new paragraph to be added to take care of fictitious or non-existing payees. (See Section 7(3) of Cap. 262). If an international cheque is payable to a fictitious or non-existing person, it may be arguable whether the cheque is an international one or not.

INDONESIA

The Indonesian Commercial Code does not contain a provision whereby a cheque may be drawn by two or more drawers or may be payable to two or more payees.

However it is commmonly found in payment transactions that a cheque is drawn jointly by two or more persons or jointly drawn by two or more persons on behalf of an entity, as a drawer.

It is to be noted that if the drawers or payees are regarded as a unity, it is not contrary to the civil law system which considers the issuance of a cheque as an underlying transaction between the drawer and the payee.

NORWAY

1. According to article 12 (1)(a), a cheque may be drawn by the drawer ".. payable to his order". A more precise wording would have been ".. payable to himself", cf paragraph 9 of the commentary to article 1.

2. According to article 12 (1)(a), a cheque may be drawn by the drawer on himself, i.e. a cheque drawn by a banker on himself, cf article 1 (2)(c). This implication would have been easier to understand if subparagraph (a) were split into two subparagraphs which might have read, cf also our comment no. 1:

(1) A cheque may:
(a) Be drawn by the drawer payable to himself;
(b) Be drawn by a banker on himself;
......

3. In most States, a central bank or a national reserve system has a monopoly to issue bank-notes which are legal tender. Even though cheques drawn by an ordinary banker on himself will not be legal tender, issuance of such bank-notes may be detrimental to public interests, especially if they are payable to bearer and issued in great numbers. Under the Geneva Convention, the principal rule is that a banker cannot draw a cheque on himself, cf Annex I (ULC) article 6 and also Annex II articles 8 and 9. Some similar provisions in the Draft Convention may be necessary to ensure wide acceptance of the Draft. Without committing ourselves, we put forward for discussion the suggestion that the Convention state that a contracting State is free:

i. to restrict issuance of cheques drawn by a banker on himself within its own territory, at least if they are drawn in its own currency.

ii. to restrict importation of such cheques into its own territory.

iii. to decide that such cheques issued or imported under violation of such restrictions will not be recognized in its territory.

iv. to decide that cheques drawn in its own currency by a foreign banker on himself will not be recognized.

4. The interpretation of paragraph (2) outlined in paragraph 5 of the commentary is confusing. We suggest that either paragraph 5 is deleted in the proposed commentary to the final text and the question left to the courts to decide or the interpretation outlined in paragraph 5 is stated in the final text of the Convention. Otherwise the interpretation outlined in the commentary will serve as a trap for the readers of the Convention.

SPAIN

Article 12 re-casts articles 9 and 10 of the draft Convention on bills of exchange and promissory notes, but does not provide for a plurality of drawees. There may be grounds for this but, in principle, there does not seem to be any reason why the possibility of a cheque being drawn against several banks should be excluded. If it is possible within one State for several banks to issue cheque-books jointly, it is *a fortiori* desirable in international practice to allow cheques to be drawn on a number of banks situated in different States.

UNION OF SOVIET SOCIALIST REPUBLICS

It would be desirable either to add to this Article a paragraph in line with the provision contained in the Geneva Convention (ULC, Article 5), viz.: "a cheque made payable to a specified person with the words 'or to bearer', or any equivalent words is deemed to be a cheque to 'bearer'" or to include this provision in the Draft as an independent article.

URUGUAY

We suggest the following wording:

"A cheque may:

....

(c) Designate two or more payees".

The rule in article 12, paragraph (2), is clear but is perhaps lacking in that it does not refer to the case where a cheque is drawn in favour of A and/or B, as mentioned in the commentary (paragraph 5).

We suggest the addition of the following:

"If it is indicated on the instrument that it is payable to alternative or joint payees, it shall be understood to be payable to all those designated".

Article 12(1)

CZECHOSLOVAKIA

We suggest that it should be mentioned expressly that an international cheque may be drawn payable also to bearer.

Article 12(1)(a)

FEDERAL REPUBLIC OF GERMANY

It can be deduced from this provision read in conjunction with Article 6 para.(2), that banks shall be entitled to draw international cheques on themselves. This would be a doubtful practice in point of view of currency policy because money may thus be created. Moreover, there is no sufficient practical need for admitting such cheques.

Article 12(2)

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B *supra* under article 9(3).

ARTICLE 13

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B *supra* under article 11(1).

Article 13(1)

NORWAY

The date of the cheque, cf article 1 (2)(d), is left out in the enumeration of paragraph 1 of the commentary to article 13.

YUGOSLAVIA

Article 13(1) provides for the completion of an incomplete cheque, thus accepting the theory of omission. Although the completion of such a cheque is permitted by some laws, since so-called essential elements are presumed, it will not benefit international payments. If a cheque is an instrument of payment, then it should be as close to a banknote as possible.

CHAPTER THREE. TRANSFER

ARTICLE 14

SPAIN

The chapter on "Transfer" is almost identical with the corresponding chapter in the draft Convention on International Bills of Exchange and Promissory Notes. There is one important difference, however, which should not be underestimated. This is the system for the transfer of cheques which are drawn payable "to bearer". Article 14 provides that such cheques are transferred by mere delivery. Endorsement does not seem to be an appropriate method of transfer for such instruments. However, article 40, paragraph (4)(b), makes the general statement that "A signature alone on the back of the cheque is an endorsement". It goes on to state that "A special endorsement of a cheque made payable to bearer does not convert the cheque into an order instrument". The meaning of endorsement of a cheque to bearer and of a signature alone on the back of the cheque should be dealt with more fully and made more clear.

YUGOSLAVIA

The two subparagraphs of article 14 regulate not only two totally different cases but they are regulated in a way which is likely to have undesirable effects.

ARTICLE 15

CANADA

For the same reason that we advocate no change in article 9, we do question the wisdom of the policy promoted in Article 15. In the experience of the Canadian banks, it is almost never necessary for a cheque to be endorsed so often that the holder is required to affix an allonge. Canada does not consider a cheque to be a credit instrument and we object to this apparent sanction by the Convention to its use as such. Undue delay in presentment for payment is a likely consequence. See our comment on Article 43(b) infra. This provision appears to Canada to be retrogressive rather than progressive since it does not assist in the task of modernizing the law to reflect current business practices.

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B supra under article 13(2)(a).

URUGUAY

We should like to see added to this article a provision establishing clearly that the instrument is transferred by endorsement even if it does not contain the words "to order".

The absence of a requirement that these words be entered on the instrument is due to the context and is explained in the commentary thereon, but the clarification would, in our view, be desirable.

ARTICLE 18

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B supra under article 16.

DENMARK

See the comment of Denmark in Part I, B supra under article 16.

NORWAY

The article deals with two somewhat different situations: on the one hand a restrictive statement included into the cheque by the drawer and on the other hand a restrictive endorsement. We question the convenience of combining the two situations and suggest that restrictive endorsements are entirely dealt with in article 22.

UNITED STATES

See the comment of the United States in Part I, B _supra_ under article 16.

ARTICLE 19

NORWAY

Article 19(2)

Article 19(2) deals with the conditional endorsement. With reference to paragraph 2 of the commentary to article 17, we call attention to the concept of "the protected holder", cf articles 6(6) and 7, and the requirement of the holder having no knowledge of claims to or defences upon the instrument. The inclusion of the condition into the endorsement may prevent a holder from qualifying as a protected holder.

ARTICLE 22

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B _supra_ under Article 20.

NORWAY

We refer to our comments to article 18.

UNITED STATES

See the comment of the United States in Part I, B _supra_ under Article 20.

ARTICLE 23

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B *supra* under article 21.

Article 23(2)

SPAIN

Article 23, paragraph (2), gives rise to serious doubts, not only because of the way it indicates the effects of endorsement in favour of the drawee, but mainly because of the exception in the last phrase, whose meaning is not at all clear and because, in any event, it raises the question of the definition of "establishments".

ARTICLE 24

URUGUAY

This provision allows a cheque to be transferred after the expiration of the period of time for presentment. We believe that this formula does not suit the interests of trade.

Under Uruguayan law, a cheque loses its intrinsic validity after the expiration of the time allowed for presentment. We feel that this is a satisfactory solution for the security of trade.

ARTICLE 25

DENMARK

See the comment of Denmark in Part I, B *supra* under article 23.

HUNGARY

See the comment of Hungary in Part I, B *supra* under article 23 (2).

INDONESIA

This article deals with forged endorsements which is also dealt with in the Indonesian Commercial Code. However, this article is concerned with the right of any party who suffered damages to recover compensation from the forger or any person who directly takes from the forger, whereas the

Indonesian Commercial Code lays down that only the drawee has the right to recover compensation. Therefore this article allows all parties concerned to recover compensation for damages.

JAPAN

See the comment of Japan in Part I, B *supra* under article 23.

NORWAY

See the comment of Norway in Part I, B *supra* under article 23.

UNION OF SOVIET SOCIALIST REPUBLICS

See the comment of the USSR in Part I, B *supra* under article 23.

Article 25(1)

CYPRUS

If an endorsement is forged, any party who suffers damages should have the right to recover compensation from the forger, from the person to whom the cheque was directly transferred by the forger and from any person or persons who received the cheque with knowledge of the forgery. It is considered correct that the person or persons who was/were aware of the forgery should not be allowed to escape liability. Cases may come to light were such a person or persons had some sort of involvement with the forger or the person to whom the cheque was directly transferred.

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B *supra* under article 23(1).

CHAPTER FOUR. RIGHTS AND LIABILITIES

HOLDER -PROTECTED HOLDER

ARTICLES 6(6), 27 and 28

CZECHOSLOVAKIA

Articles 6(6) and 27

See the comment of Czechoslovakia in Part I, B *supra* under articles 4 (7) and 25.

DENMARK

Article 28

See the comment of Denmark in Part I, B *supra* under article 26.

FEDERAL REPUBLIC OF GERMANY

Articles 27 and 28

See the comment of the Federal Republic of Germany in Part I, B *supra* under articles 25 and 26.

NORWAY

Article 6(6)

See the comment of Norway in Part I, B *supra* under article 4(7).

Articles 27 and 28

See the comment of Norway in Part I, B *supra* under articles 25 and 26.

UNITED STATES

Article 6(6)

See the comment of the United States in Part I, B *supra* under article 4(7).

Article 27

See the comment of the United States in Part I, B *supra* under article 25.

YUGOSLAVIA

Articles 27 and 28

The provisions stipulating that a party may set up against a holder who is not a protected holder any defence based on an underlying transaction prevent the circulation of a cheque. Therefore, they should be deleted.

The term "protected holder" defined in articles 27 and 28 is too complicated to grasp and should be replaced by the concept of the "good faith" holder, which would be much easier and more appropriate for the circulation of a cheque and for international transactions in general.

There must have been a mistake in the provisions of article 27 (3) (b) referring to the signature of the payee or an endorsee instead of an endorser. It is not clear why theft or forged signature of the endorser is the only ground for setting up a defence / paragraph (3) (b)/.

ARTICLE 29

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B <u>supra</u> under article 27.

NORWAY

See the comment of Norway in Part I, B <u>supra</u> under article 27.

<u>Article 29(2)</u>

DENMARK

See the comment of Denmark in Part I, B <u>supra</u> under article 27(2).

ARTICLE 31

NORWAY

See the comment of Norway in Part I, B <u>supra</u> under article 29.

ARTICLE 32

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B <u>supra</u> under article 30.

GERMAN DEMOCRATIC REPUBLIC

See the comment of the German Democratic Republic in Part I, B <u>supra</u> under article 30.

JAPAN

See the comment of Japan in Part I, B <u>supra</u> under article 30.

NORWAY

See the comment of Norway in Part I, B *supra* under article 30.

UNION OF SOVIET SOCIALIST REPUBLICS

See the comment of the USSR in Part I, B *supra* under article 30.

UNITED STATES

See the comment of the United States in Part I, B *supra* under article 30.

ARTICLE 33

DENMARK

See the comment of Denmark in Part I, B *supra* under article 31.

NORWAY

See the comment of Norway in Part I, B *supra* under article 31.

UNITED KINGDOM

See the comment of the United Kingdom in Part I, B *supra* under article 31.

ARTICLE 34

NORWAY

See the comment of Norway in Part I, B *supra* under article 32(4).

URUGUAY

This provision fails to cover the case of signature of cheques by juridical persons, especially commercial corporations. We suggest that provision be made for this, because, at the international level, this is the manner in which cheques are most frequently drawn.

ARTICLE 35

DENMARK

See the comment of Denmark in Part I, B supra under article 33.

UNITED STATES

Although this article states that an order to pay is not an assignment, it does not expressly state the practical consequence that a drawee is not liable on a cheque. The United States suggests that this article be clarified by an amendment which would expressly state that a drawee is not liable on a cheque.

ARTICLE 36

AUSTRALIA

Under the BEA, acceptance of a cheque by the drawee banker is in theory possible but in practice rare, as the cheque is normally presented simply for payment. However, under the Geneva Convention (Uniform Law on Cheques - ULC) it is not possible for a cheque to be accepted and a statement of acceptance is disregarded. The Cheques Convention in article 36 follows the ULC by providing that a statement on a cheque indicating certification, confirmation, acceptance, etc. is not an acceptance but nevertheless provides that, where such a statement is written on a cheque, there is an irrebuttable presumption that the statement simply verifies the existence of funds in the hands of the drawee bank. The drawer cannot withdraw those funds nor can the drawee apply them otherwise in payment of the cheque before the expiration of the time limit for the presentment, namely 120 days from the date of the cheque. Given the limited application of this provision to international cheques drawn under the Convention, no difficulty is foreseen with this provision.

DENMARK

This provision is unknown in Denmark and obviously clashes with the provision of section 25 of the Danish Cheques Act according to which only the drawee can certify a cheque.

NORWAY

1. We suggest that article 36 explicitly reflect that it is dealing with certifications etc. by the drawee. As the article now reads, it suggests that somebody else may certify a cheque too.

2. It is unclear and not discussed in the commentary whether certification etc. of a cheque by the drawee precludes the drawer from countermanding the cheque. The language of article 36 suggests that the answer is no. However, paragraph 5 cf 2 of the commentary to article 66 indicate a yes. The ambiguity ought to be settled in the final text.

3. According to articles 40 following, a cheque may be guaranteed. As far as we have been able to see, there is nothing in the Draft that prevents the drawee from guaranteeing the cheque for the account of the drawer if the drawer asks for it. The drawee will then be liable on the instrument in his capacity as guarantor to the same extent as the drawer unless he has stipulated otherwise, cf article 41. This mechanism provides for a convenient flexibility. We are not inclined to support inclusion of paragraph (2) in the final text.

SPAIN

Article 36 provides for the possibility of a cheque containing "special" statements. However, the article over-simplifies the question of "special cheques", attributing identical consequences to hypotheses which are not the same and which are generally recognized as having different effects. Having regard to the various possibilities listed in article 36, which refers even to "any other equivalent expression" and might include, for example, the guaranteeing of the cheque, their diversity should be recognized and they should be regulated accordingly.

Article 36(1)

YUGOSLAVIA

Article 36(1) identifies visa and certification on a cheque. In this respect, account should be taken that the legal position of the drawee /bank/ and his responsibility as well are not identical in both cases.

Article 36(2)

CANADA

Canada has already referred to what we consider to be the extremely undesirable leniency of the draft Conventions in appearing to sanction local variation on matters of such fundamental importance to the operation of a cheques Convention as the effect of certification as laid down in this Article. If certification of international cheques is to be promoted, there should be no scope for variation of the effect by local domestic law.

CZECHOSLOVAKIA

We recommend that the text of paragraph (2) be adopted.

UNION OF SOVIET SOCIALIST REPUBLICS

It would be desirable to retain paragraph (2) in this article.

ARTICLE 37

Article 37(2)

SPAIN

The prohibition in article 37, paragraph (2), of exclusion or limitation by the drawer of his liability contrasts with the rule laid down in respect of the bill of exchange. The rule laid down for cheques is the correct one, as is stated in the comments on the draft Convention on International Bills of Exchange.

Article 37(3) and (4)

CANADA

We note that articles 37 (3) and (4), which appear to have been adopted by the UNCITRAL Working Group (A/CN.9/210, pars. 94, 95) have not been reproduced in this draft Convention. Was this deletion intentional?

ARTICLE 38

YUGOSLAVIA

There is no justification for enabling the endorser to exclude or limit his own liability by an express stipulation on the cheque /article 38 (2)/. If this can be allowed when a bill is concerned, such a stipulation on the cheque will render it worthless.

ARTICLE 39

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B supra under article 41.

DENMARK

See the comment of Denmark in Part I, B _supra_ under article 41.

FEDERAL REPUBLIC OF GERMANY

See the comment of the Federal Republic of Germany in Part I, B _supra_ under article 41.

JAPAN

See the comment of Japan in Part I, B _supra_ under article 41.

NORWAY

See the comment of Norway in Part I, B _supra_ under article 41.

UNITED STATES

See the comment of the United States in Part I, B _supra_ under article 41.

URUGUAY

This provision is particularly stringent. We suggest that the liability of the person who transfers a cheque should be softened in some manner, at least by reversal of the burden of proof, the injured party having to prove culpability.

YUGOSLAVIA

A mistake must have been made in article 39 (3) since it is illogical that liability on account of any defect on the cheque is incurred only to a holder who took the cheque without knowledge of such defect.

ARTICLE 40

JAPAN

See the comment of Japan in Part I, B _supra_ under article 42.

NORWAY

1. We refer to our comment no. 3 to article 36.

2. Subparagraph (b) of paragraph (4) does not deal with guarantees. We suggest the provisions of article 40 (4)(b) be transferred to article 14 or 15.

YUGOSLAVIA

This article may create difficulties in countries allowing the acceptance of a cheque, because there is not a clear distinction between an endorsement in blank and aval.

ARTICLE 41

DENMARK

The expediency of maintaining rules of law on aval is questionable since, in contrast to bills of exchange, aval is almost non-existent for cheques.

If rules on aval are to continue in existence, the guarantors should in any event be subject to the same rules as those applying to drawer and endorsers. It seems pointless to allow a guarantor to limit his commitment on the cheque (except where partial aval is involved).

ARTICLE 42

UNITED KINGDOM

See the comment of the United Kingdom in Part I, B supra under article 44.

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

ARTICLE 43

AUSTRALIA

Article 43 of the Cheques Convention provides that a cheque must be presented for payment within 120 days after its stated date. Presentment after that time deprives the holder of the right of recourse against indorsers and their guarantors. Delay in presenting the cheque does not relieve the drawer from liability except to the extent of loss suffered because of the delay. Failure to present the cheque for payment, unless dispensed with,

relieves the drawer of the cheque from liability. It is not thought that any difficulty would arise because of the 120 day limit in relation to international cheques, which contrasts with the 12 month period, under s. 80 of the BEA, during which a cheque may be in circulation before becoming stale.

UNITED KINGDOM

This Article causes Her Majesty's Government some difficulty in that conflicting positions are adopted by significant banking interests in the UK. On the one hand it is approved subject to clarification of 43(d) in so far as it appears to be at variance with 43(c) which could be remedied by reading:

"Notwithstanding Article 43(c), a cheque may be presented for payment to the representative or authorised agent of the drawee at a clearing-house."

On the other hand the counter-argument runs that it should be clear that a bank, to which a cheque is presented, has agreed, under the rules of that clearing-house, that the receipt of the cheque by the clearing-house is presentation. Also, so the argument runs, presentation at a clearing-house should only be made by another member of the clearing-house. The counter-argument would lead to a proposed 43(d) which would read:

"A cheque may be presented by the holder or his agent through a clearing-house for payment at the place specified where the holder or the agent making the presentation is a member of that clearing-house."

Article 43(a)

NORWAY

The terms "business day" and "reasonable hour" in paragraph (a) are imprecise. We suggest that the Convention authorize the contracting States to define these terms more precisely in their national legislation.

Article 43(b)

CANADA

Canada agrees with the policy and object of this Article but has two technical objections to it. In the first place, we consider that the time limit ought to be 180 days as this would coincide with North American practice and, we believe, the requirements of the Uniform Commercial Code, Article 4-404. The practical advantages of having a uniform period for both domestic and international instruments would be salutory and significant. At the same time, we are concerned that there is a tendency for stated maxima to become common minima. Our practice in Canada is very clearly to exercise reasonable diligence to collect a cheque as quickly as is reasonably possible. We understand that this is a commonly-held practical objective and we consider

that the Convention ought to recognize it by imposing a duty upon holders and their collecting agents to present cheques reasonably promptly. Canada does not advocate any legal sanction for failure to present within the 180 days. However, the draftsmen might wish to consider a provision such as in the Canadian Bills of Exchange Act section 166 which places the risk of the drawee's failure upon the holder where presentment has been unreasonably delayed.

Section 166 of the Canadian Act provides that:

"166.(1) Subject to this Act,

(a) where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the bank, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which the drawer or person is a creditor of such bank to a larger amount than he would have been had such cheque been paid;

(b) the holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such bank to the extent of such discharge, and entitled to recover the amount from it.

(2) In determining what is a reasonable time, within this section, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case."

CZECHOSLOVAKIA

We feel that the time-limit of 120 days from the date of the cheque for presentation of the cheque for payment is correct. It is, however, not clear whether the drawee may pay also after the lapse of this time limit unless the drawer countermands the order to the drawee to pay the cheque. It would implicitly ensue from the provision of article 45 (second sentence), that the drawee should even be obliged to honour the cheque after the lapse of the said time-limit, unless payment has been countermanded, since the drawer is not released from his responsibility by late presentation of the cheque for payment. It would be useful to clarify this provision. Similarly, we recommend to give a corresponding clarification also to Art. 66.

FEDERAL REPUBLIC OF GERMANY

The period of presentation of 120 days seems to be too long. There is a danger of the cheque being used not merely as a means of payment but also as a financing instrument.

SPAIN

The very considerable amount of time allowed in article 43 for presentment of the cheque (120 days) contrasts with the period allowed under Spanish law. The time allowed seems excessive, considering the fact that the drawer is not exempted from liability even upon expiry of this period.

Furthermore, if the liability of the drawer continues, that of his guarantor should continue also. This is expressly provided for in article 52 in the case of delay in protesting, but not in article 45 in the case of delay in presentment. Although the liability of the guarantor seems clear, it should be expressly stated, particularly in view of the mainly objective character of the guarantee ("aval") under the Convention.

ARTICLE 44

INDONESIA

The provision of this article which provides for the excuse of delay in making presentment of a cheque for payment is also set forth in the Indonesian Commercial Code. However, the Indonesian Commercial Code does not stipulate the grounds on which such presentment is dispensed with.

Therefore this article is more advantageous to the holder.

NORWAY

We suggest that the expression "reasonable diligence" be worked out in some detail in the proposed commentary to the final text.

SPAIN

The causes of cessation of the obligation to present a cheque for payment could include one similar to that contained in article 52, paragraph (2) (d), of the draft Convention on International Bills of Exchange and Promissory Notes. The absence of such a clause in the draft Convention in International Cheques is unjustified.

Article 44(1)

CANADA

As with Article 52(1) of the Bills of Exchange Convention this ground for dispensing with presentment should, in the view of Canada, be qualified by requiring only reasonable efforts by the holder or its collecting agent.

Article 44(2

GERMAN DEMOCRATIC REPUBLIC

The provisions in paragraph (2) are contrary to the nature of cheques. Apart from that, they would be of no practical consequence. Therefore, we propose to delete this paragraph.

UNION OF SOVIET SOCIALIST REPUBLIS

The purpose of including paragraph (2) (a) in the draft Convention is understandable in view of the consequences specified in Article 46 (1) (b). However, noting the waiver of presentment on the cheque essentially conflicts with the nature of a cheque, which in accordance with the order contained in it is subject to payment by the bank upon presentment of the instrument itself. It can be assumed that international cheques with a note of this kind will not in practice be drawn (any more than they are at present). In accordance with the Geneva Convention (ULC, Article 43) even inclusion in the cheque by the parties of a proviso "without costs", "without protest", etc. does not relieve the holder of the requirement to present the cheque for payment within a set time, and this provision of existing international uniform law appears to be correct and reasonable. It is accordingly suggested that paragraph (2) be deleted.

Remarks similar to those made on the Draft Convention on International Bills of Exchange and International Promissory Notes are applicable with regard to waiver of presentment "by implication".

Article 44(2)(a)

CZECHOSLOVAKIA

We propose to delete this provision.

ARTICLE 45

DENMARK

This provision is wider in scope than the corresponding Danish legislation. First, it would be fair to grant the same status to guarantors et al. as that enjoyed by the drawer, cf. the commentary on Art. 41 above. Second, it will be purposeful to amplify this provision with a compensation clause corresponding to section 57 of the Danish Cheques Act which provides that the holder of a dishonoured cheque shall be allowed a claim against the drawer and any endorsers based on the doctrine of unjustified enrichment.

NORWAY

1. The guarantor of the drawer is not included in sentence 2 of article 45. However, he is included in paragraph (2) of article 52. The commentary gives no reason for this important difference between the two articles. We suggest the guarantor of the drawer be included in sentence 2 of article 45. If the guarantor wants the benefit of due presentment for payment being an absolute condition precedent to his liability, he may stipulate for it, cf article 41.

2. Articles 45 and 52 are analogous and ought to have the same structure. We suggest article 45 be divided into two paragraphs as article 52 is. Article 45 may read, cf also our comment no. 1:

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

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

3. The provisions of article 45 and 52 on the liability of the drawer are an improvement upon the Geneva Convention (ULC). The drawer will be unable to make an inequitable gain in the event of preclusion of recourse. However, an endorser may do so. The right of recourse being a right on the instrument, it seems unclear whether it will be contrary to the Convention in national law to furnish the holder with a claim off the instrument to such an inequitable gain. We suggest that the Convention state that the contracting States are free to do so, cf article 25 of the Geneva Convention Annex II. However, the question is considerably less important as regards the Draft Convention on cheques than as regards the Draft Convention on bills of exchange and promissory notes.

SPAIN

Delay in presentment of a cheque for payment (article 45) or the withholding of protest (article 52) frees the endorsers from liability but not the drawer. This solution is similar to that adopted in Spanish law where, however, the drawer is given a greater opportunity to protect himself from damage caused by the delay (see article 537 of the Spanish Commercial Code).

ARTICLE 46

DENMARK

See the comment of Denmark in Part I, B <u>supra</u> under article 54.

ARTICLE 47

FEDERAL REPUBLIC OF GERMANY

This provision according to which a post-dated cheque shall not be paid before the date mentioned for payment would make it possible to use the international cheque as a credit voucher. In the Federal Government's opinion the cheque, contrary to bill of exchange, should only have the function of a short-term payment voucher.

INDONESIA

The post-dated cheque referred to in this article is also dealt with in the Indonesian Commercial Code.

However, the Indonesian Commercial Code does not provide the remedy for a refusal by the drawee to pay before the stated date, which according to this article does not constitute a dishonour by non-payment.

URUGUAY

This provision is incompatible with the prohibition in article 11 of specification of a maturity date.

ARTICLE 48

DENMARK

See the comment of Denmark in Part I, B _supra_ under article 55.

URUGUAY

See the comment of Uruguay in Part I, B _supra_ under article 55.

ARTICLE 49

Article 49(2)

UNITED STATES

See the comment of the United States in Part I, B _supra_ under article 56(2).

Article 49(3)

NORWAY

See the comment of Norway in Part I, B *supra* under article 56(3).

ARTICLE 50

CZECHOSLOVAKIA

We recommend a modification to the effect that protest for dishonour of the cheque by non-payment may be made within the time-limit for presentation of the cheque for payment.

UNION OF SOVIET SOCIALIST REPUBLICS

It would be desirable to amend this Article by accepting a provision in keeping with the Geneva Convention (ULC, Article 41), viz.:

"Protest for dishonour of a cheque by non-payment must be made before the expiry of the time limit for presentment of the cheque. If presentment took place on the last day of the time allowed, protest may be made on the next business day".

ARTICLE 51

Article 51(2)(a)

CZECHOSLOVAKIA

See the comment of Czechoslovakia in Part I, B *supra* under article 58(2)(a).

HUNGARY

See the comment of Hungary in Part I, B *supra* under article 58(2)(a).

UNION OF SOVIET SOCIALIST REPUBLICS

See the comment of the USSR in Part I, B *supra* under article 58(2)(a).

ARTICLE 52

DENMARK

This provision is wider in scope than its equivalent in the Danish Cheques Act Art. 57 (claim based on the doctrine of unjustified enrichment) as it does not render the drawer liable. Moreover, endorsers and their guarantors, if any, are discharged, which again does not harmonise with said provision of the Danish Cheques Act.

NORWAY

See the comments of Norway to article 45. A comma is missing after the words "duly protested" in paragraph (1).

ARTICLE 53

FEDERAL REPUBLIC OF GERMANY

The suggested extension of the duties to give notice which is different from the Geneva system seems hardly to be practicable: on the one hand, it may lead to all persons concerned being given notice by all others; on the other hand, the persons party to a cheque often only know their immediate previous holder.

NORWAY

1. Paragraph (2) poses a question of interpretation. Who is the party immediately preceding a guarantor, the party for whom he has guaranteed cf article 42, or the party immediately preceding that party?

2. With reference to paragraph (2) and the example in the commentary, we mention that according to the language of paragraph (2), the person B in the example must give notice of dishonour to A when he is notified by C.

ARTICLE 56

URUGUAY

In order to facilitate implementation of the provision in the various countries which will adopt the Convention, it would be desirable to explain the concept of "reasonable diligence", or to provide some guidelines which would enable judges to interpret it in a more or less uniform manner.

Article 56(2)(b)

CZECHOSLOVAKIA

We suggest the deletion of the words "or by implication".

HUNGARY

See the comment of Hungary in Part I, B *supra* under article 58(2)(a).

UNION OF SOVIET SOCIALIST REPUBLICS

See the comment of the USSR in Part I, B *supra* under article 52.

ARTICLE 59

NORWAY

See the comment of Norway in Part I, B *supra* under article 66(1)(b)(ii).

Article 59(3)

UNITED KINGDOM

See the comment of the United Kingdom in Part I, B *supra* under article 66(2).

CHAPTER SIX. DISCHARGE

ARTCILE 61

Article 61(2)

NORWAY

See the comment of Norway in Part I, B *supra* under article 68(3).

UNITED STATES

See the comment of the United States in Part I, B *supra* under article 68(3).

ARTICLE 62

DENMARK

The provisions do no clearly specify whether the drawee is allowed to refuse partial payment, which it ought to be allowed to do.

INDONESIA

See the comment of Indonesia in Part I, B supra under article 69.

NORWAY

The word "authenticated" appears in paragraphs (4)(b) and (6). We cannot see that the word has any function in the contexts in which it appears. We therefore suggest that it be deleted.

ARTICLE 63

INDONESIA

See the comment of Indonesia in Part I, B supra under article 70.

ARTICLE 66

INDONESIA

The countermand of a cheque according to this article is effective from the date of the order to stop payment, and the drawee bank must comply with the countermand of the drawer. Such countermand, according to the Indonesian Commercial Code, is without effect until the time limit for presentment. The provision in this article provides legal certainty to the drawee bank.

URUGUAY

We feel that this provision is undesirable as it weakens confidence in the instrument.

In Uruguayan internal law a cheque is an irrevocable order. Should the draft Convention be adopted with the present provision maintained, Uruguay will have to enter appropriate reservations.

CHAPTER SEVEN. CROSSED CHEQUES AND CHEQUES PAYABLE IN ACCOUNT

ARTICLES 68, 69, 70, 71 and 72

AUSTRALIA

Article 68

There is no provision in article 68 corresponding to s.86 of the BEA which provides that a bank paying in good faith and without negligence according to the crossing is treated as if it had paid the true owner. In this respect article 68 follows the ULC rather than the BEA. However, it is noted that article 25(2) specifically leaves matters relating to the liability of a party or drawee who pays, or of an indorsee for collection who collects, a cheque on which there is a forged indorsement, to be regulated by national law.

UNITED STATES

Articles 68 - 72

Crossed cheques and cheques payable in account are unknown in the United States. It is questionable whether persons in the United States would know how to handle these cheques properly. It is possible that bank employees who handle cheques in bulk could be educated to identify these unusual items and to refer them to knowledgeable superiors. However, that would still not protect members of the general public, who also handle cheques regularly but would not be aware of the specialized rules concerning these unusual items. Thus, crossed cheques would confuse an unsuspecting public and might present opportunities for fraud if they were usable in the United States.

Further, even proper use of crossed cheques or cheques payable in account would not provide in the United States the protection expected by the foreign drawer, because the bank-customer relationship is quite different in the United States from what it appears to be in countries where such items are in regular use. In the United States, the bank-customer relationship can be more casual. United States banks do not usually investigate the past history of deposit account customers, and some banks do not even investigate the identity of such customers, so long as they are dealing with collected funds. Thus, the thief who steals a crossed cheque or cheque payable in account would probably be able in the United States to establish an account and realize on it. And, if he steals such a cheque before it reaches the payee, the loss would fall on the foreign drawer who expects to be protected.

For these reasons, the United States suggests that the use of crossed cheques and cheques payable in account in the United States would not protect parties, but might even create new avenues for potential fraud, both on all original parties to the instrument and on the general public. A possible solution might be to allow states ratifying the Convention on International Cheques to omit Chapter seven (Articles 68 -72) by an appropriate reservation.

INDONESIA

Article 71

The Indonesian Commercial Code does not contain a provision along the lines set forth in this article. Since this article permits the transferee to acquire the rights of a protected holder, we are inclined to adopt this provision.

JAPAN

Articles 68 - 71

The Japanese Government believes it essential to retain the provisions on crossed cheques, which are similar to those found in the British Bills of Exchange Act and in the Geneva Uniform Law. The non-negotiable crossed cheque which would be stablished under Article 71 is confusing, and the provision should, therefore, be deleted.

SPAIN

Articles 68-71

The draft Convention devotes particular attention to two cases: that of the crossed cheque and that of the cheque payable in account. The Convention provides that the consequences of failure to "cross" a cheque or to indicate that it is payable in account are limited to liability for damages, but there is no reference to the question of legitimation or to the discharging effects of payment. Furthermore, the distinction between the protected and the non-protected holder is again made in article 71, which indicates some consequences of the entry of the words "not negotiable". These seem to be inconsistent with the provision in article 18.

On the whole, the draft Convention's rules concerning special cheques are inadequate. The question should be dealt with more fully or, alternatively, should not be referred to at all in the Convention, which should confine itself to regulating the general prototype of cheque, so that special cheques would be left subject to the applicable national law. We would, however, prefer the first solution.

CHAPTER EIGHT. LOST CHEQUES

ARTICLE 73

DENMARK

See the comment of Denmark in Part I, B supra under article 74.

INDONESIA

See the comment of Indonesia in Part I, B supra under article 74.

JAPAN

See the comment of Japan in Part I, B supra under article 74.

NORWAY

See the comment of Norway in Part I, B supra under article 74.

SPAIN

Article 73 contains a paragraph (3) which is lacking in the corresponding article of 74 of the draft Convention on International Bills of Exchange and Promissory Notes. Its omission from the latter text is unjustified. The case of non-transferability is regulated in both drafts (see article 18 for the case of cheques and article 16 for the case of bills of exchange and promissory notes).

ARTICLE 74

INDONESIA

See the comment of Indonesia in Part I, B supra under article 75.

ARTICLE 75

JAPAN

See the comment of Japan in Part I, B supra under article 76.

NORWAY

See the comment of Norway in Part I, B supra under article 76.

ARTICLE 78

NORWAY

See the comment of Norway in Part I, B supra under article 79.

UNITED STATES

See the comment of the United States in Part I, B *supra* under article 79.

CHAPTER NINE. LIMITATION (PRESCRIPTION)

ARTICLE 79

DENMARK

See the comment of Denmark in Part I, B *supra* under article 80.

INDONESIA

See the comment of Indonesia in Part I, B *supra* under article 80.

JAPAN

See the comment of Japan in Part I, B *supra* under article 80.

NORWAY

See the comment of Norway in Part I, B *supra* under article 80.

URUGUAY

We suggest that the provision be worded as follows:

"A right of action arising on a cheque shall cease to exist after four years have elapsed ...."

The content of the rule will thus correspond to the *nomen juris* of the chapter.