II. INTERNATIONAL PAYMENTS

1. Report of the Working Group on International Negotiable Instruments on the work of its third session (Geneva, 6-17 January 1975) (A/CN.9/99)*

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INTRODUCTION

1. In response to decisions by the United Nations Commission on International Trade Law (UNCITRAL), the Secretary-General prepared a "Draft uniform law on international bills of exchange and international promissory notes, with commentary" (ACN.9/WG.IV/WP.2).†[1] At its fifth session (1972), the Commission established a Working Group on International Negotiable Instruments. The Commission requested that the above draft uniform law be submitted to the Working Group and entrusted the Working Group with the preparation of a final draft.[2]

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

3. The second session of the Working Group was held in New York in January 1974. At that session the Working Group continued consideration of articles of the draft uniform law relating to the rights and liabilities of signatories (arts. 41 to 45) and considered articles in respect of presentment, dishonour and recourse, including the legal effects of protest and notice of dishonour (arts. 46 to 62).

4. The Working Group held its third session at the United Nations Office at Geneva from 6 to 17 January 1975. The Working Group consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America. All the members of the Working Group were represented. The session was also attended by observers of the following members of the Commission: Argentina, Australia, Austria, Brazil, Bulgaria, Czechoslovakia, Germany (Federal Republic of), Hungary, Japan and Poland, and by observers from the International Monetary Fund, Bank for International Settlements, Hague Conference on Private International Law, Commission of the European Communities, Council of the European Communities and the European Banking Federation.

5. The Working Group elected the following officers:

Chairman: Mr. René Roblot (France)

Rapporteur: Mr. Roberto Luis Mantilla-Molina (Mexico)

6. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.3); the draft uniform law on international bills of exchange and international promissory notes, with commentary (A/CN.9/WG.IV/WP.2)† revised text of articles 5 (9) (b) and 12 to 41 of the uniform law (A/CN.9/WG.IV/CRP.3); note by the Secretariat on

* 6 February 1975.

† UNCITRAL Yearbook, vol. IV: 1973, part two, II, 2.

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

[2] UNCITRAL, report on the fifth session (1972), para. 61 (1) (*a*), UNCITRAL Yearbook, vol. III: 1972, part one, II, A).

[3] Report of the Working Group on International Negotiable Instruments on the work of its first session (Geneva, 8-19 January 1973), A/CN.9/77 (UNCITRAL Yearbook, vol. IV: 1973, part two, II, 1).

the desirability of preparing uniform rules applicable to international cheques (A/CN.9/WG.IV/CRP.5),‡ revised text of article 74 of the uniform law (A/CN.9/WG.IV/CRP.7); report of the Working Group on International Negotiable Instruments on the work of its first session (A/CN.9/77),§ and report of the Working Group on International Negotiable Instruments on the work of its second session (A/CN.9/86).||

DELIBERATIONS AND CONCLUSIONS

7. As at its first and second sessions, the Working Group decided to concentrate its work on the substance of the draft uniform law and to request the Secretariat to prepare a revised draft of those articles in respect of which its deliberations would indicate modifications of substance or of style.

8. In the course of its session, the Working Group considered articles 63 to 78 of the draft uniform law. The Group also held a general discussion on the desirability of including in the uniform law provisions governing the limitation of legal proceedings and the prescription of rights arising under an international instrument. A summary of the Group's deliberations and its conclusions are set forth in paragraphs 10 to 130 of this report.

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

NOTICE OF DISHONOUR *(continued)*[4]

(ARTS. 63 TO 66)

Article 63

"Notice of dishonour may be given in writing or orally and in any terms which identify the instrument and state that it has been dishonoured. The return of the dishonoured instrument shall be sufficient notice."

10. The purpose of notice of dishonour is to inform parties secondarily liable that the instrument was dishonoured by non-acceptance or by non-payment. Article 63 lays down that the manner and form in which such notice is given is immaterial provided that the notice identifies the instrument.

11. The Working Group was agreed that the giving of notice of dishonour should not be subject to any formal requirements. The Group also was agreed that notice of dishonour could be given orally.

12. The question was raised whether the words "notice of dishonour may be given in writing or orally" sufficiently covered all possible ways in which notice could be given, such as telex and telegram. The Working Group concluded that the present wording should be modified so as to make it clear that notice of dishonour could be given in any form, including by writing or orally.

13. It was pointed out that the proposed article did not provide a rule regarding the effect of a misdescription such as the rule set forth in section 3-508 (3) of the United States Uniform Commercial Code according to which a "misdescription which does not mislead the party notified does not vitiate the notice . . .". The Working Group, after deliberation, was of the view that the present wording of article 63, namely that notice may be given "in any terms which identify the instrument" sufficiently covered the case of misdescription. However, the Group requested the Secretariat to clarify this point in the commentary to the article.

14. It was suggested that the giving of notice should be understood to imply a demand for payment of the instrument. This suggestion was not retained by the Working Group on the ground that the purpose of notice of dishonour was to inform parties secondarily liable that the instrument had been dishonoured and that the obligation to pay resulted from the uniform law.

15. The view was expressed that article 63, in its present wording, did not make it sufficiently clear whether the purpose of the article was achieved by the mere dispatch of the notice or only by the receipt thereof. The Group was agreed that the requirement to give notice was met by the dispatch of the notice within the prescribed period of time, even if it had not reached the party secondarily liable. The Secretariat was requested to modify the wording of article 63 accordingly.

16. Doubts were raised whether the return of the instrument without any further indication of the reason why it was returned constituted due notice of dishonour. It was noted in this respect that an instrument could be returned for reasons other than dishonour. The Working Group, after deliberation, was of the view that if the instrument was returned for the purpose of notice of dishonour, it should be accompanied by a statement indicating that it had been dishonoured.

17. The Working Group considered:

(*a*) To whom should fall the burden of proving that the requirements of article 63 regarding the giving of notice had been complied with, and

(*b*) Whether a rule specifying this issue should be included in the article.

The Group was agreed that the burden of proof fell to the person who, under article 63, was obliged to give notice, and that article 63 should set forth an express provision to that effect.

Article 64

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

"(*a*) The day of protest or, where protest is dispensed with, the day of dishonour; or

"(*b*) The receipt of notice from another party."

‡ Reproduced in this volume, part two, II, 2.

§ UNCITRAL Yearbook, vol. IV: 1973, part two, II, 1.

|| UNCITRAL Yearbook, vol. V: 1974, part two, II, 1.

[4] The first article on notice of dishonour, article 62, was considered by the Working Group at its second session (see A/CN.9/86, paras. 135-140, UNCITRAL Yearbook, vol. V: 1974, part two, II, 1).

18. Article 64 sets forth the period of time within which notice of dishonour can duly be given. Thus, if the date of maturity of the instrument falls on Monday, the holder may present the bill for payment not only on that day but also on Tuesday or Wednesday (art. 53 (*d*)). In accordance with the decision taken by the Working Group in respect of article 59, protest must be made within the same period of time, i.e., at the latest on Wednesday. Pursuant to article 64, notice of dishonour can duly be given on the day of protest or one of the two business days which follow, i.e., at the latest on Friday.

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

19. The Working Group considered whether the period of three days, as proposed in article 64, was a sufficient time within which notice of dishonour could be given. Under one view, this period was too short because the person presenting the instrument for acceptance or for payment (usually a bank) would need additional time to advise his principal, who might be in another country, that the bill was dishonoured and, subsequently, to receive further instructions. The general view was, however, that it fell to the principal to give, in advance, instructions to his agent regarding the steps to be taken in the event that the instrument was dishonoured. The Working Group, taking into account the views expressed by banking and trade circles that a period of three days was an adequate and practical period in which to give notice, was agreed that the rule set forth in article 64 regarding the period of time within which notice could duly be given should be maintained.

20. In the course of discussion the following questions arose:

(*a*) Is notice of dishonour duly given if given by an authorized agent of the holder or of the endorser who received notice? and

(*b*) If the answer is in the affirmative, should the uniform law set forth a special provision to that effect?

21. As to the first question, the Working Group was agreed that notice of dishonour was duly given if given by an authorized agent of the holder who was in possession of the instrument, even if the instrument had not been endorsed to him or endorsed in blank.

22. As to the second question, the prevailing view was that the conclusion reached under the first question resulted from the relationship between the principal and his agent. This relationship gave rise to a great many complex questions which could not adequately be dealt with within a law on negotiable instruments. Hence, these questions should be left to national law. Furthermore, the Working Group was of the view that, within the compass of negotiable instruments, questions arising from an agency relationship were not restricted to the sole issue of notice of dishonour, but also arose in respect of other issues, such as that of presentment for acceptance. Therefore to deal in the uniform law with agency relationships in all instances where they arose, would complicate matters to the extreme. On the other hand, to deal with an agency in certain instances only might lead to the interpretation that it was excluded in others. One representative expressed disagreement with this view and stated that it would be desirable for the uniform law to include a provision to the effect that, while all rights and liabilities of the parties and of the holder were of a personal nature, certain actions which they could exercise under the uniform law, i.e., presentment for acceptance, protest and notice of dishonour, could be effected by them also through their agents.

23. With regard to the requirement under article 64 that notice of dishonour be given within the time specified, the Working Group was agreed that the article should clarify that such notice should be sent by any means sufficient to bring the dishonour of the instrument promptly to the notice of the party concerned.

Article 65

"(1) Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the holder. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

"(2) Notice of dishonour shall be dispensed with:

"(*a*) Where the drawer or an endorser or a guarantor has waived notice of dishonour expressly or by implication, such waiver shall bind only the party who made it;

"(*b*) Where the cause of delay in giving notice continues to operate beyond 30 days after the last date on which it should have been given;

"(*c*) As regards the drawer of the bill, where the drawer and the drawee are the same person, or the drawer is the person to whom the bill is presented for acceptance or payment, or where the drawer has countermanded payment, or where the drawee or the acceptor is under no obligation to accept or pay the bill;

"(*d*) As regards the endorser, where the endorser is the person to whom the instrument is presented for payment."

24. Paragraph (1) of article 65 sets forth the ground justifying delay in giving notice of dishonour. When delay is excused, the liability of the person, whose duty it is to give notice, for damages (art. 66) is not affected on the ground that there was no due notice. Paragraph (2) states the cases in which notice of dishonour is dispensed with. In such cases, the person obliged to give notice is not liable for damages under article 68. When considering article 62, the Working Group concluded that the holder and the party who received notice were dispensed from giving notice to parties whose address did not appear on the instrument or whose signature or address was illegible (A/CN.9/86, para. 137, (iii)).*

25. The Working Group expressed general agreement with the provisions of article 65.

26. It was observed that article 65, like articles 63 and 64, should make clear that "giving notice of dishonour" had the meaning of sending or dispatching the notice. The Working Group requested the Secretariat to take this observation into account when redrafting the article.

* UNCITRAL Yearbook, vol. V: 1974, part two, II, 1.

Paragraph (1)

27. The Working Group requested the Secretariat to redraft paragraph (1) in the light of the observations made by it in respect of articles 54 (1) and 61 (1) concerning delay in making presentment for payment and in making protest respectively (see A/CN.9/86, paras. 81 and 125).*

Paragraph (2)

Subparagraph (a)

28. The Working Group considered the question whether a waiver of notice of dishonour should constitute a ground for dispensation. The Group agreed with the provision set forth in the subparagraph in view of the fact that, unlike in the case of presentment for payment and in that of making protest, waiver under article 65 affected liability outside, and not on, the instrument.

Subparagraph (b)

29. The view was expressed that, unlike in the case of presentment for payment and in that of making protest, notice of dishonour should be dispensed with when, after the exercise of reasonable diligence, notice could not be given to or did not reach the party sought to be charged. Reference was made in this respect to section 50 (2) (*a*) of the English Bill of Exchange Act, 1882. The Working Group requested the Secretariat to base the redraft of subparagraph (*b*) on that provision.

Subparagraphs (c) and (d)

30. The Working Group expressed agreement with the principles underlying these subparagraphs and requested the Secretariat to draft a general rule covering the provisions set forth therein.

Article 66

"Failure to give due notice of dishonour shall render the holder liable to the drawer, the endorsers and their guarantors for any damages that they may suffer from such failure [provided that the total amount of the damages shall not exceed the amount of the instrument]."

31. Under this article, failure to give notice of dishonour does not discharge parties secondarily liable of liability on the instrument, but renders the party who failed to give notice liable for damages resulting from such failure. The draft article leaves open the question for consideration by the Working Group, whether the total amount of damages should be limited to the amount of the instrument.

32. The Working Group found itself in agreement with the substance of the article, but made a number of suggestions designed to improve clarity.

33. It was suggested that article 66 should make clear that liability existed only for those damages which were caused directly by negligent failure to give notice. Therefore, consequential damages which were not caused directly by such failure should not be taken into consideration.

34. The Working Group was agreed that the total amount of the damages should not exceed the amount of the instrument. Consequently, the provision placed between brackets should be retained. It was suggested that the term "amount of the instrument" should be redrafted so as to include the interest and expenses which were due under articles 67 and 68.

35. It was further suggested that the article should refer also to a party who took up and paid the instrument and proceeded against another party liable to him.

SUM DUE TO THE HOLDER (ART. 67)

Article 67

"The holder may recover from any party liable,

"(*a*) At maturity: the amount of the instrument;

"(*b*) After maturity: the amount of the instrument, interest due at (. . .) per cent per annum above the official rate of discount effective at the place of payment [at the place where the holder has his residence or place of business] calculated on the basis of the number of days and of a year of (365) days, and any expenses of protest and of the notices given;

"(*c*) Before maturity: the amount of the bill, subject to a discount from the date of making payment to the date of maturity, to be calculated at the official rate of discount effective on the date when the recourse is exercised at the place where the holder has his residence or place of business."

36. Article 67 lays down what sums of money the holder may recover from a party liable to him at maturity, after maturity (upon dishonour by non-payment), and before maturity (upon dishonour by non-acceptance). At maturity, the holder may recover the amount of the instrument. The amount may include interest stipulated by the drawer as part of the sum payable (art. 7). After maturity, the holder may recover this amount, delay interest and any expenses of protest and of the notices given. Before maturity, the amount of the instrument is subject to a discount.

Paragraph (a)

37. It was noted that the maturity date of a demand instrument was the date on which the instrument was presented for payment. The Secretariat was requested to take this point into account when redrafting the article.

Paragraph (b)

38. The Working Group expressed general agreement with the substance of paragraph (*b*), subject to the following observations:

(i) The paragraph should specify from which date interest was to run. The Group discussed various possibilities in this respect, e.g., the day of maturity, the day of dishonour and the day of protest. The Group concluded that interest should run from the date of maturity by reason of the fact that the holder had a legitimate expectancy of payment on the date of maturity. In this connexion, the question was raised whether the holder, in the event of presentment on one of the two business days which follow the date of maturity, should nevertheless be entitled to interest as of the date of maturity. The Group concluded that the acceptor or the

* *Ibid.*

party secondarily liable were liable as from the date of maturity since, if payment were made on, say, the second business day after that date, he would have had the benefit of the amount of the instrument. Accordingly, the Group concluded that the holder was entitled to interest as from the date of maturity.

(ii) The paragraph referred to an official rate of discount calculated on the basis of a year of 365 days. It was observed in this respect that some countries had no official rate of discount and that many banks calculated interest on the basis of a year of 360 days. It was suggested that reference to a "reasonable rate" or an "average rate prevailing in respect of bills of a similar type during the period between default and payment" should replace the present wording. Under another view, the rate should be determined by reference to the applicable national law, e.g., the national law applying to similar instruments in similar circumstances. The Working Group requested the Secretariat to conduct an inquiry on this point amongst banking and trade institutions for the purpose of obtaining information on current practices in this respect.

(iii) The paragraph referred to the official rate of discount effective *at the place of payment* [*at the place where the holder had his residence or place of business*]. Under one view, the rate of discount should be the rate prevailing at the place where the holder had his residence or place of business since it was at that place where he would pay interest on the sum of money he might be obliged to borrow as a result of the non-payment of the instrument. Under another view, the holder should have an option between the rate of discount prevailing at either the place of payment or the place where he had his residence or place of business since such an option would best protect his legitimate interests. The Working Group requested the Secretariat to consult with banking and trade institutions and to report back to it at a future session.

(iv) The paragraph referred to "any expenses of protest and of the notices given". The question was raised whether this wording included expenses resulting from bank charges, lawyers' fees and costs of collection. The Working Group concluded that the paragraph should refer to any legitimate or necessary expenses actually incurred, but that lawyers' fees were not to be included in such expenses.

Paragraph (c)

39. The Working Group requested the Secretariat to redraft paragraph (*c*) in the light of the conclusions reached in respect of paragraph (*b*).

40. It was observed that, for the sake of harmony with recent international legislation elsewhere, the phrase "residence or place of business" should be replaced by "habitual residence or seat of business". The Working Group requested the Secretariat to take into account, when redrafting the paragraph, the deliberations and conclusions reached at its first and second sessions in respect of "place of payment" (A/CN.9/77,* para. 134 and A/CN.9/86,** para. 77).

SUM DUE TO A PARTY SECONDARILY LIABLE WHO PAID THE INSTRUMENT (ART. 68)

Article 68

"A party who takes up and pays an instrument may recover from the parties liable to him:

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

"(*b*) Interest due on that sum calculated at the highest permissible legal rate at the place of payment from the day on which he made payment;

"(*c*) Any expenses which he has incurred."

41. Article 68 lays down what sums of money a party secondarily liable who has paid the instrument may recover from the acceptor or the maker, the drawer, prior endorsers and their guarantors. For the purpose of the article, it is not necessary that, when such party paid the instrument, it was endorsed to him or was endorsed in blank.

Paragraph (a)

42. The view was expressed that the words "the entire sum which he was obliged to pay" should be replaced by the words "the entire sum which he has paid". The Working Group requested the Secretariat that the revised text of the article should make clear that the party who had taken up and paid the instrument should be entitled to only that amount which he was obliged to pay and had paid. Thus, where an endorser paid to the holder more than the holder, under article 67, was entitled to, the drawer, an action by the endorser against him under article 68, should not be obliged to pay the amount the endorser had paid but only the amount which the latter should have paid. Similarly, if the endorser had paid to the holder less than the sum which the holder, under article 67, was entitled to, the endorser, under article 68, should be entitled to that sum only.

Paragraph (b)

43. The question was raised at what rate interest is due. It was pointed out that the "highest permissible legal rate", referred to in article 68 (*b*), was unclear and, because such a rate was not found in all countries, impracticable. Moreover, a legal rate, in those countries where it obtained, would not be acceptable because it was often too low. It was suggested that article 68 should refer instead to the highest customary rate or the highest commercial rate. The Working Group, after deliberation, concluded that the rate at which interest should be paid should be the same as the interest rate which would be adopted in respect of article 67 (*b*). The Secretariat was therefore requested to consult also on this point with banking and trade institutions.

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* UNCITRAL Yearbook, vol. IV: 1973, part two, II, 1.
** UNCITRAL Yearbook, vol. V: 1974, part two, II, 1.

44. The Working Group discussed the question whether interest should be paid from the date on which payment was made to the holder under article 67 (as proposed in the present wording of art. 68) or from the date on which payment was demanded under article 68. The Group expressed itself in favour of the date on which payment was made under article 67, on the ground that the party paying under article 68 had had the use of the sum involved.

Paragraph (c)

45. The Working Group was agreed that the expenses referred to in paragraph (*c*) should be only the legitimate and necessary expenses actually incurred (see para. 38, subpara. (iv) above). Thus lawyers' fees were not to be included in the expenses.

General observations

46. It was pointed out that under article 50 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes an endorser who had taken up and paid a bill of exchange or a note could cancel his own endorsement and those of subsequent endorsers. The Working Group concluded that the uniform law should reach a similar result and requested the Secretariat to take the Geneva rule into account when revising the present text of the draft uniform law.

47. It was observed that a party who had taken up and paid the instrument might under certain circumstances, i.e., when the instrument was endorsed to him or was endorsed in blank, be a holder thereof. In such a case the question arose whether, if such party in turn claimed payment from a party liable to him, he would claim payment under article 67 or article 68. The Working Group was of the view that, in this case, article 68 should apply and that articles 67 and 68 should be revised in a way that would achieve this result.

DISCHARGE OF LIABILITY (ART. 69)

Article 69

"(1) Liability of a party on an instrument is discharged by:

"(*a*) Payment in accordance with articles 70 to 75 or 80;

"(*b*) Renunciation in accordance with article 76;

"(*c*) Reacquisition of the instrument by a prior party in accordance with article 77;

"(*d*) Discharge of a prior party in accordance with article 78 (1);

"(*e*) Absence of his assent to a qualified acceptance in accordance with article 40 (2).

"(2) A party is also discharged of his liability on the instrument by any act or agreement which would discharge him of his contractual liability for the payment of money."

48. Paragraph (1) of article 69, as the first article of part VI on discharge, is declaratory in that it sets forth the ways, mentioned in other articles of the uniform law, by which a party is discharged of liability on the instrument. Paragraph (2) of the article lays down that, in addition to the grounds of discharge set forth in the uniform law, a party shall also be discharged of liability on the instrument under circumstances which under the applicable national law would discharge him of a contractual liability for the payment of money.

Paragraph (1)

49. Doubts were expressed regarding the usefulness of a declaratory paragraph setting forth the ways by which, under the uniform law, a party is discharged of liability on the instrument. It was noted that, with the exception of article 23 which the Working Group had decided to delete, other parts of the uniform law did not open with a declaratory paragraph. Furthermore, an enumeration of ways by which a party is discharged, was not necessarily exhaustive since there might be other provisions in the uniform law which would lead to discharge. On the other hand, it was observed that an enumeration of the ways by which a party can be discharged would ensure a better understanding of the law. It was also pointed out that with the deletion of paragraph (2) of article 69, the significance of paragraph (1) would be more than merely declaratory in that the various ways by which a party is discharged, set forth in the paragraph, would be limitative.

50. The Working Group decided to re-examine the usefulness of paragraph (1) at a later stage and requested the Secretariat to place the paragraph, in the revised version of the uniform law, between brackets.

Paragraph (2)

51. The Working Group considered the effect which paragraph (2) could have on the provisions concerning discharge and also the question as to what extent other articles of the uniform law concerned cases which paragraph (2) was intending to cover.

52. It was noted that paragraph (2) was intended to comprise, *inter alia,* the case where a party liable on the instrument deposited the amount due by him into court or with another competent authority and where such an act constituted payment under the applicable national law. The Working Group was agreed that a deposit made in these circumstances should also constitute payment under the uniform law and, as such, should be dealt with under article 70 concerning payment.

53. It was further noted that paragraph (2) was intended to cover cases where a party liable on the instrument was discharged of liability, under the applicable national law, by such acts as novation, conveyance of land, assignment of land, etc. The Working Group was of the opinion that also these cases should be governed by the provisions of article 70 concerning payment.

54. The Working Group was agreed that any other ways by which a party could be discharged under the applicable law and which paragraph (2) intended to cover, such as a waiver outside the instrument, should fall within the provision of articles 24 and 25, i.e., could be raised as a defence against the holder though not against the protected holder.

55. In view of the above considerations, the Working Group concluded that paragraph (2) served little purpose and should be deleted.

PAYMENT (ARTS. 70 TO 73)

Article 70

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

"(2) A person receiving payment of an instrument in accordance with paragraph (1) shall deliver the receipted instrument and any authenticated protest to the person making the payment."

56. Under article 70, a party is discharged of liability when he makes payment under either article 67 or article 68, whether or not such payment is made in good faith or without negligence. Article 70 should be read in conjunction with article 24 (3), according to which a party is obliged to pay the holder even if a third party has a claim to the instrument against the holder. Article 70 should also be read in conjunction with article 22 (1) under which a person who acquires an instrument through an uninterrupted series of endorsements is a holder even if one of the endorsements is forged, provided that such person is without knowledge of the forgery. Therefore, payment under article 70 to such holder discharges the payor irrespective of the fact that the payor knew or did not know of the forgery. It follows that payment made to the forger, to the person who took the instrument from the forger with knowledge of the forgery, or to the person who took an instrument on which the series of endorsements is interrupted, is not a discharge.

Paragraph (1)

Payment before maturity

57. The Working Group was agreed that with respect to payment made before maturity:

(*a*) The holder cannot be compelled to receive payment, and

(*b*) If the drawee, the acceptor or the maker made payment, they would do so at their own risk.

The Group was of the view that, although these rules could be deduced from article 70—namely that a party is discharged when he makes payment pursuant to articles 67 or 68—article 70 itself should state clearly the legal effect of payment before maturity. The Group therefore requested the Secretariat to include in article 70 a separate paragraph based on the wording used in article 40, subparagraph 1, of the Geneva Uniform Law on Bills of Exchange and Promissory Notes.

Payment to a holder

58. The Working Group considered in what circumstances payment to a holder, as defined in article 5 (*b*), would constitute a discharge.

59. The Working Group was agreed that there should be a direct relationship between, on the one hand, the right of a holder to demand payment and, on the other hand, payment to such holder operating as a discharge. Therefore, in the view of the Group, when a holder is entitled to payment by a party liable to him, notwithstanding the fact that a third party has a claim to the instrument, payment made to the holder should constitute a discharge even if the party paying knew of the claim. For example: the payee endorses the instrument to A as a result of fraud committed on him by A; A demands payment from the acceptor who knows of the fraud. Under article 24 (3), the acceptor cannot invoke the claim of the payee to the instrument in order to avoid liability and is therefore obliged to pay the instrument to A even if he knew of the fraud. Therefore, payment by the acceptor to A should constitute a discharge even if made with knowledge of the claim which the payee has to the instrument.

60. Similarly, when a holder is not entitled to payment on the ground that a third party has claimed the instrument from him and had informed the party liable of such claim, payment to the holder should not operate as a discharge. For example, the payee endorses the instrument to A as a result of fraud committed on him by A; the payee claims the instrument from the holder and informs the acceptor of the fraud committed; A demands payment from the acceptor. Under article 24 (3), the acceptor can invoke the claim of the payee to the instrument and thus avoid liability. Therefore, payment by the acceptor to A should not constitute a discharge.

61. The Working Group considered the special case of an instrument endorsed in blank and stolen from its owner. Under article 24 (3), the thief is entitled to demand payment from a prior party unless the owner of the instrument claims the instrument from the thief and informs the prior party that it has been stolen. It follows that under the draft uniform law, if the owner has not claimed the instrument from the thief, payment by the prior party to the thief constitutes a discharge, even if that party had knowledge of the theft. The Group took the view that this consequence might not be justified and decided to reconsider it in the context of article 24 (3). In this connexion, it was suggested that a distinction should be made between the case where the holder demanding payment was the thief himself and the case where payment was demanded by a holder who had received the instrument from the thief and who was not a protected holder.

Payment of an instrument on which an endorsement was forged

62. The Working Group considered in what circumstances payment of an instrument on which an endorsement was forged constituted a discharge.

63. The Working Group was agreed that payment by a party liable to a person who qualifies as a holder under article 22 should operate as a discharge whether or not such party knew of the forgery. For example: the instrument is stolen from the payee; the payee's signature is forged by the thief who endorses the instrument to A; A endorses the instrument to B who takes it through an uninterrupted series of endorsements without knowledge of the forgery. Under article 22, B is a holder and, as such, may demand payment from the acceptor. Therefore, payment by the acceptor operates as a discharge, even if he knows of the forgery.

64. The Working Group was agreed that payment by a party liable to a person who did not qualify as a

holder under article 22, for instance because that person knew of the forgery, should:

(*a*) Constitute a discharge if such payment was made without knowledge of the forgery, and

(*b*) Not constitute a discharge if payment was made with knowledge of the forgery.

Pursuant to the conclusions reached by the Group with respect to the definition of "knowledge" in article 6 (A/CN.9/77,* para. 70), the Secretariat was requested to re-examine whether the concept of knowledge, used for the purpose of construing the above rules, should include the element of actual knowledge only or also lack of knowledge because of gross negligence.

Impersonation

65. The Working Group considered in what circumstances payment of an instrument to a person who presents himself wrongfully as the payee or to the person to whom the instrument was especially endorsed constitutes a discharge.

66. The Working Group was agreed that payment made to an impostor should be governed by the same rules that apply to the case where payment is made to the person who forged an endorsement. Therefore, payment made without knowledge of the fact that the person demanding payment is an impostor should operate as a discharge. Conversely, payment made with such knowledge did not so operate.

Paragraph (2)

67. The Working Group expressed agreement with the provision set forth in paragraph (2), subject to the suggestion that the text should make clear that the person receiving payment should also deliver a receipted account as provided in article 50 of the Geneva Uniform Law on Bills of Exchange and Promissory Notes. In the view of one representative, the person paying the instrument had the right to claim a receipt, the protest if any, and the instrument itself.

68. The question was raised whether a person receiving payment was obliged to endorse the instrument to the payor. The Working Group was of the view that the uniform law should not set forth a provision to that effect on the ground that such an endorsement could in certain circumstances impose liability on the person who received payment.

Article 71

"(1) The holder may take partial payment from the drawee or the acceptor or the maker. In that case:

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

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

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

"(3) When an instrument has been paid in part, a party who pays the unpaid amount shall be discharged of his liability thereon, and the person receiving the payment shall deliver the receipted instrument and any authenticated protest to the party making the payment."

69. Article 71 provides that the holder is not obliged to take partial payment. However, if he does take partial payment, the liability of the other parties liable on the instrument is discharged *pro tanto*.

70. The Working Group expressed agreement with the substance of article 71.

71. It was suggested that the phrase "the holder may take partial payment" should be redrafted in order to make clear that the holder was not obliged to take partial payment. The Working Group requested the Secretariat to modify the wording of article 71 accordingly.

72. The question was raised whether the article should cover also cases of partial payment made by parties secondarily liable upon dishonour. The Working Group considered that this question should not be dealt with in the framework of article 71. It requested the Secretariat to consider this question and, if need be, draft a separate article covering the point raised.

Article 72

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

"[(2) If payment is not then made in the place where the instrument was duly presented for payment in accordance with article 53 (*f*), the instrument shall be considered as dishonoured by non-payment.]"

73. Article 72 provides that the holder is not obliged to take payment in a place other than the place where the instrument must be presented for payment in accordance with article 53 (*f*). Refusal by the holder to take payment in these circumstances results in dishonour by non-payment.

74. The Working Group expressed agreement with the substance of article 72. It was also agreed that paragraph (2), placed in brackets, should be retained.

Article 73

"(1) Where an instrument has been materially altered as to its amount, any person who pays the instrument pursuant to such alteration without knowledge of the alteration shall have the right to recover the amount by which the instrument was raised from the party who so altered the instrument or from any subsequent party, except a party who was without knowledge of the alteration at the time he transferred or negotiated the instrument.

"(2) In any other case of alteration which is material, as defined in article 29 (2), any person who pays the instrument pursuant to such alteration without knowledge of the alteration shall have the right to receive the amount paid by him from the person who altered the instrument, or from any subsequent party except a party who was without

* UNCITRAL Yearbook, vol. IV: 1973, part two, II, 1.

knowledge of the alteration at the time he transferred or negotiated the instrument.

"(3) Where the signature of the drawer or the maker has been forged, any person who pays the instrument without knowledge of the forgery shall have the right to recover the amount paid by him from the person who forged the signature of the drawer or of the maker, or from any party subsequent to the drawer or the maker except a party who was without knowledge of the forgery at the time he transferred or negotiated the instrument."

75. Article 73 deals with the rights of a person who pays an instrument that has been materially altered or on which the signature of the drawer or the maker has been forged. Under the article, such a person, if he paid without knowledge of the material alteration or of the forgery, is entitled to recover the amount paid in error from the person who materially altered the instrument or who forged the drawer's or the maker's signature, as the case may be, and from any person and any party subsequent to himself who took the instrument with knowledge of the alteration or the forgery.

76. The Working Group, after deliberation, was of the view that article 73 should not be retained on the ground that it dealt with complex situations giving rise to actions outside the instrument. Such actions should not be governed by the uniform law but be left to national law.

PAYMENT OF AN INSTRUMENT DENOMINATED IN FOREIGN CURRENCY (ART. 74)

Article 74

Alternative A

"(1) (*a*) Where an instrument is made payable in a currency which is not that of the country where payment takes place, the sum payable shall be paid in the currency of that country.

"(*b*) When such instrument is paid in the currency of the country where payment takes place, the amount payable shall be calculated according to the rate of exchange on the day of maturity or, if so specified, according to the rate of exchange indicated on the instrument.

"(2) Where such instrument is dishonoured by non-acceptance or by non-payment, the sum payable shall be paid in the currency of the country where payment takes place. In that case, the holder may at his option demand from the party liable that the amount payable shall be calculated according to the rate of exchange on the day of dishonour, or the day of maturity or the day of payment.

"(3) The provisions of paragraphs (1) and (2) shall not apply when the drawer or maker has stipulated on the instrument that payment be made in a specified currency."

Alternative B

"(1) Where an instrument is made payable in a currency which is not that of the country where payment takes place, the sum payable shall be paid in the currency stated on the instrument.

"(2)(*a*) The provision of paragraph (1) shall not apply when the drawer or maker has stipulated on the instrument that payment be made in the currency of the country where payment takes place. In that case, the amount payable shall be calculated according to the rate of exchange on the day of maturity or, if so specified, according to the rate of exchange indicated on the instrument.

"(*b*) When an instrument containing such a stipulation is dishonoured by non-acceptance or by non-payment, the holder may at his option demand from the party liable that the amount payable shall be calculated according to the rate of exchange on the day of dishonour, or the day of maturity, or the day of payment."

77. Article 74 lays down rules with respect to payment of an instrument denominated in a currency which is not that of the place of payment. The draft uniform law sets forth alternative texts. Under alternative A, the payor has the option to make payment in either the currency in which the instrument is denominated (foreign currency) or in the currency of the place of payment (local currency). Under alternative B, the payor is obliged to pay in the foreign currency stated on the instrument.

78. The Working Group also had before it a revised version of alternative B, considered and adopted by the UNCITRAL Study Group on International Payments at its ninth meeting in October 1974. The text of that version is as follows:

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

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

"(*a*) The instrument shall be paid in the currency so specified.

"(*b*) The amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication the amount payable shall be calculated according to the rate of exchange for sight drafts on the date of maturity.

"(i) Ruling at the place of payment, if the specified currency is that of that place (local currency).

"(ii) Determined according to the usages of the place of payment if the specified currency is not that of that place (non-local currency).

"(*c*) When such instrument is dishonoured by non-acceptance the amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication the amount payable shall be calculated according to the rate of exchange on the date of such dishonour.

"(*d*) When an instrument is dishonoured by non-payment the amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication:

"(i) The amount payable by the acceptor or the maker shall be calculated, at the option of

the holder, either according to the rate of exchange on the date of maturity, or according to the rate of exchange on the date when payment is made, or is tendered in accordance with article 75.

"(ii) The amount payable by any other party liable shall be calculated according to the rate of exchange on the date of maturity."

79. The reference below to the paragraphs of article 74 will be to the paragraphs of the text set forth in paragraph 75 above.

Paragraph (1)

Payment of an instrument in "foreign" or "local" currency

80. The Working Group considered whether an instrument drawn or made payable in a currency other than that of the place of payment (foreign currency) should, in the absence of an express stipulation, be paid in that currency or whether the payor should have an option of paying either in local currency or in the foreign currency in which the instrument was denominated. The Group took note of the fact that inquiries by the UNCITRAL Study Group on International Payments had revealed that under current commercial and banking practices instruments were usually paid in the currency in which the amount of the instrument was expressed, even though it was not stipulated on the instrument that payment be made in such foreign currency.

81. There was considerable support in the Working Group for the view that the uniform law should provide a rule that would be consistent with such practices and that the rule set forth in paragraph (1) of article 74 should therefore be retained. The opinion was expressed that such a rule would be the most suitable one at a time of frequent fluctuations between currencies. Thus, in the absence of a stipulation on the instrument that payment be made in the currency of the place of payment, the party liable should pay in the currency in which the amount payable is expressed. It follows that, where a drawee accepts to pay the bill of exchange, denominated in foreign currency, at maturity in local currency, such acceptance would be a qualified acceptance which the holder would be at liberty either to take or to refuse. In the latter case, the bill would be dishonoured by non-acceptance. Similarly, the refusal by the holder to take payment of the bill in local currency would result in dishonour of the bill by non-payment.

82. One representative and one observer noted their opposition to the rule set forth in paragraph (1) of article 74 and stated their preference for a provision under which the party liable would have the option of paying either in local or in foreign currency, unless the instrument expressly stipulated otherwise.

Exchange control regulations

83. The Working Group considered the relevance of exchange control regulations to the rule set forth in paragraph (1). It was noted that, in many countries, exchange control regulations imposed restrictions on payment in foreign currency. The Group was of the opinion that the provisions of the uniform law should be subject to such regulatory measures. In the view of the Group, this could be achieved by either an express provision to that effect in article 74, or by a general provision in the Convention of which the uniform law would form the annex. Most representatives expressed themselves in favour of a general provision in the Convention stating that the provisions of the uniform law shall not prevent a Contracting State from enforcing applicable exchange control regulations with respect to international bills of exchange and international promissory notes.

84. One observer drew attention to article VIII, section 2 (*b*) of the Articles of Agreement of the International Monetary Fund under 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". In the view of this observer, either the Convention or the uniform law, as the matter was ultimately decided, should state that the reference to applicable exchange control regulations should be understood to mean not only those of the forum itself but also those that the forum was bound to apply by virtue of international agreements to which it had adhered.

85. It was noted that, in many countries, if in the event of dishonour an action on an instrument was brought before the courts, judgement would be awarded for a sum in local currency. However, in the view of the Working Group, article 74 provided rules governing the liability of parties to an instrument and not rules regarding the power of the courts. Accordingly, nothing in article 74 could be construed as preventing a court from awarding judgement for a sum in local currency, and payment of that sum in such currency, in compliance with the judgement, would constitute discharge of liability.

Paragraph (2) (a) and (b)

Payment at maturity

86. The Working Group expressed agreement with the rules set forth in paragraph (2) that the drawer of a bill or the maker of a note could stipulate on the instrument that it should be paid in a specified currency other than that in which the amount of the instrument was expressed. The Group also agreed that, in that case, the provisions set forth in subparagraphs (*a*) and (*b*) should apply.

87. Under paragraph 2 (*b*) (i), in the absence of an indication of a rate of exchange, the amount payable shall be calculated according to the rate of exchange for sight drafts on the date of maturity prevailing at the place of payment. The question was raised whether the "place of payment" was the place where the instrument must be presented for payment under article 53 (*f*) or whether that place was the place where payment was actually made. The Group concluded that the term "place of payment", in subparagraphs (2) (*b*) (i) and (ii), referred to the place where the instrument must be presented for payment under article 53 (*f*).

Paragraph 2 (c) and (d)

Payment upon dishonour

Issues involved

88. Where an instrument is dishonoured by non-acceptance the holder has, upon due protest (art. 57), an immediate right of recourse against prior parties (art. 51 (2)) and the instrument becomes due before maturity. In such case, the question arises as to what rate of exchange should prevail; the rate specified on the instrument (if so specified), that ruling on the date of dishonour, on the date of maturity (if payment is made at or after maturity), on the date of deposit under article 75 if the holder refused payment or on the date of actual payment. Similar questions arise where an instrument is dishonoured by non-payment. In this event, the holder has a right of recourse against the acceptor or the maker and, upon due protest (art. 57), against prior parties (art. 56 (2) and (3)). Also here the question arises as to what rate of exchange should prevail when payment is made: the rate specified on the instrument (if so specified), the rate ruling on the date of maturity, on the date of deposit under article 75, or on the date of actual payment. In respect of both dishonour by non-acceptance and by non-payment, the further question arises whether provision should be made for one of several possible rates of exchange or whether the holder or the payor should be entitled to exercise an option between two or more of these rates and, if so, under what circumstances. Yet another question is whether the rules applicable to the rate of exchange should be the same for all parties liable on the instrument or whether a distinction should be made between parties primarily liable and parties secondarily liable. Lastly, the question arises whether the rate of exchange should be that prevailing at the place where the instrument should have been paid upon due presentment for payment or that prevailing at the place where payment is actually made.

89. In considering the above issues the Working Group examined the question as to who should bear the risk of fluctuations between currencies that could occur when an instrument was paid before, at or after the date of maturity. The Group considered this question in the case of dishonour and non-acceptance and in the case of dishonour by non-payment. It concluded that the different issues arising in these cases led to similar solutions and that it was therefore desirable that one general rule should govern all cases of dishonour.

Rate of exchange indicated on the instrument

90. The Working Group considered whether, if a rate of exchange was indicated on the instrument, that rate should prevail in the case of dishonour by non-acceptance or by non-payment. Under one view, the amount of the instrument should be paid at the rate stipulated since this would correspond to the expectation of the parties. Under another view, the rate indicated on the instrument had been stipulated on the assumption that payment would take place at maturity. It was observed in this connexion that to oblige the holder to take payment at the stipulated rate could lead to unjust consequences in that the party liable could delay making payment in the expectation that the exchange rate would change in his favour. For these reasons, the rate of exchange indicated on the instrument should not be binding upon the holder, but should be one of the rates at which he could demand payment should article 74 give such an option to the holder (see para. 92 below).

91. The Working Group was unable to reach consensus as to a rule that should govern the case of payment upon dishonour of an instrument indicating a rate of exchange. The Group decided to revert to this question at a future session and requested the Secretariat to draft alternative texts reflecting the two views expressed by representatives.

Rate of exchange not indicated on the instrument

92. Opinions were divided on the question as to what should be the rate of exchange at which an instrument denominated in a currency which is not that of the place of payment and on which there is no indication of the rate of exchange, should be paid when the instrument has been dishonoured by non-acceptance or by non-payment.

93. Under one view, the amount payable should be calculated according to the rate of exchange for sight drafts prevailing at the date of actual payment, irrespective of the fact that payment was made before, at or after maturity. Adherents to this view were divided on the question whether the holder who had suffered loss as a consequence of fluctuation in rates of exchange and of the default of the debtor should be entitled to claim damages.

94. Under another view, the rate of exchange according to which the amount payable should be calculated should be the rate ruling at the date of actual payment in all cases where payment was made before maturity. In all other cases, the rate should be that prevailing at the date of maturity. It was observed that such a principle would be consistent with the provisions of paragraph (2) (*b*). Any damages for loss sustained as a result of fluctuations in rates of exchange and caused by late payment should be left to the courts.[5]

95. Under a third view, the holder should be protected against any loss that he might suffer as a result of dishonour by non-acceptance or by non-payment. Therefore, the holder should be given the option of demanding that payment be made at either the rate of exchange ruling at the date of maturity, or at the date of dishonour or at the date of payment. In addition, if a rate of exchange was indicated on the instru-

[5] The representative holding this view submitted the following draft paragraphs to replace paragraphs (2) (*c*) and (*d*) of the text set forth in paragraph 70 above:

"(*c*) Where such an instrument is dishonoured by non-acceptance or non-payment the amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication the amount payable shall be calculated according to the rate of exchange for sight drafts ruling at the place of payment

"(i) At the date of actual payment, if such payment is made before maturity;

"(ii) Otherwise at the date of maturity.

"(*d*) Nothing in this paragraph shall prevent a court from awarding damages for loss caused to the holder by reason of fluctuations in rates of exchange where such loss is caused by late payment."

ment, the holder should have the further option to demand payment at that rate.

96. One observer expressed the opinion that the rules to be adopted in respect of the situations envisaged by article 74 should take into account the interests of the holder and of the party liable on the instrument in each instance, so that if at any time one of them wished to delay the demand for payment or the actual payment in the hope that a change in the rate of exchange would better his position, the other would have the possibility to compel settlement at a rate favourable to himself. The purpose which the rule should seek to achieve was that neither the creditor nor the debtor should be allowed to profit by delay. In the case of dishonour by non-acceptance this could best be achieved by a rule providing that, if payment was made before maturity, the holder would have the option of demanding payment at the rate of exchange prevailing either at the date of dishonour or at the date of payment. If payment were demanded after maturity, the payor should have the option of paying the amount at the rate of exchange prevailing either at the date of dishonour or at the date of maturity, subject to a further rule that if payment was not made within a certain number of days following the demand for payment, the holder would have the option of demanding payment at the rate of exchange ruling at the date of actual payment.[6]

97. The Working Group was unable to reach consensus as to a rule governing payment of an instrument denominated in foreign currency but payable in another currency after it had been dishonoured by non-acceptance or by non-payment. The Group requested the Secretariat to draft three alternative texts based on the views expressed in paragraphs 90, 91 and 92 above.

Rate of exchange ruling at the "place of payment"

98. If the amount payable is to be calculated according to a rate of exchange prevailing at a given date, the question arises whether that rate should be the rate ruling at the place where the instrument must be presented for payment to the drawee, the acceptor or the maker (in accordance with art. 53 (*f*)) or the rate ruling at the place where payment is actually effected.

99. Opinions were divided on the question which "place of payment" should prevail. The Working Group decided to revert to this question at a future session and requested the Secretariat to draft two texts reflecting the above possibilities.

"Tender" of payment

100. The Working Group was agreed that, in cases where the amount payable must be calculated with reference to a rate of exchange, the debtor, on whom a demand was made for payment after the instrument had been dishonoured, should be able to rely on the protection afforded to him by article 75, i.e. by "tendering" payment.

Miscellaneous

101. It was pointed out that in some countries two rates of exchange obtained: a commercial rate and a rate for financial transactions. In such countries with a dual rate, the question could thus arise at which of the two rates the amount payable should be calculated.

102. It was noted that where an instrument had been paid by a party secondarily liable according to the rate of exchange applicable under article 74, the amount of the instrument payable to parties liable to such payor was to be paid in the currency in which the payor had paid and that in such a case conversion into another currency would not take place. Hence, questions of rates of exchange would no longer arise.

"TENDER" OF PAYMENT (ART. 75)

Article 75

"[(1) Where a party tenders payment of the amount due in accordance with articles 67 or 68 to the holder at or after maturity and the holder refuses to accept such payment

"(*a*) The party tendering payment shall not be liable for any interest or costs as from the day payment was offered; and

"(*b*) Any party who has a right of recourse against a party tendering payment shall not be liable for such interests or costs.

"(2) The provisions of paragraph (1) (*b*) shall also apply if the person tendering payment to the holder is the drawee.]"

103. The purpose of article 75 is to enable a party liable on the instrument to tender payment in order to protect himself against liability for interest or costs accruing after the date of the tender. As a consequence thereof, any party subsequent to the party tendering payment will be discharged of liability for interest and costs as from the date of the tender.

Paragraph (1)

Concept of "tender"

104. The Working Group considered what kinds of situation should be covered by article 75. The Group was of the view that it was necessary to clarify these situations since the concept of tender had no precise equivalent in the civil law systems. The Group was agreed that:

[6] The observer expressing the above opinion submitted the following draft paragraphs to replace paragraph (2) (c) of the text set forth in paragraph 70 above:

"(c) When such instrument is dishonoured by non-acceptance the amount payable shall be calculated according to the rate of exchange indicated on the instrument. Failing such an indication the amount payable shall be calculated in the following manner:

"Subject to the right of any party secondarily liable on the instrument, at any time prior to the demand on him by the holder for payment, to make tender, and if accepted to effect payment within [ ] days thereof, of the amount of the instrument calculated according to the rate of exchange on the date of dishonour.

"If the holder's demand for payment from a party secondarily liable on the instrument should precede that party's offer of tender and be made:

"(i) Before maturity, then at the option of the holder the rate of exchange shall be calculated as of the date of dishonour or the date of actual payment;

"(ii) After maturity, then at the option of the party upon whom demand is made; the rate of exchange shall be calculated as of the date of dishonour or the date of maturity of the instrument;

Provided that if payment is not effected within _____ days of the demand, the holder may require payment calculated according to the rate of exchange on the date of actual payment."

(*a*) In order for article 75 to apply a mere offer to pay was not sufficient;

(*b*) Where according to the law of the place of payment the deposit of the amount due with a competent authority constituted payment, the making of such deposit should not be covered by article 75, since it constituted payment and, consequently, was covered by article 70;

(*c*) Article 75 should, therefore, govern only those cases in which the holder refused to take payment, as where the party liable had placed the amount due at the exclusive disposal of the holder and the holder had not taken the amount.

The Group requested the Secretariat to redraft article 75 in the above sense without using the term "tender".

Legal effect

105. The Working Group considered what should be the legal effect of a refusal by the holder to take payment. The Group was agreed that such refusal would free the party who had placed the amount due at the exclusive disposal of the holder from liability for interest and costs. The Group decided to revert to the question whether, in such case, the party would be freed from liability as from the date of deposit, the date on which the holder is informed of the deposit, or the date of refusal.

106. The Working Group was unable to reach consensus as to the legal effect of the refusal by the holder to take payment on the liability of parties who had a right of recourse against the party who had made the deposit. Under one view, such refusal should wholly discharge any party who would have been discharged of liability if the holder had taken payment. Under another view, such refusal should only free the intermediate parties from liability for interest and costs, but should not result in a total discharge of liability. The Group decided to revert to this question at a future session and requested the Secretariat to draft alternative texts that would reflect both views.

Scope of article 75

107. The present wording of article 75 enables the party making the deposit to protect himself against the payment of interest and costs accruing after the date of deposit. The Working Group was agreed that such protection should be extended to cover also the risk of a change in the rate of exchange occurring after the instrument had been dishonoured.

108. The present wording of article 75 envisages refusal of payment by the holder only. The Working Group was of the opinion that the article should also cover the case where the amount due had been placed at the exclusive disposal of a party who had taken up and paid the instrument.

109. Under the present wording, article 75 applies only in cases where the deposit of the amount due had been made at or after maturity. The Working Group was agreed that the article should also cover the case of dishonour by non-acceptance where a party liable had made the deposit before maturity.

110. The Secretariat was requested to draft a suitable formulation which would take into account the consensus reached by the Working Group as to the scope of article 75. Such formulation should also clarify that the article would apply only in cases where the deposit by the party liable was for the full amount specified in articles 67 and 68 and not in cases where the deposit was effected for a part of the amount due under these articles.

Paragraph (2)

111. The Working Group expressed agreement with paragraph (2) of article 75.

RENUNCIATION (ART. 76)

Article 76

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

"(2) Such renunciation shall not affect the right to the instrument of the party who so renounced his rights thereon."

112. Article 76 provides that a party is discharged of liability on the instrument if the holder renounces unconditionally on the instrument, at or after maturity, his rights on the instrument against that party. Such renunciation, by a writing on the instrument, is not to be considered as a material alteration under article 29. Furthermore, a discharge under article 76 will have the effect, under article 78, that any party who has a right of recourse against the party discharged, shall also be discharged. Renunciation, whilst it affects the rights which the holder has against parties liable does not affect, according to paragraph (2), the title of the holder to the instrument.

Paragraph (1)

113. The Working Group was of the opinion that its decision to maintain or delete article 76 would, to a great extent, depend on whether renunciation by a writing on the instrument occurred frequently in practice. In addition, the Group was of the view that it should obtain information on the various ways by which such renunciation takes place, e.g. by striking through the signature or by writing next to the signature words signifying renunciation.

114. The Working Group requested the Secretariat to conduct an inquiry amongst banking and trade institutions designed to obtain such information.

115. The Working Group, after deliberation, concluded that, if it should decide, at a later stage, to retain article 76, the article should be modified so as to provide that renunciation is effective whether made before, at or after maturity.

Paragraph (2)

116. The Working Group considered the effect of the cancelling of an endorsement on the title of the holder, i.e. whether such cancellation would interrupt the series of special endorsements. For example: the payee endorses to A, A to B, and B to C; C, the holder, cancels the endorsement of B. The Working Group considered the following questions:

(i) Is C a legitimate holder?

(ii) Is C entitled to demand payment from the drawer or the acceptor?

(iii) Does payment by the acceptor operate as a discharge?

(iv) If C endorses the instrument to D, what are D's rights thereon? Will D qualify as a protected holder?

(v) If C is not entitled to demand payment from the acceptor, which party is so entitled? And payment to which party will constitute a discharge?

117. The Working Group, after deliberation, was agreed that it should revert to these questions at a later stage when the inquiries that would be made to banking and trade institutions had given it the necessary information on the circumstances in which the signature of the endorser might be struck and on the frequency of such cases.

REACQUISITION OF THE INSTRUMENT BY A PRIOR PARTY (ART. 77)

Article 77

"A party liable who rightfully becomes the holder of the instrument shall be discharged of liability thereon to any party who had a right of recourse against him."

118. Article 77 deals with the case where a party who is liable on the instrument becomes, because of subsequent events, a holder. The article provides that in such case such party is discharged of his liability on the instrument to any party who has a right of recourse against him. Thus, if the instrument is endorsed by the payee to A and by A to the drawer, the drawer, according to article 77, is discharged of his liability to the payee and to A.

119. Under one view, article 77 was superfluous since cases of reacquisition by a prior party were relatively rare and since, in those cases, the result which the article sought to achieve would be achieved by resorting to general principles of law, such as the principle of *confusio*.

120. Under another view, article 77 served a useful purpose in that it provided that a party who reacquired the instrument was discharged of liability. This, in turn, would make operative the provision of article 78 under which the discharge of a party also discharged parties subsequent to him.

121. The Working Group did not reach consensus on whether to retain article 77 and decided that the article should be placed between square brackets for future consideration.

DISCHARGE OF A PRIOR PARTY (ART. 78)

Article 78

"(1) Where a party is discharged of liability on an instrument, any party who had a right of recourse against him shall also be discharged.

"(2) An agreement, not amounting to partial or total discharge, between the holder and a party liable on the instrument shall not affect the right and liabilities of other parties."

122. Under paragraph (1) of article 78, if a party is discharged of liability, whether by payment according to article 70 or as a result of renunciation or reacquisition under articles 76 and 77, any party having a right of recourse against him is also discharged. Thus, if the payee endorses the instrument to A, and A endorses to B, payment by the acceptor to B operates as a discharge of the drawer, the payee and A. Similarly, if B renounces on the instrument his rights against the payee, A is discharged. Lastly, if B endorses the instrument to the payee, A and B are discharged. Under paragraph (2), an agreement, not amounting to a discharge, between the holder and a party liable is personal to them and does not affect the rights and liabilities of other parties. Therefore, an agreement outside the instrument between the holder and the acceptors by which the holder extends the time for payment does not affect the rights and liabilities of other parties.

Paragraph (1)

123. The Working Group, after deliberation, was agreed that paragraph (1) of article 78 should be retained. In the view of the Group, the paragraph was a necessary corollary of articles 70 and 76.

124. The Working Group considered the following case: the payee endorses the instrument to A, A endorses to B, B to C, C to A, and A to X. The question was raised whether B and C were liable to X.

125. Under one view, B and C were not liable since:

(*a*) When A reacquired the instrument, his liability as an endorser was discharged (art. 77);

(*b*) As a result, the liability of B and C to A was discharged (art. 78);

(*c*) By endorsement of the instrument by A to X, X could not acquire more rights than A had (art. 24), except where X would be a protected holder. However, X did not qualify as a protected holder in respect of B and C since it was apparent on the face of the instrument that B and C were discharged.

126. Under another view, X had rights against B and C. The discharge of B and C under article 78 operated only in respect of A and not in respect of X.

127. The Working Group was unable to reach consensus as to what should be the proper rule. It was, however, of the opinion that a proper solution might be found within the framework of articles 24 and 25 of the uniform law.

Paragraph (2)

128. The Working Group considered the provisions of paragraph (2) in the context of the following example: at maturity the holder agrees with the acceptor, outside the instrument, to extend the date of payment. The following questions then arose:

(i) What are the effects of the agreement on the rights of the holder against the drawer and the endorsers?

(ii) When the holder endorses the instrument to D what are the rights of D against parties prior to the holder?

The Group was of the opinion that article 78 (2) should not deal with this question since it was covered by articles 24 and 25. The Group therefore decided to delete the paragraph.

129. The Working Group considered what would be the consequence of a modification on the instrument of the date of maturity, e.g. by writing a new date over the existing date. The Working Group was of the view that such a modification, in that it altered the liability of other parties, would constitute a material alteration and, as such, fell within article 29.

130. The Working Group considered what should be the solution under the uniform law when, instead of altering the maturity date on the instrument, the holder agreed with the acceptor to draw on the acceptor a new instrument for the same amount as that of the original instrument but with a new maturity date. The Group was of the view that this question raised the difficult issue of a renewal instrument which was not dealt with by the uniform law. It suggested that the Secretariat might undertake a study on the subject if it thought that a study would prove useful.

LIMITATION (PRESCRIPTION) (ART. 79)

Article 79

131. The Working Group held a preliminary discussion on the desirability of including in the uniform law provisions governing the limitation of legal proceedings and the prescription of rights arising in the context of an international instrument. It was observed that in respect of instruments that would be used for settling international payments and that were thus likely to circulate in more than one country, provisions regarding prescription (limitation) would be particularly relevant since national laws laid down different time-limits and different grounds for interruption and suspension. It was noted that as a result of these divergencies, it would, if the matter were left to national law, be possible that a right or action on one and the same instrument would be extinguished in one country and not in another.

132. The Working Group concluded that it should attempt to include a set of general rules governing limitation (prescription) and requested the Secretariat to prepare draft provisions on the subject together with a commentary setting forth the various issues involved. The Group was of the view that these provisions should be restrictive in scope and should cover the following two aspects:

(i) The point of time from which the period starts to run, and

(ii) The length of the period.

The Group was of the view that the provisions should probably not deal with the causes of interruption or suspension of prescription (limitation) nor with rights of recourse existing after prescription (limitation) which could best be left to national law.

133. Two representatives suggested that, in preparing the draft articles, the Secretariat should take into account the special interests which developing countries had in this question. These interests called for the choice of a reasonable time-limit, in keeping with the technical and administrative capabilities of these countries, and for the prohibition against derogating from such time-limit by agreement between the parties at the time of the issue or the endorsement of the instrument.

UNIFORM RULES APPLICABLE TO INTERNATIONAL CHEQUES

134. In response to the view expressed by some representatives during the fifth session of the Commission that uniform rules should be drawn up also for other negotiable instruments used to settle international transactions, the Commission further requested the Working Group "to consider the desirability of preparing uniform rules applicable to international cheques and the question whether this can best be achieved by extending the application of the draft uniform law to international cheques or by drawing up a separate uniform law on international cheques, and to report its conclusions on these questions to the Commission at a future session".

135. The Working Group, at its first session, requested the Secretariat to conduct, in consultation with the UNCITRAL Study Group on International Payments, inquiries regarding the use of cheques in international payments and the problems presented, under current commercial and banking practices, by divergencies between the rules of the principal legal systems.

136. At the present session the Working Group had before it a note by the Secretariat setting forth the first results of such inquiries.* The Working Group took note of the view expressed by the Secretariat and the Study Group that further study and inquiries would be necessary before a more complete and definite view of the issues could be given. Accordingly, the Group requested the Secretariat and the Study Group to make further inquiries and to submit, at a future session, a report on the use of cheques for settling international payments and the legal problems arising in that connexion. In particular, the Secretariat was requested to obtain information regarding the impact, in the near future, of the increased use of telegraphic transfers and of the development of telecommunication systems between banks on the use of cheques for international payment.

FUTURE WORK

137. The Working Group gave consideration to the timing of its fourth session. The Group was of the opinion that, in view of the progress achieved at the present session, its fourth session should be held as soon as possible. Some representatives expressed the view that the fourth session should be held in the course of 1976. Others were of the opinion that consideration of the time and place for the fourth session should be left for decision by the Commission at its forthcoming session, which will convene on 1 April 1975.

* Reproduced in this volume, part two, II, 2.