

**2. Draft Convention on International Bills of Exchange and International Promissory Notes:  
comments of Governments and international organizations: note by the secretariat  
(A/CN.9/WG.IV/WP.32 and Add. 1-10)**

**[A/CN.9/WG.IV/WP.32]**

1. The Commission, at its nineteenth session, requested the secretariat to transmit the draft Convention as finalized at that session to all States as soon as possible after the conclusion of the session, with a request that comments on the draft Convention be submitted to the secretariat by 15 November 1986. To the extent that time constraints permitted the preparation of the necessary documentation and translation, the documents received should be submitted to the Working Group in the official languages of the Commission.<sup>1</sup>

2. This note sets forth, with minimal editorial modifications, the first comments received from Governments and international organizations. Any further comments will, upon receipt by the secretariat, be included in an addendum to this note.

**CUBA**

*[Original: Spanish]*

*Final revision of the draft Convention*

With the exception of some imprecisions and points of drafting in certain articles, which should be cleared up without altering the substance and content, we feel that a sufficiently broad consensus was achieved at the last session of the Commission for the draft Convention to be submitted for consideration by the General Assembly with a view to its subsequent adoption.

The Working Group, which is to meet again in January 1987, should work on the basis that the draft Convention should not be subject to substantive amendments which might render its subsequent approval difficult. In other words, the Group should concentrate on matters of style and drafting and should not become involved in questions of substance which might modify the consensus achieved at the last session of the Commission.

*Article 4(10)*

Although we are not opposed to the definition given of the term "signature", we do consider it to be somewhat premature, for as long as authentication by mechanical means is not a part of general commercial practice, many countries will undoubtedly continue to apply domestic regulations in this area. We believe that this is a clause whose utility will come to the fore in a few years time.

<sup>1</sup>Report of the United Nations Commission on International Trade Law on the work of its nineteenth session (1986), *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 223.

*Article 57. Time limits for making a protest*

In respect of this article we prefer to maintain the reservation that time limits for making a protest should continue to be regulated by the laws of the country in whose territory the protest is to be made. This formula would also be valid for article 62.

**NORWAY**

*Article 23 bis*

The person to whom the instrument was directly transferred by the unauthorized agent should not be liable towards the purported principal under paragraph (1) of article 23 *bis*, unless he had or ought to have had knowledge of the lack of authority. The risk of loss should not be transferred from the purported principal to the endorsee in good faith, because, in most cases where the transferee is in good faith, there will exist some kind of relationship between the purported principal and the unauthorized agent. Thus, it seems more equitable and better public policy to let the purported principal, and not a transferee in good faith, bear the risk of unauthorized transfers by someone purporting to have authority as an agent. We would therefore like to propose a new subparagraph (3 *bis*) in article 23 *bis*:

"(3 *bis*) Also, the person to whom the instrument was directly transferred by the agent shall not be liable under paragraph (1) towards the principal if, at the time of the transfer, he was without knowledge that the endorsement did not bind the principal, provided that such absence of knowledge was not due his negligence."

*Article 27*

The "shelter rule" in article 27 obviously goes too far, cf. example C in the commentary to that article in document A/CN.9/213. There are no good reasons why the person C in the example should obtain the rights of a protected holder. As one way to avoid such a consequence, we suggest a new subparagraph (c) in paragraph (2):

"(c) He had knowledge of a claim to or a defence upon the instrument which could have been raised against the person who transferred the instrument to the subsequent holder."

*Article 77*

In article 77, protest for dishonour by non-acceptance is not mentioned. This seems to be a mistake, cf. paragraph (1) in the commentary to that article in document A/CN.9/213.

# HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (PERMANENT BUREAU)

[Original: French]

## Article 1, paragraph 4

Paragraph 4 of article 1 provides that "proof that the statements referred to in paragraph (2)(e) or (3)(e) of this article are incorrect does not affect the application of this Convention". The relationship between this provision and the preceding paragraphs of article 1 is not clear and raises problems. The ambiguity of this paragraph 4 was discussed during the seventeenth session of UNCITRAL and the report of that session (*Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17)*) concluded this discussion in the following manner: "it was also pointed out that there was a need to revise the criterion contained in article 1(4) so as to limit the application of the Convention to genuinely international instruments" (paragraph 41 *in fine*).

*Paragraph 4 of article 1 can in fact be interpreted in two ways:*

A. One possibility is to keep strictly to the letter of the provision and to read it only in conjunction with subparagraphs (e) of paragraphs (2) and (3), without in any way affecting the condition stated in paragraph (1) of article 1. In other words, an error on a bill of exchange or promissory note in the indications referred to in subparagraphs (e) of paragraphs (2) and (3) would not affect the application of the Convention, provided the instrument retained its international character, a condition imposed in paragraph (1).

If this is indeed what paragraph (1) of article 4 means—and in the view of the Permanent Bureau, this would be a reasonable interpretation—it should be expressly stated and the Permanent Bureau therefore suggests that the following clarification should be added at the end of the provision, which would then read as follows:

"Proof that the statements referred to in paragraph (2)(e) or (3)(e) of this article are incorrect does not affect the application of this Convention, provided the international character of the negotiable instrument, as defined in the preceding paragraphs of this article, is maintained."

B. The other possibility is to interpret the provision in paragraph (4) of article 1 as directly affecting paragraph (1), which would then give the drawer of an instrument freedom, on his own initiative alone, arbitrarily to exclude the bill of exchange or promissory note from application of the regime of national law normally applicable. In other words, a wholly "national" bill of exchange could be made not subject to the legal régime normally applicable to it and made subject to the draft Convention, even if, to take a hypothetical case, the country incorrectly indicated on the instrument was not a party to the Convention.

The Permanent Bureau takes the view that such a result is not only contrary to the intended aim of the

draft Convention, namely to establish a special, and optional, régime for *international* bills of exchange and promissory notes, but also creates a difficult problem in the area of conflict of laws. Let us suppose that a convention on conflict of laws in respect of commercial negotiable instruments, perhaps prepared under the auspices of the Hague Conference on Private International Law, were to adopt a single régime under whose terms the law of the place of payment would be applicable to a negotiable instrument. Let us further take the case of a wholly French bill of exchange on which, however, the drawer incorrectly indicated a bank in Geneva as the place of payment. In such a case, what course should be adopted by the judge, whether he be a judge of the country of "nationality" of the bill of exchange (France in this hypothetical case) or a judge of a third country? Should the judge of a third State party to the draft Convention, respect the provision in paragraph (4) of article 1, in other words should he apply the draft Convention to this purely national instrument, even though in our example neither France nor Switzerland are parties to the Convention envisaged? If he notes that neither Switzerland or France are parties to the draft Convention and the latter therefore cannot be applied, should he nevertheless respect the incorrect indication on the negotiable instrument and apply Swiss law to a purely French bill of exchange, applying the normal conflict rule?

It will be seen that the result of this second possible interpretation of paragraph (4) of article 1 raises serious problems which, in the opinion of the Permanent Bureau of the Hague Conference, were perhaps not sufficiently discussed during the preparatory work on the draft Convention. A re-examination of this problem would seem to be necessary and, in particular, it would seem reasonable to adopt a restrictive interpretation, along the lines developed in A.

## Article 2

Throughout the work on the draft Convention, the observer from the Hague Conference repeatedly objected to the exorbitant character of article 2, which may not only lead to unpredictable situations in practice, but is a source of difficulties in the area of conflict of laws. His arguments in favour of attempting to root the draft Convention in a legal order, by requiring that the place where the bill is drawn and the place of payment be situated in contracting States, always received a sympathetic hearing from delegates, but never succeeded in convincing.

The Permanent Bureau has no intention of repeating those arguments here. However, it does wish to make an observation and put forward a suggestion:

A. The Permanent Bureau takes the view that, as things stand at present and in view of the wording of article 2, it is not possible for a State party to the Geneva Conventions concerning bills of exchange and promissory notes to ratify, or even sign the draft Convention. (The same applies moreover to States parties to the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices, signed in Panama City on 30 January 1975.)

It seems absolutely necessary, therefore, before the draft Convention is again submitted to a session of UNCITRAL, for there to be consultation among the States parties to the Geneva Conventions and that they find a system which would enable them to accept the draft Convention. The Permanent Bureau considers that the difficulty cannot be resolved in a convention on conflict of laws alone. It is necessary for the draft Convention itself to contain an article that makes it possible, in one way or another, to resolve the difficulty.

B. The underlying philosophy of article 2 under discussion is strangely reminiscent of that which presided over the preparation of the two Hague Conventions of 1964 relating to a uniform law on the international sale of goods. These two Conventions also had an exorbitant character, since they purported to apply independently of recourse to private international law.

During the Diplomatic Conference which adopted these two Conventions, the delegates realized that this exorbitant character could have a negative effect and be a hindrance to ratification of the Convention. Consequently, a number of reservations were allowed in order to temper the rigour of the fundamental principle. It is worth noting that, with the exception of one country, Israel, all the States which ratified the 1964 Hague Conventions did so utilizing one or other of the reservations provided for.

The Permanent Bureau fears that an identical result will be reached with the present draft Convention and that it will encounter serious obstacles to its ratification by certain States if an arrangement such as that allowed at the Hague in 1964 is not provided for in the present case. It is for this reason that the Permanent Bureau wishes to suggest that a *reservation* be allowed under the draft Convention, the wording of which might be as follows:

"Any State may, at the time of signature, ratification... etc., declare that its courts will apply the Convention only if the place where the bill of exchange or promissory note is drawn and the place of payment of the instrument are both situated in Contracting States."

The conciliatory aspect of this reservation should be noted: by restricting it to the non-application of the Convention by courts of the State making the reservation, it still allows the parties to the instrument and the banks to take a risk by negotiating or discounting the instrument. The reservation will come into play only if the bill of exchange or promissory note gives rise to litigation in the courts of the State making the reservation.

#### [A/CN.9/WG.IV/WP.32/Add.1]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth, with minimal editorial modifications, the comments received between 15 and 21 November 1986 from the following States: Canada, Japan, Sierra Leone and Spain. Any further comments will, upon receipt by the secretariat, be included in a later addendum.

## CANADA

The Government of Canada, having completed its consultations concerning the draft Convention, considers the draft Convention to be satisfactory in its present form and hopes that it will be adopted by UNCITRAL at its twentieth session.

## JAPAN

### I. Introduction

It will be very meaningful to establish a new system of bills of exchange or promissory notes to be issued only for international transactions, while there already exist negotiable instruments governed by conventions and domestic laws. The Japanese Government supports the idea of adopting a new multilateral convention which will regulate the said instrument. The present text of the draft Convention on International Bills of Exchange and International Promissory Notes, which is the product of discussions in the United Nations Commission on International Trade Law at its nineteenth session, provides an excellent basis for achieving a good compromise between the Anglo-American system and the Geneva system. Therefore, the Japanese Government considers the basic principles under which the present text is drafted acceptable. The Japanese Government appreciates the strenuous efforts of the Commission, and it hopes the Commission will complete its examination of the draft Convention at its twentieth session in 1987. The Japanese Government, however, believes that some provisions in the present text remain to be improved. Japan's comments and proposals regarding these problematic provisions are as follows.

### II. Comments on individual provisions

#### 1. Payable on demand (article 8(2))

(1) Article 8(2) is modelled on the Anglo-American System. In fact, the United Kingdom has the provision corresponding to article 8(2) in section 10(2) of the Bills of Exchange Act, 1882 (BEA). As for the United States, it did have a similar provision in the final sentence of section 7 of the Uniform Negotiable Instruments Law (UNIL). However, that sentence has not been retained in section 3-108 of the Uniform Commercial Code (UCC) which reworded section 7 of the UNIL, on the grounds that the sentence served no meaningful purpose, or rather resulted in trapping the unwary. Thus the UCC provides in section 3-501(4) that neither presentment nor notice of dishonor nor protest is necessary as to endorsers after maturity.

(2) Article 8(2) is the most problematic provision, since it is not clear what the legal effects of the rule contained in article 8(2) will be. For instance, it is not clear whether presentment or protest is necessary with regard to an endorser after maturity (that is, whether articles 53(1), (2) and 59(1), (2) are applied to overdue paper), and whether an endorser after maturity is liable to parties subsequent to himself (article 20 of the 1930 Geneva

Convention providing a Uniform Law for Bills of Exchange and Promissory Notes denies the liability of the endorser after maturity towards those parties). Neither is it clear whether the time-limit of presentment for payment ("one year of its date"—see article 51(f) is to be reckoned from the date of the instrument or from the date of maturity, nor from what time the period of prescription referred to in article 80(1) is reckoned.

Therefore, as for article 8(2), at least its legal effects should be clarified in the course of discussions.

## 2. *Valid claim* (articles 25(2), (4)(a), 26(2) and 68(3))

The word "valid", which is found in articles 25(2), (4)(a), 26(2) and 68(3), should be retained in order to prevent a party from raising a *ius tertii* defence that is palpably false. If the word "valid" is deleted, a party will be easily discharged of liability on the instrument by simply raising a defence that a third person is asserting a claim, which may be false or fabricated by conspiracy of a party and a third person. Needless to say, such a result is unjustifiable in view of the status of a holder who is presumed to be a protected holder unless the contrary is proved (article 28).

## 3. *Shelter rule* (article 27)

The former article 27(2),<sup>1</sup> which the Working Group on International Negotiable Instruments deleted at its fourteenth session in 1985, should be introduced again into the draft Convention.

*Example X:* A makes a note payable to the payee, B. The note is stolen from B. C, the thief, transfers it to D, a protected holder. If D exercises a right of recourse against C and C pays the note, does C have the rights on the note?

In this Example, C should not have the rights on the note. However, it is not clear whether such conclusion can be drawn from the present wording of article 27(2) (b), since C is not a holder but a party (article 67).

## 4. *Unauthorized signature* (article 32(5))

Article 32(5) is modelled on article 8 of the 1930 Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, but such provision is found neither in the BEA nor in the UCC.

It necessarily follows from article 32(5) that an agent who signed without authority or exceeding his authority will benefit at the expense of the person whom he purported to represent. For instance, if C transfers the note to D by signing in a representative capacity for B in the aforementioned example X, under article 32(5) C acquires the same rights as B, and is able to exercise the rights on the note against A. Such conclusion is not acceptable; C should not gain, through his theft, a benefit to the detriment of B.

<sup>1</sup>It reads as follows:

"(2) If a party pays the instrument in accordance with article 66 and the instrument is transferred to him, such transfer does not vest in that party the rights to and upon the instrument which any previous protected holder had."

The right conclusion in the said case as compared with the case in which C transfers the note to D by signing as a principal (see para. 3) is that C is liable but has no rights on the note.

Accordingly, article 32(5) should be deleted.

## 5. *Discharge by payment* (article 68(3))

In the example X described above, if A pays C knowing at the time of payment that C acquired the note by theft, A should not be discharged of liability. However, it is not clear whether such conclusion can be drawn from the present wording of article 68(3), since C is not a holder but a party (article 67). Therefore, article 68(3) should be amended so as to read as follows:

"A party is not discharged of liability if he pays a holder who is not a protected holder *or a party subsequent to himself who has paid the instrument and is in possession thereof* and knows at the time of payment that a third person has asserted a valid claim to the instrument or that the holder *or the party* acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery."

## 6. *Discharge of a prior party* (article 73(2))

Article 73(2) was amended by the Commission at its nineteenth session because of the inconsistency between article 68(3) and Article 73(2). As a result of the amendment, a proviso was added. If the above-mentioned proposal concerning article 68(3) (see para. 5) is adopted, the proviso of article 73(2) should also be amended so as to read as follows:

"except where the drawee pays a holder who is not a protected holder *or a party subsequent to himself who has paid the instrument and is in possession thereof* and knows at the time of payment that a third person has asserted a valid claim to the instrument or that the holder *or the party* acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery."

## 7. *Acquirement of rights by payment* (articles 67 and 44(2))

(1) Article 67 provides that a party who pays an instrument in accordance with article 66 may recover a certain amount of money from the parties liable to him. Article 67, however, should not be applied to the case in which a party who pays an instrument knows at the time of payment that the holder acquired the instrument, for instance, by theft and, in accordance with article 68(3), is not discharged of liability.

*Example Y:* A makes a note payable to the payee, B. B transfers it to C. The note is stolen from C. D, the thief, exercises a right of recourse against B. If B pays the note knowing at the time of payment that D acquired the note by theft, B should not be allowed to exercise the rights provided for in article 67 against A.

Accordingly, article 67 should be amended so as not to be applicable to the said case.

(2) If the above-mentioned proposal concerning article 67 is adopted, article 44(2) should also be amended so as not to be applicable to the case in which the guarantor knows at the time of payment that the holder acquired the instrument, for instance, by theft.

*Example Z:* A makes a note payable to the payee B. The note is stolen from B. D, the thief, exercises a right of recourse against C, the guarantor for B. If C pays the note knowing at the time of payment that D acquired the note by theft, C should not be allowed to exercise the rights thereon against A and B.

## SIERRA LEONE

### Article 4(10)

This paragraph should, immediately after the last word "means", omit the semicolon and add the following: "with the intention that such signature should be taken as genuine." The additional words distinguish a forged signature from one put on an instrument without a fraudulent motive. See, for example, article 14(1)(b) which clearly distinguishes between the two categories of signature.

### Article 4; suggested new paragraphs

A new paragraph should be inserted in this article defining "drawer" as follows: "Drawer means a person who by himself or his agent duly authorised draws a bill". The need for this paragraph is highlighted by articles 32(1) and 11(2)(a) the cumulative effect of which is that, while they make it possible for an agent to draw a bill or note, a drawer in the ordinary sense of the term may only be liable if the instrument was drawn with his authority.

For the same reason as stated above, a paragraph should be inserted defining a maker as meaning "a person who by himself or his agent duly authorised makes a note".

Although article 12 describes the method by which an instrument is transferred from the drawer or maker to the payee which in some legal systems is known as the issue of the instrument, this article may not be the appropriate place to put a definition reflecting such a transfer, as the article deals with endorsed instruments only. It is therefore suggested that article 12 should be deleted and the word "transfer" be defined in a new paragraph in article 4 as follows:

"'Transfer' means:

"(a) The first delivery of an instrument by the drawer or maker to a person who takes it as holder; or

"(b) The endorsement and delivery of the instrument by the endorser to the endorsee; or

"(c) Mere delivery of the instrument if the last endorsement is in blank."

It is to be noted that the draft Convention has used the term "transfer" instead of "negotiation" which words do not carry the same meaning in some legal systems.

### Article 7(3)

This paragraph should omit the last three words "of the instrument" and add "on which the instrument matures". As the paragraph now stands it makes interest on instruments the capital of which is payable at a definite date (see article 8(3)(a)) payable even before the obligation to pay the capital arises, i.e. on the date that the instrument matures.

### Article 8(5)

The full stop at the end of the sentence should be deleted and the following words added: "or the date on which the instrument is presented for acceptance and is dishonoured". The additional words take care of the situation where the bill is not accepted on presentment for acceptance. If the present text remains as it is, such a bill will not mature unless it is subsequently accepted, which may never happen.

For a similar provision for a note see article 8(7).

### Article 13

Since article 13(2) is dealing with the definition of the various types of endorsement, this article is the appropriate place where reference should be made to the other types of endorsement for collection and to conditional endorsement even though the latter is prohibited under article 17(1). The following paragraphs should therefore be added to article 13(2):

"(c) For collection, in accordance with article 16(2);

"(d) Conditional, where a condition is placed upon the payment of the bill or note or the incurring of liability on the instrument."

### Article 14(3)

After the last word "instrument" in the paragraph the following words should be added: "unless he is a party to any fraud, duress or mistake". A person should not be a holder acquiring rights to an instrument if he himself has obtained such instrument by dubious means.

### Article 16

For the purpose of coherence and continuity, article 20(1) and (2) should be transferred to article 16 as article 16(3) and (4) respectively.

### Article 23

After the word "forgery" in the second line of paragraph (1) insert the following: "but who adopts it in accordance with article 30 or who becomes aware of the forgery after the instrument has been transferred by him and does not notify his immediate transferee". The basis of this addition is that forgery ought to break the chain of transferability, "negotiability" as the expression is usually termed, so that the person whose endorsement is forged and those who have signed the instrument before the forgery but are unaware of it and do not adopt it would not become liable to any party who took the

instrument after the forgery. If this view is upheld then the question of compensation to such persons will not arise as they would not have suffered any damage. A person who is likely to suffer damage is the one who is envisaged in article 30 or the one whose endorsement is forged and who does not notify a subsequent holder in the event of learning about the forgery or a subsequent signatory of the instrument placed in a similar situation.

#### Article 23 bis

The following words in the second and third lines of article 23 *bis* (1) should be deleted: "or any party who signed the instrument before such endorsement". Such a person ought not to be affected by the conduct of an agent who is not his agent but who endorses the instrument before it reaches the hands of that agent.

There that party cannot incur liability for the agent's conduct for which he can suffer damage. Even in the case of a principal, responsibility for his agent's authorised act should arise only if he adopts it or estoppel is pleaded against him.

#### Article 25

Delete from the article the following: "who is not a protected holder" immediately coming after the word holder in paragraphs (1) to (4). This qualification is unnecessary as the terms "holder" and "protected holder" are clearly defined in article 4, paragraphs (6) and (7) respectively.

#### Article 39

Either paragraph (2)(a) should be deleted because it is inconsistent with paragraph (1), or it should be retained but paragraph (2)(b) should be amended to read as follows: "The bill is dishonoured to the extent of the partial non-acceptance."

#### Article 40

Paragraph (2) of this article is inconsistent with article 17(1), either of which should be deleted.

#### Article 42

The last sentence of paragraph (1) should be amended to read as follows: "A guarantee may be given by any person who may not already be a party". It is inconceivable how a person already liable on an instrument can guarantee another person also liable on the same instrument when in the case of dishonour recourse will have to be made to the "guarantor" on his own liability. If the intention of the paragraph is to enable a drawer or endorser, who excludes his liability under article 34(2) or article 40(2) respectively but who is nevertheless a party to the instrument, to guarantee, then the sentence should be recast in order to reflect this. The following wording is therefore suggested: "A guarantee may be given by any person who may not already be a party or who may be a party who has excluded his liability as drawer or endorser".

#### Article 48

In the third line of paragraph (2) delete the words "or is a fictitious person" and substitute the words "or is a fictitious or non-existing person". In most common law countries, the words "fictitious" and "non-existing" when applied to persons, though having the same effect, do not carry the same meaning in the law of bills of exchange.

#### Article 52

Paragraph (2)(d): The same comment as in article 48 for the addition of the words "or non-existing" immediately before the first "person" in the third line of this paragraph.

#### Article 66

Paragraph (1)(c): Add after the words "Before maturity" the words "upon dishonour by non-acceptance". Surely, this article is intended to deal with a bill payable at a fixed date after sight, which requires presentment for acceptance in order to fix the date of maturity, and not a bill payable on demand. Where a non-demand bill has been so dishonoured, the holder need not wait for the date of maturity which may never come. However, in the case of a demand bill which does not need a presentment for acceptance before presentment for payment and where the maturity date is prescribed under article 51(f), with the existing text there is nothing to prevent a holder from recovering from prior parties even before he has presented the bill for payment. (See a similar provision in the case of discharge by payment under article 68(1)(b)).

## SPAIN

[Original: Spanish]

### 1. Methodology

The observations contained in this document are divided into two main groups: those of a general nature and those on points of detail. The general observations provide an assessment of the draft as a whole, viewed as a single regulatory text requiring a comprehensive analysis. The detailed observations concern specific precepts of the draft Convention.

The two types of observation are included under different headings in this document.

A further observation on the methodology should be made at the outset: in issuing these observations, the Spanish Government does so bearing in mind its observations drawn up in 1983 in response to the request of the Commission at its fifteenth session.

The new observations contained in this document take as a starting-point those already formulated in 1983 and their comparison with the work carried out by the Commission on the various occasions between then and now when it has examined the draft in question. The Spanish Government reiterates the observations it formulated at that time.

## 2. General observations

### One

The Spanish Government takes a generally positive view of the efforts directed by UNCITRAL, over a long period of time, to establishing international legislation which will subject international bills of exchange and promissory notes to uniform rules. This legislative policy objective continues to be of great legal interest and the economic importance of the realities covered by these rules continues or has even increased. International trade continues to require the establishment of means of credit and of facilitating payment of contracted obligations, and it is desirable that these means should be formally recognized as international and should be subject to legal rules which are equally international and uniform, with the widest possible scope.

For these reasons the Spanish Government reiterates its favourable opinion of the work being carried out by UNCITRAL in this area, which is currently taking concrete form in the draft Convention considered here.

### Two

With a view to the achievement of concrete practical results, the Spanish Government has always considered what it called in 1983 the "spirit of compromise" which had characterized the preliminaries and initial work on international bills of exchange and promissory notes to be an instrument of great political significance and enormous legal utility. This "spirit of compromise" has guided the efforts devoted to drawing up the draft Convention by countries belonging to the world's two major groups as regards the legal doctrine on matters relating to negotiable instruments, namely countries belonging to the common law system and those belonging to the system of the Geneva Conventions, either as parties or in so far as they are influenced by specific solutions.

The search for an intermediate, balanced formula between the two legal systems which guided the efforts of the Commission for many years appears to have been to some extent abandoned following the last session this year, 1986, to be replaced by a process of constant adjustments to the draft whose effect is to incline it progressively towards solutions, particularly with regard to the technique for formulating and drafting norms, more appropriate to the common law system than to the above-mentioned "spirit of compromise" between common law and the Geneva system. The most palpable expressions of this are the marked increase in the casuistic nature and literary or descriptive character of the norms and, parallel to this, a growing disregard—functional, at least—for the fundamental concepts of the continental system.

### Three

Concurrently with the previous observation, the Spanish Government takes the view that the text of the draft Convention is becoming increasingly difficult to read and understand. This gives grounds to fear future difficulties concerning its uniform understanding, application and interpretation.

This defect, which was already evident in 1983, may even have worsened during the most recent sessions of the Working Group and the Commission. Examples of the grounds for this observation are the increase in the quantity of definitions and cross-references and a great proliferation of enumerated instances of application or exclusion from application of the general rules. The Spanish Government is of the view that a final effort should be made to strip the draft of excessive enumerations and proliferating cross-references in order to produce a text with an equitable balance of simply formulated general rules. This will appreciably improve the understanding and interpretation of the future Convention.

The general structure of the draft and the clarity of its rules have not, in the judgement of the Spanish Government, been improved during the most recent working sessions. There has rather been a deterioration due to the accumulation of the above-mentioned factors.

### Four

The "Spanish original" of the draft, following the most recent working sessions, shows a very considerable improvement compared with its original wording. A host of terms, generally anglicisms, quite alien to Spanish legal-terminological tradition and reality have disappeared, and been replaced by appropriate substitutes. The same has happened to expressions or turns of phrase resulting from literal translations into Spanish from the language in which the draft was originally prepared.

While noting this very appreciable improvement, the Spanish Government nevertheless believes that it would be possible to improve the linguistic purity of the "Spanish original", particularly in the second half of the text (from, approximately, article 45).

### Five

The text of the draft still has two gaps which in the view of the Spanish Government could lead to serious difficulties in the future concerning the practical application of the rules being prepared. These gaps were already pointed out by the Spanish Government in its observations made in 1983, and their foreseeable practical implications reveal, in an indelible manner, dogmatic shortcomings in the draft. The gaps in question are the following:

1. The draft still contains no procedural rules. Traditionally, on the continent, the fortunes of media of exchange and commercial paper in general have been based on the privileged régime of the legal exercise of rights incorporated in the instruments. Legislative texts on negotiable instruments continue to maintain specific procedural rules in virtue of which creditors holding bills and notes benefit from a rapid and expeditious procedure for the satisfaction of claims incorporated in negotiable instruments.

The UNCITRAL draft does not take into account this tradition, which is shared by many States members of the Commission, and leaves the regulation of procedural matters to the national legislation. In the view of the



Spanish Government the draft should contain at least an indication of the privileged, rapid and expeditious character of the procedure for the legal exercise of the rights mediated by an international bill of exchange or promissory note. It would be even better if the rules for this legal procedure were incorporated in the actual text of the draft Convention and formed part of it.

2. The draft still does not contain comprehensive regulations covering the relations between the transaction of issuing an international bill of exchange and, in general, the documentary transaction on the one hand and the transaction underlying the instrument on the other. Since the latter transaction is the reason for which the bill of exchange or the promissory note is created by the drawer or maker, it is desirable to lay down some brief, specific and precise rules to determine the reciprocal influences established between the underlying transaction and the instrumental relationship as a result of the putting into circulation of an international bill of exchange or promissory note.

In the absence of such regulations, the legal security of the causal or underlying debtor is threatened even in the case of payment for his account of the instrumental debt. This danger is only the most conspicuous of those incurred if there are no rules governing the range of relationships between the underlying transaction and the transaction with the negotiable instrument: other dangers, if of lesser consequence, exist throughout the draft text.

#### *Six*

The Spanish Government reiterates its reservations concerning the draft's provisions regarding the "protected holder". Despite this, it realizes that they may constitute a point of equilibrium and meeting point between the two major world systems in relation to negotiable instruments.

With this consideration in mind, it appreciates the improvements introduced in the legal rules concerning the so-called "protected holder" throughout the most recent working sessions of the Commission.

#### *Seven*

The economic and legal importance of the draft text, and of the media of exchange regulated by this document, make it advisable that the final discussion and definitive formulation of the text of the Convention should take place in the context of a diplomatic conference, independent of the problems raised by the financial questions involved in this solution.

The maintenance of this position is advisable also in the light of the fact that due to its content, poised between the different world systems in relation to negotiable instruments, it can be foreseen that the regulatory solutions incorporated in the draft will contrast markedly with the tradition in these matters of the majority of the States concerned. The solution of this dichotomy must, without any doubt, be resolved at a diplomatic conference. Moreover, through such a means of finalizing the work, the Convention would acquire a particular weight which would be unattainable by any

other procedure for approval or final drafting. It is essential that the draft should carry great weight, if it is to be successful and widely accepted by the various States.

### *3. Detailed observations*

#### *Articles 1(2)(b) and 46*

The qualification of "unconditional" which article 1(2)(b) gives to the order to pay contained in the bill of exchange is difficult to reconcile with the content of article 46, according to which it is permitted by agreement to attach conditions, even if indirectly, to the order contained in the instrument.

#### *Article 5*

In article 5 it would be desirable to make clear the régime applicable to the hypothesis of actual ignorance of the fact in question.

#### *Article 11*

It is not made sufficiently clear in article 11 that completion of the blank bill must take place before its maturity, which is a logical requirement of the system, since a bill which matures incomplete is not a bill, if the missing elements are essential requisites.

In order to clarify this chronological situation it would be desirable to mention the point expressly in article 11.

#### *Articles 25 and 27*

In articles 25 and 27 it would be desirable to make clear the regime applicable to transfer of a bill of exchange following maturity and whether the new holder acquires the status of protected holder.

#### *Article 46(1)*

In article 46(1), first sentence, it is proposed that the phrase "or before the occurrence of a specified event" should be deleted, since it may open the door to the introduction, even if indirectly, of a condition affecting a transaction closely related to the successful attainment of the bill's purpose, in other words its acceptance.

#### *Article 73(2)*

Both in its drafting and its content article 73(2) gives rise to difficulties of understanding. In particular, the discharging effect of the payment by the drawee in respect of the liabilities to pay of antecedent parties to an instrument should be indicated.

#### **[A/CN.9/WG.IV/WP.32/Add.2 and Corr.1]**

This addendum to document A/CN.9/WG.IV/WP.32 sets forth, sometimes in considerably shortened form, the comments received between 24 and 28 November 1986 from the following States: Argentina, France,



Germany, Federal Republic of, and Mexico. Despite the late date of submission and the stringent control and limitation of United Nations documentation, the secretariat hopes to be able to translate and publish this addendum in time for the fifteenth session of the Working Group. However, in order to achieve this, it was unfortunately necessary to shorten considerably the more extensive comments received from the French Bankers' Association, referred to in the comments of France, and from Mexico. The secretariat, using its best judgement, selected those portions of the comments which propose new wording of articles or parts thereof since a meaningful discussion of those proposals requires that delegates have the text before them in their respective language. Thus not reproduced here are those portions of the comments which contain explanations of the proposals or which suggest the deletion of a provision or a part thereof. These kinds of comments may be made orally by the proposing delegations, although, of course, it would have been preferable to include them in this addendum. Copies of the full comments in their original language will be made available during the session. The secretariat wishes to express its regrets for this emergency measure and to ask all delegations, in particular those whose comments had to be shortened, for their understanding.

## ARGENTINA

[Original: Spanish]

1. On the basis of the results achieved, it appears that the draft put forward has not taken into account either the need for technical perfection in legal texts or the need for the elaboration of uniform norms that are acceptable to the international community.

The draft still contains inconsistencies which will probably necessitate its revision, not only as far as substantive aspects are concerned, but also with regard to the technical terminology of negotiable instruments and even grammatical drafting. In particular, the Spanish version still suffers from defects which betray the fact that it was originally drafted in another language, and shortcomings in the translation. It lacks conciseness, clarity and technical correctness.

2. It would be desirable to eliminate the abundance of definitions, as well as unnecessary and obvious provisions for special cases, sometimes alien to negotiable instruments law.

The same could be said concerning the legislative casuistry afflicting the draft.

3. The approach of not listing the defences that may be set up in each case and of referring to other articles or paragraphs, or to the Convention itself in general (e.g. article 25, paragraph 1(a)), is inconvenient. This approach may be the reason why the defence of payment (*defensa de pago*) has been omitted.

4. Argentina considers that the adoption of an international convention on international bills of exchange and promissory notes will be useful and viable

in so far as the structure and solutions adopted facilitate the interpretation of their characteristics and do not lead to an increase in doubtful situations.

Argentina also believes that the experience of over half a century in using the Geneva rules must not be ignored and that an appropriate solution to possible conflicts should be found.

5. The importance of the "typicity" (*tipicidad*) of the document must be borne in mind. The negotiable instrument has the "typicity" inherent in its necessity, abstraction, literality (*literalidad*) and autonomy or else it does not have this and, in that case, it will not be a bill of exchange or a promissory note because it will not be a negotiable instrument.

Some provisions in the draft indicate a lack of consistency with the doctrine and objective of negotiable instruments. This statement is based on the observation that the instruments dealt with lack viability to circulate with the character of *abstraction* from or independence of the fundamental relationship or underlying transaction which generated them.

6. Some of the provisions in the draft are detrimental to the general structure of the instruments.

7. The future Convention represents an attempt to provide an instrument of integration to facilitate international transactions. Without an appropriate collection procedure, this functional criterion would be inconsistent, above all because there is a great divergence between member countries in the matter of procedures. It would perhaps be desirable to incorporate in the draft the provisions needed to make debt collection effective.

8. The proposal has various inconsistencies; see, for example, article 1, paragraphs (2)(b) and (3)(b). If both the international bill of exchange and the international promissory note contain an unconditional order to pay a definite sum of money to the payee or to his order, this means that they must contain an unconditional promise to pay a certain sum of money. However, if one accepts the acceleration clause and there is a case of default, as provided for in article 6, subparagraph (c), there will have to be a frequently lengthy and disputed investigation to fix the maturity date (if this is invoked).

It thus seems improbable that, in such instances, it can be maintained that we have here an unconditional promise, necessary for the document to retain its "abstract" character. And if we refer to these instruments as promissory notes or bills of exchange, without paying attention to their "typicity", we will be introducing a serious confusion which should be avoided.

9. The drafting of parts of the document is faulty, e.g. article 18. Other articles in the Spanish version are unintelligible, e.g. articles 25, 26 and 27.

10. In its current form, the draft is still not calculated to remedy the existing divergences between the legislations of member States.

11. Argentina hopes that the foregoing proposals and recommendations will be useful for the deliberations of the Working Group and in improving the final text of the draft.

## FRANCE

*[Original: French]*

In its present state, the draft Convention is not considered acceptable in France.

It has been noted that the Commission, at its nineteenth session (report A/41/17, paragraph 222), laid down that the Working Group, to meet in Vienna in January 1987, would be at liberty to suggest any improvements to the draft Convention and should, in particular, examine it with a view to remedying any "inconsistencies" and "lacunae" which might be found.

As it stands, since it may otherwise not be adopted, the draft should be examined thoroughly, not only to bring about a substantial improvement in the drafting and to clarify it, but also to bring the substantive rules it sets out into line with the requirements of international practice. A number of mutually incompatible rules should be carefully revised. Some serious gaps should be filled.

\* \* \*

In the first place it is absolutely imperative to ensure that the present draft Convention and the Geneva Convention are compatible. The comments made by the representative of the Hague Conference on Private International Law regarding article 2 of the draft cannot be ignored.

\* \* \*

It is no less essential that the draft should be readable and understandable, particularly with regard to the definition and status of the "holder". The holder is the central character in any legislation regarding bills of exchange and promissory notes, since he receives them as a substitute for money. In this connection it is inadvisable, in article 4, paragraph (7), to define the protected holder in relation to the definition of the non-protected holder (article 25). It is important that the protected holder should be clearly defined. It is equally important that the status of protected holder, as set out in article 26, should not be based on a reference to eight articles. Article 26 must also be written in plain language. An attempt to do this will reveal that the current wording gives rise to serious inconsistencies. Article 25, concerning the status of the non-protected holder, must also be rewritten in the interests of clarification and simplification.

The French delegation has drawn up new draft versions for articles 4(7), 25 and 26.

Similarly, the rules governing acceptance (article 36 and following articles) and those governing the case of presentment for acceptance being dispensed with (articles 48, 50(1)(b), 50(2), 55 and 56-58) are frightfully complex. It is essential that an effort should be made to clarify them.

\* \* \*

The French delegation notes that the draft is not sufficiently precise with regard to the rights and obligations of the persons linked by a negotiable instrument. A good negotiable instrument is one that uses "hallowed" formulae which require no interpretation. A simple, formal examination must enable any holder or endorsee to ascertain the extent of his rights and obligations. However, the draft Convention obliges the holder or endorsee to consider how much he knows or his own degree of involvement in relations between the signatory and successive holders, and then to investigate, inform himself or make checks. In short, the draft does not give the holder security and, in any case, does not give him security equivalent to that provided by the Geneva Convention. This is extremely worrying to France and the French banks.

\* \* \*

The draft still contains serious lacunae. It does not envisage endorsement in pledge, sets of identical parts of an instrument, or the establishment of copies, whereas provisions relating to these matters are particularly likely to find application in international trading operations.

The French delegation has prepared drafts on all these points. It has reintroduced the proposal submitted at the Commission's session in July 1986 because it did not understand how the President could conclude that the Commission did not wish to adopt its proposal, whereas Austria, Germany, Federal Republic of, Iraq, Switzerland, United States of America and Uruguay had indicated their support for it, and only Egypt, German Democratic Republic, Mexico and the Union of Soviet Socialist Republics had opposed it (summary record A/CN.9/SR.350, paragraphs 46-70).

\* \* \*

The French delegation has also submitted particular comments regarding articles 1, 2, 5, 6, 7(1) and (5), 8(2), 9, 14, 16(2), 23, 23 bis, 27, 30, 33, 41(1), 42, 43, 45, 46(1), 46(2), 47, 48 and following, 49, 50, 51(6), 51(c), (d), (e), 52(2)(d), 53(3), 54 bis, 57(1), 58, 59(3), 64 bis and following (to be added), 65, 66(4), 68(3), 68(4)(e) and 73. Draft wording has been suggested for many of these articles.

\* \* \*

The French Bankers' Association sent the UNCITRAL secretariat a detailed note setting out its comments before the 15 November deadline.

*Excerpts\* from comments of the French Bankers' Association referred to in the comments of France*

### *Article 1 (draft text)*

(1) This Convention applies to an international bill of exchange when it contains the words "international bill

\*As indicated in the introductory note to this addendum, only those portions of the comments are reproduced here which propose new wording of articles or parts thereof.

of exchange (Convention of . . .)" and indicates that at least two of the following places are situated in different States:

- (a) The place where the bill is drawn;
- (b) The place indicated next to the signature of the drawer;
- (c) The place indicated next to the name of the drawee;
- (d) The place indicated next to the name of the payee;
- (e) The place of payment.

(2) This Convention applies to an international promissory note when it contains the words "international promissory note (Convention of . . .)" and indicates that at least two of the following places are situated in different States:

- (a) The place where the note is made;
- (b) The place indicated next to the signature of the maker;
- (c) The place indicated next to the name of the payee;
- (d) The place of payment.

(3) Proof that the indications referred to in this article are incorrect does not affect the validity of the bill of exchange or of the promissory note when two of the places indicated in paragraphs 1 and 2 above are situated in different States.

#### *New article 1 bis (draft text)*

(1) An international bill of exchange is a written instrument which:

- (a) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;
- (b) Is payable on demand or at a definite time;
- (c) Is dated;
- (d) Is signed by the drawer.

(2) An international promissory note is a written instrument which:

- (a) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;
- (b) Is payable on demand or at a definite time;
- (c) Is dated;
- (d) Is signed by the maker.

#### *Article 2 (draft text)*

This Convention shall apply when the place where the bill of exchange is drawn or the promissory note made and the place of payment are Contracting States.

(Another less good wording which may give rise to a reservation:

This Convention shall apply when at least two of the States indicated in paragraphs 2 and 3 of (present) article 1 are Contracting States.)

#### *Article intended to replace the provisions of the present article 4(7)*

The holder may be a protected holder or a holder who is not a protected holder.

The expression "protected holder" means the holder of an instrument which, when he took it, was complete or, if an incomplete instrument within the meaning of paragraph (1) of article 11,<sup>1</sup> was completed in accordance with authority given.

(a) Provided that, when he became a holder:

- He was without knowledge of a defence available under this Convention (article 25(1)(a));
- He was without knowledge of a defence based on an underlying transaction between the party from whom payment is claimed and the drawer, or between the party from whom payment is claimed and the party subsequent to himself, or arising from the circumstances as a result of which he became a party (article 25(1)(b));<sup>2</sup>
- He was without knowledge of any defence based on incapacity of the party from whom payment is claimed to incur liability on the instrument or on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to such party's negligence (article 25(1)(d));
- He was without knowledge of valid claims to the instrument of any other person (article 25(1)(d));
- He was without knowledge of any non-acceptance or non-payment (article 4(7)(a));

(b) And provided that, when he became a holder:

The time-limit provided by article 51 for presentation of the instrument for payment had not expired;<sup>3</sup>

(c) And provided that:

He did not obtain the instrument by fraud or theft or participate at any time in a fraud or theft concerning it.

<sup>1</sup>That is to say, an instrument which contained, in the text thereof, the words "international bill of exchange (Convention of . . .)" and was signed by the drawer . . ., but which lacked the other elements corresponding to one or more requirements of paragraph 2 of article 1, i.e. which lacked the indication regarding the unconditional order to pay given by the drawer to the drawee, or the indication regarding the maturity, or the date, or the indication of the two places situated in different States, reflecting the international character of the instrument.

<sup>2</sup>The present article 25(1)(b) reads: "Except as provided in paragraph (3) of this article . . .". This is ambiguous. It should read: "Subject to the provisions of paragraph (3) of this article . . .".

<sup>3</sup>However, it will be noted that article (25)3, to which the present article 4(7) refers, limits the enforceability of claims and defences, in the event of presentation for payment *after expiry of the time-limits*, to claims and defences to which the transferor of the instrument to the holder is subject. This is an inconsistency.

A holder who does not fulfil these conditions shall be a holder who is not a protected holder.

(This article would take the place of the present article 4(7) or could be situated between article 25 and article 26, becoming article 25 *bis*. Article 4(7) would then read:

“Protected holder” means a person in possession of an instrument in accordance with article 25 *bis*”.)

*New article 20 bis to be inserted after article 20 (draft text)*

When an endorsement contains the statements “value in security” (“*valeur en garantie*”), “value in pledge” (“*valeur en gage*”), or any other statement implying a pledge, the endorsee

(a) Is a holder by virtue of article 4(6) and (7) and article 28;

(b) May exercise all the rights arising out of the instrument;

(c) May only endorse the instrument for purposes of collection;

(d) Is subject to claims and defences which may be set up against the endorser only in the cases specified in articles 25 and 26.

Such an endorsee, having endorsed for collection, is not liable upon the instrument to any subsequent holder.

*Articles 23(1)(b) and 23 bis (1)(b)*

In order to specify the conditions under which there is a presumption of collusion, as set out in articles 23(1)(b) and 23 *bis* (1)(b), it would be desirable to word these two subparagraphs as follows:

“The person who received the instrument directly from the forger, having knowledge thereof”;

“The person who received the instrument directly from the agent, having knowledge of the absence of authority”.

*Article 25*

A new wording of article 25 is absolutely essential. The following is a proposed wording.

*Article 25 (draft text)*

A party may set up or assert against a holder who is not a protected holder:

- Any defence available under this Convention;
- The exceptions set out in article 26(1)(a);
- Any defence based on the underlying transaction between himself and the drawer or between himself and the party subsequent to himself, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;

- Any defence arising from the circumstances as a result of which he became a party, but only if the holder took the instrument with knowledge of such defence or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;
- The claims which may be validly made on the instrument by any other person, but only if the holder took the instrument with knowledge of such claims or if he obtained the instrument by fraud or theft or participated at any time in a fraud or theft concerning it;
- Any defence resulting from the underlying transaction between himself and the holder;
- Any other transaction between himself and the holder that would be available as a defence against contractual liability;<sup>4</sup>
- Any defence based on incapacity of such party to incur liability on the instrument or on the fact that such party signed without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to his negligence.

*Article 26*

It is proposed that article 26 should be worded as follows; a new wording is absolutely essential.

*Article 26 (draft text)*

(1) In principle, a party may not set up any defence against a protected holder.

However, he may plead:

- That (article 29(1)) no one is liable on an instrument if he has not signed it, unless (article 30) a person whose signature has been forged has accepted to be bound by that forged signature;
- That (article 31(1)), if an instrument has been materially altered,
  - Parties who have signed the instrument subsequent to the material alteration are liable thereon according to the terms of the altered text;
  - Parties who signed the instrument before the material alteration are liable thereon according to the terms of the original text;
- That (article 32(3)) the person purported to be represented is not liable on an instrument signed:
  - By a person as agent but without authority to sign or exceeding his authority;
  - By an agent with authority to sign who has not indicated that he is signing in a representative capacity, without naming the person whom he represents;

<sup>4</sup>The limitation concerning transactions between the party claiming payment and the holder which could serve as defences against contractual liability is open to criticism and should be restricted.

- That (article 49) a bill of exchange which should have been presented for acceptance has not been so presented (this defence being pleaded by the drawer, the endorsers and their guarantors);
- That (article 53) the bill has not been presented for payment (this defence being pleaded by the drawer, the endorsers and the guarantors);
- That (article 59) the protest for non-acceptance or for non-payment which should have been made has not been made (this defence being pleaded by the drawer, the endorsers and their guarantors and not by the acceptor and his guarantor);
- That (article 80) the limitation period for exercising the right of action arising on the instrument has elapsed.

(2) A party may also set up against a protected holder defences based on the underlying transaction between himself and such holder.

#### *Article 27(2)(a)*

It would be desirable to amend article 27(2)(a) as follows: "if, when the instrument was transferred to him, he had knowledge of a transaction which gives rise to a claim to, or a defence upon, the instrument".

#### *Article 33*

It is regrettable that the draft Convention does not recognize the automatic transmission of ownership to successive holders of the bill of exchange of the funds made available for payment by the drawer.

Failing this, it would be desirable for the possibility of envisaging this to be at least expressly recognized. With this in mind, article 33 could be supplemented as follows: "Unless so mentioned on the instrument, the order to pay. . . (etc.)".

#### *Article 41(1)(c)*

It is desirable that the words "and the previous endorsers" should be added after the words "... the acceptor" and again after the words "... the drawer".

#### *Article 43(2)*

The second paragraph of article 43 does not make the guarantor's liability for payment of the bill dependent on presentation thereof to the drawee.

Such a provision transforms the guarantee (*aval*) into an independent guarantee to pay on first request, which is doubtless not very desirable. If the text should be retained, it would be advisable to add that the guarantor must pay "... even in the absence of the drawee's acceptance".

#### *Article 45(2)(c)*

It is requested that article 45(2)(c) should be deleted.

If not, the text of paragraph (c) should be supplemented by the following words: "... except where payment of such a bill of exchange is bank-domiciled".

#### *Article 46(1)*

The second sentence of this paragraph should refer only to (b) of paragraph 2 of article 45, since:

- The drawer cannot stipulate both that the bill must be presented (article 45(2)(a)) and that it must not be presented for acceptance (article 46(1)).

Deletion of paragraph (c) of article 45(2) was requested above.

#### *Article 46(2)*

It is suggested that the previous wording (1982) should be re-established. It envisaged that, when acceptance is refused, "the bill is not thereby dishonoured".

#### *Article 47(b)*

It is suggested that paragraph (b) should be amended as follows: "A bill drawn upon two or more drawees may be presented to one of them only ..." (French version: "... peut n'être présentée qu'à l'une quelconque. . . ").

#### *Article 49*

It would be desirable to supplement article 49 as follows:

"Failure to present an instrument for acceptance does not discharge the guarantor of the drawee of liability thereon".

#### *New article 54 bis (draft text)*

Garnishment to stop payment is admitted only in the case of loss or theft of the instrument or the legally established insolvency or legally established incapacity of the holder.

#### *Articles 64 bis-64 sexies to be added*

#### *C. Parts of a set, and copies*

##### *I. Parts of a set*

#### *Article 64 bis*

A bill of exchange can be drawn in a set of two or more identical parts.

These parts must be numbered in the body of the instrument itself, and the total number of sets drawn must be mentioned; in default, each part is considered as a separate bill of exchange.

Any holder of a bill which does not specify that it has been drawn as a sole bill may, at his own expense, require the delivery of two or more parts. For this purpose he must apply to his immediate endorser, who is bound to assist him in proceeding against his own endorser, and so on in the series until the drawer is

reached. The endorsers and guarantors are bound to reproduce their endorsements and guarantees on the new parts of the set.

#### *Article 64 ter*

Payment made on one part of a set operates as a discharge, even if there is no stipulation that this payment annuls the effect of the other parts. Nevertheless, the acceptor is liable on each accepted part which he has not recovered.

An endorser who has transferred parts of a set to different persons, as well as subsequent endorsers, are liable on all the parts bearing their signature which have not been restored.

#### *Article 64 quater*

A party who has sent one part for acceptance must indicate on the other parts the name of the person in whose hands this part is to be found. That person is bound to give it up to the lawful holder of another part.

If he refuses, the holder cannot exercise his right of recourse until he has had a protest drawn up specifying:

(1) That the part sent for acceptance has not been given up to him on his demand;

(2) That acceptance or payment could not be obtained on another of the parts.

## II. Copies

#### *Article 64 quinquies*

Any holder of an instrument has the right to make copies of it.

A copy must reproduce the original exactly, with the endorsements and all other statements to be found therein. It must specify where the copy ends.

It may be endorsed and guaranteed in the same manner and with the same effects as the original.

#### *Article 64 sexies*

A copy must specify the person in possession of the original instrument. The latter is bound to hand over the said instrument to the lawful holder of the copy.

If he refuses, the holder may not exercise his right of recourse against the persons who have endorsed the copy or guaranteed it until he has had a protest drawn up specifying that the original has not been given up to him on his demand.

If the original instrument, after the last endorsement before the making of the copy, contains the clause "commencing from here an endorsement is only valid if made on the copy" or some equivalent formula, a subsequent endorsement on the original is null and void.

#### *Article 65 (to be supplemented)*

Although the joint liability of the parties to a bill of exchange seems implied by the spirit of the Convention, it is not expressly provided for.

It seems desirable to remove all uncertainty in this area and to amend article 65 as follows:

"All persons who have drawn, accepted, made, endorsed or guaranteed an instrument are jointly and severally liable towards the holder.

"The holder may exercise his rights on the instrument against any one party, or several or all parties, liable thereon and is not obliged to observe the order in which the parties have become bound.

"Any party who has paid the instrument has the same right in respect of parties liable to him.

"Action taken against one of the liable parties does not preclude action against the others, even those subsequent to the one initially proceeded against."

#### *Article 68(3)*

This paragraph should be worded as follows:

"A party is not discharged of liability if he pays a holder who is not a protected holder and knows at the time of payment that a person has validly asserted a claim on the instrument and that the holder had knowledge of such claim when he came into possession of the instrument or he obtained the instrument by fraud or theft or he participated at any time in a fraud or theft concerning it."

#### *Article 73(2)*

The following wording is proposed:

"Payment by the drawee of the whole or a part of the amount of a bill of exchange to the holder, or to any party who has paid in accordance with article 66, discharges all parties of their liability to the same extent, except where the drawee pays a holder who is not a protected holder and knows at the time of payment that a person has validly asserted a claim on the instrument and that the holder had knowledge of such claim when he came into possession of the instrument or he obtained the instrument by fraud or theft or he participated at any time in a fraud or theft concerning it."

\* \* \*

## FEDERAL REPUBLIC OF GERMANY

The Federal Government welcomes the fact that UNCITRAL has given Governments the opportunity of submitting observations on the draft Convention on International Bills of Exchange and International Promissory Notes—drawn up at the nineteenth session—and thus of facilitating revision of this draft by the working party. The Federal Government is pleased to be able to make use of this opportunity, but attaches importance to the declaration that its observations on individual questions of a technical nature do not signify support for the draft as a whole. In the opinion of the Federal Government, it has not been shown that it is necessary or even only expedient—either in terms of economic needs or in terms of legal considerations—to draw up a Convention restricted to bills of exchange and promissory notes in international trade.

The Federal Government is of the opinion that in some of its provisions the draft requires a thorough linguistic revision. This seems necessary in some cases for the sake of linguistic clarification of what is meant and in other cases for the sake of avoiding differences in wording covering the same meaning. Thus, for instance, as discussions have shown, the meaning of the words "asserted a valid claim" (e.g. in article 25, paragraph (4)(a)) is not unequivocal. Also, it is, for example, not clear why in regard to the same legal consequence the words "is deemed not have been written" have been selected in article 17, paragraph (2), second sentence, whereas the words "is without effect" have been selected in article 35, paragraph (2), second sentence.

Further, there should be an examination as to whether the catalogue of definitions in article 4 ought not to be supplemented—for the sake of comprehensiveness—by the concepts mentioned in article 8 ("drawer", "maker", "acceptor", "endorser" and "guarantor").

With regard to individual provisions of the draft Convention the following suggestions are made:

#### *Article 20(1)(c)*

It is suggested that in article 20, paragraph (1)(c) the word "only" be inserted after the word "subject". This change amounts to a clarification; it corresponds to article 18, paragraph (2) of the Geneva Convention.

#### *Article 31(1)(b)*

In article 31, paragraph (1)(b), second sentence, it must be made clear that the liability of a party who has assented to the alteration shall be governed not by the terms of the altered text but by the terms of the original text where the alteration has been made for the benefit of that party. It is suggested that this sentence be supplemented by the following words: "or, at the option of the holder, to the terms of the original text".

#### *Article 41(3)*

In article 41, paragraph (3) there should, in addition to the reference made to interest calculated in accordance with article 66, be a reference to the discount in article 66, paragraph (4). It might otherwise incorrectly be concluded that on payment before maturity interest shall in all events be calculated according to the rate laid down in paragraph (2) and not according to the discount rate, for the discount rate is not a "rate of interest" in the strict sense of the term. Hence, it is suggested that the words "or discount, whichever is appropriate" should be inserted after the word "interest".

#### *Article 66(3)*

In article 66, paragraph (3) it should be made clear that the possibility of demanding further compensation in addition to interest shall also apply to payment before maturity where this causes loss to the holder (for instance as a result of the higher costs of refinancing). Paragraph (3) should therefore follow the present paragraph (4) and should be given the following wording as the new paragraph (4):

"Nothing in paragraphs (2) and (3) prevents a court from awarding damages or compensation for additional loss caused to the holder by reason of payment before maturity or delay in payment".

#### *Article 68*

In article 68, paragraph (4)(b) it should be made clear—in correspondence with article 13, paragraph (1) and article 42, paragraph (2)—that payment of an instalment may also be acknowledged on a slip affixed to the instrument concerned where the space available thereon is insufficient. Hence, it is suggested that, at the end of the sentence, the words "or on a slip affixed thereto ("allonge")" should be inserted after the word "instrument".

Consideration should, moreover, be given to clarification in article 68 to the effect that a holder is not obliged to accept payment before maturity of the instrument. Such clarification would correspond with article 69, paragraph (1) of the draft.

#### *New article on pledge endorsement*

The draft should be supplemented by a provision on pledge endorsement. In this respect reference is made to the working document (A/CN.9/XIX/CRP.7) submitted by the French delegation at the nineteenth session of UNCITRAL.

#### *Relationship of the Convention to the stamp laws*

It might be advisable for there to be inclusion in the Convention of a provision corresponding with Article 1 of the Geneva Convention of 1930 on the stamp laws in connection with bills of exchange and promissory notes. This provision should stipulate that the validity of obligations arising out of a bill of exchange or a promissory note or the exercise of the rights that flow therefrom shall not be subordinated to the observance of the provisions concerning the stamp.

\* \* \*

MEXICO

[Original: Spanish]

As will be recalled, prior to the thirteenth session of the Working Group on International Negotiable Instruments, Mexico submitted comments on the draft Convention on International Bills of Exchange and International Promissory Notes. Consequently, the Mexican Government will limit its comments on this occasion to those articles which were the subject of important observations or amendments during the seventeenth and nineteenth sessions of the United Nations Commission on International Trade Law (UNCITRAL) and the thirteenth and fourteenth sessions of the Working Group mentioned above. Reference will also be made to other articles which are considered important.



*Article 1(2)(a) and (3)(a)\**

The following wording is proposed:

(2) An international bill of exchange is a written instrument which:

(a) Contains in the text of its first paragraph the words "international bill of exchange (Convention of . . .)";

...

(3) An international promissory note is an instrument which:

(a) Contains in the text of its first paragraph the words "international promissory note (Convention of . . .)";

...

*Article 1, new paragraph (5)*

The insertion of a paragraph (5) is proposed, which could consist of one of the two following alternatives:

"(5) The elements required pursuant to paragraphs (2) and (3) above must appear on the first sheet of the document. Any additional clause which it is desired to stipulate legally may be included afterwards, and this may be done on additional sheets."

Or:

"(5) When the document consists of several pages, these must be identified with reference to each other in such a way that they show without any possibility of doubt that they constitute a single document."

The existing paragraph (5) would become paragraph (6).

*The concept of "knowledge" (articles 3, 5, 23, 25 and 26)*

The Convention refers to:

(a) *Good faith* and, as a necessary consequence, its opposite, *bad faith* (article 3);

(b) *Knowledge* (article 5);

(c) *Deliberate ignoring* (article 5);

(d) *Absence of knowledge due to negligence* (articles 23, paragraphs (2) and (3), 23 *bis*, paragraphs (2) and (3), 25, paragraph (2)(d), and 26, paragraph (1)(c));

The draft would be greatly simplified, without any diminution of security for the parties, if the requirement concerning negligence in the articles indicated above, and any other article where it appears, were eliminated. It is true that in civil law systems there is a certain inclination to make negligence equivalent to guilt; but negligence in common law seems to have a different meaning from guilt in civil law.

If the suggestion made here were adopted, the result would be:

\*As indicated in the introductory note to this addendum, only those portions of the comments are reproduced here which propose new wording of articles or parts thereof.

(a) The establishment of a system which would facilitate uniform international interpretation, in line with article 3 and other instruments of UNCITRAL and instruments governing private international law;

(b) The definition in article 5 would correspond to the system applied in the Convention.

Consequently, it is proposed that the reference to negligence should be eliminated in article 23, paragraphs (2) and (3), article 23 *bis*, paragraphs (2) and (3), article 25, paragraph (2)(d), and article 26, paragraph (1)(c).

*Article 4(7)*

This text is rather difficult to read; the difficulty is increased by the fact that, in subparagraph (a), the order of reference is inverted. It would be clearer to say: "other than in paragraph (1), subparagraph (c)(ii), thereof". But even then, it would still be difficult to read.

The following text of subparagraph (a), which would mean the same, would probably be more acceptable:

"(a) He was without knowledge of the fact that its transferor was an unprotected holder and that at least one of the parties could assert or set up against that holder a claim or defence that would be available as a defence against contractual liability".

*Article 4(10)*

(10) "Signature" means a handwritten signature, even if it is illegible but corresponds to that of its author, or a facsimile thereof [in the Spanish version: *o la impresa en facsímile*], or any other means of effecting the equivalent authentication, and "forged signature" includes a signature by the wrongful or unauthorized use of such means;

*Article 6(b)*

The following wording is proposed:

"(b) By instalments at successive dates, provided that the amount of each partial payment is stated in the text of the instrument".

*Articles 11 and 38*

Article 38, paragraph (1), was amended at the nineteenth session of the United Nations Commission on International Trade Law.

In order to promote the use of the documents referred to in the Convention, by giving more legal security to those who acquire them, through consistency between the provisions of the Convention and clarity in its text, it is proposed that article 38, paragraph (1), should be left as it was, and that article 11, paragraph 1, should be amended to read as follows:

"(1) An incomplete instrument which satisfies the requirement set out in subparagraph (a) of paragraph (2) of article 1 and bears the signature of the drawer or the acceptance of the drawee, or which satisfies the requirements set out in subparagraphs (a) and (f) of paragraph (3), but which lacks other elements pertaining to one or more of the requirements set out

in paragraph (2) or (3) of article 1 [Spanish version: *en los párrafos 2) o 3) del artículo 1*] may be completed and the instrument so completed is effective as a bill or a note.

#### Article 20(3)\*

It is not clear whether the endorsee of documents with the "not negotiable" or other equivalent clause has the power to endorse such a document for collection. The following drafting is proposed:

"... the instrument may not be transferred again, and any endorsement of the document that is made shall give the endorsee the powers of an endorsee for collection".

#### Articles 25(1)(d) and 26(1)(c)

The hypothesis that someone might sign a document without knowing that he is becoming a party to an instrument in accordance with the Convention is one which should disappear. To allow this defence only complicates matters and reduces the security of the instruments put into circulation in accordance with the Convention. To maintain this possibility will create incomprehensibility and suspicions, which, as has been pointed out, may prove an obstacle for the ratification or accession of the various countries.

It is proposed that this defence should be eliminated. This will give the additional advantage of eliminating the reference to the concept of negligence (see what has been said on the subject of knowledge). If this proposal is not accepted, at least it should be made clear that the burden of proof of the absence of negligence should be on the person who pleads the defence, so that the text would read as follows:

"... based ... *provided that such party proves that such absence of knowledge was not due to his negligence*".

#### Article 41

It is proposed that, in chapter IV, a section 3 should be introduced entitled "*The liability of a person who transfers an instrument by endorsement or by mere delivery*", to go at the end of the chapter, after the present article 44, and article 41 should be moved there with the necessary changes in the numbering of the articles.

#### Article 48(2)

In Mexican law, and in the law of some European countries, the *sociedad colectiva* is one specific type of business enterprise. Thus, in Spain, for example, there is the *sociedad en nombre colectivo* (general partnership), commonly known as a *sociedad colectiva*, etc. It is therefore suggested that in the Spanish text, at any rate, the following wording should be used:

\*Note by the secretariat: Article 20, paragraph (3), which the Commission at its nineteenth session transferred to article 16 as its new paragraph (2) in modified form, has erroneously been retained in the Spanish version of the draft Convention.

[ "... or if the drawee is] *una empresa, sociedad o asociación civil o comercial*, [or other legal entity which has ceased to exist." ] (Literal translation: "an enterprise or civil or commercial society" [or "company" or "partnership" ] "or association".)

The same problem is encountered in other articles, for example in article 52, paragraph (2).

#### Article 66(1)(c)(i)

The following text is suggested:

"(i) The amount of the bill with interest to the date of payment, at the rate stipulated, and if no rate has been stipulated it shall be calculated in accordance with paragraph (4)".

#### Article 68(4)

It is suggested that, in subparagraph (a), the phrase "unless agreed otherwise" should be deleted.

The following new wording is suggested for subparagraphs (b), (c), (d) and (e):

"(b) In the case of an instrument payable by instalments at successive dates, the drawee or a party making a payment, when the total amount is not paid off as a result of such payment, may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.

"(c) If an instrument payable by instalments at successive dates is dishonoured by non-acceptance or non-payment as to any of its instalments [Spanish version: *En el caso de un título pagadero a plazos en fecha sucesivas si hay falta de aceptación o pago en cualquiera de sus vencimientos*] and a party pays the instalment, the holder, in addition to giving a receipt for the partial payment and making mention thereof on the instrument, must give the party a certified copy of the instrument and any necessary authenticated protests in order to enable such party to exercise a right on the instrument.

"(d) The person from whom payment is demanded may withhold payment if the person demanding payment does not deliver the instrument to him. If the payment in question is a partial payment, the person from whom payment is demanded may withhold payment if the mention on the instrument or the receipt or the certified copy referred to in subparagraphs (b) and (c) of this paragraph are not made or given to him. Withholding payment in these circumstances does constitute dishonour by non-payment under article 54.

"(e) If payment is made but the person paying, other than the drawee, fails to obtain the instrument if the payment in question is a total payment, or mention of the payment on the document in the case of a partial payment, such person is discharged but the discharge cannot be set up as a defence against a protected holder."

#### Article 71(3)(b)

The text should read:

"(b) The amount payable is to be calculated according to the rate of exchange indicated on the

instrument. Failing such indication, the amount payable is to be calculated according to the bank rate having the greatest resemblance to that for payment of instruments on the date of maturity."

\* \* \*

[A/CN.9/WG.IV/WP.32/Add.3]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth, sometimes in summarized or otherwise shortened form, the comments received between 1 and 5 December 1986 from the following States: Bangladesh, Czechoslovakia, Italy, Netherlands and Yugoslavia.

## BANGLADESH

### Article 4(7)

In addition to the existing stipulations, the requirement of being a holder for valuable consideration should exist for a holder to be a "protected holder".

### Article 14(1)(b)

The definition of "holder" should not include stipulation covering holding of an instrument against a forged endorsement.

### Article 23(2) and (3)

Exemption from liability as afforded under article 23(2) and (3) should be available only where the payment has been made to a protected holder.

### Article 31(1)(b)

Parties who have signed an instrument before a material alteration made without their consent should stand discharged from their liabilities under the instrument whether according to the altered text or to the original text of the instrument.

### Article 38

A bill of exchange which is not signed by the drawer cannot be treated as an instrument and the question of acceptance of an instrument by the drawee even before its signature by the drawer should not arise. Article 38(1) should be reformulated to delete the stipulation of acceptance before the signature of the instrument by the drawer.

### Article 47(b)

The stipulation of the article should be reversed to provide that a bill drawn upon two or more drawees must be presented to each of them unless the bill clearly indicates otherwise.

### Article 51(f)

The time-limit for presentation for payment of an instrument payable on demand should be stated as a reasonable time not exceeding one year in any case.

### Article 74

The holder of a lost bill should be entitled to a duplicate bill from the drawer subject to furnishing necessary security/indemnity. The holder of the lost bill should also be required to notify the incidence of loss to all parties.

### Article 80(1)

For the words "four years" the words "three years" should be substituted.

## CZECHOSLOVAKIA

The Government of the Czechoslovak Socialist Republic supports the efforts of the United Nations Commission on International Trade Law aimed at the unification and harmonization of the law of international trade and is of the opinion that such unification and harmonization can significantly contribute to the development of international trade and to the establishment of the new international economic order. For this reason, the Czechoslovak Socialist Republic also welcomed the commencement of the work on the Convention on International Bills of Exchange and International Promissory Notes and took an active part during the whole time in preparing the draft Convention.

In considering the draft Convention the Government of the Czechoslovak Socialist Republic takes into account that the draft serves the purpose of a worldwide unification of the rules regulating bills of exchange and promissory notes which has been furthered by UNCITRAL. In this respect the submitted draft Convention appears to be a well-balanced compromise between the rules based on the system of the Geneva Convention and the rules of the Anglo-American systems of law regulating bills of exchange and promissory notes.

The Government of the Czechoslovak Socialist Republic appreciates the fact that the draft Convention is not expected to replace the present legislation of the individual States regulating bills of exchange and promissory notes and that the parties have a choice between the application of the municipal rules and the rules of the Convention. This approach may increase the willingness of States to accede to the Convention.

The Government of the Czechoslovak Socialist Republic believes that the proposed rules of the Convention correspond to the needs of international trade as well as international payment and credit transactions and that they are a contribution to the commercial and banking practice. Therefore, the Government of the Czechoslovak Socialist Republic has no specific comments on the draft Convention on International Bills of Exchange and International Promissory Notes.

## ITALY

*General observations*

As has repeatedly been stressed in the previous sessions of the Commission, the Italian Government follows the work undertaken to create a uniform set of rules for international bills of exchange and promissory notes with considerable interest, and considers that it can still constitute a useful instrument in international trade despite the existence of more modern techniques for international payments. The Italian Government furthermore appreciates the considerable effort made to elaborate compromise solutions between existing systems and confirms that it intends to contribute to this effort in order to permit the reaching of results of an even more satisfying nature than those reached so far.

In fact, at a general level the project now examined does not appear as yet to correspond to its aims and purposes and requires to be further improved, above all in order to meet the need for certainty felt in particular in international transactions (especially in a field such as that of bills of exchange and promissory notes). In this respect attention must be called to two aspects in particular:

(a) The method followed for the drafting of the uniform rules appears to suffer excessively from the drafting style of the common law tradition and could, therefore, cause considerable problems when the text is submitted for interpretation to civil law judges who are unfamiliar with this technique. Above all, the excessive use of cross-references from one article to another is disputable, the reading of the text being as a consequence rendered difficult, with the additional danger of contradictions and uncertainties in interpretation;

(b) At a more substantial level it must be noted that on numerous points the draft appears to offer transactions involving international bills of exchange less protection than would be desirable: definitely less than that offered by the Geneva Convention, and this despite the international scope of application of the new instrument which would rather require more protection.

Both a simplification of the drafting style and a reconsideration of those aspects where the protection of the transferee of an international bill of exchange still appears to be inadequate would, therefore, be desirable.

*Observations on individual provisions**Article 3*

The meaning of "good faith in international transactions" as a criterion for the interpretation of the draft Convention is not clear. It is, in fact, a criterion which may be used as a norm for the behaviour of the parties, but it does not have great meaning when it is addressed to a judge who has to interpret the legal provision. Such a criterion could in reality implicate an elasticity of interpretation lacking consistence with the need for certainty and with the formal principles which are basic for the matter in hand.

*Article 4(6) and (7)*

The definitions of "holder" and "protected holder" are still not satisfactory. Indeed they form a particularly clear example of the technique of drafting by means of references and would appear to be able to create considerable uncertainties of interpretation: the provisions examined in fact appear incomprehensible without the consideration of numerous others, with the result that they do not even facilitate the task of the interpreter, revealing themselves furthermore to be lacking any normative content in themselves.

The question could instead be raised whether it would not be simpler to avoid such definitions altogether, in particular considering that a factual approach which regulates the exceptions which may be set up in the different cases against the holder of the instrument would without doubt be more suitable for a set of rules to be applied at an international level.

Lastly, at a more technical level, the relationship created by article 4(7) between the protection of the holder of the instrument and the problems resulting from the circulation of an incomplete instrument does not appear to be satisfactory.

It would certainly be preferable in this respect to overcome the theoretical preconception according to which, in such a case, the document would lack any real negotiability; it would be preferable to recognize a protection for all the data contained in the instrument, with the exclusion, therefore, only of that so far left out. It would, for example, appear to be unjustified that the fact that the date of issuance has been left out may condition the protection of the transferee of the instrument even as regards the sum indicated in it from the beginning.

*Article 6(c)*

The possibility, unknown to the Geneva Convention, of an instrument payable by instalments with an acceleration clause such as the one considered here may place an excessive burden upon the debtor. Moreover, one should not neglect the uncertainties which could result from this provision for the circulation of the instrument—uncertainties which in particular refer to the rights which it confers at any given moment.

*Article 11*

It may be appropriate to state with greater clarity that the completion of an incomplete instrument is possible only if there is an agreement between the parties which confers authority of completion, in order to eliminate the doubt, which is probably unfounded but which has often arisen in the interpretation of the Geneva Convention, that such authority may derive *ipso jure* from the mere possession of an incomplete instrument. It would also serve the purpose of drawing in the draft Convention the fundamental distinction between the two different forms of incomplete instrument, i.e. the instrument "*in blanco*" and the instrument "*incompleto*" strictly speaking, a distinction which would also be useful for the solution of the problems indicated above of coordination with article 4(7).

### Articles 23 and 23 bis

While the rule of article 23 for the case of forged endorsement may be considered an acceptable compromise between the diverging legal traditions on this point, considerable reserve must be reiterated as regards the equation article 23 *bis* institutes with endorsement by an agent without authority (*falsus procurator*). In this latter case, the legal situation appears to be considerably different: suffice it to consider that while forgery of an endorsement constitutes a material fact which can be ascertained more or less easily, lack of authority requires, in order to be demonstrated, an evaluation of a legal nature which may well be extremely difficult. This difficulty is furthermore accentuated in an international context where the differences between the legal systems with reference to agency in general and agency regarding negotiable instruments in particular may render such an ascertainment even harder.

A solution which *in concreto* distinguishes between the two cases, and which requires lack of good faith for the liability of a transferee who acquires the instrument from a *falsus procurator*, is therefore to be recommended.

### Articles 25 and 26

Beyond the basic reservations expressed in the general observations, it would appear to be necessary to reconsider at least the provision of the real (i.e. available against any kind of holder) defence *non est factum* contained in article 25(1)(d) and above all in article 26(1)(c) which may, in fact, have serious consequences for international transactions, particularly when considering the possibility of an instrument drafted in a language different from that of the person who has signed and the consequent possibility that the defence may unjustifiedly burden successive holders of the instrument with a *Sprachrisiko* which the need for certainty requires to be imposed upon the person who has signed.

### Article 30

The Italian delegation has already repeatedly expressed its doubts as regards the cases regulated in this article of acceptance or representation by the person whose signature was forged. While the reservations remain, it notes with satisfaction that every reference to behaviour by implication has been eliminated.

A further improvement of the provision considered is, however, possible. It may above all be useful to clarify the exact meaning of acceptance or representation, specifying in particular whether it in each and every case must implicate a liability from the instrument, that is to say a liability *erga omnes*, or whether instead there may not be cases in which such a liability operates only in favour of the party with respect to whom the relevant behaviour is adopted. The wording of article 30 would appear to suggest the first alternative—a solution which appears indiscriminate and unsuitable to regulate the diversity of cases which *in concreto* may occur.

The wording proposed by the *ad hoc* working party at the nineteenth session of the Commission (A/CN.9/XIX/CRP.13) which stressed that the liability con-

sidered must be understood “according to the terms of such acceptance or representation” would, therefore, appear to be preferable.

### Article 42

Doubts may be expressed with reference to article 42(1), which provides for the possibility of a guarantee for the benefit of the drawee, even where the latter is not liable under the instrument, this all the more so when it is considered that the necessity of more persons being liable may just as well be satisfied by other means, for example, by an endorsement on the instrument.

The provision of article 42 may further create serious problems of interpretation in connection with the principle of article 43, e.g. by giving rise to the doubt of whether in the case considered the guarantee of the guarantor exists also in the case of non-acceptance by the drawee.

### Article 68

Without reiterating the doubts which the rule of article 68(3) may raise for the legal systems adhering to the Geneva Convention, it is hoped that the possibility of strengthening the protection of the person liable for the instrument be reconsidered, in order to reduce the risk of a non-discharging payment on his part by restricting it to the sole case of bad faith or gross negligence.

## NETHERLANDS

### Articles 42-44: the guarantor

In view of the increasing use of forfaiting, under which bills of exchange or promissory notes, bearing the aval or guarantee of a third party (usually a bank), are discounted, articles 42-44 concerning the guarantor take on a special importance. It is therefore desirable that the rights and obligations of the guarantor on an international instrument be construed in a uniform manner. One major factor giving rise to non-uniform interpretation is that of the relationship of the applicable law of suretyship to the rules concerning the guarantor in the proposed Convention.

The question whether and, if so, to what extent suretyship law impinges upon the law of negotiable instruments is a troublesome one in both civil and common law systems. In particular, the question whether defences available to the surety or guarantor may be derived from suretyship principles has been resolved differently in various jurisdictions. Approaches range from allowing a guarantor to raise suretyship defences in certain situations (see, e.g., section 3-415(3) of the U.S. Uniform Commercial Code) to providing an exhaustive listing of the guarantor's defences in the negotiable instruments law itself (as in the Geneva Uniform Law). However, even under the last approach instances are known where the courts have admitted

typical suretyship defences resulting in the discharge of the giver of the "*aval*".\*

In the view of the Netherlands, articles 42-44 of the draft Convention are not specific enough on the issue just raised. Must it be assumed that suretyship defences are not available to a guarantor? Or that such defences are not available against a protected holder or a holder who was without knowledge of such defences when he took the instrument? It is suggested that the draft Convention should be unequivocally clear on this point. The Netherlands would obviously prefer that the rights and obligations of the guarantor be governed exclusively by the provisions of the proposed Convention.

#### Article 42(4)

(4) "... Unless the content otherwise requires ..." should read "... Unless the context otherwise requires ...".

The Working Group introduced the words "Unless the context otherwise requires ..." into the text of paragraph (4) at its sixth session (see A/CN.9/147, paragraph 87). Unfortunately, the annex to the Working Group's report, setting forth the text of the articles as adopted by the Working Group at its sixth session, shows the word "content", an obvious misprint which has since figured in subsequent versions of the draft Convention.

#### Article 42(4)(c)

There is no trace in the reports of the Working Group as to why and how this provision found its way into the text of article 42(4). It appears for the first time in the report of the Working Group on the work of its ninth session (A/CN.9/181) in a text of article 43 "as considered by the Working Group."

It is not immediately clear what the effect of the provision of paragraph (4)(c) is if the signature alone on the back of the instrument is that of the drawee. Paragraph (4)(b) states that the signature alone of the drawee on the front of the instrument is an acceptance. Presumably (because of article 37) the signature alone of the drawee on the back of the instrument is also an acceptance. Yet, the way in which article 42(4) is drafted could lead to an interpretation, obviously not intended, that it is not an acceptance but a guarantee.

It is suggested that paragraph (4)(c) be reconsidered. It is noted that, under the Geneva Uniform Law, a signature alone of a person who was then not the holder of the instrument is not, as under paragraph (4)(c), an endorsement. Paragraph (4)(c), if retained, could result in an interrupted series of endorsements (because of article 14(1)(b)), in which case the last person in possession could not be a holder although the instrument was in fact regularly transferred under article 12.

\*E.g., according to the French *Cour de Cassation*, the giver of an *aval* is discharged, under article 2037 of the *Code Civil*, if he establishes that he cannot be subrogated to the rights of the holder, in order to exercise his rights against the person for whom he has become guarantor, because of fault on the part of the holder. See *Roblot, Les Effets de Commerce*, at 215-216.

#### Article 42(5)

The Netherlands would prefer a rule according to which, in the absence of an indication for whom the guarantee is given, the presumption is that the guarantee is given for the drawer of a bill, unless the signature of the guarantor is accompanied by such words as "payment guaranteed".

In general, however, and whatever text is adopted in this respect, paragraph (5) should make clear whether the presumption stated in that paragraph is rebuttable or irrebuttable. If the presumption is rebuttable, the further question arises whether proof to the contrary may be adduced only from what appears on the instrument itself, or also from facts or elements outside the instrument. It is noted that the reports of the Working Group contain no indication of the Working Group's view on this point but that the commentary to the draft Convention (A/CN.9/213, article 42, commentary on paragraph 5) states that the presumption is irrebuttable.

In the view of the Netherlands, the holder who takes an instrument on which the guarantor has failed to specify the person for whom he has become guarantor should be entitled to rely on the legal presumption of paragraph (5), unless he had knowledge of the fact that the guarantee was given for a person other than the acceptor of the drawee. Such knowledge could be imputed in cases where the context in which the signature of the guarantor appears on the instrument (e.g. the guarantor's signature appears next to the name or signature of a person other than the presumed person under paragraph (5)) clearly indicates the intention of the parties.

In view of the divergent interpretations given by the courts in respect of article 31(4) of the Geneva Uniform Law (a provision corresponding to that of article 42(5) of the draft Convention), it would seem imperative to state specifically in the proposed Convention whether the legal presumption is rebuttable or irrebuttable and, if rebuttable, on which grounds.

#### Article 43(1)

Under paragraph (1) the guarantor may set up as defences to his liability defences that are available to the party for whom he has become guarantor. The paragraph is silent on the question whether the guarantor may also set up defences that are personal to himself.

#### Article 43(2)

The guarantor of the drawee also undertakes to pay the bill before maturity if the bill is dishonoured by non-acceptance. This follows from article 50(2)(b) but should be added to article 43(2).

#### Article 44(2)

Under this provision, "the guarantor who pays the instrument has rights thereon against the party for whom he became guarantor ...". It is suggested that the words "has rights thereon" be replaced by the words "has a right of recourse thereon". An alternative suggestion is to specify that "rights thereon" means a right to recover, e.g.: "The guarantor who pays the

instrument may recover from the party for whom he became guarantor or from the parties who are liable thereon to that party the entire sum paid by him and interest on that sum at the rate specified in article 66(2) from the date on which he made payment".

#### Article 49

This article does not give a solution as regards the guarantor for the drawee of a bill which must be presented for acceptance. If the bill is not presented for acceptance, should the guarantor of the drawee be considered as discharged?

### YUGOSLAVIA

#### I. General remarks

1. The Socialist Federal Republic of Yugoslavia considers that the draft Convention as revised by the United Nations Commission on International Trade Law (UNCITRAL) at its nineteenth session is better than the previous ones and that it constitutes a solid basis for a successful regulation of this matter on international level.

2. Yugoslavia considers that the existing (inadequate) national regulations could be modified by the adoption of the UNCITRAL Convention. Namely, it should be emphasized that the 1930 Geneva Conventions were ratified with numerous reservations so that no real unification of European bills of exchange law was achieved. However, the fact is that the international banking practice was lately oriented towards the adoption of some institutions of Anglo-American bills of exchange law which, irrespective of the text of the UNCITRAL draft Convention, make it necessary, in the opinion of numerous lawyers and bankers, to revise and adapt the Geneva Conventions to the practice which has been developing beyond them. Therefore, it is considered that the adoption of the draft Convention would have a positive effect on the revision of the existing national regulations and their harmonization with contemporary international banking practice.

3. Careful reading of the text of the draft Convention leads us to the conclusion that it protects more the drawers than the drawees but that has always been the main characteristic of bills of exchange; in addition, all States represent both drawers and drawees so that it is difficult to request the modification of the provisions providing for the consistent implementation of this basic principle in the draft. Perhaps some provisions could still be reformulated so as to ensure equal protection of both drawers and drawees.

4. The main difficulty Yugoslav lawyers have as regards the draft Convention is related to the concept of "protected holder" as an institution of the common law system, which is absolutely unfamiliar to European lawyers. Since, by its many characteristics, the "protected holder" of the bill of exchange resembles the "responsible holder", there is a danger that the

"protected holder" would be viewed in the countries of the Geneva system as the "responsible holder" which may create confusion and doubt. In order to avoid this, Yugoslavia considers that it will be necessary:

(a) To work out a glossary of the Convention similar to that made by the Commission's secretariat in 1982 (A/CN.9/213) which was very useful for the understanding of certain provisions of the draft;

(b) To publish in an UNCITRAL bulletin or magazine (similar to corresponding UNIDROIT publications) court judgements or arbitration awards rendered on the basis of the Convention since there is a danger that different standards will be applied in its interpretation which may hamper and slow down the process of unification of this significant matter.

#### II. Comments on individual provisions

##### Articles 4(7) and 28

The new definition of "protected holder" is better than previous ones. The important principle stipulated in article 28 should be emphasized by placing it immediately after article 4 as a separate article.

##### Article 5

The words at the end of article 5 could be deleted. If this is not acceptable, one should attempt to find new wording which would eliminate to a certain extent the difficulties arising from the interpretation of the second part of article 5. It is obvious that it is difficult to prove that a person could not have been unaware of the existence of a certain fact.

##### Article 7(5), (6) and (7)

Although the efforts of the *ad hoc* working party in formulating the provisions on the determination of a variable rate should be welcomed, it would be necessary to reconsider carefully the provisions of paragraphs (5), (6) and (7) since they appear not to be consistent with the provisions of articles 66 and 71 relating to similar issues.

The formulation of article 7(5) is considered as very successful and should remain in the final version of the Convention. Perhaps it could be improved by stipulating that certain variable rates are not inconsistent with the usual pegging practices (a certain stock or other international money market). It is also suggested that, in addition to the comment on this article, some examples from practice should be mentioned in order to assist contracting parties in determining variable interest rates.

##### Article 8

The definition of article 8 does not define precisely what date is in question. Therefore, it is suggested that the words "after the date" should be deleted or that the words "which is not fixed" should be added.



*Article 9*

At the end of paragraph (1)(a), the following words should be added: "but not in the alternative".

*Articles 23 and 23 bis*

By referring to negligence in articles 23 and 23 *bis*, the security of the bill is weakened since a subjective criterion is introduced which is in practice difficult to prove.

*Articles 25 and 26*

It is suggested that the following words be deleted in articles 25(1)(d) and 26(1)(c): "or on the fact that such party signed the instrument without knowledge that his signature made him a party to the instrument, provided that such absence of knowledge was not due to his negligence". It is hard to conceive that in international banking traffic involving professionals someone signs the instrument by error (such a situation could probably occur in internal traffic).

*Article 32*

In paragraph (1), in the English language, the word "agent" is used while in paragraph (3) reference is made to a person who signed the instrument in a representative capacity (the same term is used also in the French and Russian texts). In order to avoid ambiguities and difficulties in translating these terms into other languages, the text should be clarified as to whether two different persons are in question or only one agent.

*Article 56(3)*

Although the formulation of article 56(3) facilitates the process of making protest, we would like to propose that, in the interest of safety of the instrument, the possibility of making protest to the court be also considered.

*Article 66*

As already mentioned, it is proposed that the provisions of article 66, particularly paragraphs (2), (3) and (4), be compared with the provisions of article 7(5), (6) and (7). It should be underlined that in article 7 the starting point is the principle of autonomy of the will of the contracting parties while in article 66(2) it is the *lex fori*. If this was the intention, then both articles may remain unchanged; but if it is necessary to take the same position than some corrections are inevitable. Perhaps it would be better to link the determination of interest rates to some international stock or other known international money market which will be the one nearest to the one where the instrument is payable.

*Article 69*

Article 69(1) should be made more flexible and the drawee be entitled to make partial payment of the instrument, provided that the holder may always make a

subsidiary claim for any outstanding part. The drawee may find it convenient to make the payment of an instrument in instalments so that the categorical provisions in article 69 should be softened. If such modifications were introduced, the position of the drawee would be improved which would require changes in other provisions of article 69 as well as articles 66 and 67 which explicitly provide for the right of the holder to request the entire sum (together with the interest).

*Article 80*

The general period of prescription of four years is too long particularly in view of the fact that different calculations are made for different persons whereby the already long period can be prolonged which may cause uncertainty and does not correspond to the interests of international traffic.

*A/CN.9/WG-IV/WP-32/Add.4*

This addendum to document A/CN.9/WG-IV/WP.32 sets forth the comments of the United States of America, received on 31 December 1986.

## UNITED STATES OF AMERICA

*General comments*

The United States still generally approves of the draft of the Convention on International Bills of Exchange and International Promissory Notes dated 10 July 1986 and set forth in document A/CN.9/XIX/CRP.16 and annex I to the UNCITRAL Report on the work of its nineteenth session.

The United States regarded the 1982 draft of the Convention, developed by the UNCITRAL Working Group under the chairmanship of a universally recognized French expert in this field, as a workable compromise having a conceptual balance between the fundamentally different approaches of several legal systems. Since 1982, two types of change have been made to that draft. One type of change has shifted the conceptual balance toward the Geneva system and away from the British Bills of Exchange Act and American Uniform Commercial Code. Although this may have created a conceptual imbalance, the present draft may still represent a workable compromise. However, in the interest of the acceptability of the convention as adopted to countries having many different types of legal systems it is hoped that there will be no further shift in the conceptual balance.

The second type of change is the refinement of analysis and drafting of many individual sections of the draft Convention. In this regard, the United States believes that UNCITRAL has greatly improved the 1982 draft. Our review of the 1986 draft indicates that, with minor exceptions, it is technically sound and in sufficiently good form for final action by UNCITRAL. Our suggestions for future drafting are therefore few and, although bothersome, are not crucial.

*Article-by-article comments**Article 4(7)*

The cross-reference to article 25 is still ambiguous. A definition not using such a cross-reference should be drafted, so that the Working Group can make a conscious comparison and choice.

*Articles 23 and 23 bis*

The use of the word "pays" in paragraphs (2)(a) of each these articles creates confusion because it does not refer to the payment of an instrument by the maker, acceptor or drawee. Instead, it refers to the remittance of funds for the instrument by an endorsee for collection. The United States would prefer to amend the language of both paragraphs (2)(a), and keep and clarify the present substantive concept.

*Article 30*

The use of the word "accepted" in "accepted to be bound" creates confusion because the word "accepted" also has a technical meaning in negotiable instruments law. The United States proposes substitution with the words "consented to be bound" to avoid confusion and retain the meaning of the concept.

*Article 68*

Article 68 discharges *parties* who pay an instrument, but this does not include the drawee. Of course, the drawee, as such, has no liability on the instrument, but the drawee does have two types of potential liability arising out of the payment of the instrument. First, there is the drawer-drawee relationship — has the drawee properly discharged its obligation to the drawer by payment? Second, there is the liability to third party claimants of the instrument. Such claimants may seek damages through conversion actions against the drawee who pays an instrument to someone other than those claimants.

Although drawee-drawer relations are generally outside the scope of the draft Convention, there is at least one instance in which this "gap" could prove troublesome if left entirely to local law. If the payee's necessary endorsement is "forged" (i.e., the payee's name is written on the back of the instrument by someone other than the payee), a subsequent person in possession can still be a holder. If such a subsequent holder presents the instrument, he is entitled to payment. However, if the drawee pays, nothing in the present draft of the Convention protects the drawee in its relation to the drawer. In legal systems in which such payment now would not be proper, the drawee could be exposed to loss either to the drawer or to the person who suffered loss, unless the concepts in article 68 are expanded to cover the drawee.

*Article 79*

Article 79(1) provides a payor of a lost instrument with the rights of a payor in possession of a paid

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

**[A/CN.9/WG.IV/WP.32/Add.5]**

This addendum to document A/CN.9/WG.IV/WP.32 sets forth, in somewhat modified and sometimes shortened form, the comments received between 22 December 1986 and 12 January 1987 from Brazil and Turkey as well as a brief note by the secretariat concerning a communication received from Uruguay.

**BRAZIL***General observations*

1. The draft Convention is intended to be an acceptable compromise between the Common Law systems and the Civil Law systems on negotiable instruments, which would be made through mutual concessions. Of course, a complete unification of negotiable instruments law covering both international and domestic bills of exchange and promissory notes would no doubt be ideal. However, such a goal would be difficult to attain, as all representatives supporting further work on the draft Convention agree. Therefore, a simpler approach would be desirable, i.e., the preparation of a uniform law concerning the international bills of exchange and international promissory notes for optional use that might coexist side by side with the mandatory legislation.

2. As has been noted, the existence of divergent legal systems concerning international bills of exchange and international promissory notes had not given rise to serious problems in respect of international negotiable instruments used in international payment and financing transactions, as evidenced by the paucity of relevant case law. Consequently, it was feared that the creation of an additional system of international bills of exchange and international promissory notes would lead to serious complications in that different sets of rules would apply to similar types of instruments. Of course, it is a nonsense to assert that the present draft Convention is giving birth to new negotiable instruments which have nothing to do with the traditional bills of exchange and promissory notes.

3. For us the creation of a special legal régime for international instruments would not be the most appropriate way to unify the law. That unification would truly be served only if applicable to negotiable instruments in both their domestic and international settings. We agree that the Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (1930) is outdated in some respects, and revision of this document (and of the Geneva Convention providing a Uniform Law for Cheques (1931)) would be desirable. It seems to us that the proper solution would be a revision of these Geneva Conventions and not the drafting of a new and competing Convention on the same subject.

4. Furthermore, we have doubts whether countries that had ratified the 1930 and 1931 Geneva Conventions would be able to ratify the proposed draft Convention without violating their obligations under the former Conventions. It is felt that the 20 countries that ratified the Geneva Conventions must denounce them before ratifying the new one.

5. Otherwise, it seems to us that the draft Convention, although presenting a compromise between competing universes, would not encourage circulation of the international instruments "created" by it since it does not favour sufficiently the position of the holder for the following reasons: (a) the proposed draft text is too complex and often difficult to understand because the provisions — which include 80 articles with 10 paragraphs each totalling thus more than 800 legal commands — frequently contain references to other provisions in the draft instead of dealing with an issue in a self-contained provision; (b) it is deemed unlikely that the Convention would command wide support.

6. Finally, we insist that the natural procedure for the adoption of the draft Convention as a convention is to recommend to the General Assembly of the United Nations to convene a diplomatic conference for the eventual adoption of the draft Convention.

#### *Specific observations on individual articles*

##### *Article 1*

The parts of the definition contained in paragraphs (2) and (3) are the formal requirements for the instrument. The list (excessive in our view) should reflect this, and not be formulated in the definition style used in the present draft, specifying the essential formal requirements. Furthermore, both paragraphs state that a qualifying bill or note must be a "written instrument", but the term "written" is not defined in the Convention.

According to subparagraphs (2)(a) and (3)(a) the words "international bill of exchange (Convention . . .)" or "international promissory note (Convention . . .)" must appear in the text of the instrument. In the practical handling of the instruments it is important that these words are easily recognized: when the drawer of a bill (or the maker of a note) uses the words "international bill of exchange (Convention . . .)" he

thereby indicates a choice of legal régime in compliance with the Convention. However, the required formalities may be buried in a mass of printed terms and may not be conspicuous.

##### *Article 2*

According to this article the Convention would be applicable without regard to whether the places indicated on an international bill of exchange or on an international promissory note were situated in Contracting States. Obviously, this would cause difficulties in cases where such instruments were brought before courts in a non-contracting State.

##### *Article 3*

This provision seems malapropos and concerns more the objective to guide interpretation than the criteria to govern it.

##### *Article 4*

This article gives a long list of definitions. The procedure is not usual in civil law statutes but may be accepted in the case of an international convention. However, some of the definitions appear obvious and unnecessary.

##### *Article 5*

According to this provision, "knowledge" is considered to be present not only in the case of positive knowledge but also in the case where a person could not have been unaware of the existence of a fact. According to the Commentary, this wording implies a presumed knowledge. This might lead to the objectionable conclusion that the person concerned has the burden to prove his ignorance.

##### *Article 6*

At some length, articles 6 and 7 establish the rule that instruments may be paid with interest. Such provision exists in the Geneva system, but in a more restricted form.

##### *Article 8*

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

##### *Article 11*

An incomplete instrument is often used in international transactions and it is commendable that the provisions relating to such an instrument were included in the draft Convention. But the distinction between an incomplete instrument and an ineffective instrument is not clear. The Convention should stipulate that in the

case of an incomplete instrument one or more essential elements are deliberately omitted so that they may be completed later by an authorized person.

#### *Article 16*

The intent of article 16 is not clear. This article combines and confuses two situations: that in which the drawer or maker issues an instrument which does not have the normal transfer characteristics of negotiability, and that in which an endorser makes a restrictive endorsement.

#### *Article 17*

A condition attached to an endorsement is ineffective but it does not invalidate the endorsement. This provision would appear debatable in this article and in conflict with article 18.

#### *Article 21*

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

#### *Article 22*

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

#### *Article 23*

The formulation of article 23, which would certainly be one of the essential provisions of the Convention, is acceptable as a compromise between Civil Law and Common Law.

#### *Articles 25 and 26*

One of the main reasons for the lack of clarity and the complexity of the system is the differentiation between holder and protected holder, because this differentiation has the result that there are two different groups of defences. According to the rules suggested, in practice all imaginable defences may be invoked against the holder of a bill of exchange who is not a protected holder. However, a holder does not become a protected holder for the mere reason that due to gross negligence he lacked knowledge of a defence. That restriction of trade protection as opposed to the Geneva system will impair the negotiability of the international bill of exchange substantially.

#### *Article 32*

The draft Convention lacks a rule concerning signature by juridical persons, especially commercial corporations.

#### *Article 39*

This article introduces a concept which is both intricate and impractical. Partial acceptance must be regarded as non-acceptance.

#### *Article 42*

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

#### *Article 46*

The provision in article 46 that the drawer may "stipulate on the bill that it must not be presented for acceptance" seems badly worded.

#### *Article 50*

The range of cases classed as dishonour by non-acceptance seems too wide; this makes the position of prior parties insecure.

#### *Article 54*

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

#### *Article 57*

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

#### *Article 60*

The suggested extension of the duties to give notice as compared to those under the Geneva system seems hardly to be practicable.

#### *Article 70*

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

#### *Article 74*

With respect to the possibility that the obligation on an instrument is paid in instalments, it will be useful that duplicates and copies of an instrument may be drawn or made.

#### *Article 80*

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

## TURKEY

The draft Convention on International Bills of Exchange and International Promissory Notes has been examined from the viewpoint of its conformity with the

Turkish legislation and the following conclusions were drawn:\*

### *General observations*

1. The draft Convention contains some unnecessary repetitions and details from a systematical viewpoint, resulting at places in the loss of coherence in the text. For example, "*force majeure*" has been treated separately in articles 48, 52, 63 and 75. Likewise, dispensation from protest and notice of dishonour are dealt with in articles 52(2), 58(2) and 63(2) respectively.

It is believed that a more appropriate approach would be, as adopted in the Turkish legal system and the subjacent Geneva Conventions, to handle all these matters in a single article, see Article 643 of the Turkish Code of Commerce (TCC).

2. Some definitions are missing from the text. For example, the "drawer", "maker", "endorser", "guarantor" and "acceptor" have not been defined.

3. There is no clarity as to which national law will be applied to situations for which there is no provision in the Convention.

### *Comments on individual articles*

#### *Article 2*

Article 2 of the draft Convention does not confine the enforceability of the Convention to the Contracting States. This may create certain complications.

#### *Article 4*

The provision of article 4(7), which establishes a correlation between the protection of the protected holder and the time-limit for presentment, gives rise to certain hesitations.

#### *Article 6*

This article states that it is possible to insert an interest clause irrespective of the nature of the term of the promissory note or to make remittances thereunder in instalments. This is clearly in contradiction with Articles 587 and 615(ultimo) of the TCC, although efforts seem to have been made in article 64(4)(b) and (c) to alleviate the extent of the problems likely to arise from the remittance by instalments of the amount of the promissory note.

#### *Article 8*

The provision of article 8(2) that the acceptance or endorsement or giving of a guarantee after maturity

renders the instrument into one payable upon demand is somewhat alien and contradictory to our legal system, where an endorsement after maturity results in the assignment of the claim. This provision of the draft Convention is somewhat ambiguous.

Article 8(5) and (7) must be completed by including "acceptance" and "refusal of acceptance".

#### *Article 13*

Contrary to the provisions of Article 595(II) ultimo of TCC, the requirement of entering a blank endorsement on the back of the instrument is not contained in article 13(2) but introduced instead in article 42(4). It would be more appropriate to insert this requirement into article 13(2).

#### *Article 14*

The legal consequences that may accrue from the application of article 14(3) are not clear. It is believed that the requirement of good faith should be included here.

#### *Article 16*

Where the drawer forbids endorsement, such instruments become registered certificates according to our legal system. Yet, according to article 16 of the draft Convention instruments bearing this restriction may be endorsed solely for the purpose of collection. According to Article 593(II) of the TCC such instruments may be endorsed only via assignment of the claim. Likewise, the element of "assignment" should also be clearly introduced into article 16.

#### *Article 22*

This article, governing endorsement after maturity, has been viewed with some concern since it is felt that a time-limit should be specified for such endorsements. The clause "except by the drawee, the acceptor or the maker" does not figure in our law. Furthermore, the failure to establish a correlation with protests under this article and the absence of provisions covering endorsements after maturity are considered as a shortcoming.

#### *Articles 23 and 23 bis*

Article 23(1)(b) does not protect the person acquiring the instrument from a forger even if the former acts in good faith. The same is also true for persons acquiring instruments from unauthorised persons under article 23 bis (1)(b).

#### *Article 25*

The term "protected" as used here is somewhat new for the Continental European law systems and it is believed that it should be replaced by the concept of good faith. The provisions introduced by article 25(1)(d) seem to be capable of restricting the instrument's circulation and to be misused against its holder.

\*Not reproduced here are those portions of the comments which state differences between the draft Convention and the Turkish legislation without indicating in some way any doubt or objection to the draft Convention.

*Article 26*

The provisions of article 26(1)(b) contradict the "protected holder" concept introduced in article 4(7). Likewise, the holder should no longer be considered "protected" where a defence exists arising from any fraudulent act on his part in obtaining the party's signature on the instrument. The use of the same defence in article 26(1) against both *bona* and *mala fide* holders has been found incoherent. Likewise, the person defined in article 26(2) should no longer be a protected holder.

*Article 34*

Under article 591 of the TCC, the drawer cannot relieve himself of the responsibility for non-payment while article 34(2) of the draft Convention grants the drawer the possibility, albeit limited, of sidestepping this responsibility. However, it may be contended that the rights of the holder are still upheld to some extent since this discharge is made contingent upon the establishment of someone else's liability.

*Article 37*

It would be appropriate to introduce a provision into article 37(b) to the effect that the signature of the drawee should be made on the front of the instrument. This article can also be combined with article 42(4)(b).

*Article 38*

We do not believe that a significant practical benefit may be derived from article 38(2), which provides for acceptance and thus for presentment for acceptance, subsequent to refusal of acceptance or payment. The holder does not have any interest in obtaining an acceptance after maturity. However, the consideration in the text of this possibility will not cause an undue problem.

Where a bill drawn payable at a fixed period after sight is accepted and the acceptor fails to indicate the date of acceptance, the drawer or the holder may insert the date. The precondition of protest, provided in our commercial law, for the commencement of the time-period may well better serve to preserve and protect the holder's rights.

*Article 41*

Article 41(1) envisages certain warranties toward the holder by an endorser who merely delivers the instrument. However, for those cases where the transferor may not be traced, it would be more to the point to introduce a practical approach to the questions of proof.

*Article 50*

Article 50(1)(b) appears superfluous in view of the existence of article 58(2)(d) providing for exemption from protest.

*Article 51*

The provision of article 51(e), which requires that an instrument which is not payable on demand be paid by the end of the working day following the date of maturity, restricts the possibilities of obtaining a remittance. The Turkish legislation allows two working days after maturity. A longer period may be envisaged in international payments.

*Article 53*

Article 53(3) states that the responsibility of the guarantor of the drawee will continue also in cases where the instrument is not presented for payment. This provision cannot be sustained under law. The same also applies for article 59(3).

*Article 66*

Article 66(1) fails to mention the 0.3 % commission referred to in Article 637(4) of the TCC. It may nevertheless be claimed that this point falls within the ambit of article 66(3). Similarly, there is no mention of a 0.2 % commission due to the drawee remitting payment under article 67 (cf.: Article 638(4) of TCC).

*Article 69*

Article 69(1) states that the holder is not obliged to take partial payment while Article 621(II) of TCC indicates that such holder is not entitled to reject it. The refusal of partial payment in the draft Convention which at the same time allows instalment remittances is deemed as a contradiction.

*Article 74*

Article 74 is totally different from the system introduced by the TCC since, according to this article, the holder is not required to obtain a court decision in case of loss or cancellation of the instrument. Although the system of the draft Convention apparently introduces some advantages, the establishment of a link between the cancellation mechanism and a court decision would offer greater security to the parties involved. Finally, it is felt that it would be appropriate to determine the duration of any security which the court may order under article 74(2)(c), as is done in article 74(2)(d) for the case of a deposit.

## URUGUAY

*Note by the secretariat:* Uruguay transmitted to the secretariat a copy of a report prepared by Professor Dr. Delfino Cazet who had represented Uruguay at the nineteenth session of the Commission. It is suggested therein that Uruguay would not submit any comments on the draft Convention since the draft text is generally considered to be of high quality and to provide acceptable solutions. However, during future deliberations of the Working Group and the Commission, Uruguay may make suggestions for improving in certain respects the consistency, balance, completeness and style of the text.

## [A/CN.9/WG.IV/WP.32/Add.6]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth the comments of China, prepared by the Bank of China, received on 19 January 1987.

## CHINA

[Original: Chinese/English]

## Article 1

Paragraph (5) of article 1 states: "This Convention does not apply to cheques." But for "cheques" there is no clear definition. In the text of U.C.C. of the United States of America and the Bills of Exchange Act, 1882, of the United Kingdom, cheques are defined as a kind of bills of exchange. Therefore, in the absence of a definition of cheques in this Convention, it seems impossible to prevent such States as the United States and the United Kingdom from applying the Convention to cheques also.

In view of the differences in regard to cheques in the legislations of various countries, it is suggested that at the end of paragraph (5) the following phrase should be added: "in spite of the fact that cheques are considered as a kind of bill of exchange in some States."

## Article 38

The words "incomplete instrument" as used in the first sentence of article 38 have a different meaning from the "incomplete instrument" mentioned in paragraph (1) of article 11. It is proposed that the term "incomplete instrument" in paragraph (1) of article 38 should be replaced by another term.

## Article 47(e)

It seems unnecessary for a bill which is payable on demand to be presented for acceptance. Since it is already stipulated in article 51(f) that an instrument which is payable on demand must be presented for payment within one year of its date, it is suggested that the words "on demand or" should be deleted.

## Article 49

The words "so presented" do not seem very clear. It is proposed that article 49 should be redrafted as follows:

"Except for the cases described in article 48, if a bill which must be presented for acceptance is not presented for acceptance in accordance with the provisions of articles 45 and 47, the drawer, the endorsers and their guarantors are not liable on the bill."

## Article 46

The term "specified event" as used in paragraph (1) needs to be further clarified. A so-called "specified event" may or may not occur. The term "specified event" implies a kind of uncertainty, and if the drawer

should make the occurrence of such an event a prerequisite for the presentation of the bill for acceptance, the bill would be defective when it is drawn, and it is likely that it would be returned for dishonour by non-acceptance; this would be contrary to the objective of this Convention, which is to promote negotiable instruments.

Suggestion: after the words "specified event" add: "which is certain to happen."

## Article 23(3) in relation to article 68(3)

The views expressed on this issue during discussions at the nineteenth session and the position taken by the Working Group are duly noted.

It is still considered that there is some inconsistency between article 23(3) and article 68(3), and that this inconsistency would affect the concrete application of this Convention. According to article 23(3), a party or the drawee who pays an instrument shall not be liable if, at the time he paid the instrument, he was without knowledge of the forgery, provided that such absence of knowledge was not due to his negligence. However, he is to be held liable if such absence of knowledge was due to his negligence. Paragraph (3) of article 68 states that a party is not discharged of liability if he pays a holder and knows at the time of payment that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery. On the contrary, a party is discharged of liability if he was without knowledge of the theft or forgery, whether or not such absence of knowledge was due to his negligence.

The key issue is how the word "know" in article 68(3) is to be interpreted. According to the draft formulations of this Convention, the meaning of the word "know" in paragraph (3) of article 68 must be interpreted in accordance with article 5.

It is observed that the words "to have knowledge" can be interpreted as including two aspects of meaning:

- (a) The party has actual knowledge of the fact in question;
- (b) He could not have been unaware of it, but he deliberately feigns ignorance of it.

Thus the provisions of article 5 as mentioned above are found to be different from the concept of negligence as recognized under civil law in various countries. According to national legislation, the concept of negligence covers feigned ignorance as well as ignorance due to negligence by the party. The wording of article 5 fails to express clearly the concept of a party's not having knowledge due to negligence.

There are two options for eliminating this inconsistency:

- (a) Article 68(3) should be redrafted so as to have the word "know" clearly defined, or a provision might be added to the effect that the party shall also not be discharged of liability if he was without knowledge due to his own negligence;

- (b) There should be a revision or further explanation of the concept of knowledge in article 5 in order to express clearly the idea that ignorance by the party due



to negligence should be construed as having knowledge. We are inclined to favour the revision of this article. To make it more clear, it is proposed that there should be a clear provision, such as the following: the word "know" or "knowledge" mentioned anywhere in this Convention should be interpreted in accordance with the provisions of article 5.

[A/CN.9/WG.IV/WP.32/Add.7]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth the comments of Iraq and Mali received on 10 March and 3 February 1987 respectively. It may be noted that the Working Group at its fifteenth session considered the comments submitted by Governments and international organizations in regard to articles 1 to 32 and expressed the view that the comments on the remaining articles could appropriately be discussed by the Commission in plenary session.<sup>1</sup>

IRAQ

[Original: Arabic]

Article 1

This article determines the conditions which must be fulfilled for a bill of exchange to be considered international. The most important requisites are contained in paragraph (a)—an international bill of exchange must contain the words "international bill of exchange"—and in paragraph (e)—it must specify that at least two of the following places are situated in different States:

- (i) The place where the bill is drawn;
- (ii) The place indicated next to the signature of the drawer;
- (iii) The place indicated next to the name of the drawee;
- (iv) The place indicated next to the name of the payee;
- (v) The place of payment.

Paragraph (e) above makes an instrument international if at least two of the places indicated therein are situated in different States. That means that it would be quite easy for a payee to make an instrument international if he made it out in a country other than his own. For example, an Iraqi merchant can make an instrument in France, i.e. the place where the bill is drawn, and indicate next to his own name (the drawer) his address in Iraq. Accordingly, an instrument becomes international even if the place of payment is in Iraq and both the drawee and the payee are also in Iraq. Thus such an instrument is considered international because it indicates in the text thereof that it is an international bill of exchange and because the place where the bill is

drawn and the place indicated next to the name of the drawer are situated in different States.

The fact is that this criterion is not sufficient for a bill of exchange to be considered international, because, as in the example given above, a drawer can deliberately take the bill of exchange out of the scope of application of national law, by making it an international bill of exchange and hence avoid the requirement that the bill of exchange should be subject to the provisions of national law.

We therefore suggest that an additional requisite should be added to the effect that an international bill of exchange must be drawn in order to pay a debt arising from an international commercial transaction. In that manner we would have achieved the objective of making bills of exchange relating to international trade subject to the provisions of the Convention under consideration.

Article 6

This article introduces a new principle with regard to commercial instruments, namely payment of the amount of a bill of exchange by instalments (subparagraphs (b) and (c) of the said article).

We believe that the payment of the amount of a bill of exchange by successive instalments at successive dates is completely incompatible with the nature of a commercial instrument as well as with the text of the second paragraph of article 1 of the draft convention, which states that a bill of exchange "Is payable on demand or at a definite time".

To allow the amount of a bill of exchange to be paid by instalments at different dates would make the right to a bill of exchange uncertain and impede acceptance of such bill of exchange for circulation.

We therefore suggest that subparagraphs (b) and (c) of article 6 should be deleted.

Article 7

Paragraph 5 of this article provides for the possibility of making the rate of interest on the amount of the bill of exchange either a definite rate or variable. However, with regard to commercial instruments, the principle of accepting a variable rate of interest makes the debt indicated in the instrument unknown in advance, and therefore puts the debtor in a position where he does not exactly know the extent of his liability. This would, accordingly, affect the acceptance of such a commercial instrument for commercial transactions. In addition, the calculation of a variable rate of interest, provided for by the above-mentioned paragraph, cannot be easily applied in practice, or in the same manner in the various States. Furthermore, such a provision would place a heavy burden on some developing countries, particularly as the majority of these countries are at present faced by a major problem, namely the payment of their debts with high interest.

Article 13

Paragraph (2) of this article introduces two types of endorsement, namely special endorsement and endorsement in blank. However, what is described in

<sup>1</sup>Report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (New York, 17-27 February 1987), A/CN.9/288, paras. 6-7.

subparagraph (a) of this paragraph is, in fact, an endorsement to bearer rather than an endorsement in blank; the two have different forms.

The form referred to in the text as an endorsement in blank, "that is, by a signature alone or by a signature accompanied by a statement to the effect that the instrument is payable to a person in possession thereof", is that of an endorsement to bearer, as contained in most legislations which derive the provisions on commercial instruments from the Geneva Uniform Law. These include the Iraqi Trade Law No. 149 of 1984 and the legislations of the Arab States.

We therefore suggest that there should be a statement that there are two types of endorsement—that is, a special endorsement and an endorsement to bearer.

#### Article 74

This article deals with the payment of an instrument when the instrument is lost. In subparagraphs 2(c) and 2(d), it refers to measures adopted by the competent court, but without identifying the competent court. In order to avoid problems of conflict of laws and conflict of jurisdiction, we therefore suggest that in such cases the competent court should be the court of the place of payment of the commercial instrument.

#### MALI

[Original: French]

The Malian Government supports the draft Convention on International Bills of Exchange and International Promissory Notes, whose purpose it is to promote commerce throughout the world.

Nevertheless, in view of the increasing concern of banking circles to reduce the risks confronting them, the competent Malian authorities would welcome, as accompanying measures, any provisions designed to prevent the uncontrollable circulation of signatures. The question is essentially one of limiting the zones within which negotiable instruments may be circulated in order to afford better protection to the signatories, who are no longer able to control the uses to which their signatures may be put.

#### [A/CN.9/WG.IV/WP.32/Add.8]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth a letter of the Secretary-General of the International Chamber of Commerce received on 10 July 1987. It may be noted that the Working Group at its fifteenth session considered the comments submitted by Governments and international organizations in regard to articles 1 to 32 and expressed the view that the comments on the remaining articles could appropriately be discussed by the Commission in plenary session.<sup>1</sup>

<sup>1</sup>Report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (New York, 17-27 February 1987), A/CN.9/288, paras. 6-7.

#### INTERNATIONAL CHAMBER OF COMMERCE

[Original: English/French]

The International Chamber of Commerce (ICC), through its Commission on Banking Technique and Practice, has followed UNCITRAL's work on a draft Convention on International Bills of Exchange and Promissory Notes for a number of years. We note that the draft Convention aims, *inter alia*, to establish a system of law for negotiable instruments which harmonizes both civil and common law and appreciate the efforts made over the years to accommodate different national viewpoints and systems of law.

The ICC attends UNCITRAL sessions in its capacity as an observer. Our representatives have regularly followed meetings of the Working Group on International Negotiable Instruments and have kept the Banking Commission informed of discussions and progress.

UNCITRAL Working Group members have expressed in private conversation with the ICC observers the hope that, in view of its integrity and wide representation, the Banking Commission could become instrumental in putting forward international banking community opinion on the draft Convention. Members of the Commission therefore requested me at their last meeting to make their views on the subject known to UNCITRAL in preparation for the next session in July 1987.

The draft Convention has been discussed for some time. The Banking Commission has been made aware of comments on its content, both in support and in disagreement. The representative of France, for example, has presented the ICC with both written and oral comments which were noted at a recent Banking Commission meeting.

It would seem there is a certain degree of probability that the Convention will be ratified as it is already supported by a certain number of countries. Banks will therefore ultimately be called to handle negotiable instruments under the terms of the Convention even if their own Governments have not ratified it. The ICC believes that banks should therefore be made aware of and take an interest in the contents of the draft.

Although such a Convention may not be required when instruments circulate within specific national or legal systems which function well internally, once there are cross-border contacts or circulation of such instruments between different legal systems then a new international convention could be appropriate to regulate their use. The value of the Convention would also depend greatly upon its wide adoption.

The different existing systems do not in all respects provide users with flexibility and options (such as currency and interest rate references for example) which can arise from new and continually changing transaction patterns. The UNCITRAL proposal will, therefore, assist those users who wish to do so, to incorporate obligations arising from instruments provided for in the draft Convention.

One potential problem which could hinder ratification of the UNCITRAL Convention is that many countries already adhere to the terms of the Geneva Convention. At the present time many countries feel they could not ratify the draft Convention without the modification or

adjustment of the Geneva Convention. The ICC would support an initiative by an appropriate existing international body to tackle such a complex problem which is inherent to the decision to ratify the UNCITRAL Convention or not.

There is more detail in the draft Convention than in the Geneva Convention, but less than in common law statutes such as, for example, the Uniform Commercial Code. Whilst wishing to preserve the present level of detail as a compromise in drafting style, we feel that the text could be improved if it were nevertheless possible to limit the number of cross-references. So many cross-referenced articles create the impression that the text is too complicated and difficult to understand. We would suggest that the text could become more readable if the articles were drafted in a self-contained style reducing the cross-references to a minimum.

With regard to forfeiting, we would appreciate clarification to ensure that an *aval* is subject only to the terms of the draft Convention and not subject to extraneous suretyship defences which could arise under local suretyship law.

Finally, with regard to article 68(3) (as per the draft of the nineteenth session in June-July 1986) the ICC would hope that the present provisions on discharge could be reconsidered and amended so as to allow a bank which pays a holder to be discharged of liability so long as there is no court order to the contrary.

The ICC urges UNCITRAL to bear the foregoing comments in mind when considering the draft Convention at its next meeting in Vienna in July. It is necessary to ensure that the draft Convention is as clear, balanced and precise as possible so that all interested parties can find it both acceptable and valuable.

#### [A/CN.9/WG.IV/WP.32/Add.9]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth the comments of Egypt received on 20 July 1987. It may be noted that the Working Group at its fifteenth session considered the comments submitted by Governments and international organizations in regard to articles 1-32 and expressed the view that the comments on the remaining articles could appropriately be discussed by the Commission in plenary session.<sup>1</sup>

#### EGYPT

[Original: French]

#### Article 33

The meaning of this article is unclear. As worded, it only excludes the possibility that the order to pay may "of itself" transfer ownership of funds made available for payment to the payee, but does not exclude the possibility that such transfer may be made by an "agreement" indicated on the instrument. If this is the meaning of the text, it would be advisable to say so more

clearly. If the text is intended to convey the opposite meaning, it would then be necessary to delete the words "of itself", so that the rule may apply to both situations.

#### Article 34(2)

It would be advisable to delete this paragraph, which gives the drawer the possibility of evading the obligation to pay the instrument. The drawer, as the creator of the instrument and the principal obligor thereof, should not be given any possibility of evading his responsibility, even if he provides a serious guarantee or if the instrument already bears the signature of another party liable on it. It should be noted that the Geneva Uniform Law affirms this principle, virtually a moral one, in article 9, which declares any clause whereby the drawer may evade the guarantee to pay to be inapplicable. In the present draft convention, article 35, paragraph 2, forbids the maker of a promissory note, who is—up to a point—in a similar situation to the drawer, from evading his obligation to pay and makes any stipulation along those lines inapplicable. Would it not be logical to apply the same rules to both situations?

#### Article 37

Amend subparagraph (b) of this article to specify that only a signature "on the front" of the bill of exchange may express the drawee's acceptance.

If this proposal is adopted, it will then be necessary to delete paragraph 4(b) of article 42.

#### Article 38(3)

The right granted by this text to the drawer and the holder, when the drawee refuses to insert the date of acceptance in the cases in question, is excessive and likely to create difficulties in practice. It would be more advisable to adopt a solution which deems such refusal to be a refusal to accept and give the holder the right to have the omission recorded by means of a protest in order to retain his rights of recourse.

#### Article 41(3)

This paragraph gives the transferee, where the responsibility of the transferor is involved, the right to "recover, even before maturity, the amount paid by him to the transferor". This is a form of recourse before maturity available to the transferee, but against whom? Only against the transferor? Or against him and all other parties liable, including prior endorsers? The text does not tell us, but it ought to make it clear.

*Note:* The same ambiguity exists in paragraph 1(c) of the same article.

#### Article 42

##### Paragraph 2

This text states that "a guarantee must be written on the instrument or on a slip affixed thereto (*allonge*)".

Banking practice in several countries, including Egypt, frequently means that the bank gives a guarantee on a

<sup>1</sup>Report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (New York, 17-27 February 1987), A/CN.9/288, paras. 6-7.

separate document covering several instruments which are clearly specified. It would be advisable to add this form of guarantee.

*Paragraph 4(b) and (c)*

These two provisions are not in the right place. They have been included in a section concerning guarantees, although one relates to acceptance and the other to endorsement. It would be preferable to put them where they belong. We have already suggested the deletion of subparagraph (b) as a result of our proposal concerning the amendment of article 37(b). As regards subparagraph (c), it should be moved to chapter III (Transfer). All that would then remain of paragraph 4 would be the introductory part and subparagraph (a), which should be combined in a single text as follows:

"A guarantee may be effected by a signature alone. Unless the content otherwise requires, a signature alone on the front of the instrument, other than that of the drawer or the drawee, is a guarantee."

*Article 45*

Delete paragraph 2(c).

*Article 46(1)*

The reference in the second sentence of this text to article 45, paragraph 2, should be restricted to subparagraphs (b) and (c)—if subparagraph (c) is retained. Subparagraph (a) should be excluded because it supposes that the bill bears a stipulation that it must be presented for acceptance. It would be strange if the bill were to bear two contradictory stipulations, one that it must be presented for acceptance and the other forbidding this.

*Article 51*

*Subparagraph (c)*

This text may cause difficulties in practice, particularly if death occurs only a few days before the date of maturity, when the heirs or the persons entitled to administer the estate are not yet known. A proposal to delete this subparagraph would dispose of the matter.

*Subparagraph (e)*

This text requires an instrument which is not payable on demand to be presented for payment on the date of maturity or on the business day which follows. That is too short a period, particularly for an international instrument. It would be desirable to extend it. Under the Geneva Uniform Law, the period is two days. In our opinion, it should be still longer—three or four days.

*Article 54 bis*

*Proposal*

Add an article 54 *bis* forbidding opposition to payment, except in exceptional cases, such as loss, theft, or the holder's bankruptcy or incapacity.

*Article 55 bis*

*Recommendation*

Add a new provision to the convention making the instrument itself an "executory instrument", while leaving it to the applicable law to regulate the consequences of its having that status. This would make recourse easier for the holder, since he would no longer be obliged to bring proceedings to obtain a judgement or order.

If this recommendation is accepted by the Commission, the new article could be included in chapter V, section 3, before or after article 55.

*Article 57*

The period allowed under this article for making a protest for dishonour by non-acceptance or non-payment (the day on which the bill or instrument is dishonoured or one of the two business days which follow) is too short. In view of the severity of the penalty incurred by failing to meet this deadline (loss of all recourse), it would be desirable to allow a longer period.

*Article 60*

The holder's obligation to give notice to all parties (drawer, endorsers and guarantors) is excessive. Often the holder only knows the party immediately preceding him, from whom he received the instrument; he does not know the other parties and may not even know their addresses. How, then, can he give them notice in good time, particularly if they are scattered over various countries?

It might be asked whether the holder will be able, if this difficulty arises, to invoke article 64, paragraph 1 (excusability of delay in giving notice), or paragraph 2 (notice of dishonour dispensed with).

*Article 65*

*Proposal*

Add a new paragraph 2 as follows:

"Recourse against one of the parties liable on the instrument does not prevent the holder from acting against the other parties liable even if they are subsequent to the party first proceeded against."

This provision, which is necessary in order to safeguard the rights of a holder who in his recourse does not follow the order in which the parties have become bound does not appear anywhere in the convention. It should. It is to be found in the Geneva Uniform Law (article 47). In the present draft convention, article 65 would be the best place for it.

*Article 68(4)(e)*

The meaning is clear, but the wording is ambiguous.

*Article 69(1)*

There are no good grounds for giving the holder the right to refuse partial payment. It is not in the interests

of the holder, who, logically, should accept the partial payment offered and then exercise his right of recourse for the rest. This right is above all detrimental to the other parties liable on the instrument, since it deprives them of partial discharge.

On this point it would be desirable to go back to the rule in article 39 of the Geneva Uniform Law, which does not allow the holder to refuse partial payment.

#### Article 73(2)

Delete the last phrase, beginning with the words "except where the drawee".

A drawee who does not pay properly should bear all the consequences himself, remaining liable *vis-à-vis* a third person who has asserted a valid claim to the instrument or to the legitimate holder of the instrument who is a victim of theft or forgery. The other parties may be presumed to be in good faith and should not have to pay for the drawee's dishonesty.

#### Articles 74-79

It may be asked whether these articles still serve any purpose, given that it is common practice all over the world to photocopy documents. Would it not be more to the point to rewrite these articles to take account of progress in electronics?

#### [A/CN.9/WG.IV/WP.32/Add.10]

This addendum to document A/CN.9/WG.IV/WP.32 sets forth the comments of Morocco received on 29 July 1987. The Working Group at its fifteenth session considered the comments submitted by Governments and international organizations in regard to articles 1-32

and expressed the view that the comments on the remaining articles could appropriately be discussed by the Commission in plenary session.<sup>1</sup>

### MOROCCO

[Original: French]

1. The question of the drawer or the party on whose behalf the bill of exchange is drawn having the funds available at maturity was not dealt with in the draft text, although UNCITRAL noted that this question was one of the most important problems not settled by the Geneva Conventions.

2. The draft Convention does not indicate whether a bill of exchange must be made in one original copy only or in several identical copies, nor does it provide for the making of duplicates.

Should it be necessary or possible to provide for more than one original or more than one duplicate, relevant rules should be laid down.

Should this not be the case, it would be more appropriate to include in the draft Convention a provision expressly stipulating that international bills of exchange and international promissory notes must be drawn up in a single original.

3. While the draft Convention deals with the problem of discrepancy between the amount expressed in words and the amount expressed in figures on the bill, it does not raise the question of a discrepancy in the expression of the amount of the bill when it is expressed several times, either in words or in figures.

<sup>1</sup>Report of the Working Group on International Negotiable Instruments on the work of its fifteenth session (New York, 17-27 February 1987), A/CN.9/288, paras. 6-7.

### 3. Draft Convention on International Bills of Exchange and International Promissory Notes: draft final clauses: note by the secretariat: (A/CN.9/WG.IV/WP.33)

1. The Commission, at its nineteenth session,<sup>1</sup> requested the secretariat to submit to the Working Group draft final clauses to be included in the draft Convention. This note has been prepared pursuant to that request.

2. The draft final clauses set forth in this note are modelled on the final provisions of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). Some draft provisions or parts thereof have been placed between square brackets so as to invite special attention and consideration by the Working Group.

<sup>1</sup>Report of the United Nations Commission on International Trade Law on the work of its nineteenth session (1986), *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 223.

*Draft final clauses to be included in the draft Convention on International Bills of Exchange and International Promissory Notes*

#### Chapter IX. Final provisions

##### Article 81

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

##### [Article 82]

This Convention prevails over any international agreement which has already been or may be entered into and which contains provisions concerning the