2. *Analysis of replies and comments by governments and banking and trade institutions to the questionnaire on negotiable instruments used for making international payments: report of the Secretary-General**

CONTENTS

INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), at its second session held in Geneva from 3-31 March 1969, considered certain problems in international payment transactions arising out of the existence of different systems of law on negotiable instruments.[1] The Commission concluded that a solution might lie in the creation of a new negotiable instrument to be used in international transactions only, and decided to make a further study of the possibility of creating such an instrument, based upon an inquiry aimed at securing the views and suggestions of Governments and banking and trade institutions.[2]

2. To that end the Commission requested the Secretary-General:

"(*a*) To draw up a questionnaire in consultation with the International Monetary Fund, UNIDROIT, the International Chamber of Commerce and, as appropriate, with other international organizations concerned, taking into consideration the views expressed in the Commission;

"(*b*) To address such a questionnaire to Governments and/or banking and trade institutions as appropriate;

"(*c*) To make the replies to the questionnaire available to the Commission at its third session, together with an analysis thereof, prepared by the Secretary-General in consultation with the organizations mentioned in sub-paragraph (*a*) above."[3]

3. In compliance with this request, the Secretariat convened two meetings at UNESCO in Paris at which it consulted international organizations having a special interest in the matter. The first meeting was held from 30 June-4 July 1969 and devoted to preparing a questionnaire. The second meeting was held from 19-23 January 1970 and devoted to the consideration of the replies received from Governments and banking and trade institutions and to assistance in the preparation of an analysis thereof.[4]

[1] A summary of the Commission's discussions is set out in paragraphs 64-81 of the report on the work of its second session.

[2] *Ibid.*, para. 79, and paras. 86 and 87.

[3] *Ibid.*, para. 87.

[4] The following took part in the meetings:

Mr. Robert Effros (Counsellor for Legislation, International Monetary Fund);

* A/CN.9/38.

The questionnaire

4. One part of the questionnaire was designed to obtain factual information on present methods and practices from banking and other institutions with respect to international payments. A second part of the questionnaire was designed to identify the nature and cause of any problems encountered in settling international transactions by means of negotiable instruments.

5. In addition, an annex to the questionnaire contained a number of questions directed to the main points of difference between the Common Law and Civil Law systems; these questions were designed to secure information that might be useful in harmonizing those differences or in choosing between divergent rules in the event that the Commission should decide to propose measures to deal with the problems encountered in this area.

6. The Commission, at its second session, discussed the feasibility of measures to harmonize the basic differences among the prevailing rules governing negotiable instruments, such as the Geneva Conventions and the rules of the various common law systems. The Commission concluded that an attempt to unify or harmonize the rules applicable to both domestic and international transactions would face serious difficulties, and decided to study further the possibility of creating a new negotiable instrument to be used in international transactions only. The phrase "new negotiable instrument", in the context of the Commission's deliberations, reflected the decision to concentrate on the rules applicable to instruments used in international transactions, and also to envisage the possibility that those rules might be made applicable on an optional basis. For these reasons, this report will describe the current proposals as relating to the possibility of unified rules for instruments used for international payments and the further possibility that such rules may be made applicable only if the parties so choose.

7. The text of the questionnaire and its annex is as follows:

Mr. Roland Tenconi (Adviser, Central Banking Service, International Monetary Fund);

Professor Jorge Aja Espil (Rapporteur on Negotiable Instruments of the Inter-American Juridical Committee, representing the Organization of American States);

Professor Michel Vasseur (Professor at the Faculty of Law of the University of Paris, representing UNIDROIT);

Mr. Henri Guisan (Legal Adviser, Bank for International Settlements);

Mr. B. S. Wheble (Chairman, Commission on Banking Technique and Practice of the International Chamber of Commerce);

Mr. Frederic Eisemann (Legal Adviser, International Chamber of Commerce);

Professor Schinnerer (Professor at the Economic University of Vienna, Rapporteur of the Special Working Party on Negotiable Instruments of the International Chamber of Commerce);

Mr. John J. Clarke (Special Legal Adviser, Federal Reserve Bank of New York, acting as consultant);

Mr. J. Milnes Holden (Legal Adviser, Inter-Bank Research Organization (United Kingdom), acting as consultant).

The Secretariat acknowledges gratefully the co-operation and assistance received from the above organizations and experts.

QUESTIONNAIRE

A. *Present methods and practice for making and receiving international payments*

1. What methods are currently used for making international payments, for example:
   (*a*) Negotiable instruments, such as cheques, bills of exchange (whether or not drawn under a documentary credit), promissory notes and similar instruments?
   (*b*) Other methods of making international payments, such as payments made under a documentary credit (where no bill of exchange is employed), and inter-bank and intra-bank transfers (e.g. international payment orders, telegraphic transfers and *giro*)?
2. To what extent is each method used?
3. To what extent, if at all, has any one method tended to be replaced by another in the past decade?
4. To what extent, and in what manner, have established trade practices influenced the use of a particular method?
5. To what extent are the instruments referred to in 1(*a*) above:
   (*a*) Drawn on a bank or a non-bank drawee?
   (*b*) Made payable at a bank when drawn on a non-bank drawee?
6. To what extent do exchange control regulations influence the choice of method?
7. To what extent is use made of *aval* or other guarantee, and what form does such *aval* or guarantee take, e.g. by writing on the negotiable instrument or on a separate document?
8. To what extent are negotiable instruments used in international transactions drawn in sets?

B. *Problems encountered in settling international transactions by means of negotiable instruments*

1. In the use of negotiable instruments, what types of problems have arisen which are predominantly of a practical nature? (Please illustrate with concrete examples).
2. In the use of negotiable instruments, what types of problems have arisen which are predominantly of a legal nature? (Please illustrate with concrete examples). In particular, have there been problems, arising from differences between legal systems, in respect of the following:
   (*a*) The forms and contents of instruments?
   (*b*) The rights and liabilities of parties to an instrument?
   (*c*) "Consideration" or "value", "*provision*", and "*abstraction*"?
   (*d*) Forged signatures and endorsements?
   (*e*) Lost instruments?
   (*f*) The forms of protest, and the giving of notice of dishonour?
   (*g*) The liabilities of agents and purported agents signing the instrument?
3. In what manner have the problems referred to in 1 and 2 above been mitigated or resolved in practice?

ANNEX TO THE QUESTIONNAIRE

A. *Form and contents*

1. Should the rules relating to a new negotiable instrument specify requirements as to its form and, if so, what should be the essential requirements?

2. Should the rules permit the instrument to stipulate that:
   (*a*) The principal amount will bear interest?
   (*b*) The principal amount may be payable in instalments?
   (*c*) The holder may demand payment in a specified currency which is not that of the place of payment?
3. Should the rules specify the form of "signature", e.g. written, facsimile, perforated, by symbols, or otherwise?

B. *Rights and liabilities of parties*

1. Should the rules specify the circumstances under which the holder of an instrument may acquire it free from:
   (*a*) Claims by prior parties or holders, and
   (*b*) Defences which would have been available to the defendant if the defendant had been sued by a prior party?

   If so, what should be these circumstances?
2. Should the rules specify permissible types of endorsement and, if so, what types?
3. Should the rules provide that the holder be obliged to accept partial acceptance?
4. Should the rules provide that the holder be obliged to accept partial payment?
5. Should the rules provide that the drawer shall have a right to restrict his liability to the holder?

C. *Presentment and dishonour*

1. Should the rules permit alternatives as to the place of presentment?
2. Should the rules permit that the instrument be payable only by, at, or through a bank?
3. Should the rules provide that protest on dishonour be essential, or that a less formal kind of evidence is sufficient?
4. If protest is considered essential:
   (*a*) For what reason is it considered essential?
   (*b*) Could present practice be simplified?
5. In respect of notice of dishonour, what should the rules provide with reference to:
   (*a*) Its form?
   (*b*) The persons by and to whom it should be given?
   (*c*) The effects of failure to give notice within a specified time-limit?
6. In what circumstances should delay in presentment, protest, or giving notice of dishonour be:
   (*a*) Excused by the rules?
   (*b*) Dispensed with altogether by the rules?

D. *Other matters*

1. Should the rules permit the debtor to make payment into court (or to another competent authority) in the event of an instrument not being presented for payment at maturity?
2. Should the rules contain a provision regarding damages to be recovered by the holder and by prior parties liable to the holder in the event of the instrument being dishonoured by non-acceptance and/or non-payment?
3. What period of limitation regarding the taking of legal action should the rules prescribe:
   (*a*) Against the acceptor?
   (*b*) Against the drawer and/or endorser(s)?
   (*c*) By one endorser against a prior endorser?

8. The questionnaire was addressed to the States Members of the United Nations and of its specialized agencies, and to the Central Banks and Bank Associations in those countries. In addition, the International Chamber of Commerce addressed the questionnaire to its National Committees.

9. As of 5 February 1970, replies had been received from the following:[5]

1. Argentina (Q/A)	Government (Ministry of Justice)
2. Australia (Q/A)	Australian Bankers' Association
3. Austria (A)	Government (Federal Ministry of Justice)
4. Austria (Q/A)	Austrian National Bank
5. Austria (Q/A)	Association of Austrian Banks and Bankers
6. Austria (Q/A)	Osterreichische Ländesbank
7. Barbados (Q/A)	Government
8. Barbados (Q/A)	East Caribbean Currency Authority
9. Belgium (Q/A)	Government
10. Belgium (Q/A)	National Bank of Belgium
11. Cambodia (Q/A)	Government
12. China (Q/A)	Central Bank of China
13. Cyprus (Q/A)	Central Bank of Cyprus
14. Czechoslovakia (Q/A)	Government
15. Czechoslovakia (Q/A)	Czechoslovak National Bank
16. Denmark (Q/A)	Federation of Danish Banks
17. Dominican Republic (Q/A)	Central Bank of the Dominican Republic
18. Ecuador	Central Bank of Ecuador
19. El Salvador (Q)	Central Reserve Bank of El Salvador
20. Ethiopia (Q/A)	Commercial Bank of Ethiopia
21. Federal Republic of Germany (Q/A)	Government (Ministry of Justice)
22. Federal Republic of Germany (Q/A)	German Federal Bank
23. Federal Republic of Germany (Q/A)	German National Committee of the I.C.C.
24. Federal Republic of Germany (Q)	Federal Association of German Banks
25. Finland (Q/A)	Finnish Bankers' Association
26. France (Q/A)	Bankers' Association
27. France (Q/A)	Banque de France
28. Greece (Q/A)	Bank of Greece
29. Greece (Q/A)	Greek National Committee of the I.C.C.
30. Guatemala (Q)	Bank of Guatemala
31. Hungary (Q/A)	National Bank of Hungary
32. Iceland (Q/A)	Central Bank of Iceland
33. India (Q/A)	Foreign Exchange Dealers' Association
34. Iraq (Q/A)	Government (transmitting reply of the State Organization for Banks)

[5] The letters "Q", "A" or "Q/A" following the name of a country indicate that the reply covers the Questionnaire, the Annex, or the Questionnaire and the Annex. The absence of any of these letters indicates that the reply was of a general nature only.

35.	Iraq (Q)	Central Bank of Iraq
36.	Ireland (Q/A)	Central Bank of Ireland
37.	Italy (Q/A)	Italian National Committee of the I.C.C.
38.	Japan (Q/A)	Federation of Bankers' Associations of Japan
39.	Jordan (Q/A)	Central Bank of Jordan
40.	Republic of Korea (Q/A)	Government
41.	Republic of Korea (Q/A)	Bank of Korea
42.	Kuwait (Q/A)	Government (transmitting reply of the Central Bank of Kuwait)
43.	Malawi (Q/A)	Government
44.	Malawi (Q/A)	Reserve Bank of Malawi
45.	Malaysia (Q/A)	Government
46.	Malta (Q)	Central Bank of Malta
47.	Mauritius (Q)	Bank of Mauritius
48.	Mexico (Q/A)	Government
49.	Mexico (Q/A)	Bank of Mexico
50.	Morocco (Q/A)	Government (Ministry of Finance)
51.	Netherlands	Netherlands National Committee of the I.C.C.
52.	Norway (Q)	Government (Ministry of Justice)
53.	Philippines (Q)	Central Bank of the Philippines
54.	Poland (Q/A)	Government
55.	Portugal (Q)	Portuguese National Committee of the I.C.C.
56.	Sierra Leone (Q/A)	Bank of Sierra Leone
57.	Singapore (Q/A)	Government (transmitting reply of the Development Bank of Singapore)
58.	Singapore (Q/A)	Association of Banks in Malaysia-Singapore
59.	Somalia (Q)	Somali National Bank
60.	South Africa (Q/A)	South African Reserve Bank
61.	Sweden	Government[6]
62.	Sweden (Q/A)	Swedish Bankers' Association[6]
63.	Sweden (Q/A)	Post Office Bank
64.	Sweden (Q/A)	General Export Association of Sweden; Federation of Swedish Wholesale Merchants and Importers (joint reply)
65.	Switzerland	Swiss National Committee of the I.C.C.
66.	Thailand (Q/A)	Bank of Thailand
67.	Trinidad and Tobago (Q/A)	Central Bank of Trinidad and Tobago
68.	United States	Government
69.	United States (Q/A)	Federal Reserve System
70.	Union of Soviet Socialist Republics (Q/A)	Government
71.	United Kingdom (Q/A)	Accepting Houses Committee
72.	United Kingdom (Q/A)	Association of British Chambers of Commerce
73.	United Kingdom (Q/A)	British Bankers' Association[7]
74.	Venezuela (Q/A)	Government (transmitting reply of the Central Bank of Venezuela)
75.	Bank for International Settlements (Basel, Switzerland) (Q/A)	
76.	Inter-American Development Bank (Q/A)	
77.	International Bank for Economic Co-operation (Moscow, USSR) (Q)	
78.	International Bank for Reconstruction and Development (Washington, D.C., United States) (Q)	

[6] The Swedish Government states that the competent authorities fully concur in the replies given by the Swedish Bankers' Association, the Post Office Bank, the General Export Association of Sweden, and the Federation of Swedish Wholesale Merchants and Importers.

10. The analysis set out hereafter follows closely the layout of the questionnaire and its annex. Part I (covering questions 1 to 7 of part A of the questionnaire) deals with present methods and practice for making and receiving international payments. Part II (covering questions 1 to 3 of part B of the questionnaire) reports on the problems encountered in settling international transactions by means of negotiable instruments. Part III relates to the views expressed on what uniform rules should govern a negotiable instrument used in international transactions. Part IV sets out tentative conclusions and suggestions which the Commission may wish to consider in deciding upon its further course of action.

11. It was not deemed advisable, at this stage, to reproduce and translate the replies received to the questionnaire as documents of the Commission. As of 5 February 1970, the volume of replies amounted to 550 pages; it did not appear feasible, at this stage, to reproduce all these documents.[8] Photostats of the replies will, however, be available at the third session for consultation by members of the Commission.

12. The following abbreviations are used in the report:

BEA: Bills of Exchange Act, 1882 (United Kingdom)

UCC: Uniform Commercial Code (United States)

ULB: Geneva Uniform Law on Bills of Exchange and Promissory Notes

ULC: Geneva Uniform Law on Cheques.

I. Present methods and practice for making and receiving international payments

13. In deciding to study further the possibility of establishing uniform rules for negotiable instruments used for international payments, the Commission recognized the need to seek information on present practices for making and receiving international payments. Consistent with that objective, part A of the Questionnaire sets

[7] The reply of the British Bankers' Association also incorporates the views of the Committee of Scottish Bank General Managers.

[8] A compilation of the replies to part A of the questionnaire and to the questions set out in the annex was prepared by the Secretariat as a working paper for the meetings held in Paris from 19-23 January 1970 (referred to in para. 3 above). Copies of that working paper (in English only) were available for examination in conjunction with the original text of the replies.

out a number of questions designed to obtain such information.

14. It was felt that the Commission would wish to ascertain what types of negotiable instruments, as compared with other methods of payment, are at present used in settling international transactions, the extent of their use, what trends are discernible in this respect, and to what extent outside factors, such as trade practices and control exchange regulations, bear upon the use of a particular method of payment. Questions 1, 2, 3, 4 and 6 were designed to elicit factual information on these points. In addition, questions 5, 7 and 8 seek to determine certain other aspects of banking and payment practices.

15. The replies to each of these questions are analysed below under separate headings.

A. *Methods used for making international payments*

16. Question 1 asked: "What methods are currently used for making international payments", and directed the inquiry to the following examples:

(*a*) *Negotiable instruments,* such as cheques, bills of exchange (whether or not drawn under a documentary credit), promissory notes and similar instruments;

(*b*) *Other methods,* such as payments where no bill of exchange is employed, with special reference to inter-bank and intra-bank transfers (e.g. international payment orders, telegraphic transfers and *giro*).

17. The replies reveal the use of a wide range of payment methods. Both negotiable instruments and inter-bank transfers are universally used. The replies also show the virtually universal use of payments made under documentary credits. The replies give less attention to intra-bank transfers (as contrasted to inter-bank transfers). Some replies specifically note the absence of the use of *giro* for the making of international payments,[9] while this method is stressed by others.[10] Travellers cheques and travellers letters of credit receive special mention in some replies.[11]

B. *The extent to which each method is used*

18. In some major trading and financial countries, inter-bank transfers predominate; these may include wire transfers, mail transfers and payment orders.[12] A great many replies emphasize the importance of payments made through bills of exchange and cheques.[13] No clear pattern appears; cheques are said to be used extensively in some countries for international payments,[14] but are seldom or rarely used in others.[15] Again, while bills of exchange appear to be the primary means of effecting international payments in some countries,[16] their use is limited in the practice of others.[17] Promissory notes seem not to be used extensively in the practice of various respondents,[18] but widely in that of others.[19]

19. *Giro* is not used at all for making international payments in respect of some countries,[20] but is becoming significant in the practice of others.[21]

20. Some replies emphasize the relative significance of documentary credits among the various payment methods;[22] other replies indicate that a small proportion only of international payments is made by such means,[23] or are mainly used in transactions with certain groups of countries.[24]

21. Some replies note that payments for imports and exports of goods are characterized by documentary credits and bills of exchange, whereas other types of payments are characterized by bank transfers or cheques.[25]

22. A further factor affecting the payment pattern is the extension of credit in the underlying transaction; in this event, bills of exchange and promissory notes are said to prevail.[26]

23. Some replies note that payment methods vary among different regions. The reply by Czechoslovakia notes that payments involved in trade with the United Kingdom, the Commonwealth countries and the United States are effected almost exclusively by bills of exchange in the context of documentary collections or credits. The reply of the Central Bank of Iceland mentions the use of promissory notes with special reference to trade with the United States. Replies from Central American sources stress the importance of cheques in payments between the countries participating in the Central American Clearing House. The reply of the Union of Soviet Socialist Republics distinguishes between foreign trade payments involving other socialist countries, and payments involving capitalist or developing countries. Payments involving other socialist countries are effected primarily by the collection (*inkasso*) method with post-acceptance, although there is also use

[9] E.g., 8, 32 and 60. The numbers in this and other footnotes refer to the respondents listed in paragraph 9, above.

[10] E.g., 51, 53 and 63.

[11] E.g., 58, 69 and 73.

[12] E.g., 4, 6, 21, 22, 25, 48, 60, 69 and 71. By way of example, the United States Federal Reserve System estimates that about 90 per cent of the dollar volume of payments arising from international transactions and originating or terminating in that country are effected by means of inter-bank and intra-bank transfers. In the Federal Republic of Germany and Finland 75 per cent of the volume of international payments are made through payment orders, and in South Africa approximately 80 per cent.

It should be noted that a certain percentage of bank transfers represent final settlements incident to other payment mechanisms.

[13] E.g., 2, 7, 8, 19, 20, 27, 30, 31, 34, 36, 37, 38, 47, 53, 57, 66 and 67.

[14] E.g., 19, 22, 23 and 69.

[15] E.g., 2, 13, 20, 31, 57 and 70.

[16] See foot-note [8].

[17] E.g., 23, 25 and 41.

[18] E.g., 25, 34, 40, 56, 57 and 69.

[19] E.g., 70 and 73.

[20] E.g., 7, 32 and 60.

[21] E.g., 51 and 63.

[22] E.g., 2, 8, 11, 17, 35 and 39.

[23] E.g., 23, 25, 27, 40 and 57.

[24] E.g., 16 (in Far East trade and trade with developing countries), 27 (in transactions with countries of Eastern Europe and with those of the Third World).

[25] E.g., 1, 11, 13, 17, 30, 33 and 35.

[26] E.g., 30 (promissory notes); 31, 37 and 51 (bills of exchange); 54 (bills of exchange and promissory notes).

of the collection method with pre-acceptance, and also letters of credit and bank transfers. In transactions outside the socialist area, the most commonly used method is the letter of credit, with lesser use of the collection (*inkasso*) and transfer methods. Although cheques are less frequently used for payments for Soviet exports, bills of exchange and promissory notes are said to be widely used where credit is granted.

C. *Present trends in the use of payment methods*

24. The replies of a number of countries,[27] indicate a trend towards increasing use of the cable or telegraphic transfer. Where the transfer methods are feasible, they are widely preferred because of speed and safety and because, as one respondent observes, payors hold on to their funds as long as possible under present tight money market conditions.[28] In the United States, for example, it is estimated that 90 per cent of the dollar amount of international payments originating or terminating in that country are made by this means.

25. An almost equal number of respondents indicate a trend toward the increasing use of bills of exchange not involving documentary credits.[29] There remains, however, a substantial number of replies that indicate no general trend or tendency. In some, the choice of a particular method or methods can be traced to certain local conditions, such as conditions that in some instances favour the use of cheques[30] and in others have the opposite effect.[31] There have been no discernible trends towards or away from the use of promissory notes.[32]

26. The reply of one respondent suggests that the trend toward cable or telegraph transfers will intensify and spread in international trade transactions as technological changes in wider parts of the world make it possible to use these modern methods.[33] There is, however, no indication that cable or telegraphic transfers will be widely used in all parts of the world in the immediate future or that in any part of the world such transfers will supplant the use of the more traditional payment devices.

D. *Influence of trade practices on choice of method*

27. With a view to ascertaining the commercial patterns that are relevant to banking practice and that need to be considered in formulating new rules, one question inquired concerning the extent to which established trade practices have influenced the use of a particular payment method.

28. Many of the replies state that trade practices exercise no, or no appreciable, influence upon the method of payment used. Others attribute a choice of method to the existence of other factors, such as banking practices,[34] the bargain of the parties[35] and their financial situation,[36] regional influences (the existence of a clearing house),[37] exchange controls,[38] technological changes,[39] and the like. Where commercial or trade practices might have exercised a decisive influence in normal situations,[40] this influence is found by at least one respondent to be offset or suppressed by rules of national policy in one or both of the countries concerned in a bilateral transaction.[41]

E. *Influence of exchange control regulations on choice of method*

29. While a number of replies indicate that exchange control regulations have no, or no appreciable, influence on the choice of method of payment,[42] the greater number find that they do have an influence. The replies show that regulatory measures vary widely; their effect upon the choice of method of payment and even the form of the instrument is, consequently, equally varied. A free choice among methods of payment is not possible in many parts of the world, with various consequences: e.g., the use of cheques has been inhibited.[43] Other replies note reliance on banks as conduits of payment.[44]

30. Some replies refer to specific provisions of exchange control regulations: restrictions on payment for imports in advance of receipt of the goods,[45] restrictions on the time for payment for certain imports,[46] and requirements of antecedent authorization for the acceptance or payment of a bill.[47]

F. *Negotiable instruments drawn on, or made payable at, a bank*

31. In order to ascertain the role of banks and similar institutions in the use of negotiable instruments, information was sought on the extent to which these instruments are

(*a*) Drawn on a bank or a non-bank drawee, and

(*b*) Made payable at a bank when drawn on a non-bank drawee.

(a) *Drawn on a bank*

32. Under Anglo-American usage, the term "cheques" refers to bills of exchange (or drafts) that are drawn on a bank and payable on demand. Under the Geneva system cheques are distinguished from bills of exchange. The difference in usage makes it difficult to interpret some of the replies. In any event, the replies

[27] E.g., 4, 21, 22, 35, 36, 38, 48, 49, 53, 63, 64, 70, 71, 74, 75 and 76.

[28] See 49.

[29] E.g., 2, 15, 20, 29, 33, 43, 48, 49, 53 and 70.

[30] E.g., 4, 6, 19, 30 and 36.

[31] E.g., 31, 35, 43, 44, 64 and 76.

[32] E.g., 11, 29, 32 and 62.

[33] See 69.

[34] E.g., 7, 15, 36, 39 and 60.

[35] E.g., 8, 13 and 74.

[36] E.g., 14.

[37] E.g., 19 and 30.

[38] E.g., 14, 35, 53, 58 and 63.

[39] E.g., 75.

[40] E.g., 1, 11, 20, 26, 27 and 43.

[41] See 26.

[42] E.g., 10, 12, 15, 20, 26, 27, 30, 31, 36, 37, 40, 42, 43, 44, 47, 50, 54, 56, 58, 70, 76 and 78.

[43] E.g., 4, 5, 6, 34, 35 and 60. But cf. 19.

[44] E.g., 32, 35, 45, 48, 62, and 78.

[45] E.g., 13, 25, 39 and 59.

[46] E.g., 13 and 28.

[47] E.g., 11.

show that large numbers of bills of exchange are drawn on non-banks, such as the buyers of goods. For instance, an estimated 99 per cent of all bills of exchange in the Federal Republic of Germany are drawn on non-bank drawees.[48]

33. The replies concur in bringing out the fact that in most cases, if not regularly, bills of exchange are drawn on a bank when issued under a documentary credit, or in connexion with commercial letters of credit, or when a bank intervenes directly in the financing of a transaction.[49]

(b) *Payable at a bank*

34. The prevailing practice appears to be that bills of exchange are usually payable ("domiciled") at a bank,[50] although a number of replies are to the contrary.[51] No reasons are stated for this difference in practice.

G. *Guarantees of payment (including the* aval*)*

35. In this area, different terms are used for similar undertakings. Under the Geneva Uniform Laws (ULB, articles 30-31; ULC, articles 25-26), an *aval* is a guarantee of payment executed by a signature and words such as "good as *aval*" (*bon pour* aval), either in the instrument or on an "allonge". Other guarantees may be given by a separate instrument. As some replies note, in practice, an endorsement of a bill by the guarantor produces the same effect as an *aval*.[52]

36. There is strong evidence in the replies that the guaranteeing of bills of exchange or promissory notes by an *aval* or by a separate document is a practice that is not frequently resorted to in international transactions.[53] There are, however, a few notable exceptions. Thus, several replies state that guarantee or *aval* is customarily used in connexion with medium-term or long-term transactions,[54] or in transactions with certain groups of countries.[55] In at least one country the obligations of importers under bills of exchange drawn on them are secured by the local bank or by foreign banks acting for it.[56]

37. Little or no mention is made of the practice of guaranteeing promissory notes.[57]

H. *Negotiable instruments drawn in sets*

38. Several replies indicate the existence of a fairly constant practice to draw bills of exchange in sets, either by tradition or in order that a second copy may be issued in the event of the first's going astray; however, the greater number report that this practice tends to diminish or has become rare. On the other hand, it seems that a substantial proportion of documentary credits call for the presentation of documents in sets.

II. Problems encountered in settling international transactions by means of negotiable instruments

39. The second part of the questionnaire was designed to identify the various types of problems that arise in the use of negotiable instruments in international transactions. The first question inquired about problems that are predominantly of a practical nature; the second question asked about problems that are primarily of a legal nature. On analysing the replies, it does not seem helpful, for present purposes, to emphasize this distinction between "practical" and "legal" problems; instead, emphasis will be placed on reported problems that stem from the divergencies between the rules of the Geneva and Anglo-American systems. Similarly, it does not seem helpful, for present purposes, to emphasize those problems or difficulties which do not arise from the nature of negotiable instruments or the rules applicable thereto. Examples of this character include: problems relating to the physical work required in the handling of an ever-increasing volume of paper; the introduction of computers; the lack of uniformity in the format or languages; and errors in drawing instruments where there is no indication that these errors resulted from lack of uniformity in the law.

40. This part of the report contains, by way of comment, explanatory notes on the relevant provisions of the Geneva Uniform Laws and of the Anglo-American law. It is realized that a comparison between the two systems does not necessarily expose the full range of divergencies in the law. Many of the countries that have adhered to the Geneva Conventions have done so with important reservations. Other countries that have used the Geneva texts as models have made important modifications. There are, in addition, important differences among the laws of countries with common law tradition. These major systems, however, have served as the cores around which countries have structured their negotiable instruments law and therefore constitute significant reference points.

A. *General*

41. A number of replies state that the use of negotiable instruments in international transactions has not given rise to any significant problems or difficulties or that, where problems do arise, they occur only in exceptional cases.[58] Some of these replies explain the absence or rareness of problems by the following:

(*a*) The existing laws operate satisfactorily and the divergencies between the civil law and common law systems are mainly of academic importance and, at any

[48] See 22. On the other hand, it is estimated that 75 per cent of all bills of exchange originating abroad and payable in the Member States are drawn on banks (cf. 69). It is, however, not clear whether this percentage also includes "cheques" in the sense of the Geneva Uniform Law.

[49] E.g., 13, 16, 20, 26, 50, 57, 71 and 73.

[50] E.g., 2, 7, 8, 11, 12, 22, 26, 29, 30, 32, 35, 36, 39, 43, 44, 50, 53, 57, 60, 62, 64, 66, 70, 71 and 72.

[51] E.g., 10, 13, 19, 20, 32, 40, 41, 54 and 56.

[52] E.g., 16, 22, 37, 45 and 57.

[53] E.g., 2, 4, 5, 7, 8, 12, 14, 20, 22, 23, 26, 43, 44, 45, 47, 53, 59, 60, 67 and 69.

[54] E.g., 48, 49, 57, 58 and 62.

[55] E.g., 5 and 71.

[56] See 70.

[57] E.g., 40, 41 and 71.

[58] E.g., 8, 12, 13, 32, 35, 42, 43, 44, 45, 47, 48, 49, 50, 56, 57, 58, 59, 60, 66, 67, 74, 76.

event, are not a serious impediment to international payments by means of negotiable instruments;

(*b*) The problems and difficulties that are from time to time encountered are removed or minimized by the Uniform Rules for the Collection of Commercial Paper and the Uniform Customs and Practice for Documentary Credits, drawn up by the International Chamber of Commerce, and by procedures that the banking institutions have developed for the solving of problems on an *ad hoc* basis;

(*c*) The majority of foreign trade transactions takes place with countries whose laws are based on the same principles as those in the country of the respondent;

(*d*) In the majority of foreign trade transactions bills of exchange are not negotiated or transferred, the only parties involved being the drawer (exporter) and the drawee or acceptor (importer).

42. The majority of replies, however, report that problems are encountered in the use of negotiable instruments in international transactions. These problems are set out below under separate headings.

B. *Form and content*

43. A large number of replies draw attention to problems that can be traced to divergencies in the rules in respect of the form and content of negotiable instruments. Although the Geneva Uniform Laws and the Anglo-American law unite on several requirements as to the form and content of instruments, there are significant differences.[59] Some of the replies merely state that problems of this general character occur,[60] while others point to difficulties that have arisen where instruments are drawn in accordance with the provisions of the law of the issuing country but where their form and content do not conform to the provisions of the law of the country of payment.[61]

44. More specifically, problems are said to have arisen in the following contexts;

(a) *The effect of statements in the instrument, such as references to an underlying contract.*[62]

(b) *The effect of "not negotiable" written on the instrument.*[63]

(c) *Deviations from the traditional handwritten signature in drawing, accepting or endorsing an instrument.*[64]

(d) *Bills of exchange payable by instalments.*[65] One respondent comments that the rule (under the Geneva system) against instruments payable in instalments often runs counter to practical requirements, particularly in cases where the contract provides for payment in instalments after delivery.[66]

(e) *Failure to insert the term "bill of exchange" in the body of the instrument.* On this point there is an important difference between the rules of the two principal systems.[67] Some replies note that the absence of the term "bill of exchange" on the instrument often necessitates a confirmation by the drawer that the instrument represents a bill of exchange according to the law of the country of payment.[68] It is also noted that divergent formal requirements often make it difficult to determine whether an instrument is a bill or a cheque.[69] One respondent comments that difficulties in this respect are said to arise where banking institutions of countries belonging to the Geneva system do not accept terms like "First of exchange" or "Sole of exchange", appearing on a bill, as substitutes for the term "Bill of exchange".[70]

(f) *Stipulation of interest.* The Geneva rules set forth restrictions on provision for interest that are not found in Anglo-American law. The replies note that these differences have produced difficulties;[71] they include the suggestion that there should be a uniform rule under which bills of exchange could cover interest as well as principal. One respondent observes that, in foreign trade transactions, the restrictions imposed by the law in regard to interest often make it difficult to draw bills

---

[59] The common grounds shared by the Geneva Uniform Laws and the Anglo-American law are the requirements that the instrument contain (i) the drawer's or maker's signature, (ii) an unconditional promise or order; (iii) payment of a determinable sum of money, and (iv) payment to be made on demand or at a fixed or determinable future time.

There are, however, significant differences between the two systems. First, the Geneva Uniform Laws require that the name of the type of instrument appear on the instrument to establish its negotiability (ULB, article 1 (1)). Second, the Geneva Uniform Laws require that the date and place of issue and the place of payment be set out in the instrument (ULB, article 1 (5) and (7)). Third, the Geneva Uniform Laws require that the name of the payee appear on the face of the instrument (ULB, article 1 (6)).

[60] E.g., 1, 5, 28, 30, 31, 37, 51, 53, 64.

[61] E.g., 2, 6, 11, 14, 15, 26, 37, 71, 73.

[62] E.g., 20.

[63] E.g., 26.

[64] *Ibid.* The Geneva Uniform Laws merely speak of "signature" without defining the term. Under Section 2 BEA " 'written' includes printed, and 'writing' includes print". Under section 1-201 (39 and 46) UCC " 'signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing". UCC section 3-401 (2) states that "a signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature".

[65] E.g., 14, 15, 26, 38 and 70. Bills and notes payable in instalments are deemed null and void under the Geneva system (art. 33 ULB). Anglo-American law, however, specifically allows for bills required to be paid by stated instalments. (Section 9 (1) BEA; section 3-106 (1) UCC.)

[66] See 70.

[67] The Geneva Uniform Laws require that the term "bill of exchange" ("cheque") be inserted in the body of the instrument (art. 1 ULB and ULC), whereas no such requirement is found in Anglo-American law.

[68] E.g., 14, 15, 21, 22.

[69] E.g., 31. See the discussion of differences in terminology in paragraph 32 above.

[70] E.g., 6, 31 and 62.

[71] The Geneva uniform laws contain strict rules on interest. Article 5 ULB allows a stipulation for interest in the case of bills payable at sight or at a fixed period after sight, but such a stipulation is deemed not to be written in the case of any other bill of exchange (i.e. bills payable on or after a fixed period after date). Article 7 ULC does not allow any stipulation in the case of cheques. On the other hand, Anglo-American law (section 9 (1) BEA and section 3-106 (1) (a) UCC) permits the stipulation of interest on any draft or note.

of exchange on purchasers for the price of the goods. For example, it is noted that in cases where the contract provides that the interest and the principal must be separately stated, the interest cannot be included in the total amount of the bill.[72]

C. *Specific problems of rights and liabilities of the parties*

45. The more specific problems or difficulties referred to in the replies may conveniently be summarized under the following sub-headings:

(*a*) Claims and defences of parties;

(*b*) Stipulation of non-liability;

(*c*) Conditional acceptance and conditional endorsement;

(*d*) Liability of third persons signing.

(a) *Claims and defences of parties*[73]

46. Some replies call attention to lack of uniformity with respect to the protection afforded to a holder of a negotiable instrument against defences of the debtor.[74]

(b) *Stipulation of non-liability*[75]

47. One reply calls attention to the provision of the Geneva Uniform Law on bills of exchange prohibiting the drawer from including in the bill any stipulation limiting or excluding his liability for payment.[76] The reply observes that this prohibition conflicts with the relationships between parties using bills of exchange for the settlement of international trade transactions, particularly in cases where there is a documentary credit and the terms of the credit provide for the negotiation of drafts by a bank. It is further noted that this prohibition is inconsistent with provisions of the ICC Uniform Customs and Practice for Documentary Credits on the drawing of drafts without recourse against the drawer.[77]

(c) *Conditional acceptance or conditional endorsement*[78]

48. It is stated that questions arise in connexion with undated acceptances; in common law countries, where the acceptance is undated, the holder may enter the appropriate date on the bill, while under the Geneva system the holder must, in such a case, protest the undated acceptance.[79] Problems appear to have arisen also because of uncertainties as to the effect, under the laws of various jurisdictions, of certain forms of endorsements.[80]

(d) *Liability of third persons who sign an instrument*[81]

49. Reference is made to problems arising from the fact that the liability of the co-signatories (or co-acceptors) is not uniform under the legislation of the various countries. It is noted that in this respect the Geneva system adopts the institution of *aval*.[82] Problems may also arise from the failure to specify for whom an *aval* is given, and one reply points out the inconvenience of the Geneva rule whereby, in the absence of a precise indication, the *aval* is deemed to have been given in favour of the drawer.[83]

Problems connected with the form of *aval*, the tenor of the operative clause and the place on the bill where it should be indicated are also mentioned in other replies.[84]

---

[72] See 70.

[73] It is in connexion with the circumstances and conditions under which a person may acquire an instrument free of claims and defences of other parties that the Geneva and Anglo-American systems differ considerably. Generally speaking, under the Geneva system (ULB articles 16 and 17 and ULC articles 19, 21 and 22) the possessor of a bill (or endorsable cheque) is deemed to be the lawful holder if he establishes his title through an uninterrupted series of endorsements, good faith, and the absence of gross negligence. Under the UCC (sections 3-302, 3-305 and 3-306), a person obtains preferred status if he is a holder (merely showing an uninterrupted series of signatures that appear to be endorsements does not establish the status of holder) and takes the instrument for value, in good faith, and without notice of certain facts and conditions. See also *infra*, at para. 50 and foot-note [86]. In addition to these differences in conditions, there is also a difference in the degree of protection afforded to the lawful holder.

[74] E.g., 5, 26, 27, 28, 37 and 64.

[75] Article 9 ULB treats any stipulation by which the drawer releases himself from the guarantee of payment as null and void (*idem* article 12 ULC). In contrast with the Geneva uniform laws, both the BEA (section 16 (1)) and the UCC (section 3-413 (2)) permit the drawer to insert an express stipulation negativing or limiting his own liability to the holder of a bill.

[76] See 70.

[77] See also 54 and 62.

[78] Under article 26 ULB the acceptance must be unconditional, but the drawee may restrict it to part of the sum payable. Every other modification introduced by an acceptance into the tenor of a bill operates as a refusal to accept, but the acceptor is nevertheless bound according to the terms of his acceptance. By section 44 (1) BEA, the holder may refuse to take a qualified acceptance and, if he does not obtain an unqualified acceptance, may treat the bill as dishonoured by non-acceptance. Similarly, under section 3-412 (1) UCC any drawer or endorser who does not assent is discharged from his liability on the bill.

As to conditional endorsements, under the ULB (article 12) any condition to which an endorsement is made subject is deemed not to be written. Under the BEA (section 33) conditional endorsements have the same effect as an unrestricted endorsement.

[79] See 70.

[80] E.g., 69.

[81] By articles 30 and 31 ULB, payment of a bill may be guaranteed by the signature of a third person appearing on the bill (*aval*) and, under article 32 ULB, the person who so signs assumes the same liability as the person for whom he has become guarantor. If the *aval* does not specify for whom it is given, it is deemed to have been given for the drawer (article 31 ULB). The nature of the presumption established by article 31 ULB is, however, controversial. Some countries (e.g. Switzerland, *Bundesgericht*, 19 June 1951) consider that the presumption can be rebutted, others (e.g. Germany, *Oberlandesgericht* Stuttgart, 13 November 1936) that it may not be rebutted. In still others (e.g. France) case law shows both tendencies.

Under the BEA (section 56), where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course (unless he excludes his liability, cf. section 16 (1)). The UCC deals, in section 3-402, with a "signature in an ambiguous capacity" and provides that "unless the instrument clearly indicates that a signature is made in some other capacity it is an endorsement".

[82] See 31. *Aval* is discussed *supra* at paragraph 35.

[83] See 26.

[84] E.g., 54.

D. "Consideration" *or* "Value", "Provision" *and* "Abstraction"

50. These varying concepts of common law and of civil law do not appear to have given rise to any serious difficulties, and there are few replies which refer to them.[85]

E. *Forgery and alterations*

(a) *Forged signatures and endorsements*

51. The two principal systems differ sharply with respect to the rights obtained under a forged endorsement.[86] Numerous replies report the existence of problems occurring in connexion with forged signatures;[87] most draw attention to the divergency of legal rules in respect of forgery as being at the root of the problems.[88]

(b) *Alterations*

52. Although a few replies[89] mention problems that have been encountered in connexion with alterations made on instruments without initialling by the party who made the alterations, it is not clear that these problems result from differences in the legal rules.

F. *Lost instruments*

53. Problems arising in this context are sometimes seen as predominantly practical and sometimes as legal. A few of the replies on this point indicate the frequency with which these problems have occurred.[90] These replies suggest that the incidence of lost instruments is low.

54. Some replies point to the differences which exist in respect of the rules applicable to lost or stolen instruments, *inter alia* in the following contexts: the effect of loss or theft on the rights of the parties; procedures for cancelling a lost instrument; the obligation to replace a lost instrument; protection of the rights of the person having lost the instrument, and extinction of obligations under such an instrument. Reference is also made to problems caused by lost travellers' cheques and a few replies indicate the desirability of a uniform regulation in this field.

G. *Protest and notice of dishonour*

(a) *Protest for non-acceptance or non-payment*[91]

55. The problems referred to in the replies under this heading relate mainly to difficulties or legal divergencies concerning the formal requisites of protest and the time within which a bill must be protested. Reference is made to the divergency of rules as to the necessity for protest.[92] Thus, it is said that divergent rules present a serious problem. Particular attention is drawn to the fact that under the law of certain countries protest is a prerequisite to legal action against the acceptor, and not only in the case of recourse. In addition, where an *aval* has been given for the acceptor, it is not always clear whether protest is necessary if the holder wishes to take legal action against the guarantor for non-payment on the part of the acceptor.

56. It is noted that although rules on protest often relate only to the manner of proof of the fact that the bill was presented, the enactments of certain countries also provide for protest as a statutory requirement so that, if protest is not made in accordance with this requirement, the drawer and the endorsers are discharged from liability.[93] Another respondent[94] refers to provision in foreign countries regulating the duties of agents in respect to giving notice of dishonour to their principals. It is noted that these provisions may be less stringent than those to which those agents are required to conform

---

[85] E.g., 26, 37.

[86] Under section 24 BEA, in the case of bills of exchange, no title can be made through a forged signature and the forged (or unauthorized) signature is wholly inoperative. Forgery, therefore, nullifies the claims of subsequent transferees against parties prior to the forgery. The Geneva Uniform Law adopts the opposite principle. Under article 16 ULB, title to a bill is established through an uninterrupted series of endorsements. Consequently, a party taking a transfer of a bill bearing a forged endorsement from a holder subsequent to the forgery obtains a good title.

Under section 3-404 UCC "any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it". The term "unauthorized signature" is defined by section 1-201 UCC to include both a forgery and a signature made by an agent exceeding his actual or apparent authority. Hence, if a signature on the instrument, necessary to the transfer of title (as in the case of a payee's endorsement) is forged, the holder under it cannot take good title and, if he obtains payment or acceptance, will have breached his warranty to the payor or acceptor. Where the UCC may not be applicable to the endorser's contract (as where the endorser is located outside the U.S.), it is the practice of at least some U.S. bankers to obtain from those endorsers special undertakings giving the payor bankers a protection not less than that afforded by the UCC in this regard.

[87] E.g., 1, 4, 5, 26, 28, 30, 33, 34, 35, 40, 49, 60, 62, 64, 69, 73 and 75. But see 69 (legal differences not the principal cause of difficulties).

[88] See 69.

The following example of a problem arising from the difference between the Geneva rules and the rules obtaining under the Uniform Commercial Code is given by the Swedish Bankers' Association. A Swedish bank received for collection a cheque drawn on a bank in the United States. The Swedish bank forwarded the item for collection, received payment in due order without reservations and accounted the proceeds to its principal, after which the Swedish bank assumed that the matter was closed. To gain as much security as possible, Swedish banks often send cheques drawn on U.S. banks for collection with the request for crediting only after final payment. Nevertheless, the Swedish Bank can risk several years later receiving a demand from the relevant bank in the United States, with the information that an endorsement is forged. After so long a period, the Swedish bank usually has no opportunity of following up the matter in Sweden or of obtaining payment from whomsoever was principal at the time.

[89] E.g., 7 and 30.

[90] 15, 16, 36, 43, 44, 64, 74 and 75.

[91] Both the Geneva Uniform Laws (article 44 ULB) and the Anglo-American statutes (section 51 (2) BEA and section 3-501 (3) UCC) require, as a condition for the right to exercise recourse against the drawer and the endorsers, that the holder protest a dishonoured bill for non-acceptance or non-payment. Under Anglo-American law, however, this requirement must be satisfied only in the case of a foreign bill.

[92] See 54 where it is noted that instructions to protest are sometimes given without real necessity.

[93] E.g., 33.

[94] See 2.

by the local legislation; difficult practical and legal problems arise since under such legislation principals are responsible for the acts and omissions of their agents. Still another respondent,[95] in a similar context, refers to cases in which these problems have arisen.[96]

57. Several other replies refer to the different legal effects of protest or failure to make protest. It is said that the absence of uniform rules with regard to the procedural consequences of protest of dishonour gives rise to certain practical and legal difficulties in recovery actions. For instance, the procedural law of certain countries offers the holder of the protested bill certain advantages (accelerated proceedings, attachment of property of the debtor and so forth), while the law of other countries does not confer the same advantages.[97] Some replies merely mention that there have been problems as a result of the fact that the requirements concerning protest of a bill of exchange differ from country to country.[98]

58. More generally, problems are said to arise through a lack of clear understanding, internationally, of the rules on protesting for dishonour and the practice of countermanding payment in respect of bank drafts.[99]

(b) *Formal requisites of protest*[100]

59. Some of the replies state in general terms that difficulties have been experienced owing to differences between legal systems as regards form,[101] or both form and procedure.[102] Other replies specify in what connexion problems have arisen. It is stated that problems occur in connexion with differing interpretations "here and abroad" of legal requirements regarding noting and/or protesting. More specifically, it is noted that countries have varying notarial laws and that no precise pattern exists as to noting and protest.[103] Another reply notes that dissimilarities in the form of protest prescribed by legal systems have resulted in the loss of rights.[104]

60. Many replies favour a simplification of the form and formalities of protest. It is said that, where international transactions are concerned, the formalities are cumbersome owing to the plurality of places and, hence, of applicable laws. (For example, acceptance may occur in one country, and payment in another). The view is expressed that a harmonization and simplification of the relevant rules would be desirable and that a simple bank confirmation should be sufficient.[105]

61. One respondent state that, regardless of the procedure in force in any given country for establishing the fact of non-payment of a bill, all bills drawn for payment abroad are, in the case of dishonour, passed to the authorities by the correspondent bank in the foreign country so that an official protest can be entered.[106]

(c) *Time for protest*[107]

62. Some replies comment on difficulties encountered in respect of the time for protest. Reference is made

[95] See 69.

[96] It is reported that in the United States, the law of the place of issuance of a bill of exchange determines whether protest is required to charge the drawer. The reply of the U.S. Federal Reserve System refers to the following proposition in *Amsinck v. Rogers,* 189 N.Y. 252, 82 N.E. 134 (1907): "Where [a] bill of exchange was endorsed by the drawers to a firm of bankers in the city of New York, who sent it to their agent in Vienna for collection, and such agent failed to demand payment thereof, in accordance with the laws of this state, and upon the refusal of the drawers to pay, failed to protest the same and give notice of such protest to the drawers in the manner required by the law of this state, the latter are discharged from any liability thereunder, notwithstanding the instrument might have been, under the law of Austria, a mere "commercial order" for the payment of money of which no protest need be made".

The application of the law of the place of issuance was reaffirmed in *Bank of Nova Scotia v. San Miguel,* 214 F.2d. 102 (1st Cir. 1954).

[97] See 70.

[98] E.g., 25 and 26.

[99] E.g., 36.

The reply of the Central Bank of Ireland specifies that under Irish law a bill of exchange may be noted as a preparatory step to protest. A bill may be noted on the day of its dishonour and must be noted not later than the succeeding day. The protest may be extended subsequently as of the day of the noting. This procedure, it is stated, is at variance with that obtaining in many countries. In the event of litigation a protested bill is admitted as evidence. It is necessary to have a bill noted or protested, in order to preserve the recourse against the drawer and endorsers, unless the remitter of the bill sends instructions to the contrary. When a bill has been dishonoured, notice of dishonour may be given to the drawer and each endorser as soon as the bill is dishonoured and must be given within a reasonable time thereafter. The return of a dishonoured bill to the drawer or any endorser is deemed a sufficient notice of dishonour. Each endorser of a bill is liable thereon.

[100] By article 44 ULB, default of acceptance must be evidenced by an authentic act (protest for non-acceptance and non-payment) and article 8 of the Geneva Convention for the settlement of certain conflicts of laws in connexion with bills of exchange and promissory notes provides that

> "The form of and the limits of time for protest, as well as the form of the other measures necessary for the exercise or preservation of rights concerning bills of exchange or promissory notes, are regulated by the laws of the country in which the protest must be drawn up or the measures in question taken."

Under section 51 (7) BEA a protest must contain a copy of the bill, and must be signed by the notary making it; it must also specify the person at whose request the bill is protested, and the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found. (See also section 94 BEA.) By section 3-509 UCC: "A protest is a certificate of dishonour made under the hand and seal of a United States consul or vice consul or a notary public or other person authorized to certify dishonour by the law of the place where dishonour occurs."

[101] E.g., 76, 31 and 62.

[102] E.g., 14 and 15.

[103] See 71.

[104] See 16.

[105] E.g., 5 and 26.

Cf. in this connexion section 3-510 (6) UCC, by which "the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonour" is admissible as evidence of dishonour and of notice of dishonour.

[106] See 70.

[107] Article 44 ULB provides that protest for non-acceptance must be made within the limit of time fixed for presentment for acceptance. Protest for non-payment of a bill of exchange payable on a fixed day or at a fixed period after date or sight must be made on one of the two business days following the day on which the bill is payable.

to difficulties experienced in respect of the time within which a bill must be protested under various legal systems. Thus, in several cases, observance of the time-limits has proved difficult or even impossible, and, because of brief time-limits, the commercial banks in some countries are reluctant to assume the obligation to protest.[108]

III. Comments in replies concerning the substance of possible new uniform rules

63. The first part of the Questionnaire (set out in full at para. 7, *supra*) elicited information on the current practices followed in making and receiving international payments. The responses are summarized in part I of this report at paragraphs 13-38, *supra*. The second part of the Questionnaire sought information concerning the problems encountered in making and receiving international payments by means of negotiable instruments. The responses are summarized in part II of the report at paragraphs 39-62, *supra*.

64. In addition, an annex accompanying the Questionnaire invited comments concerning the possible content of new rules applicable to international transactions, if such rules should be formulated. These questions were primarily concerned with points on which there are divergencies among the prevailing legal systems. The replies to these questions constitute a voluminous and valuable documentation on the views of Governments and banking institutions on important issues of negotiable instruments law in the context of international payments.

65. The richness and variety of these replies present difficult problems for analysis. The suggestions and opinions concerning new rules that might be proposed point in various directions. In addition, opinions concerning the appropriate rule on one issue are often related to a proposed rule on a different point. In such cases it would be misleading to catalogue replies without taking full account of these complex relationships.

66. As has been noted (*supra*, para. 3), in evaluating the responses to the Questionnaire, the Secretariat has received valuable assistance from specialists related to various international organizations having interest and competence in this field. At the time of the most recent meeting for such consultation, held in Paris from 19-23 January 1970, several important replies from Governments and banking organizations were not yet available for analysis. In addition, it may now be advisable and feasible to consult international organizations and others who are in a position to contribute the experience and viewpoints of additional regions.

67. For these reasons, it was deemed appropriate to defer the preparation of the analysis of the comments concerning the substance of the possible new rules until after further study and consultation.

IV. Conclusions

A. *The question of continuation of work in respect of the law of negotiable instruments*

68. As was indicated in part II of this report, many replies support the view that international payments, for the most part, are effected efficiently and without legal difficulty; other replies note that the transactions in which difficulties arise because of legal disharmony constitute a very small percentage of the total body of international payments.[109]

69. Certain replies have pointed to ways in which banks have been able to develop procedures or arrangements to overcome difficulties resulting from divergencies in the law. For example, although many replies have drawn attention to the problems resulting from the divergency between the rules of different legal systems with respect to the effect of a forged endorsement (para. 51, *supra*), it appears that certain banks have been able to secure special undertakings from foreign banks and customers by which they obtain protection that is equivalent to that afforded under local law[110] or by which they safeguard themselves against liability.[111] Various banks have also pointed to the utility of standardized procedures and standard contract provisions such as those of the ICC Uniform Customs and Practice for Documentary Credits. On the other hand, it appears that such arrangements have their principal utility in defining the relationship between the banks and their own customers and in establishing a contractual definition of the obligations of banks in certain special situations, such as the handling of bills of lading and related documents submitted under letters of credit. It is not suggested that such arrangements solve the problems resulting from divergencies in the legal rules with respect to the rights and liabilities of all the parties to a negotiable instrument for international payments, such as the rights and liabilities of endorsers and drawees who are not parties to such undertakings. The replies also make it apparent that, even when transactions are settled satisfactorily by banks, delays may occur, or the customer may incur loss or extra expenses.[112]

By section 51 BEA a bill must be noted on the day it is dishonoured, and when a bill has been duly noted, "the protest may be subsequently extended as of the date of the noting". Under the BEA, "the actual protest, as distinguished from the noting, may be drawn up and completed at any time before the commencement of the suit, or even before or during the trial, and antedated accordingly". (Byles on Bills of Exchange, 22nd ed., p. 174.) See section 93 BEA.

By section 3-509 (4) UCC, any necessary protest is due by the time that notice of dishonour is due.* However, under section 3-509 (5), "If, before protest is due, an instrument has been noted for protest by the officer to make protest, the protest may be made at any time hereafter as of the day of the noting".

* Section 3-508 (2) provides that "Any necessary notice must be given by a bank before its midnight deadline and by any other person before midnight of the third business day after dishonour or receipt of notice of dishonour".

[108] E.g., 16, 17, 62.

[109] See the references at note 58, *supra*.

[110] See *supra* at note 86. For concern by foreign banks with the legal rules resulting from such arrangements, see note 88.

[111] Banks in many countries incorporate clauses in their general conditions whereby transferors are responsible, vis-à-vis the bank that discounts or pays the negotiable instrument, for the consequences of forged endorsements or of forgeries in the text of a bill of exchange or cheque. Cf. 75.

[112] See also the reply of the French Bankers' Association which notes that problems and disparities "... are mitigated in practice only by compromise solutions, conventional exceptions

70. It is relevant to note the substantial number of replies, summarized in part II, *supra*, that point to specific problems resulting from disharmony in the law. Attention may be directed, for example, to the emphasis which the replies have given to difficultes that arise from disharmony in rules governing formal requisites for negotiable instruments,[113] the effect of forged endorsements,[114] and the requirements as to the mode and time for protest and notice of dishonour.[115]

71. It should also be pointed out that the analysis of reported problems in part II, *supra*, does not take into account several important replies that were received after the preparation of that part.[116]

72. The Commission may therefore think that there is, at this stage of the preparatory work, sufficient basis for continuing with the study. Possible steps for further action which the Commission may wish to consider are set out below.

B. *Possible steps for further action*

73. For the reasons indicated in paragraphs 67 and 71 above, the Commission may wish to request the Secretariat:

(*a*) To prepare a detailed analysis of the replies to the annex (the substance of possible new uniform rules), and to ask the respondents to supplement or clarify the information they have given where such information shows gaps;[117]

(*b*) To complete the analysis of part II of this report (problems encountered in settling international transactions by means of negotiable instruments) by including the replies that arrived too late for analysis herein.

74. The Commission may also wish to request the Secretariat to hold further consultations with international organizations for the purpose of analysing the information received and evaluating its bearing on commercial practice.[118] In this connexion, the Commission may wish to provide guidance as to feasible ways to elicit assistance from organizations representing other regions and interests.

75. It is hoped that the evidence already before the Commission and any supplementary evidence which will be supplied to it in time for the fourth session will enable the Commission to decide at that session whether further action in respect of the law of negotiable instruments is justified. If so, the Commission would then probably also wish to consider that approach, among the several that would in principle be open to it, would best correspond to the needs of commercial practice in that field. In order to assist it in its deliberations, the Commission may therefore with to request the Secretariat, in addition to completing the analysis, to make a study of the alternative approaches by which the unification and harmonization of the law of negotiable instruments could be promoted. The alternative approaches might include the following:

(i) A convention that would prescribe the rules governing negotiable instruments used for international payments. (Compare the approach of the Uniform Law for the International Sale of Goods attached to the Hague Convention of 1964.)

(ii) A convention similar to that outlined in (*a*) above, but with substantive rules limited to the most troublesome problems of divergency under the present legal systems.

(iii) A convention setting forth rules would be applicable only to those instruments used in international payments that bear an identifying label. (E.g. "International Bill of Exchange subject to the . . . Convention".) Thus, the uniform rules prescribed by such a convention would be applicable on an optional basis, i.e. when the parties so choose.[119] This approach should be contrasted to that of the uniform rules prescribed by a convention of the type referred to under (i) above, which would be mandatory for international transactions in instruments defined in the convention.

(iv) A programme directed towards harmonization of the existing systems by encouraging the modification of certain of the rules of the existing national laws that have proved to be particularly troublesome for international transactions.[120]

(v) Assistance or encouragement in the development and acceptance by banks of uniform contractual

or other purely empirical practices. There might be a temptation to think that these pragmatic and necessarily very varied options provide an element of flexibility which makes it possible for negotiable instruments to be adapted to the circumstances and special rights of those using them. In fact, this argument cannot outweigh the vital consideration of the need for clarity and security in the legal relations between all parties interested in the *dénouement* of the transaction to which the instrument relates. This clarity and security can come only from universally accepted rules reflected, in practical terms in formal liabilities which are as precise and strict as possible".

[113] See paras. 43 and 44, *supra*.

[114] See para. 51, *supra*.

[115] See para. 55, *supra*.

[116] Nineteen further replies were received between 19 January and 9 March 1970.

[117] Many respondents declared their willingness to supply the Commission with further information, if so requested.

[118] See the Commission's decision in this regard, quoted in para. 2 of this report.

[119] A recent example of the optional application of legal provisions to an international document is provided by the Draft Convention on Combined Transports (Tokyo Rules). Articles 2 and 3 of this Draft Convention reads as follows:

"2. In this Convention, 'Combined Transport Bill of Lading' (CT A Bill of Lading) means a document evidencing a contract for the carriage of goods between two States by at least two modes of transport of which at least one is by sea or inland waterways and at least one is not by sea, which bears the heading 'Combined Transport Bill of Lading subject to the Tokyo Rules'.

"3. Each Contracting State shall apply the provisions of this Convention to every CT Bill of Lading and to the contract evidenced thereby whatever may be the place of issue, the place at which the goods are taken in charge, the place designated for delivery, or the nationality of the means of transport, the combined transport operator, the consignor, the consignee or any other interested person."

[120] Suggestions to this effect were made in some replies, e.g., 21, 22, 27.

arrangements or guides to practice, designed to minimize misunderstanding or dispute.

76. In view of the time needed for the completion of the analysis, the preparation of studies and the consultation with interested organizations, the Commission may wish to defer a decision on the creation of a Working Group on Negotiable Instruments until its next session.

B. Bankers' Commercial Credits

*Note by the Secretary-General transmitting a study by the International Chamber of Commerce on documentary credits and observations thereon**

1. The United Nations Commission on International Trade Law (UNCITRAL), at its first session, decided to include in its work programme, as a priority item, the subject of bankers' commercial credits as related to international payments.[1] In view of the interest of, and work done by, the International Chamber of Commerce on this and related topics, the Commission further decided to request the Secretary-General to inquire whether the International Chamber of Commerce would be prepared to undertake a study of the subject.[2] The Secretary-General was also requested to consult with other organizations concerned.[3]

2. In accordance with the Commission's request, the Secretary-General, by a letter dated 21 May 1968, inquired whether the International Chamber of Commerce would be prepared to submit, for transmission to the Commission, a study on the above topic. In response to the Secretary-General's inquiry, the International Chamber of Commerce prepared a study entitled "Documentary Credits", which is reproduced in annex I below.

3. By a letter dated 11 November 1968, the Secretary-General transmitted the study to the organs and organizations listed in annex II to this document and invited them to submit any observations they might wish to make on the subject of bankers' commercial credits as related to international payments, as well as any suggestions on steps which UNCITRAL might usefully take in promoting the harmonization and unification of law in this matter.

4. At the time of writing of this note, replies had been received from the secretariats of the Economic Commission for Europe and the International Institute for the Unification of Private Law (UNIDROIT).[4]

5. The Executive Secretary of the Economic Commission for Europe stated that the Uniform Customs and Practice for Documentary Credits, codified by the International Chamber of Commerce, "appeared to meet fully the requirements of the interested parties" and endorsed the suggestion made by the International Chamber of Commerce in its study that UNCITRAL should commend the Code to all Member States of the United Nations.

6. The Secretary-General of UNIDROIT qualified the Code as "the most typical example of the efficacy of the unification of law realized through standardization of commercial customs and practice" and advised that UNIDROIT, in collaboration with the international Chamber of Commerce and the Economic Commission for Europe, was preparing for 1969 a round-table conference of interested international organizations on legal problems concerning the international through bill of lading and, particularly, the document of carriage and title to be used in respect of goods shipped in large containers. It was suggested by UNIDROIT that the conclusions reached at that conference might be considered by the International Chamber of Commerce at a future review of the Uniform Customs and Practice for Documentary Credits.

ANNEX I

Documentary credits:

STUDY SUBMITTED TO THE UNITED NATIONS BY THE INTERNATIONAL CHAMBER OF COMMERCE

Introduction

1. From the viewpoint of the merchants involved international trade can present many problems, not the least being that of providing the "commercial security" desired by both buyer and seller, i.e. ensuring that both the making and receiving of payment for the goods shall be effectively linked with the passing of title to such goods.

2. For nearly a century — and on an increasing scale since the 1920s — internationally operating bankers have been making a major contribution to the solving of this specific problem by providing "documentary credits" — sometimes also referred to as "documentary letters of credit" or "commercial credits" or "commercial letters of credit".

Definition

3. Currently, these credits are internationally defined as:

"... any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant for the credit), is to make payment to or to the order of a third party (the beneficiary) or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or authorises such drafts to be paid, accepted or negotiated by another bank, against stipulated documents and in compliance with stipulated terms and conditions."

4. Basically, therefore, such "arrangement", whether described as a "credit" or a "letter of credit", or as "documentary"

[1] Report of the Commission on the work of its first session, (A/7216), para. 25.

[2] *Ibid.*, para. 28.

[3] *Ibid.*

[4] Comments and observations that may be received hereafter from other organizations are summarized in the addendum to this document.

* A/CN.9/15 and Add.1.