

(3) Failure to notify renders the party who has paid the lost instrument liable for any damages which the person whom he paid may suffer from such failure, provided that the damages do not exceed the amount referred to in article 66 or 67.

(4) Delay in giving notice is excused when the delay is caused by circumstances which are beyond the control of the person who has paid the lost instrument and which he could neither avoid nor overcome. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

(5) Notice is dispensed with when the cause of delay in giving notice continues to operate beyond 30 days after the last date on which it should have been given.

Article 76

(1) A party who has paid a lost instrument in accordance with the provisions of article 74 and who is subsequently required to, and does, pay the instrument, or who, by reason of the loss of the instrument, then loses his right to recover from any party liable to him, has the right:

- (a) If security was given, to realize the security; or
- (b) If the amount was deposited with the court or other competent authority or institution, to reclaim the amount so deposited.

(2) The person who has given security in accordance with the provisions of paragraph (2)(b) of article 74 is entitled to obtain release of the security when the party for whose benefit the security was given is no longer at risk to suffer loss because of the fact that the instrument is lost.

Article 77

A person claiming payment of a lost instrument duly effects protest for dishonour by non-payment by the use of a written statement that satisfies the requirements of article 74, paragraph (2)(a).

3. Working paper submitted to the Working Group on International Negotiable Instruments at its fourteenth session — draft Convention on International Bills of Exchange and International Promissory Notes: some considerations and suggestions relating to major controversial issues: note by the secretariat (A/CN.9/WG.IV/WP.30) [Original: English]

1. The Working Group, at its thirteenth session,¹ considered the major controversial issues, namely the concept of holder and protected holder, the effect of forged endorsements and the liability of the transferor by mere delivery or by endorsement. In this connection, it requested the secretariat to consider or study certain questions relating to the major controversial issues and to

¹Report of the Working Group on International Negotiable Instruments on the work of its thirteenth session (New York, 7–18 January 1985), A/CN.9/261.

Article 78

A person receiving payment of a lost instrument in accordance with article 74 must deliver to the party paying the written statement required under article 74, paragraph (2)(a), receipted by him and any protest and a receipted account.

Article 79

(1) A party who has paid a lost instrument in accordance with article 74 has the same rights which he would have had if he had been in possession of the instrument.

(2) Such party may exercise his rights only if he is in possession of the receipted written statement referred to in article 78.

Chapter VIII. Limitation (prescription)

Article 80

(1) A right of action arising on an instrument may no longer be exercised after four years have elapsed:

- (a) Against the maker, or his guarantor, of a note payable on demand, from the date of the note;
- (b) Against the acceptor or the maker or their guarantor of an instrument payable at a definite time, from the date of maturity;
- (c) Against the acceptor of a bill payable on demand, from the date on which it was accepted;
- (d) Against the drawer or an endorser or their guarantor, from the date of protest for dishonour by non-acceptance or non-payment or, where protest is dispensed with, from the date of dishonour.

(2) If a party has paid the instrument in accordance with article 66 or 67 within one year before the expiration of the period referred to in paragraph (1) of this article, such party may exercise his right of action against a party liable to him within one year from the date on which he paid the instrument.

draft or re-draft pertinent provisions.² This note has been prepared pursuant to that request.

A. Defences available against holder or protected holder; definition of protected holder (A/CN.9/261, paras. 23–26)

1. Article 26(1)(b)

2. The following modification of article 26(1)(b) is suggested:

²A/CN.9/261, paras. 26, 39, 48, 59, 63 and 67.

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

(a)

(b) Defences resulting from a transaction between himself and such holder that would be available as defences against contractual liability or defences arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party;”

3. Under this modified version of subparagraph (b), where the protected holder has dealt with a party, that party may set up against such holder not only defences derived from the transaction between them which gave rise to the issue or transfer of the instrument, but also defences based on another transaction, unrelated to the issue or transfer, provided that the defence is one that may be invoked against contractual liability. The rationale for this rule is that it would prevent circuity of action. Following this rationale, there may be no need for limiting the modification, as was suggested in the Working Group,³ to those defences deriving from agreements which were related to the underlying transaction such as agreements for prolongation.

4. Thus, if the maker (A) issued a note of SwF 100 to the payee (P) and P transferred the note to C in payment of a sale of goods transaction between P and C, P could, in a recourse action by C against P upon dishonour of the note by A, set up as a defence to his liability on the note the fact that, for instance, C owed P SwF 100 on account of a loan made by P to C, even though the loan was unrelated to the transfer of the instrument.

5. Therefore, if a defence would be available to P in an action by C based on contract, that defence would also be available to P in an action by C on the note. The question whether any defence and, if so, which ones would be available to P in an action by C based on contract is to be determined by the applicable national law.

2. Article 25(1)(c)

6. If the above suggested modification of article 26(1)(b) were accepted, article 25(1)(c) could be brought into accordance with it as follows:

“(c) Any defence resulting

(i) from the underlying transaction between himself and the holder;

(ii) from any other transaction between himself and the holder that would be available as a defence against contractual liability;”

3. Article 4(7)(a)

7. The following modification of article 4(7)(a) is suggested:

“(7) ‘Protected holder’ means the holder of an instrument which, when he obtained it, was complete or, if

incomplete as referred to in article 11(1), was completed by him in accordance with an agreement entered into, provided that, when he became a holder:⁴

(a) He was without knowledge of a claim to, or defence to liability on, the instrument referred to in article 25, other than in paragraph (1)(c)(ii), or of the fact that it was dishonoured by non-acceptance or non-payment; and”

8. The fact that, when the holder took the instrument, he had knowledge of a defence to liability on the instrument derived from a transaction between himself and the holder unrelated to the issue or transfer of the instrument (i.e. the defence available under the suggested redraft of article 25(1)(c)(ii)) should not prevent the holder from being a protected holder. As a protected holder he would not be subject to the defences available under article 25 but only to those available under article 26.

4. Additional modifications of articles 25 and 26

9. The secretariat suggests modifying article 25(3)(b) as follows:

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

(a)

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

10. This addition is intended to correct what appears to have been a legislative oversight and to align it with the corresponding “mirror image” provision of article 68(3).

11. The secretariat suggests modifying article 26(1)(a) as follows:

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

(a) Defences under articles 29(1), 30, 31(1), 32(3), 49, 53, 59 and 80 of this Convention;”

12. It appears that the reference to article 59, which had been included in an early draft version of article 26(1)(a), was deleted in the context of the draft Convention on International Cheques as being inappropriate in that context and subsequently, for the sake of harmony between the two draft Conventions, also omitted in the draft Convention on International Bills of Exchange and International Promissory Notes. However, it is submitted that failure to make a necessary protest as referred to in article 59 should be a defence against the protected holder of a bill or a note.

⁴The opening words of paragraph (7) are given here in the revised form as adopted by the Working Group at its thirteenth session, A/CN.9/261, paras. 9–14.

³A/CN.9/261, para. 25.

B. Definition of knowledge, article 5 (A/CN.9/261, para. 67)

13. The following modification of article 5 is suggested:

“For the purposes of this Convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or

Variant A: if he deliberately disregarded facts or circumstances known to him which, but for such disregard, would have given him actual knowledge.

Variant B: if there exist facts or circumstances which would have given him actual knowledge had he not deliberately disregarded them.

Variant C: if he does not have actual knowledge because he wilfully disregarded facts or circumstances known to him.”

14. The proposed text, whichever drafting variant may be chosen, retains the principle that knowledge means actual knowledge; however, it allows the imputing of knowledge to a person who did not have actual knowledge on the ground that that person knew of facts or circumstances which, but for his wilful or deliberate disregard of them, would have given him actual knowledge of the fact at issue. Such cases where a person wilfully closes his eyes may be illustrated by the following:

Example: Various bills and notes are stolen from Payee (P). P informs among others A about the theft and requests him to compare the signature on any instrument that may be offered to him with the specimen signature of P which A has in his hands. Later, A takes a bill, on which the endorsement of P is forged, without examining the signature, although he remembers P's earlier warning. He deliberately closes his eyes because of an overwhelming interest in acquiring this bill, for example, because he does not want to endanger the conclusion of an advantageous deal. In such a case it seems justified to treat A as if he had actual knowledge.

15. It should be noted that the suggested modification of article 5 would not cover any instance of negligence or carelessness which does not amount to wilful disregard. However, this restriction is irrelevant in the context of those provisions of the draft Convention where lack of knowledge is qualified by words such as “provided that such absence of knowledge was not due to his negligence” (see articles 23(2), (3) and 23 bis (2), (3) as adopted by the Working Group, A/CN.9/261, paras. 38, 47; articles 25(1)(d) and 26(1)(c)).

C. Limit of liability in articles 23(4) and 23 bis (4) (A/CN.9/261, paras. 39 and 48)

16. The following modification of article 23(4) is suggested:

“(4) Except as against the forger, the damages recoverable under paragraph (1) may not exceed *the amount*

of the instrument, plus interest calculated at the rate of ..., and any reimbursement [actually paid] for expenses of protest and notices, and any interest or cost incidental to the giving of security under article 74.”

17. The above text is intended to avoid the reference to articles 66 and 67, which was viewed as questionable by some representatives and observers at the last session of the Working Group. If this proposed wording is accepted, it should also be used in the new article 23 bis (4).⁵

D. Liability of transferor, article 41 (A/CN.9/261, paras. 49–63)

1. *Nature of liability of transferor by mere delivery (or by endorsement “without recourse”)*

18. Article 29 of the draft Convention sets forth the general principle that a person is not liable on an instrument unless he signs it. Accordingly, a person who transfers an instrument by mere delivery, without endorsement, incurs no liability on the instrument to his transferee and other subsequent holders.

19. However, most, if not all, legal systems recognize some kind of liability of a transferor by mere delivery, which is based on the assumption that a person, in transferring an instrument, makes certain implied representations or warranties. In common law systems such liability is expressly regulated in the statutory enactments of negotiable instruments law. In civil law systems such liability derives from the general law of obligations or contract, in particular the law of sale. Under all systems, a transferor by mere delivery, unlike an endorser, does not guarantee payment of the instrument. His liability is not on the instrument but rests on other grounds.

(a) *Common law*

20. Under section 58(3) of the English Bills of Exchange Act, 1882 (BEA), and those enactments that are directly derived from it,⁶ the transferor of a bearer bill is liable to reimburse his immediate transferee who gave value to him if:

(a) the bill is not what it purports to be (i.e. if it is a forgery);

(b) he has no right to transfer it (i.e. he has a defective title);

(c) he is at the time of transfer aware of any fact which renders it valueless (i.e. he knows that the bill will not be paid).

Section 58 (3) of the BEA also applies where a party endorses a bill “without recourse”.

⁵A/CN.9/261, para. 48.

⁶E.g. Australian Bills of Exchange Acts (1909–1936) section 63; New Zealand Bills of Exchange Act, 15 of 1908, section 58; Sri Lanka Bills of Exchange Ordinance, Chapter 18 of the Revised Statutes (1938), section 58; Canadian Bills of Exchange Act, Chapter 16 of the Revised Statutes (1927), sections 137, 138.

21. Under section 3-417(2) of the Uniform Commercial Code of the United States of America (UCC), the transferor whether by endorsement or by mere delivery who receives consideration warrants to his transferee who takes the instrument in good faith:⁷

- (a) that he has good title to the instrument;
- (b) that all signatures are genuine or authorized;
- (c) that the instrument has not been materially altered;
- (d) that no defence of any party is good against him; and
- (e) that he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

Where a party endorses "without recourse", the warranty stated under (d) above is limited to a warranty that the transferor has no knowledge of such a defence.

22. The liability of the transferor by mere delivery under the above mentioned enactments is not, as is the liability of an endorser on the instrument, conditioned by presentment, dishonour and any necessary notice of dishonour or protest of the instrument, but arises at the time of the transfer. The transferee has an action for breach of warranty immediately upon his discovery of a fact constituting such breach, irrespective of whether the instrument has matured.

23. The type and nature of liability incurred by the transferor by mere delivery may be illustrated by the following:

Example: X forges on a note the signature of Maker (M) and issues it to Payee (P). P endorses the note in blank and delivers it to A. A delivers the note to B. Upon presentment at maturity, M refuses to pay. B would have a recourse action against P, based on P's endorsement, but would not have any action on the instrument against A since A has not signed it. B, however, would have a special statutory right to proceed against A on the ground that A transferred an instrument in breach of a representation he impliedly made, namely in the case at issue that the note is what it purports to be (BEA) or that all signatures are genuine or authorized (UCC).

24. As mentioned, an important distinction between an action on the instrument by way of recourse and an action off the instrument is that the action off the instrument is not conditioned upon presentment, dishonour and notice of dishonour or protest. In the above example, B, upon discovering that the maker's signature was forged, need not wait till the day of maturity and non-payment of the note before suing A.

⁷Where a transfer is by endorsement, the warranties are given in favour of all subsequent transferees.

(b) *Civil law*

25. Unlike the common law statutes, the negotiable instruments laws of civil law countries do not set forth provisions regarding the liability of the transferor by mere delivery.⁸ Doctrinal writings in these countries give little or no discussion of such liability and, at most, treat the matter in a cursory fashion.

26. In civil law countries, the question whether a transferor by delivery and, for that matter, an endorser who endorses without recourse make implied representations⁹ is to be answered by reference to the general law, more particularly by reference to the provisions in the civil code governing the sale of claims and other incorporeal rights.¹⁰ Under these provisions, the transferor by delivery guarantees the existence of the rights embodied in the instrument at the time of transfer; exceptions to this rule relate to instances which hardly ever occur in international commercial practice. The remedy for breach of the representation or guarantee thus made is a civil action for damages.

(c) *Tentative conclusion*

27. It would appear that most, if not all, legal systems recognize that a transferor by mere delivery or an endorser who endorses without recourse may be liable where the instrument transferred is not what he impliedly represented it to be. Whereas the common law statutes on negotiable instruments set forth specific provisions in this respect, the negotiable instruments laws of civil law countries are silent on the point and regard must be had to general provisions of the civil code. The dearth of judicial decisions and writings on this issue in civil law countries causes considerable difficulty in ascertaining, and reporting here, in respect of which defects or infirmities the transferor by delivery makes an implied guarantee and whether an action on the ground of breach of such guarantee is available to the transferee before maturity of the instrument, i.e. upon his discovery of the infirmity.

28. In view of the above, it may be thought unsatisfactory if the proposed Convention were to remain silent on the point and the issue were to be left to the applicable national law. Before drawing a final conclusion, consider-

⁸An exception is provided by Colombia and Panama whose negotiable instruments law is inspired by the Uniform Negotiable Instruments Law (1896) of the United States. Articles 67 and 68 of the Colombian Law 46 of 1923 and article 65 of the Panamanian Law 52 of 1917, following section 65 of the Uniform Negotiable Instruments Law, provide that a person negotiating an instrument by delivery or by qualified endorsement, warrants:

(a) That the instrument is genuine and in all respects what it purports to be;

(b) That he has good title to it;

(c) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

Where the negotiation is by delivery alone, the warranty extends only in favour of the immediate transferee.

⁹The basis for liability may be somewhat differently described.

¹⁰E.g. French Civil Code, art. 1693; German Civil Code, art. 437; Italian Civil Code, art. 1266; Mexican Commercial Code, art. 39 and Civil Code, art. 2043; Netherlands Civil Code, arts. 1570-1571.

ation should be given to the question whether liability for the infirmities listed in article 41(1) should also be imposed on a transferor by endorsement and delivery.

2. Extension of article 41 to endorsers

(a) General considerations

29. All negotiable instruments laws recognize that an endorser, unless he has stipulated otherwise, undertakes to pay the instrument if it is dishonoured by non-acceptance or non-payment. Depending on the law which is applicable, the conditions precedent to such liability are due presentment, protest or the giving of notice of dishonour.

30. As noted above (para. 21), under at least one negotiable instruments law (UCC) the endorser also represents that he has good title to the instrument, that all signatures are genuine or authorized, that the instrument has not been materially altered, that no defence of any party is good against him and that he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument. This liability of the endorser is available to the holder before the maturity of the instrument.

31. Under systems other than the UCC the holder's remedies may only be derived from the general law of contract or the law of sale. Within these systems, different positions are taken as to whether in fact liability of an endorser off the instrument is recognized. One position is that there is no need for such liability on the grounds that the liability of an endorser on his endorsement is sufficient to compensate the transferee. Sometimes this result is explained by means of an *e contrario* argument where there is in the negotiable instruments law a specific rule imposing such liability only upon a transferor by mere delivery.

32. The opposite position is that the existence of liability on the endorsement does not exclude liability off the instrument under the general law as a result of the fact of delivery which, after all, takes place both in the case of a mere delivery and in the case where the transferor endorses the instrument. The practical relevance of liability off the instrument is that the endorsee would not have to wait for the dishonour of the instrument, as he has in respect of his rights under the endorsement, but has an immediate right of action without there being a dishonour. This liability is of particular importance in those cases where the transferor endorses the instrument without recourse. Another situation where such liability gains practical relevance is where, within one and the same transaction, endorser and transferor are not identical (e.g. agent liable on endorsement and principal liable as transferor) and one of them is insolvent.

(b) Conclusion

33. As has been observed by some Governments in their comments on article 41 of the draft Convention, if

the draft Convention were to impose a liability off the instrument on a transferor by mere delivery but not on a transferor by endorsement and delivery, a more extensive liability would then be imposed on a transferor by mere delivery in that his liability would not be conditioned upon presentment, dishonour and the making of protest and, furthermore, could be invoked by his transferee before maturity of the instrument. Moreover, it would appear that the considerations set forth in paras. 18 to 28 supporting the imposition of liability on a transferor by mere delivery would apply with similar force to the question whether such liability should also be imposed on an endorser.

34. It would, therefore, seem appropriate and desirable to treat these two situations alike. Consequently, the draft Convention should either include a regime in respect of such liability for both the transferor by mere delivery and the transferor by endorsement and delivery or not deal with this liability off the instrument at all.

35. If it were decided that the draft Convention should include provisions in this respect, the Working Group may wish to consider the revised draft of article 41, as set forth and explained below (paras. 43-53).

36. If it were, however, decided that the draft Convention should not deal with such liability, the Working Group may wish to consider, as regards the liability of an endorser off the instrument, whether

- (a) the matter should be left to the applicable national law, or
- (b) the draft Convention should expressly exclude the application of national law.

37. As to the approach under (a), it is questionable whether the draft Convention could satisfactorily achieve its objectives or accommodate the relevant rules of an applicable national law. Various fact patterns could be envisaged which might lead one to conclude that this approach is perhaps not the most commendable.

Example: Seller, on 1 September, draws a bill, subject to the Convention, on Buyer in favour of himself. The bill is drawn payable on 1 December. On 5 September Seller endorses and delivers the bill to A. On 6 September A learns that the goods delivered by Seller to Buyer were defective and that Buyer thus has a defence to his liability on the bill to Seller.

38. If the draft Convention were to leave room for the application of a national law, in order to determine whether Seller, in addition to his liability under the Convention as an endorser, may also be liable to A off the instrument, one would obviously first have to determine which law was applicable. Such a determination may not be free from difficulties. But assuming that the applicable law could be determined and that it did not recognise a liability off the instrument in respect of a transferor by endorsement and delivery, A, in the above example, would have an action against Seller, by way of

recourse, only if Buyer dishonoured the bill. A different result would obtain if the applicable law made available to A an action for breach by Seller of the warranty he gives as transferor that no defence of any party is good against him (cf. UCC, S. 3-417(2)(d)). In such event A may bring an action for damages against Seller or rescind the transaction between him and Seller already on 6 September.

39. It may be asked whether it would be acceptable for such different results to occur under a Convention setting forth uniform rules in respect of international negotiable instruments.

40. More problematic is the question whether a national law which makes a breach of warranty action available to the transferee where, say, an endorsement is forged, such as the UCC, can properly be accommodated within the system of the draft Convention. Under the UCC, the breach of warranty action may be justified by the fact that the transferee of an instrument containing a forged endorsement is not a holder and, consequently, has no right to payment of the instrument. Under the draft Convention, however, a forged endorsement does not prevent the transferee from being a holder, and thus from being entitled to payment, though he may incur liability under article 23.

41. The approach under (b) above would expressly exclude the application of national law. Its advantages are that there would be no need to ascertain the applicable national law and that the regime regarding the liability of a transferor by endorsement would be uniform. However, the express exclusion of national law should not prevent the matter from being governed by private contract. In many countries, special provisions, often in the form of general banking conditions or contained in the contract of deposit between customer and bank, may apply where a bill of exchange is endorsed to a bank for collection or is discounted. By virtue of such provisions banks usually are entitled, in case of dishonour, to charge back the amount credited to the account of the endorser/transferor. By virtue of applicable general conditions, a bank may also be authorized to charge back, under certain circumstances, the amount credited even before maturity.

42. Therefore, it may be thought that, given the vagueness of national laws, the legal regime for international negotiable instruments which the draft Convention seeks to establish would gain in clarity and certainty if it set forth basic provisions establishing liability off the instrument in respect of an endorser. Obviously, this solution would make sense only if it were decided that the draft Convention should contain provisions regarding the liability of the transferor by mere delivery.

3. *Proposed redraft of article 41 (A/CN.9/261, paras. 56-59)*

43. The following revised draft of article 41 is suggested:

"Article 41

"(1) Unless otherwise agreed, a person who transfers an instrument [by mere delivery] represents to the holder to whom he transfers the instrument that:

- (a) The instrument does not bear any forged or unauthorized signature;
- (b) The instrument has not been materially altered;
- (c) No party has a valid claim to the instrument or a defence against him;
- (d) The instrument has not been dishonoured by non-acceptance or non-payment.

"(2) Liability on account of any defect referred to in paragraph (1) of this article is incurred only to a holder who took the instrument without knowledge of such defect and, as regards a defect referred to in paragraph (1)(d), only if the transferor had knowledge of the defect.

"(3) The amount recoverable under paragraph (1) of this article may not exceed

Variant A: the value received by the transferor for the instrument, plus interest calculated at the rate of ...

Variant B: the amount of the instrument, plus interest calculated at the rate of ..."

44. The above suggested revised draft of article 41 follows in substance the draft prepared by the representative of France and adopted by the Working Group, subject to improvement of its drafting and modification of paragraph (3). However, the following amendments are proposed and explanations submitted for consideration by the Working Group.

45. Following a request by the Working Group,¹¹ no reference is made to the notion of "warranty", and the term "represents" is used instead. Also the term "damages" is no longer used in the proposed text.

46. As regards the opening words of paragraph (1), the words "by mere delivery" are placed between square brackets, pending decision on the question whether liability would be incurred only by a transferor by mere delivery or by any transferor, whether or not he endorsed the instrument.

47. The secretariat has considered whether subparagraph (c) of paragraph (1) should be deleted in view of the decision by the Working Group, as reflected in the new paragraph (2 *bis*) of article 25, that claims and defences that are listed in article 25(1)(b) and (2) may be set up against a holder who is not a protected holder only if the holder had knowledge of them when he took the instrument.¹² Since thus a holder without knowledge of such a claim or defence is not subject to it, it would

¹¹A/CN.9/261, para. 59.

¹²A/CN.9/261, para. 18.

appear that the reference in article 41(1)(c) loses its justification in respect of those claims and defences covered by the new paragraph (2 *bis*).

48. However, article 41(1)(c) remains relevant as regards other defences, which include those listed in article 25(1)(a), (c) and (d). Since these remaining defences essentially relate to discharge or absence of liability, there does not appear to be any reason why, if knowledge on the part of the transferor is not required in respect of the defects listed in article 41(1)(a) and (b), knowledge should be required in respect of the defects under subparagraph (c). Consequently, the above redraft of article 41(2) retains the requirement of knowledge merely in respect of the defects listed in subparagraph (d).

49. Subparagraph (d) has been retained even though dishonour by non-acceptance or non-payment may give rise to discharge of liability under article 59 and would thus fall under article 41(1)(c). However, liability under article 41 should also exist in cases where protest has been made upon dishonour and liability on the instrument is thus not discharged. In the latter case, the value of the instrument would be affected and therefore only a transferor who knew about the dishonour should be held liable in this respect.

50. Paragraph (3) fixes a limit of the liability incurred under paragraph (1) by establishing a ceiling for the amount recoverable by the transferee. Variant A implements the decision of the Working Group that the amount which the holder may recover from a transferor by mere delivery should be limited to the amount he paid, or the value he gave, for the instrument plus interest which, in a given case, may be less than the amount of the instrument.¹³

¹³A/CN.9/261, para. 57.

51. Variant B has been added by the secretariat for consideration by the Working Group for the following reasons. The amount of the instrument provides a clear-cut ceiling, while the value received by the transferor may be less easily determined when goods or services were given to him by the holder. This ceiling would also better accord with the basis of the liability, namely, that the holder received an instrument which was not what the transferor represented it to be.

52. It may be noted that paragraph (3) merely regulates the limit of liability, without specifying which particular remedies may be available and how the recoverable amount would be assessed. While thus recovery of damages could be accommodated as well as rescission of contract, these two methods should be taken into account when selecting the most acceptable variant of paragraph (3). In particular, if variant B were chosen it should be considered whether this ceiling would apply only to recovery of damages or also to rescission of contract, i.e. limit the amount or value to be returned by the transferor to the holder to the amount of the instrument.

53. As regards assessment of damages, it is submitted that this is to be done in accordance with the applicable national law which, in most likelihood, will provide that the recoverable loss consists of the difference between what the holder justifiably expected to receive and what he in fact received. The assessment is easily made after maturity when the holder can clearly see the extent to which the defect affects his right to obtain payment. As regards assessment of damages before maturity or dishonour, a practical way of determining the loss due to the defect or infirmity under article 41(1) would be to ascertain the actual or probable market price which a buyer, who knows about the defect, would pay for the instrument.

4. Draft Convention on International Bills of Exchange and International Promissory

Notes: response to requests of the Working Group on International Negotiable Instruments: note by the secretariat: (A/CN.9/285)

[Original: English]

1. At its fourteenth session, the Working Group on International Negotiable Instruments requested the secretariat to undertake certain enquiries or to prepare certain draft provisions in implementation of decisions made by it in respect of the draft Convention on International Bills of Exchange and International Promissory Notes and to present its conclusions to the Commission for consideration. This note conveys the conclusions of the secretariat in these matters.

I. Definition of money or currency, article 4(11)

2. The definition of money or currency in article 4(11) as found in document A/CN.9/211 was as follows:

"[(11) 'Money' or 'currency' includes a monetary unit of account which is established by an intergovernmental institution even if intended by it to be transferable only in its records and between it and persons designated by it or between such persons.]"

The Working group adopted a revised text as follows:

"(11) 'Money' or 'currency' includes a monetary unit of account which is established by an intergovernmental institution or by agreement between two or more States."

In doing so, the Working Group noted that there might be implications to its decision of which it was unaware.