

II. INTERNATIONAL PAYMENTS

1. Report of the Working Group on International Negotiable Instruments on the work of the second session (New York, 7-18 January 1974) (A/CN.9/86)*

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INTRODUCTION

1. In response to decisions by the United Nations Commission on International Trade Law (UNCITRAL), the Secretary-General prepared a "Draft uniform law on international bills of exchange and international promissory notes, with commentary" (A/CN.9/WG.IV/WP.2).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 (articles 12 to 22), the rights and liabilities of signatories (articles 27 to 40), and the definition and rights of a "holder" and a "protected holder" (articles 5, 6 and 23 and 26).³

* 4 February 1974

¹ UNCITRAL report on the fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), 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 (1972), *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717) para. 61 (2) (c); UNCITRAL Yearbook, Vol. III: 1972, part one, II, A.

² *Ibid.*, para. 61 (1) (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.

3. The Commission at its sixth session (1973) took note with appreciation of the report of the Working Group on its first session, and requested it to continue its work.⁴

4. The Working Group held its second session at United Nations Headquarters in New York from 7 to 18 January 1974. The Working Group consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. With the exception of Egypt, all the members of the Working Group were represented. The session was also attended by observers from the following members of the Commission: Austria, Brazil, Czechoslovakia, Greece, Guyana, Japan, Nepal, Philippines and Sierra Leone, and by observers from the International Monetary Fund, Bank for International Settlements, Commission of the European Communities, Hague Conference on Private International Law and the European Banking Federation.

5. The Working Group elected the following officers:

Chairman Mr. René Roblot (France)
Rapporteur Mr. Roberto L. Mantilla-Molina (Mexico)

6. The Working Group had before it the following documents: a provisional agenda (A/CN.9/WG.IV/WP.3), the draft uniform law on international bills of exchange and international promissory notes, and com-

⁴ UNCITRAL report on the sixth session (1973) *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17* (A/9017), paras. 25-36; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A.

mentary (A/CN.9/WG.IV/WP.2),⁵ and the 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).⁶

DELIBERATIONS AND CONCLUSIONS

7. As at its first session, 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 42 to 62 of the draft uniform law. A summary of the Group's deliberations in respect of those articles and its conclusions are set forth in paragraphs 10 to 140 of this report.

9. At the close of its session, the Working Group expressed its appreciation to the representatives of international banking and trading 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 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.

A. Liability of an endorser on the instrument

Article 41

"The endorser engages that upon dishonour of the bill by non-acceptance or non-payment or upon dishonour of the note by non-payment, and upon any necessary protest, he will pay the amount of the instrument, and any interest and expenses which may be claimed under articles 67 or 68, to the holder or to any party subsequent to himself who is in possession of the instrument and who is discharged from liability thereon in accordance with articles 69 (2), 70, 71 or 76."

10. Article 41 lays down what is the liability of the endorser on his endorsement of an international instrument. Under the article, the liability of an endorser is a secondary liability: it materializes upon dishonour of the instrument by non-acceptance or by non-payment and is subject to any necessary presentment for acceptance or for payment and the making of a protest. An endorser may limit or exclude his liability on the instrument by an express stipulation to that effect on the instrument. At its first session, the Working Group decided that the question as to whether a party can limit or exclude his liability should be dealt with in the articles governing the liability of each of the parties to an instrument (see report of the Working Group on International Negotiable Instruments on the work of its first session, A/CN.9/77, paragraph 99, *in fine*).⁷ The Group also agreed that an exclusion or limitation of liability by a party would be effective only

with respect to that party (*ibid.*, paragraph 102). Consequently, article 41 of the revised text (A/CN.9/WG.IV/CRP.3) provides that:

"(a) The endorser may exclude or limit his liability by an express stipulation on the instrument.

"(b) Such stipulation shall be effective only with respect to the endorser."

11. In connexion with the endorser's liability being subject to the making of a protest, where protest is necessary, it was noted that article 58 allowed for the making of an authenticated protest and the making of a protest in simplified form. The question was raised as to what would be the legal effect of a protest, in simplified form, for dishonour of an instrument on which it was stipulated that an authentic protest was required. In this connexion, it was suggested that in such a case the holder should not lose his rights of recourse against prior parties, but should be liable for any damages that were due to his failure to make an authenticated protest. The Working Group decided to take up this question in the context of article 58.

12. It was suggested that the commentary to article 41 should emphasize the importance of the giving of notice in view of the fact that failure to do so would make the holder liable for damages (see article 66).

13. The Working Group expressed provisional agreement with article 41. In accordance with the opinion expressed by it at its first session (A/CN.9/77, para. 120),⁸ the Group decided that the part of the article dealing with the endorser's liability to parties subsequent to himself who are in possession of the instrument and are discharged of liability thereon, should be examined in connexion with the provisions of the draft uniform law concerning discharge (part six).

B. Liability of an endorser outside the instrument

Article 42

"(1) Any person who negotiates an instrument shall be liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to the negotiation

"(a) A signature on the instrument was forged or unauthorized; or

"(b) The instrument was materially altered; or

"(c) A party has a valid claim or defence; or

"(d) The bill is dishonoured by non-acceptance or non-payment or the note is dishonoured by non-payment.

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

14. Article 42 concerns the liability of an endorser outside the instrument. An endorser is liable for any damages that a subsequent holder may suffer because of defects in previous signatures, material alterations or other infirmities in the rights of the endorser to and upon the instrument. The fact that the endorser did not know of such defects, alterations or infirmities, whether negligently or not, does not affect his liability under the article. Such liability runs with the instru-

⁵ The text of the draft uniform law on international bills of exchange and international promissory notes was reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 2.

⁶ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

⁷ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

⁸ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

ment in favour of any subsequent holder who, when taking the instrument, had no knowledge of the defects, alterations or infirmities.

Since the liability incurred under article 42 is a liability outside the instrument, it is incurred also by a person who is not himself liable on the instrument, as where an endorser has endorsed the instrument "without recourse" or where a person has transferred an instrument, on which the last endorsement is in blank, by mere delivery. Furthermore, such liability materializes the moment the instrument is delivered, regardless of its date of maturity. Since the liability is outside the instrument, presentment and the making of protest is not a condition precedent to such liability.

15. The Working Group expressed provisional agreement with the inclusion in the draft of a provision on the lines of article 42, subject to reviewing the article in the context of forged or unauthorized signatures. The following observations were made:

- (i) The article should provide for an upper limit of the amount for damages beyond which the endorser would not be liable. It was agreed that such liability should not exceed the amount which a holder may receive by application of article 67 or 68.
- (ii) The expression "any person" in paragraph 1 of article 42 should not comprise agents for collection. In this connexion it was noted that such agents could be contractually liable to the holder, i.e. outside the instrument.
- (iii) The Working Group was of the opinion that a person liable under article 42 should be permitted to exclude his liability, for instance by writing on the instrument the words "without recourse". However, it was noted that the insertion of such a clause in the instrument could be construed as excluding the liability of the endorser under both article 41 and article 42, thus making it impossible for him to exclude his liability under one of these articles only. The Group instructed the Secretariat to examine the possibility of a special clause which would exclude liability under article 42 only, and to make appropriate inquiries to that effect among banking and trade institutions.
- (iv) The Working Group was agreed that a person liable under article 42 should not be able to exclude his liability if he himself had committed a fraud, if he knew that prior to the transfer of the instrument to him a signature on the instrument was forged or unauthorized, where the instrument was materially altered, where a party had a valid claim or defence, or where the instrument was dishonoured by non-acceptance or non-payment.

16. The Working Group concluded that the provision in article 42 (1) (c) should be complemented by adding the words "against him", on the ground that defences between previous parties that could not be opposed to the transferor should not give rise to an action against the transferor.

17. The question was raised whether the liability under article 42 should also extend to liability for insolvency of a prior party. It was agreed that article 42

should not deal with this issue. However, it was pointed out that, under the draft uniform law, the fact that the drawee was in the course of insolvency proceedings constituted dishonour by non-acceptance; the transferor would thus become liable under article 42. The Working Group requested the Secretariat to ensure that this consequence be specifically stated in the commentary on the final text of the draft uniform law to be submitted to the Commission.

18. As regards the use of the term "negotiates" in paragraph (1) of article 42, the Working Group requested the Secretariat to employ, in the revised text of the article, the concepts of endorsement and delivery, in accordance with its conclusions in respect of article 13 (see report of the Working Group on the work of its first session, A/CN.9/77, para. 17).⁹

19. One representative and the observer of an international organization expressed their reservations in respect of article 42.

C. Rights and liabilities of a guarantor (articles 43-45)

Article 43

"(1) Payment of an instrument may be guaranteed, as to the whole or part of its amount, by any person who may or may not be a party.

"(2) A guarantee must be written on the instrument or on a slip affixed thereto. It is expressed by the words: 'guaranteed', 'aval', 'good as aval', or by words of similar import, accompanied by the signature of the guarantor.

"(3) A guarantor may specify the party whose payment he guarantees.

"(4) In the absence of such specification, the person guaranteed shall be the drawer, in the case of a bill, or the maker, in the case of a note."

20. Articles 43, 44 and 45 set forth rules in respect of a person guaranteeing on the instrument the obligation of another party. Under the Geneva Uniform Law on Bills of Exchange and Promissory Notes such guarantee is known as "aval". The special obligation of a guarantor is to be distinguished from the obligation of an endorser, which is regulated under articles 41 and 42. Under article 43, paragraph (3), a guarantor may specify on the instrument the party whose liability he guarantees. Under paragraph (4), in the absence of such indication, he will be deemed to have guaranteed the liability of the drawer, in the case of a bill, or of the maker, in the case of a note. Evidence brought from outside the bill which would prove that the guarantor intended to guarantee the liability of another party will not invalidate such presumption.

21. The Working Group at its first session considered the scope of the provisions on guarantee and that of the provision on endorsement. Under paragraph (2) of article 43, a guarantee is effected by the signature of the guarantor on the instrument, or on a slip affixed thereto, accompanied by the words "guaranteed", "aval", "good as aval" or by words of similar import. A mere signature, not being the signature of the drawer, the drawee or an endorser, would therefore not have been a guarantee under article 43

⁹ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

but would have constituted an undertaking under article 32, namely that of an endorser. At its first session, the Working Group considered that the liability following from such a mere signature should be dealt with in connexion with articles 43 to 45 and that the text of article 32 should be deleted. The Group, at its first session, concluded that the scope of article 43 should be broadened by deleting from article 43 (2) the provision that a guarantee is effected only by a signature which is accompanied by the words "guaranteed", "aval", "good as *aval*", or by words of similar import (A/CN.9/77, para. 114).¹⁰ The Group also concluded that additional questions arising in the context of a mere signature should be dealt with in the present article (*ibid.*). However, the Group was agreed that the signature alone of the drawee on the front of the instrument constituted an acceptance (*ibid.*, para. 128).

22. The Working Group, at the present session, was of the opinion that the uniform law should make provision for liability on the instrument by way of guarantee.

23. The Working Group, taking into account the consequences of the deletion of article 32, considered the liability under a mere signature on the basis of the following example: the drawer issues a bill to the payee P and the bill shows the following series of signatures on its back: (1) Pay to A (signed) P; (2) (signed) X; (3) Pay to B (signed) A; (4) (signed) B; (5) (signed) Y; (6) Pay to D (signed) C. The Group concluded that X, B and Y should be liable as endorsers because their signatures could be construed, on the face of it, as fitting within a chain of endorsements.

24. The Working Group expressed agreement with the provisions of paragraphs (3) and (4) of article 43. However, the Group requested the Secretariat to clarify in paragraph (3) that the specification by the guarantor should appear "on the instrument or on a slip affixed thereto".

25. It was observed that the present wording of article 43, paragraph (1), made the guarantor guarantee "payment" of the instrument. The Working Group requested the Secretariat to modify article 43 in such a way as to make it clear that the guarantor guaranteed a party's undertaking on the instrument.

Article 44

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

"(2) The guarantor shall be liable on the instrument even when the party for whom he has become guarantor is not liable thereon, unless the party's lack of liability is apparent from the face of the instrument."

26. Article 44 provides in paragraph (1) that the liability of a guarantor is of an accessory nature. It follows that if the liability of a party is secondary, the liability of his guarantor is also secondary. Further, the guarantor may base defences against his liability on the instrument on the defences which the party

whose obligation he guaranteed many invoke. However, paragraph (2) specifies an area in which the liability of the guarantor is primary in that he will incur liability when the liability of the person for whom he has become a guarantor was null and void *ab initio*, as where such person's signature on an instrument was forged or such person signed the instrument without capacity.

27. The Working Group considered three possibilities with respect to the nature of the guarantor's liability:

- (1) His liability should be a primary liability in all cases;
- (2) His liability should be an accessory liability in all cases; and
- (3) His liability should be primary in some cases and accessory in others.

The Group, after deliberation, concluded that the most appropriate solution would be to lay down a rule under which the liability of the guarantor would be accessory in all cases, except where the guarantor had stipulated otherwise on the instrument. Consequently, the Group agreed to delete paragraph (2) of article 44.

28. It was suggested that the commentary on article 44 should specify that a guarantor could not only invoke the defences of the party for whom he became liable, but also any defences which were personal to himself.

Article 45

"The guarantor, when he pays the instrument, shall have rights thereon against the party guaranteed and against those who are liable thereon to that party."

29. Pursuant to article 45, the guarantor, upon payment of the instrument by him, acquires rights on the instrument against the party for whom he became guarantor and against those parties who were liable on the instrument to that party.

30. The Working Group considered the question whether the guarantor, upon payment of the instrument by him, should have rights not only on the instrument but also to the instrument over and above the rights which a payor has under article 70 (2). Referring to the deliberations held at its first session (see A/CN.9/77, para. 62), the Group was agreed that the guarantor should not be considered to be a holder and that, upon payment of the instrument by him, his only rights should be the rights under articles 45 and 70 (2).

D. Presentment, dishonour and recourse

I. PRESENTMENT FOR ACCEPTANCE

Article 46

"(1) The holder must present a bill for acceptance

"(a) When the drawer or an endorser or a guarantor has stipulated on the bill that it shall be so presented;

"(b) When the bill is drawn payable at a fixed period after sight; or

¹⁰ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

"[(c) When the bill is drawn payable elsewhere than at the residence or place of business of the drawee].

"(2) The holder may present for acceptance any other bill."

31. Presentment for acceptance is optional, except in the cases specified in article 46. Failure to present a bill for acceptance in these cases affects the liability of prior parties as provided in article 50.

Paragraph (1) (a)

32. The Working Group was agreed that the drawer, an endorser or a guarantor could stipulate on the bill that it must be presented for acceptance.

33. The Working Group considered the effect of a stipulation, made on an instrument, on the liability of parties subsequent to the party making the stipulation. The Group was agreed that under the uniform law:

- (i) A stipulation made on the instrument by the drawer or the maker would be operative in respect of subsequent parties, unless a subsequent party had stipulated otherwise on the instrument;
- (ii) A stipulation made on the instrument by an endorser or a guarantor would be personal to that endorser or that guarantor and, therefore, not be operative in respect of subsequent parties.

The Group also examined the following questions:

- (i) Would a stipulation made on an instrument be effective only if it was especially signed by the party making the stipulation?
- (ii) What should be the effect of a stipulation when it could not be determined from the face of the instrument which party had made it?

The Group, after deliberation, was of the opinion that the uniform law should not set forth any special rule on these questions.

Paragraph (1) (b)

34. The Working Group expressed agreement with the provision of this paragraph.

Paragraph (1) (c)

35. The Working Group considered three alternative solutions in respect of a bill drawn payable elsewhere than at the residence or place of business of the drawee:

- (i) The holder would have an option to present or not present a domiciled bill for acceptance;
- (ii) The holder must present a domiciled bill for acceptance and failure to do so would result in non-liability of prior parties; or
- (iii) The holder must present a domiciled bill for acceptance and failure to do so would render him liable to a prior party for any damages that such party might suffer from a dishonour of the bill by non-payment if the dishonour was due to non-presentment for acceptance.

The Working Group, after deliberation, was agreed that presentment for acceptance of a domiciled bill

should be mandatory and that failure to present should result in the non-liability on the bill of prior parties. The Group was of the opinion that such a rule was justified in view of the fact that where the drawer indicated the place of payment on the bill and such place was not the residence or place of business of the drawee, the drawee would need to be advised so as to be able to provide for the necessary funds at the place of payment.

36. The Working Group requested the Secretariat to redraft paragraph (1) (c) in such a way that the requirement of presentment for acceptance would not apply in the case of a domiciled bill drawn payable on demand.

Paragraph (2)

37. The Working Group suggested that this paragraph should become paragraph (1) since it sets forth a general rule to which the present paragraph (1) states the exceptions.

Article 47

"(1) The drawer or an endorser or a guarantor may stipulate on the bill that it shall not be presented for acceptance or that it shall not be presented before a specified date or before the occurrence of a specified event.

"(2) Where a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph (1) and acceptance is refused the bill is not thereby dishonoured in respect of the party making the stipulation.

"(3) Where the drawee accepts a bill notwithstanding a stipulation that it shall not be presented for acceptance, the acceptance shall be effective."

38. Article 47 permits a party, by a stipulation on the bill, to exclude his liability to pay the bill in the event of dishonour by non-acceptance. The holder will thus not be able to exercise an immediate right of recourse against such party. Similarly, a party may stipulate on the bill that it not be presented for acceptance before a specified date or before the occurrence of a specified event, e.g. the arrival of the goods. However, an acceptance given, notwithstanding such stipulations, is effective.

39. The Working Group expressed agreement with the provisions set forth in paragraph (1) of article 47, in so far as it concerned a stipulation made by the drawer. Consistent with its deliberations in respect of article 46 (see paragraph 33 above), the Group was agreed that the stipulations referred to in paragraph (1) of article 47 if made by the drawer, would benefit subsequent parties.

40. The Working Group considered the following questions:

- (i) Should a party other than the drawer be permitted to make a stipulation prohibiting presentment for acceptance?
- (ii) Where the drawer has stipulated that the bill must be presented for acceptance, and an endorser stipulates that it must not be so presented, what is the legal effect of such stipulation on the liability of parties subsequent to the endorser?

The Group was of the view that preference should be given to a rule under which only the drawer could make a stipulation prohibiting presentment which would be effective as to other parties. At the same time, it was of the opinion that the relationship between various stipulations excluding or limiting liability should be examined more closely. The Group requested the Secretariat to redraft article 47 with these considerations in mind.

Article 48

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

"(a) The holder must present the bill to the drawee.

"(b) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise.

"(c) Where the drawee is dead, presentment may be made to the person or authority who, under the applicable law, is entitled to administer his estate.

"(d) Where the drawee is in the course of insolvency proceedings, presentment may be made to a person who under the applicable law is authorized to act in his place.

"(e) Where a bill is drawn payable on, or at a fixed period after, a stated date, any presentment for acceptance must be made before the date of maturity.

"(f) A bill drawn payable at a fixed period after sight must be presented for acceptance within one year of its date.

"(g) A bill in which the drawer or an endorser or a guarantor has stated a date or time-limit for presentment for acceptance must be presented on the stated date or within the stated time-limit.

"(h) A bill in which the drawer or an endorser or a guarantor has stipulated that it shall be presented for acceptance, but without stating a date or time-limit for presentment, [or a bill which is drawn payable elsewhere than at the place of business or residence of the drawee and which is not a bill payable after sight,] must be presented before the date of maturity."

41. In order to establish the liability of parties because of dishonour for non-acceptance (article 51 (2)), presentment for acceptance, whether optional or mandatory, must be "due presentment". Article 48 specifies what constitutes due presentment.

Paragraph (a)

42. The Working Group expressed agreement with the principle underlying paragraph (a) that presentment for acceptance should be "personal", i.e., "to the drawee". However, the Group was of the opinion that

- (i) The bill must be presented at a reasonable hour on a business day, and
- (ii) If the bill indicates a place of acceptance, presentment must be made at that place.

Paragraph (b)

43. The Working Group expressed agreement with this provision.

Paragraphs (c) and (d)

44. The Working Group expressed agreement with these provisions. The question whether the death or insolvency of the drawee dispenses with presentment for acceptance is discussed under article 49 (1) (see paragraphs 53 to 56 below).

45. One representative expressed his reservation in respect of paragraph (d).

Paragraph (e)

46. The Working Group expressed agreement with this provision.

Paragraph (f)

47. The question was raised whether the period of one year running from the date of issue of the bill within which a bill drawn payable after sight must be presented for acceptance was justified. The Working Group requested the Secretariat to inquire among banking and trade institutions what would be an acceptable period of time within which such bills should be presented for acceptance.

48. The question was also raised how the period of one year could be calculated if the bill did not state a date of issue. The Working Group was agreed that, in such a case, the holder should be able to insert the true date of issue. In this connexion, it was agreed that if the holder should insert a wrong date of issue, the effects would be similar to those set out in article 11.

Paragraph (g)

49. The Working Group expressed agreement with the provision of this paragraph.

Paragraph (h)

50. The Working Group was of the view that this paragraph was already covered by paragraphs (e) and (f) and therefore superfluous.

Presentment by mail

51. The Working Group provisionally agreed that the uniform law should not set forth a specific provision in respect of presentment for acceptance or for payment through the post. In the view of the Group, the absence of such a provision would not prevent a holder from using the post for presentment. The Group requested the Secretariat to inquire on the practice of presentment by mail and the existence of any special rules for presentment and the making of protest through or by the post.

Article 49

"Presentment for acceptance shall be dispensed with

"(1) Where the drawee is dead or is in the course of insolvency proceedings, or is a person not having capacity to accept the bill;

"(2) Where, with the exercise of reasonable diligence, presentment cannot be effected within the time-limits prescribed for presentment for acceptance;

"(3) Where a party has waived presentment expressly or by implication, in respect of such party."

52. Article 49 states the cases in which presentment for acceptance is dispensed with. Under article 51 (1) (b), such cases constitute constructive dishonour and, under article 51 (2), the holder may then exercise an immediate right of recourse, subject to any necessary protest.

Paragraph (1)

53. The Working Group considered the question whether the death of the drawee or the fact that the drawee is in the course of insolvency proceedings should entitle the holder to an immediate right to recourse against prior parties. Under one view, there should not be constructive dishonour because in the event of the drawee's death, the holder could present the bill to the drawee's heirs and, in the event of insolvency proceedings, to the person who under the applicable law was authorized to act in his place. Moreover, in the case of insolvency proceedings, non-presentment would be to the detriment of the drawer in that the assets of the insolvent drawee would possibly have been distributed among his creditors before the drawer exercised a right of action against the person authorized to administer the drawee's assets. Under another view, the holder when taking the bill had a legitimate expectancy to be paid fully by the drawee according to the terms of the instrument. Such expectancy fell short in the case of the drawee's death or his insolvency. The Working Group concluded that the latter view should prevail and expressed agreement with the provision of paragraph (1). One representative expressed his reservation.

54. The question was raised whether the provision should also apply to legal entities which were not physical persons ("*personnes morales*"). The Working Group was of the view that the rule under paragraph (1) of article 49 should apply also to such entities. It instructed the Secretariat to redraft paragraph (1) in such a way as to make it clear that the rule would apply only to entities which under the applicable national law were defunct or had ceased to exist.

55. The Working Group considered the special problem of the merger of a drawee-company with another company. The Group was agreed that if in such a case the drawee ceased to exist, this case should be governed by paragraph (1).

56. It was suggested that the Secretariat should consider the case of a fictitious drawee with a view to possibly extending the provision of paragraph (1) to this case also.

Paragraph (2)

57. The Working Group expressed agreement with the provision of this paragraph.

Paragraph (3)

58. The Working Group considered the question whether the uniform law should provide for the waiver of presentment for acceptance. It was noted that, in accordance with the general policy underlying the Draft Uniform Law, a party had the faculty to limit, exclude or increase his liability on an instrument. On the other hand, it was also noted that the effect of a waiver of presentment for acceptance was that the party in respect of whom the waiver was operative would not be freed from liability because of failure by the holder to present for acceptance a bill which must be so presented. Failure to present should not give the holder a right of immediate recourse against parties on whom the waiver was binding on the ground that there was constructive dishonour. It was further noted that non-presentment for acceptance of an instrument drawn payable after sight would result in the absence of a maturity date and that, in accordance with article 1 (2), there would not be a bill. The Group was therefore of the opinion that paragraph 3 should be deleted. The Group also requested the Secretariat to study the question whether and in what circumstances the uniform law should make provision for waiver of presentment for acceptance. (On waiver of presentment for payment, see paragraph 83 below; on waiver of protest, see paragraphs 128 and 129 below.)

Article 50

"(1) If a bill which must be presented for acceptance in accordance with article 46 (1) (a) is not duly presented, the party who stipulated on the bill that it shall be presented shall not be liable on the bill.

"(2) If a bill which must be presented for acceptance in accordance with article 46 (1) (b) or (c) is not duly presented, the drawer, the endorsers and the guarantors shall not be liable on the bill."

59. In the case of bills that must be presented for acceptance under article 46, the failure of the holder to present results in the absence of liability of prior parties on the bill.

60. The Working Group expressed agreement with the provision of article 50, but requested the Secretariat to introduce into paragraph (1) the amendments agreed upon in respect of article 46 (1) (a) regarding the effect of the stipulation on the liability of subsequent parties.

Article 51

"(1) A bill is dishonoured by non-acceptance

"(a) When acceptance is refused upon due presentment or when the holder cannot obtain the acceptance to which he is entitled under this law; or

"(b) When presentment for acceptance is dispensed with pursuant to article 49, and the bill is not accepted.

"(2) Where a bill is dishonoured by non-acceptance the holder may, subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorsers and the guarantors."

61. Article 51 (1) lays down what constitutes dishonour by non-acceptance. Article 51 (2) states the consequences of such dishonour as regards the liability of prior parties.

62. The Working Group expressed agreement with the provisions of article 51, subject to the opinion expressed by it under article 49 (3) (see paragraph 58 above) that waiver of presentment for acceptance should not constitute constructive dishonour.

63. The question was raised whether paragraph (2) was necessary since the same rule was set forth in article 57. On the other hand, it was observed that stating the consequence of dishonour made it easier for a reader to grasp the significance of this article.

II. PRESENTMENT FOR PAYMENT

Article 52

"(1) Presentment of a bill for payment shall be necessary in order to render the drawer, an endorser or a guarantor liable on the bill.

"(2) Presentment of a note for payment shall be necessary in order to render an endorser or his guarantor liable on the note.

"(3) Presentment for payment shall not be necessary to render the acceptor liable."

64. Under article 52, presentment of an instrument for payment is not necessary to make the acceptor or the maker liable. However, such presentment is necessary to establish the liability of the drawer, endorser and guarantor.

65. The Working Group expressed agreement with the substance of article 52. However, it was pointed out that the rules under article 52 also followed from other provisions of the draft uniform law (article 34 as regards the drawer, article 34 (*bis*) as regards the maker, article 36 as regards the acceptor, article 41 as regards the endorser, article 44 as regards the guarantor, and article 55). The Secretariat was requested to take this into account when redrafting the section on presentment.

66. The Working Group was agreed that paragraph (3) should be completed by inserting the words "or the maker" after the word "acceptor".

Article 53

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

"(a) The holder of an instrument must present the instrument for payment to the drawee or to the acceptor or to the maker, as the case may be.

"(b) Where a bill is drawn upon or accepted by two or more drawees, or where a note is signed by two or more makers, it shall be sufficient to present the instrument to any one of them; if a place of payment is specified, presentment shall be made at that place.

"(c) Where the drawee or the acceptor or the maker is dead, and no place of payment is specified, presentment must be made to the person or authority who under the applicable law is entitled to administer his estate.

"(d) An instrument which is not payable on demand must be presented for payment on the day on which it is payable or on one of the two business days which follow.

"(e) An instrument which is payable on demand must be presented for payment within one year of its stated date and if the instrument is undated within one year of the issue thereof.

"(f) An instrument must be presented for payment:

"(i) At the place of payment specified on the instrument; or

"(ii) Where no place of payment is specified, at the address of the drawee or the acceptor or the maker indicated on the instrument; or

"(iii) Where no place of payment is specified and the address of the drawee or the acceptor or the maker is not indicated, at the principal place of business or residence of the drawee or the acceptor or the maker."

67. In order to establish the liability of the drawer, the endorser and their guarantors on the ground that there was actual dishonour by non-payment (article 56 (1) (a)), presentment for payment must be "due" presentment. Article 53 specifies what constitutes due presentment.

Paragraph (a)

68. The Working Group expressed agreement with the provision of paragraph (a), subject to specifying in the provision that presentment for payment must be made at a reasonable hour on a business day.

Paragraph (b)

69. The Working Group expressed agreement with the substance of paragraph (b), but requested the Secretariat to redraft the provision on the lines of paragraph (b) of article 48, specifying that if a bill is drawn upon or accepted by two or more drawees, or if a note is made by two or more makers, it shall be sufficient to present the instrument to any one of them, unless the instrument clearly indicates otherwise.

70. The Working Group was agreed that the words "if a place of payment is specified, presentment shall be made at that place" should be deleted.

Paragraph (c)

71. The Working Group expressed agreement with the substance of this paragraph. It was noted that, under articles 49 and 51, the death of the drawee dispensed with presentment for acceptance and entitled the holder to an immediate right of recourse against prior parties. The Working Group was agreed that in this case, presentment for payment should be also dispensed with. The question arose under what circumstances presentment for payment would nevertheless be required. The Group was of the view that two cases could be envisaged: (i) that of a demand bill and (ii) that of a bill on which the drawer had stipulated that it should not be presented for acceptance. The Group requested the Secretariat to examine the im-

plications of articles 49 and 51 in the context of paragraph (c), in so far as the drawee was concerned. One representative expressed his reservation in respect of paragraph (c).

72. In view of the deletion of article 54 (2) (d) (see paragraph 86 below), the Working Group requested the Secretariat to add to article 53 a new paragraph which would provide that where the drawee, the acceptor or the maker was in the course of insolvency proceedings, presentment for payment must be made to a person who under the applicable law is authorized to act in his place.

Paragraph (d)

73. The Working Group considered whether it was justified to allow the holder of an instrument to present the bill for payment also on one of the two business days which follow the day of maturity. The view was expressed that the two extra days should be granted for the sole benefit of the drawee, the acceptor or the maker. However, the Group was informed that paragraph (d) was necessary in order to facilitate the presentment for payment within the time-limits laid down in the uniform law, and to accommodate present commercial practices. The Group therefore concluded that it was appropriate to grant the holder, usually a collecting bank, two additional days for due presentment. (See also paragraphs 115-117 below.)

Paragraph (e)

74. The question was raised whether the period of one year, running from the date of issue of the instrument, within which an instrument payable on demand must be presented for payment, was justified. The Working Group requested the Secretariat to inquire amongst banking and trade institutions what would be an acceptable period of time within which such an instrument should be presented for payment. It was suggested that the period laid down in respect of presentment for acceptance need not necessarily be the same as the period laid down in respect of presentment for payment, and that there might be grounds for laying down a shorter period for presentment for acceptance than for presentment for payment.

Paragraph (f)

75. The Working Group considered a proposal made at the preparatory stage of work on the draft uniform law under which an instrument should be domiciled for payment with a bank. In this context, reference was made to a more general proposal made by the Banca d'Italia according to which the uniform law would permit only one non-bank endorsement, namely that of the payee. The Working Group agreed to consider these proposals in the context of the scope of application of the uniform law (articles 1 to 3).

76. The Working Group was of the opinion that paragraph (f) should be complemented by an additional provision in subparagraph (iii) according to which an instrument may be presented wherever the drawee, the acceptor or the maker can be found or at the drawee's last known residence or place of business.

77. The question was raised as to the meaning of the terms "principal place of business" and "residence". The Working Group was agreed that these terms should not be defined in the uniform law, but should be left to local law. In this connexion, the Group referred to its deliberations and conclusions in respect of article 40 (A/CN.9/77, para. 134),¹¹ requesting the Secretariat to give further consideration to the interpretation of the "place" of payment.

78. As to the term "residence", the Working Group was agreed that it should relate only to the private residence of an individual person and not to the residence of the officers of a legal entity which was not a private person ("personne morale").

Use of copies of a bill or a note

79. The Working Group requested the Secretariat to make inquiries regarding the use of a copy of a bill or a note in making presentment for payment.

Article 54

"(1) Delay in making presentment for payment shall be excused when the delay is caused by circumstances beyond the control of the holder. When the cause of delay ceases to operate, presentment must be made promptly [within ... days].

"(2) Presentment for payment shall be dispensed with

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

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

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

"(d) Where the drawee or acceptor of a bill or the maker of a note, after the issue thereof, is in the course of insolvency proceedings in the country where presentment is to be made;

"(e) As regards a bill, where the bill has been protested for dishonour by non-acceptance;

"(f) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to pay the bill and the drawer has no reason to believe that the bill would be paid if presented."

80. Article 54 provides for the excuse of delay in making presentment for payment. When delay is excused, the liability of prior parties is not affected on the ground that there was no presentment for payment. Under the article, delay is excused when the holder is prevented from presenting the instrument for payment by circumstances beyond his control. Under paragraph (2) (b) and (c), present-

¹¹ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

ment for payment is dispensed with altogether if the cause of delay continues to operate beyond 30 days after the date of maturity, in the case of a fixed-term instrument, or beyond 30 days after the expiration of the time-limit for presentment for payment, in the case of an instrument payable on demand. Under paragraph 2, presentment for payment is also dispensed with where it was waived, where the drawee, acceptor or maker is in the course of insolvency proceedings, where the bill was protested for dishonour by non-acceptance and where, as regards the drawer, the holder has no reason to believe that the bill would be paid.

Paragraph (1)

81. In connexion with the expression "circumstances beyond the control of the holder", the Working Group considered whether delay in making presentment for payment should be excused if the delay was due to circumstances which were personal to the holder, such as illness or death. It was noted that the Working Group on Time-Limits and Limitations (Prescription) had considered a similar rule and had suggested to the Commission a provision under which delay (typically, in commencing legal proceedings) would be excused if it was due to circumstances which were "not personal to the creditor and which he could neither avoid nor overcome" (A/CN.9/70, annex I, article 19).¹² This wording was modified by the Commission as follows: "Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome . . ." (see article 20 of the Draft Convention on Prescription (Limitation) in the International Sale of Goods, Yearbook of the United Nations Commission on International Trade Law, Vol. III: 1972, part one, I, B, para. 21). It was noted that this language approved by the Commission did not exclude circumstances personal to the creditor. The Working Group was agreed that article 54 (1) should use the same wording as article 20 of the Draft Convention on Prescription (Limitation). The suggestion was made that the provision in article 54 (1) of the present draft should more clearly exclude excuse based on circumstances imputable to the fault of the holder. It was indicated that the language of article 20 of the Prescription Convention, by addition of the phrase "and which he could neither avoid nor overcome" was helpful in this regard. The Group noted that in translating the above provision of the Draft Convention on Prescription (Limitation), the verbal equivalent was used in other language versions, rather than legal idioms such as *force majeure* or act of God. It was agreed that this approach should also be used in the language versions of the present draft, since such legal idioms had different meanings in different systems of law.

82. The Working Group was of the view that the term "promptly" should be replaced by the term "with reasonable diligence" as used in article 49 (2), and that the words "within . . . days" placed between brackets should be deleted.

¹² UNCITRAL Yearbook, Vol. III: 1972, part two, I, B, 2.

Paragraph (2)

Subparagraph (a)

83. The question of an express or an implied waiver was considered by the Working Group in connexion with the waiver of the making of a protest (see article 61, paragraphs 128 and 129 below).

Subparagraph (b)

84. The Working Group expressed agreement with this provision.

Subparagraph (c)

85. It was noted that under the present wording of subparagraph (c), the holder, in the case of a demand bill, could not exercise a right of recourse on the ground of constructive dishonour by non-payment until 30 days after the expiration of the time-limit for presentment for payment. In the view of the Working Group, this rule would result in an unreasonable period of inaction imposed on the holder. The Group therefore requested the Secretariat to reconsider subparagraph (c) with a view to enabling the holder to exercise his right of recourse within a shorter period of time than that provided in the present text.

Subparagraph (d)

86. The Working Group was of the opinion that the fact that the drawee, the acceptor or the maker was in the course of insolvency proceedings should not entitle the holder to an immediate right of recourse. The holder should present the instrument for payment to the person who under the applicable law was authorized to act in the place of the drawee, the acceptor or the maker and, in the case of dishonour by non-payment, should protest the instrument for non-payment. The Group therefore was agreed that subparagraph (d) should be deleted.

87. It was pointed out that under the legal system of some countries the bankruptcy of the acceptor or the maker accelerated the date of maturity. The Working Group requested the Secretariat to study the effect of such acceleration on the relevant provisions of the draft uniform law.

88. It was observed that the negotiable instruments law of some common law countries made provision for a so-called "protest for better security" in the case of bankruptcy or insolvency of the acceptor, or of suspension of payment by him, before the bill became due. The Working Group requested the Secretariat to study the question whether similar provisions should be introduced in the Uniform Law.

Subparagraph (e)

89. The Working Group expressed agreement with the provision of subparagraph (e).

Death or insolvency proceedings of the drawee

90. The Working Group considered the case of a bill drawn payable at a fixed date which did not include a stipulation that it be presented for acceptance. In such a case, article 49 (1) provides that the death of the drawee or the fact that he was in the course of insolvency proceedings dispenses with presentment for ac-

ceptance. The Group was of the opinion that in respect of such a fixed term bill, article 54 (2) should make provision for dispensation from presentment for payment.

Subparagraph (f)

91. The Working Group was agreed that subparagraph (f) should be deleted provisionally and that the issues presented by this provision should be taken up in connexion with a redraft by the Secretariat of article 62 (2) (c).

Article 55

"(1) If a bill is not duly presented for payment, the drawer, the endorsers and their guarantors shall not be liable on the bill.

"(2) If a note is not duly presented for payment, the endorsers and their guarantors shall not be liable on the note."

92. Under article 55, failure to make presentment for payment will result in the absence of liability on the instrument of the drawer, the endorsers and their guarantors. Therefore the holder will not be entitled to exercise a right of recourse in the event of dishonour of the instrument by non-payment.

93. The Working Group expressed agreement with the provision of article 55.

94. The question was raised what would be the effect of the absence of liability on the instrument of secondary parties, because of non-presentment for payment, on their liability on the transaction underlying the drawing or endorsing of an instrument. Reference was made in this respect to section 3-802 of the Uniform Commercial Code. The Working Group requested the Secretariat to examine this question and the possible need for a special provision governing this situation.

Article 56

"(1) An instrument is dishonoured by non-payment,

"(a) When payment is refused upon due presentment or when the holder cannot obtain the payment to which he is entitled under this Law; or

"(b) When presentment for payment is dispensed with pursuant to article 54 (2), and the instrument is overdue and unpaid;

"(2) Where a bill is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise a right of recourse against the drawer, the endorsers and the guarantors;

"(3) Where a note is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise a right of recourse against the endorsers and their guarantors."

95. Article 56 states when an instrument is dishonoured by non-payment. Provision is made in paragraph (1) (a) for actual dishonour (when payment is refused or the holder cannot obtain the payment to which he is entitled) and in paragraph 1 (b) for constructive dishonour (when presentment for payment is dispensed with). Under paragraphs (2) and (3), in the event of such dishonour, the holder is then, subject to

any necessary protest, entitled to exercise an immediate right of recourse against the drawer, the endorsers and their guarantors.

96. The Working Group expressed agreement with the provision of article 56, subject to modifying paragraph (2) as follows: instead of "*the* guarantors" read "*their* guarantors".

97. One representative expressed the view that the provision of article 56 should be included in part six, section 2 (payment).

III. PROTEST

Article 57

"Where a bill has been dishonoured by non-acceptance or by non-payment or where a note has been dishonoured by non-payment, the holder may exercise his right of recourse only after the bill or note has been duly protested for dishonour in accordance with the provisions of articles 58 to 61."

98. Under article 57, the making of a protest is necessary in order to entitle the holder to exercise, upon dishonour of the instrument by non-acceptance or by non-payment, a right of immediate recourse.

99. The Working Group considered whether the uniform law should provide for the making of a protest in the event of dishonour of an instrument and, if so, what should be the consequences of a failure on the part of the holder to effect such protest.

100. Under one view, protest should not be required unless there was an express stipulation to that effect on the instrument. This solution was adopted in the Draft Uniform Law for Latin America on Commercial Documents. In support of this view it was stated that protest was a mere formality and that it would not always produce reliable evidence by an independent person of the fact of dishonour.

101. Under another view, the making of a protest should be required under the uniform law, but failure to do so should make the holder liable for damages only. In support of this view, it was stated that this would give just results, in that failure by the holder to perform the formality of protest should not benefit parties who were liable on the instrument. However, if through the absence of protest such parties had suffered, the holder should be liable for damages. It was noted that this solution would be in harmony with the legal effect given by the draft uniform law to failure to give due notice of dishonour (article 56).

102. Under yet another view, protest was required in order to establish the liability of secondary parties on the instrument. In support of this view it was stated that such parties, when signing the instrument, had undertaken to pay the amount of the instrument upon due presentment for acceptance, where required upon due presentment for payment and in the event of dishonour. Evidence thereof, obtained from a person independent from the holder, was therefore required. It was further noted that in some countries a protest for dishonour was necessary to bring summary proceedings on the instrument. Finally, the concept of protest was universally known and the uniform law would therefore, in this respect, be in conformity with current practice.

103. The Working Group, after deliberation, was agreed that the last view, which was also underlying the draft uniform law, should prevail. Consequently, article 57 should be retained.

Article 58

"(1) A protest may be effected by means of a declaration written on the instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument domiciled with a named person for payment, by that named person; the declaration shall be to the effect that acceptance or payment is refused.

"(2) A protest shall be effected by means of an authenticated protest as specified in paragraphs (3) and (4) of this article in the following cases:

"(a) Where the declaration specified in paragraph (1) of this article is refused or cannot be obtained; or

"(b) Where the instrument stipulates an authenticated protest; or

"(c) Where the holder does not effect a protest by means of the declaration specified in paragraph (1) of this article.

"(3) An authenticated protest is a statement of dishonour drawn up, signed and dated by a person authorized to certify dishonour of a negotiable instrument by the law of the place where acceptance or payment of the bill or payment of the note was refused. The statement shall specify

"(a) The person at whose request the instrument is protested;

"(b) The place and date of protest; and

"(c) The cause or reason for protesting the instrument, the demand made and the answer given, if any, or the fact that the drawee or the acceptor or the maker could not be found.

"(4) An authenticated protest may

"(a) Be made on the instrument itself; or

"(b) Be made as a separate document, in which case it must clearly identify the instrument that has been dishonoured."

104. Article 58 makes provision for two kinds of protest: a protest in simplified form effected by means of a declaration, written on the instrument and signed and dated by the drawee, the acceptor or the maker, to the effect that acceptance or payment is refused (paragraph 1), and an authenticated protest (paragraph 3). Under the article, an authenticated protest is required in the following cases:

(i) When the declaration of the drawee, the acceptor or the maker is refused or cannot be obtained; or

(ii) When the instrument specifies an authenticated protest; or

(iii) When the holder calls for an authenticated protest.

Paragraph (1)

105. The view was expressed that a declaration written on the instrument by the person dishonouring the instrument should not be considered as constituting

a protest; such a declaration should be considered as an act replacing protest. Hence article 58 should state that, for the purposes of effecting a protest, an authenticated protest was required and should specify in a separate paragraph that a protest could be replaced, in certain specified circumstances, by a dated declaration written on the instrument and signed by the person dishonouring it.

106. It was noted that the purpose of dealing with the declaration of dishonour in paragraph (1) of article 58 was to emphasize that this form of protest should be the rule and not the exception. However, the view was expressed that article 58 could set forth an additional provision on the following lines:

"Where an authenticated protest is replaced by the declaration of dishonour referred to in paragraph , such declaration shall have the effect of an authenticated protest in every respect."

Paragraph (2)

107. The Working Group was agreed that paragraph (a) should be deleted in view of the fact that the case envisaged in that paragraph was covered by paragraph (c).

Paragraph (3)

108. The Working Group expressed agreement with this provision subject to the following amendments:

(i) In subparagraph (b) the words "and date" should be deleted in view of the fact that the person drawing up the statement of dishonour was already, under paragraph 3, obliged to date the statement;

(ii) In subparagraph (c) the words "the cause or reason for protesting the instrument" should be deleted since this would follow from the demand made by the person drawing up the protest and the answer given by the drawee, the acceptor or the maker.

109. The question was raised whether, under the uniform law, a protest made in a country other than the country where the instrument was dishonoured, was a valid protest for the purposes of the uniform law. It was observed that, under the uniform law, a protest must be effected in the country where the instrument was dishonoured because it was only in that country that proof of due presentment and of dishonour could be obtained. Furthermore, a person authorized to certify dishonour under the law of one country would not always be authorized to certify dishonour under the law of another country.

Paragraph (4)

110. The Working Group expressed agreement with the substance of paragraph (4). The Group was agreed that subparagraph (a) should specify that the authenticated protest could be made also on a slip affixed to the instrument.

111. The suggestion was made that if a separate document was drawn up, the dishonour should be noted on the instrument. Any subsequent holder would thus know that the instrument had been dishonoured and that the dishonour had been protested. It was observed that it was ordinary notarial practice in some countries

to note an instrument upon dishonour. The Working Group was of the view that the uniform law should not set forth a specific provision on this point, but requested the Secretariat to mention the advisability of such a noting in the commentary on the whole.

Stipulation for additional elements of protest

112. The question was raised whether a party could stipulate on the instrument that requirements additional to those set forth in paragraph 3 should be met by the holder in effecting due protest. It was observed that, under the uniform law, a party could limit his liability and that therefore such a stipulation was permitted.

Presentment effected through the post

113. The question was raised whether the uniform law should set forth a specific rule regarding the place where protest may be effected when presentment was effected through the post and the instrument was returned by the post dishonoured (see section 51 (6) (a) of the United Kingdom Bills of Exchange Act, 1882). The Working Group requested the Secretariat to study this question in connexion with its inquiry on the practice of presentment of mail and the existence of any special rules for presentment by mail (see paragraph 51 above).

Article 59

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

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

"[(3) An authenticated protest must be effected at the place where the instrument has been dishonoured.]"

114. Article 59 lays down the time-limits within which an instrument must be protested for dishonour. Failure to observe these time-limits will deprive the holder of his rights of recourse against parties secondarily liable. Under paragraph (3) an authenticated protest must be effected at the place where the instrument was dishonoured.

Paragraphs (1) and (2)

115. It was observed that, by virtue of the provisions of article 53 (d) and (e) and article 59 (1) and (2), it would be possible for a holder to protest a bill or a note on the fourth day after maturity. Thus if a bill matured on a Monday, the holder, under article 53 (d), could present the bill for payment on Wednesday and upon dishonour protest the bill on Friday. Under article 64, notice of dishonour must be given within the two business days which follow the day of protest. It could thus occur that the party against whom the holder wishes to exercise his rights of recourse would be notified on Tuesday of the following week.

116. The Working Group was of the view that this long lapse of time was not desirable. The Group concluded therefore that protest for dishonour by non-payment must be made on the day on which the instru-

ment is payable or on one of the two business days which follow. With respect to protest for dishonour by non-acceptance, the Group was agreed that such protest must be made on the day on which the bill was dishonoured or on one of the two business days which follow. The Group was of the opinion that protest for non-acceptance must be made upon the first dishonour of the bill and that a second presentment for acceptance could not constitute a due presentment.

117. One representative, however, expressed the view that the present text of paragraphs (1) and (2) provided the more satisfactory rule in respect of protest for dishonour by non-payment. He noted that the rule suggested by the Group posed a problem in the case of a demand bill or note and that, for that type of instrument, a different rule would be required.

Paragraph 3

118. It was observed that according to article 59 (3) an authenticated protest must be effected at the place where the instrument was dishonoured. Therefore, if a place of payment was specified on the instrument, the instrument could only be duly presented and be dishonoured at that place (see article 53 (f) (i)). Consequently, protest must be effected at that place.

119. One representative was of the view that paragraph (3) should be complemented by a provision setting forth the place where protest must be effected in all cases referred to in article 53 (f).

120. The Working Group agreed that the substance of paragraph (3) should be dealt with under article 58.

Article 60

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

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

121. According to article 60, failure on the part of the holder to protest an instrument for dishonour by non-acceptance or by non-payment results in the absence of liability of parties secondarily liable on an instrument.

122. The Working Group expressed agreement with the provision of article 60.

123. The suggestion was made that, in the case of an instrument stipulating an authenticated protest, failure to make such a protest should not free secondary parties from liability if the holder had made a protest in simplified form under article 58 (1). The Working Group was of the view that if a party had stipulated that an authenticated protest be made, a protest in simplified form would not be in accordance with the stipulation limiting the liability of the party who made the stipulation.

Article 61

"(1) Delay in protesting a bill for dishonour by non-acceptance or by non-payment or a note for dishonour by non-payment shall be excused when the delay is caused by circumstances beyond the control of the holder. When the cause of delay ceases

to operate, protest must be made promptly [within ... days].

"(2) Protest for dishonour by non-acceptance or by non-payment shall be dispensed with:

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

"(b) Where the cause of delay in making protest continues to operate beyond 30 days after maturity or, in the case of an instrument payable on demand, where the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment for payment;

"(c) As regards the drawer of a bill, where (i) the drawer and the drawee are the same person; or (ii) the drawer is the person to whom the bill is presented for payment; or (iii) the drawer has countermanded payment; or (iv) 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;

"(e) Where presentment for acceptance or for payment is dispensed with in accordance with articles 49 or 54 (2)."

124. Under article 61 delay in protesting an instrument for dishonour is excused when the delay is caused by circumstances beyond the control of the holder. When delay is excused, the liability of parties secondarily liable is not affected on the ground that there was no due protest. Paragraph (2) states the cases in which protest is dispensed with. In such cases, the holder can exercise a right of immediate recourse against the parties secondarily liable.

Paragraph (1)

125. The Working Group requested the Secretariat to redraft paragraph (1) in the light of the observations made in respect of article 54 (1) concerning delay in making presentment for payment (see paragraph 81 above).

126. The Working Group was agreed that the excuse of delay in protesting an instrument for dishonour should benefit both the holder of the instrument and the person authorized to certify dishonour. It was specified that where the protest was made by a public functionary, such as a notary, and the delay in the effecting of protest by such functionary was excused under article 61, the excuse would operate to the benefit of the holder.

127. The question was raised whether paragraph (1) should also apply to a holder making a protest in simplified form. It was noted that if delay would also be excused in respect of such a protest, the provision could give rise to abuse. The Working Group, after deliberation, was agreed that the excuse of delay in protesting should benefit only the holder who made an authenticated protest.

Paragraph (2)

Subparagraph (a)

128. The Working Group considered the question whether a waiver of protest by the drawer, an endorser or their guarantor made outside the instrument would

dispense the holder from protesting the instrument for dishonour. Various views were expressed, but the Group was unable to reach agreement on this point. The Group requested the Secretariat to prepare alternative texts based on the following:

- (i) Waiver of protest may be stipulated expressly on the instrument, or expressly or impliedly outside the instrument (present text);
- (ii) Waiver of protest may be stipulated only expressly whether on or outside the instrument;
- (iii) Waiver of protest may be stipulated only on the instrument.

129. The Working Group considered the question in respect of which party a stipulation "without protest" would be operative. Consistent with the conclusions it had reached earlier in respect of article 46 (see paragraph 33 above), the Group was agreed that:

- (i) If the drawer made such a stipulation on the instrument, the stipulation would be operative in respect of all subsequent parties;
- (ii) If an endorser or a guarantor (except the guarantor of the acceptor or the maker) made such a stipulation on the instrument, the stipulation would be operative only in respect of such endorser or guarantor;
- (iii) Any stipulation outside the instrument would be operative only in respect of the party making the stipulation.

Subparagraph (b)

130. The Working Group expressed agreement with the provision of subparagraph (b). It was specified that the word "delay" in this subparagraph referred to the delay excused under paragraph (1).

Subparagraphs (c) and (d)

131. The Working Group expressed agreement with the principle underlying subparagraphs (c) and (d). The Group requested the Secretariat to draft a general rule covering these subparagraphs.

Subparagraph (e)

132. The Working Group expressed agreement with the provision of subparagraph (e).

133. The question was raised on whom should fall the burden of proving that the instrument was dishonoured by non-acceptance or by non-payment when protest was dispensed with: the holder or the person who raises as a defence against his liability that the instrument was not duly presented for acceptance or for payment? The Group concluded that the burden of proof should be borne by the holder and that no special rule was needed to achieve this result.

134. The Working Group requested the Secretariat to conduct an inquiry amongst banking and trade institutions for the purpose of ascertaining if its conclusion would or would not impair the international circulation of the proposed international instrument.

IV. NOTICE OF DISHONOUR

Article 62

"(1) Where a bill has been dishonoured by non-acceptance or by non-payment, due notice of dis-

honour must be given to the drawer, the endorsers and their guarantors.

"(2) Where a note has been dishonoured by non-payment, due notice of dishonour must be given to the endorsers and their guarantors.

"(3) Notice may be given by the holder or any party who has himself received notice, or by any other party who can be compelled to pay the instrument.

"(4) Notice operates for the benefit of all parties who have a right of recourse on the instrument against the party notified."

135. Article 62 sets forth rules in respect of notice of dishonour. The article should be read in conjunction with article 66 under which failure of the holder to give due notice of dishonour makes him liable for damages which a party may suffer as a consequence of such failure. Under the draft uniform law, the liability of secondary parties is not affected because they have not received notice. According to article 62, notice of dishonour must be given to any prior party by the holder or by any party who has himself received notice, and the notice operates for the benefit of all parties who have a right of recourse against the party notified. For example: a bill is drawn in favour of the payee, who endorses it to A. A endorses to B, B to C, and C to D. D presents the bill for payment to the drawee and payment is refused. Under article 62, D must give notice of dishonour to all prior parties, on pain of being liable for damages to the party paying the bill. When C receives notice of dishonour from D, C must, in turn, give notice of dishonour to parties prior to him. Notice sent by D or C to the drawer enures for the benefit of the payee, A and B.

136. The Working Group was agreed that the principle underlying the draft uniform law, namely that failure on the part of the holder to give due notice of dishonour would not free secondary parties from liability but would make the holder liable for damages, was acceptable.

137. The Working Group considered the question who should give notice of dishonour and to whom it should be given. The Group recognized the importance of notice of dishonour to parties who were secondarily liable on an instrument and concluded as follows:

- (i) The holder, upon dishonour by non-acceptance or by non-payment, must give due notice of dishonour to all previous parties who were secondarily liable;
- (ii) An endorser or a guarantor who received notice must give notice to the party immediately preceding him and liable on the instrument;
- (iii) The holder and the party who received notice are dispensed from giving notice to parties whose address does not appear on the instrument or whose signature or address is illegible. The Working Group considered that the question of the requirement of notice to a party whose identity or address was known, but could not be read or did not appear on the instrument, required further study.
- (iv) The holder and the party who received notice must give notice to the party immediately preceding them and liable on the instrument, even

if the address of such party does not appear on the instrument or if his signature or address is illegible.

- (v) Notice of dishonour operates for the benefit of all parties who have a right of recourse on the instrument against the party notified.

One representative expressed disagreement with the proposed rule under (ii) and (iv) above.

138. The effect of the proposed rules is that, in the example given in paragraph 135 above, D must give notice of dishonour to all prior parties on pain of being liable for damages to the party paying the bill. When C receives notice of dishonour from D, C must, in turn, give notice of dishonour to B. The fact that the address of C does not appear on the instrument does not dispense D from giving notice of dishonour. Similarly, the fact that the address of B does not appear on the instrument does not dispense C from giving notice of dishonour. Furthermore, under the rule proposed under (v) above, notice sent by D to the drawer enures for the benefit of the payee.

139. With respect to the proposed rule under (iv) above, it was observed that that rule was based on the presumption that an endorsee should know his own endorser. However, the rule specified that notice be given to an immediately preceding party *who is liable on the instrument*. Thus, in the example given in paragraph 135 above, if B had endorsed the bill without recourse, C, having received notice from D, must give notice to A. If A's address did not appear on the bill, or if his signature or address was illegible, the requirement that C must in such case nevertheless give notice was unreasonable, since C could not be presumed to know A who was not his endorser. The Working Group agreed to revert to this question when examining the redraft of article 62.

140. The Working Group considered the question whether a holder was obliged to send notice of dishonour to a person who transferred an instrument without endorsing it. The Group was of the view that such party should not be entitled to notice of dishonour although he might be liable under article 42.

CONSIDERATION OF THE DESIRABILITY OF PREPARING UNIFORM RULES APPLICABLE TO INTERNATIONAL CHEQUES

141. The Working Group was informed that, in response to its request that an inquiry be conducted regarding the use of cheques in international payment transactions (see report on the first session,¹³ paragraphs 136-138), the Secretariat, in consultation with the UNCITRAL Study Group on International Payments, had drawn up a questionnaire which had been addressed to banking and trade institutions and that an analysis of the replies received thereto would be submitted to it at a future session.

FUTURE WORK

142. The Working Group gave consideration to the timing of its third session. The Group was of the unani-

¹³ UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 1.

mous opinion that, in view of the progress achieved at the present session, its third session should be held as soon as possible. Some representatives expressed the view that the third session should be held in the course

of 1974. Others were of the opinion that consideration of the time and place for the third session should be left for decision by the Commission at its forthcoming session, which will convene on 13 May 1974.

2. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
<i>Second session of the Working Group on International Negotiable Instruments</i>	
Report of the Working Group on International Negotiable Instruments on the work of its first session	A/CN.9/77*
Report of the Secretary-General: draft uniform law on international bills of exchange and international promissory notes, with commentary	A/CN.9/WG.IV/WP.2**
Provisional agenda	A/CN.9/WG.IV/WP.3
Draft uniform law on international bills of exchange and international promissory notes; revised text of articles 5(9), 6 and 12 to 41	A/CN.9/WG.IV/CRP.3
Draft uniform law on international bills of exchange and international promissory notes	A/CN.9/WG.IV/CRP.4 and Add. 1 to 13

* Reproduced in UNCITRAL Yearbook, Vol. IV: part two, II, 1.

** The text of the draft uniform law on international bills of exchange and international promissory notes was reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, II, 2.