

UNITED NATIONS  
GENERAL  
ASSEMBLY



Distr.  
GENERAL

A/CN.9/249  
7 March 1984



28299

ORIGINAL: ENGLISH

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:

Major controversial and other issues

Note by the Secretariat

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## INTRODUCTION

1. The United Nations Commission on International Trade Law, at its sixteenth session (24 May - 3 June 1983), decided to devote part of its seventeenth session to a substantive discussion of the draft Convention on International Bills of Exchange and International Promissory Notes and the draft Convention on International Cheques. To this end it requested the Secretariat to identify key features and major controversial issues that may be inferred from the comments of Governments and international organizations on the draft Conventions. 1/

2. This note has been prepared in response to the Commission's request. It analyzes the comments of 24 Governments 2/ to the extent that these comments reveal major problems and substantial controversies; an analytical compilation of the comments submitted by Governments and the International Monetary Fund is contained in document A/CN.9/248.

3. The text of the draft Convention on International Bills of Exchange and International Promissory Notes is set forth in document A/CN.9/211, and the text of the draft Convention on International Cheques in document A/CN.9/212. The commentary on the draft Convention on International Bills of Exchange and International Promissory Notes is contained in document A/CN.9/213, and the commentary on the draft Convention on International Cheques in document A/CN.9/214.

4. This note is in three parts. Part I analyzes the major issues raised by Governments in their general comments on the draft Conventions. Part II deals with the following subject-matters in respect of which there appear to be major controversial issues: A. Forged endorsements; B. The concept of holder and protected holder; C. Liability of a transferor by mere delivery; D. Crossed cheques and cheques payable in account. Part III sets forth additional issues raised in the comments by Governments.

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1/ Report of the United Nations Commission on International Trade Law on the work of its sixteenth session (1983), Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17), para. 80.

2/ 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 and Yugoslavia.

PART I: GENERAL COMMENTS ON THE DRAFT CONVENTIONS

5. An analytical survey of the general comments of Governments on the draft Conventions obviously cannot reflect the nuances and differences of emphasis which only a reading of the full text of the comments will reveal. Reference is therefore made to document A/CN.9/248 which reproduces in Part I, A, the general comments on the draft Convention on International Bills of Exchange and International Promissory Notes and in Part II, A, the general comments on the draft Convention on International Cheques.

A. Draft Convention on International Bills of Exchange and International Promissory Notes

6. The comments show that a majority of the responding Governments 3/ are of the general view that:

- (a) The draft Convention represents an acceptable and workable compromise between the civil law and common law systems;
- (b) The draft Convention generally simplifies the issue, negotiation and payment of the proposed instruments;
- (c) The draft Convention provides certainty in the rules applicable to international commercial transactions and obviates the application of conflict of laws rules;
- (d) The text of the draft Convention is well organized, detailed and of relevance to modern business practices and it solves satisfactorily the problems arising in the context of settling international payment transactions by means of negotiable instruments.

Most of the Governments referred to above are therefore of the view that the draft Convention on International Bills of Exchange and International Promissory Notes constitutes a suitable basis for the adoption of an international convention on the subject.

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3/ Australia, Canada, China, Czechoslovakia, Finland, German Democratic Republic, Hungary, Indonesia, Japan, Norway, Spain, USSR, United States, Uruguay, Yugoslavia.

7. Several Governments, with different emphasis, <sup>4/</sup> express doubt about the advantages of adopting a new Convention on International Bills of Exchange and International Promissory Notes. The arguments of these Governments may be summarized as follows:

- (a) The establishment of a third system of negotiable instruments law does not add measurably to legal certainty;
- (b) Because of the complexity of its provisions, a new convention in the form currently proposed has little or no chance to enter into force;
- (c) A convention of the scope proposed by the draft would be effective only if it would be mandatory;
- (d) The harmonization of the law of negotiable instruments should be focused on the unification of legal rules concerning domestic negotiable instruments or in the alternative further work should be done in respect of a draft convention resulting in uniform rules for both domestic and international instruments;
- (e) The Commission's efforts to bring about unified law should be directed at making the Geneva uniform laws acceptable to the countries of the common law system.

8. Note by the Secretariat: One may roughly formulate the positions taken by responding Governments as follows:

1. The efforts of the Commission should be directed towards the adoption of a Convention on International Bills of Exchange and International Promissory Notes for optional use.
2. The Convention should be of a mandatory character.
3. It is inadvisable to establish a third system of negotiable instruments law.
4. The unification of negotiable instruments law should focus on a revision of the Geneva Conventions of 1930 and 1931 with a view of making them acceptable to countries of the common law system. The draft Convention prepared by the UNCITRAL Working Group could serve as a suitable basis for such work.

9. In discussing the above issues the Commission may wish to recall that at its second session (3-31 March 1969) it took its decision in respect of work on negotiable instruments after having considered the following three issues:

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<sup>4/</sup> Austria, Federal Republic of Germany; to lesser degree: Netherlands, Sweden, United Kingdom.

- (a) Securing a wider acceptance of the Geneva Conventions of 1930 and 1931;
- (b) Revising the Geneva Conventions of 1930 and 1931 with a view to making them more acceptable to countries following the Anglo-American legal system;
- (c) Creating a new negotiable instrument.

10. After further study and taking into account the replies of Governments and international organizations to a questionnaire, the Commission at its third session (6-30 April 1970) was unanimous in considering that "the only viable approach at the current stage was for it to focus its work on a convention setting forth rules that would be applicable to a special negotiable instrument for use in international transactions. The uniform rules set forth in such a convention would only be applicable to an instrument bearing a heading indicating that it would be subject to the rules of the convention. The use of the instrument would be optional".<sup>5/</sup> At its fourth session (29 March - 20 April 1971), the Commission gave further consideration to the approach it had approved at its third session and expressed general agreement that "this approach would provide the most feasible solution to the problem and difficulties in this field of international payments".<sup>6/</sup>

#### B. Draft Convention on International Cheques

11. Those Governments which express doubt about the advantages of adopting a new Convention on International Bills of Exchange and International Promissory Notes have even more serious reservations as regards a new Convention on International Cheques. Most of the Governments which express support for the draft Convention on International Bills of Exchange and International Promissory Notes also, and for the same reasons, express support for the draft Convention on International Cheques. However, some of these Governments <sup>7/</sup> take a less positive attitude in respect of the draft Convention on International Cheques. The reasons for these doubts and reservations may be summarized as follows:

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<sup>5/</sup> Report of the United Nations Commission on International Trade Law on the work of its third session (1970), Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017), para. 112.

<sup>6/</sup> Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8017), para. 27.

- (a) Since international bills of exchange and international promissory notes are typically employed by the business community in international transactions and cheques are less frequently used in such transactions, there is not the same need for a convention on international cheques as there is for a convention on international bills of exchange and international promissory notes; future efforts should rather be directed towards the law relating to international payments made by electronic funds transfer;
- (b) There would be greater difficulty to adapt banking and commercial practices to a convention on international cheques as currently drafted by reason of the absence of specific collection rules such as those contained in Article 4 of the Uniform Commercial Code and the presence of rules on crossed cheques and cheques payable in account, both unknown in the United States;
- (c) The draft Convention does not do justice to the special function of a cheque as a payment instrument and therefore cannot be considered as a suitable basis for further work in respect of international cheques.

## PART II: MAJOR CONTROVERSIAL ISSUES

12. The issues referred to under A, B and C below are presented here in respect of the draft Convention on International Bills of Exchange and International Promissory Notes but concern equally the draft Convention on International Cheques.

### A. Forged endorsements (articles 14(1)(b) and 23)

13. The comments of Governments show by and large that the proposed scheme in respect of forged endorsements is generally acceptable. However, the following are issues in respect of which there appears to be disagreement:

- (a) The transferee from the forger should not be liable if he took the instrument in good faith (Mexico, Spain);
- (b) The use of the term "party" in article 23(1) would prevent a payee (see definition of "party" in article 4(8)) from recovering compensation for any damage that he may have suffered because of the

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7/ Norway, United States

forgery of his signature (Japan). In this connexion Japan suggests that after the words "any party" the words "and any person whose endorsement is forged", be added;

- (c) Article 23 should state that the amount which may be recovered as compensation is limited to the amount specified in article 66 or 67 (Japan);
- (d) In respect of article 23 (2), the liability of the payer of an instrument or of the endorsee for collection who collects an instrument on which there is a forged endorsement should be specifically regulated (Austria, Hungary, Mexico, USSR). In this connexion it is suggested that the payer or the endorsee for collection should be liable for compensation only if he knew of the forgery (Hungary, Mexico, USSR);
- (e) An exception should be made to the 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. In such situations the loss should be placed on the drawer and not on the taker from the forger (United States).

14. Note by the Secretariat: It would appear that of the five main issues raised in connexion with forged endorsements only the first issue materially affects the compromise proposed in the draft Convention. As regards the issue raised under (b) above, it would seem that it was within the intention of the Working Group that any person whose endorsement was forged should be entitled to recover compensation under article 23. Therefore, the amendment proposed by Japan appears to reflect that intention. With regard to the issue raised under (c) above, the Commission may wish to decide whether article 23 (1) should provide for a limit to the amount of compensation recoverable. If so, the Commission might consider that the compensation recoverable under article 23 (1) may not exceed the amount referred to in article 66 or 67.

B. The concept of holder and protected holder

15. The comments made in respect of articles 4 (7), 25 and 26 of the draft Convention show that several respondents from civil law countries are of the view that the approach of the Geneva uniform laws is to be preferred to that of the draft Convention on the following grounds:

- (a) The draft Convention's approach, in operating a distinction between holder and protected holder, lacks clarity and is complex (Austria, Czechoslovakia, Netherlands, Spain);

- (b) The requirements which must be met by a holder in order to obtain protected holder status are too strict and go beyond those that should be required for a person to be a holder in good faith (Austria, Czechoslovakia, Federal Republic of Germany, Norway, Spain, Yugoslavia). In particular:

(i) Knowledge of a particular claim or defence should not preclude protection against other claims or defences of which the holder had no knowledge (Austria, Federal Republic of Germany, Norway);

(ii) Under the proposed scheme it would be possible that a person who, in taking the instrument, acts knowingly to the detriment of the debtor nevertheless cuts off a defence because his transferor was a protected holder (cf. shelter rule of article 27), whereas under the Geneva uniform laws he would not be so protected (Austria);

- (c) It is difficult to determine, on the basis of the instrument alone, what the rights are of a person in possession of an instrument: is he a holder or a protected holder? (Austria);
- (d) The question as to what constitutes a valid claim to the instrument is not regulated but left to the applicable law (Austria).

16. The following suggestions are made:

- (a) in respect of article 4 (7) (definition of protected holder):

(i) It is unacceptable that a holder cannot be a protected holder if the instrument was incomplete at the time he became a holder, even if the instrument was subsequently completed by that holder in accordance with the authority given. For example, under the draft Convention such a holder would not be able to cut off a defence unrelated to the element left uncompleted, but completed as authorized (Finland, Norway);

(ii) The definition of protected holder is not sufficiently comprehensive. In particular the criterion of "regularity" is not clear and requires further study (Japan);

(iii) In sub-paragraph (a) the phrase "referred to in article 25" should be deleted. This limitation is not justified since it would permit a person to attain protected holder status even though, when taking the instrument, he knew of breach of contract defences or fraud in the inducement in the transaction underlying the original issue of the instrument (United States);

- (b) in respect of article 25 (rights of a holder):

The defences that may be set up against a holder should be listed (Austria); a list of specific cross references to articles of the Convention furnishing defences should be added (United States);



(c) in respect of article 26 (rights of a protected holder):

(i) The protected holder should be protected against the defence of non est factum (Denmark); the words "or on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to his negligence" should be deleted (Finland);

(ii) the defences referred to in article 26 (c) are incomplete; preference is given to leaving the question as to what constitutes a real defence to the applicable law (Netherlands).

C. Liability of a transferor by mere delivery

17. Several respondents oppose the provision laid down in article 41, which imposes liability, off the instrument, on a transferor by mere delivery, and propose to delete it (Czechoslovakia, Denmark, Federal Republic of Germany, Japan, Netherlands, Norway) or, if the provision is to be retained, to reexamine it in relation to the liability of a transferor by endorsement and delivery (Japan, Netherlands). The view is also expressed that the provision as now drafted would impair the circulation of the instrument (Federal Republic of Germany, Netherlands). In particular, several respondents note that article 41 would impose greater liability on transferors by mere delivery than on transferors by endorsement and delivery (Japan, Netherlands, Norway, United States).

18. The following suggestions are made:

- (a) The liability of the transferor by mere delivery should be left to the applicable national law (Czechoslovakia);
- (b) The application of article 41 (1) (a) should be restricted to the forged signature of the drawer (Norway);
- (c) The words, in paragraph (1), "by mere delivery" should be deleted so as to make the warranty liability of article 41 applicable to both endorsers and non-endorsers (United States).

D. Crossed cheques and cheques payable in account  
(Articles 68-72 of the draft Convention on International Cheques)

19. The United States suggests, for the reasons stated in its comments on articles 68-72, that thought should be given to allowing contracting States to omit Chapter seven (articles 68-72) of the draft Convention by an appropriate reservation.

20. Japan, while in favour of retaining the provisions on crossed cheques, is of the view that the non-negotiable crossed cheque which article 71 establishes is confusing and proposes deletion of that article.

PART III: ADDITIONAL ISSUES

21. In addition to the major controversial issues set forth in Parts I and II above, the comments raise many other issues of substance and drafting. Though these issues are of the kind that could be left to a conference of plenipotentiaries, the Commission may wish to discuss some or all of the issues set forth below.

A. Draft Convention on International Bills of Exchange and International Promissory Notes

22. Article 1 (2) (e): "international elements"

- (a) Japan queries whether an instrument should qualify as an international instrument 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. It is proposed that the places listed in paragraph (2) (e) should be listed in distinct groupings and that the instrument should be considered an international instrument only if at least one of the places in one group and one of the places in another group are situated in different States.
- (b) Japan is also of the view that of the places listed in paragraph (2) (e), the place where the instrument is drawn or made and the place of payment are to be regarded as essential factors determining the law applicable to issues not covered by the Convention. For this reason Japan proposes that the place of drawing and the place of payment be made essential requisites for purposes of the application of the Convention.

23. Article 4 (10) and article X: "definition of signature"

- (a) Canada opposes a provision along the lines of article X on the ground that permitting contracting parties to vary the legal effect of signatures other than handwritten signatures would erode the advantages of uniform rules. Canada therefore proposes the deletion of article X. The German Democratic Republic, Hungary and the Union of Soviet Socialist Republics express strong support for the retention of article X and for the inclusion of an article along the lines of article 12 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).
- (b) Denmark and the Federal Republic of Germany express doubt about including a provision in the Convention allowing for signatures that are made by mechanical and other means.
- (c) Mexico and Spain are of the view that a signature made by the unauthorized use of mechanical means should not be deemed to be a forged signature.

- (d) The United States proposes that the definition of forged signature should include both unauthorized signatures and those beyond the scope of an agent's authority.

24. Article 4 (11): "definition of money"

- (a) Czechoslovakia, the United States and the International Monetary Fund suggest that the definition of money be improved.
- (b) Specifically, the United States proposes that the definition be amended to include both official physical currency and immediately available credit.
- (c) The International Monetary Fund proposes a definition of money or currency as follows:

"'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."

25. Article 6 (a): "rate of interest"

- (a) Czechoslovakia and the United States propose that where an instrument is to be paid with interest the interest rate should be stated.
- (b) The United States proposes that the provision should permit floating rate notes to be negotiable.

26. Article 7 (4): "rate of interest stipulated"

China notes that owing to constant changes in international market rates it is hardly possible to fix the interest rate on a time bill in advance and that sometimes the interest rate is calculated at a floating rate prevailing at the date of payment (see also the observations of the United States under article 6 (a)). China proposes that the following phrase should be added to paragraph (4): "or indicates that interest is to be paid at the international market rate at a definite time and place".

27. Article 10: "bill drawn by drawer on himself"

China observes that a bill drawn by the drawer on himself is by nature a promissory note and that accordingly the holder may treat it as such under the provisions governing international promissory notes. For this reason China proposes that the article be supplemented by the following wording: "and regarded by the holder as an international promissory note".

28. Article 11: "incomplete instrument"

China proposes that this article be deleted since the provision may give rise to unnecessary disputes.

29. Articles 30, 52, 58, 63: "legal effects of implied act or omission"

The draft Convention recognizes in several provisions the legal effect of an act or omission which is not express but implied. Czechoslovakia, the German Democratic Republic, Hungary and the Union of Soviet Socialist Republics oppose this concept.

30. Article 34 (2): "exclusion of liability by drawer"

Denmark, Norway and Spain are opposed to a provision permitting the drawer to exclude his liability.

31. Article 42: "guarantee"

- (a) The Federal Republic of Germany objects to the presumption that if a guarantor has not specified the person for whom he has become guarantor that person is the acceptor or the drawee in the case of a bill and the maker in the case of a note on the ground that the intention of the guarantor is usually expressed by the fact that the guarantor's signature is placed next to that of the person for whom the guarantee is given.
- (b) Japan proposes that article 42 should include a provision to the effect that an incomplete instrument may be guaranteed before it has been signed by the drawer or the maker or while otherwise incomplete. Japan notes that the draft Convention makes provision for the acceptance by the drawee of an incomplete instrument.
- (c) Spain queries the provision allowing a guarantee to be given for the drawee.

32. Articles 48 and 52: "bankruptcy of drawee"

The German Democratic Republic, Hungary, Spain and the Union of Soviet Socialist Republics are of the view that presentment for acceptance and presentment for payment should be dispensed with in the case where the drawee is bankrupt or insolvent and that an immediate right of recourse should then be available to the holder.

33. Article 58 (2) (d): "dispensation of protest for dishonour"

Spain objects to this provision which dispenses with protest for dishonour by non-acceptance or non-payment if presentment for acceptance or for payment is dispensed with.

34. Article 68 (3): "ius tertii"

- (a) Norway suggests that where a third person has asserted a claim to the instrument the provision of article 68 (3) should provide that the law of the place of payment should determine whether payment of the amount of the instrument into court should constitute a discharge.

- (b) The United States proposes that article 68 be amended to make an exception to discharge of the payer where a third party claimant both notifies the payer of its claim and provides security deemed adequate by the payer.

**B. Draft Convention on International Cheques**

**35. Article 4: "postdated cheques"**

- (a) Uruguay objects to this provision which permits the cheque to bear a date other than the date on which it is drawn, on the ground that to so date a cheque is a criminal offense in Uruguay.
- (b) The Federal Republic of Germany, in the context of article 47 which provides that a postdated cheque shall not be paid before its date, objects to the use of postdated cheques on the ground that this would make it possible to use the international cheque as a credit voucher.

**Note by the Secretariat:** Under the Geneva Uniform Law on Cheques, article 28, a postdated cheque is payable on demand.

**36. Article 12: "cheques drawn by a bank on itself"**

The Federal Republic of Germany and Norway are of the view that to allow banks to draw cheques on themselves would amount to the creation of money and that this would not be advisable.

**37. Article 24: "transfer after expiration of time for presentment"**

Uruguay objects to this provision.

**38. Article 66: "stop payment"**

Uruguay objects to this provision under which the drawer is entitled to countermand the order to the drawee to pay the cheque.

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**39. Note by the Secretariat:** Finally, the Secretariat draws the attention of the Commission to article 66 (2) and (3) of the draft Convention on International Bills of Exchange and International Promissory Notes and articles 36 (2) and 59 (3) of the draft Convention on International Cheques which contain square brackets.