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**DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL
PROMISSORY NOTES AND DRAFT CONVENTION ON INTERNATIONAL CHEQUES:**

Major controversial and other issues

Addendum

Summary of the comments of Romania and Switzerland

Note by the Secretariat

1. This addendum contains an analytical survey of the comments of Romania and Switzerland on the draft Convention on International Bills of Exchange and International Promissory Notes and the draft Convention on International Cheques. These comments were received after document A/CN.9/249, analyzing the comments of 24 Governments and the International Monetary Fund, had been completed. The comments of Romania and Switzerland could also not be included in the analytical compilation of comments by Governments and international organizations (A/CN.9/248).*

*Copies of the comments of Romania and Switzerland in their original language (French) will be made available at the session.

PART I: GENERAL COMMENTS ON THE DRAFT CONVENTIONS

A. Draft Convention on International Bills of Exchange and International Promissory Notes

2. Switzerland is of the opinion that

- (a) the co-existence of two divergent systems of negotiable instruments law (i.e. the Anglo-American system and the Geneva uniform law system) has not adversely affected international payment transactions by means of these instruments, and that it therefore must be doubted whether the creation of a third system is justified;
- (b) difficulties arising in connection with negotiable instruments do not stem from the applicable law but are due to such problems as the insolvency of the debtor or foreign exchange restrictions.

3. Switzerland also expresses the view that

- (a) though in international payment transactions the bill of exchange has to a great extent been replaced by the documentary letter of credit and other payment instruments, there are certain commercial transactions that require the use of an instrument such as the bill of exchange which retains its importance as an instrument of credit and of discounting. A modernization of the bill of exchange could well make this type of commercial paper more attractive;
- (b) the work carried out by UNCITRAL might serve as the basis for the formulation of a new system that would replace the Geneva uniform law. The Convention embodying the new system should unify the law represented by the two major systems. States that become parties to the Convention would undertake to incorporate it in their domestic law;
- (c) the proposed draft Convention sets forth rules governing international bills of exchange, whilst what is needed are international rules governing bills of exchange. It is considered inadvisable to establish a new third system in addition to the existing systems. Such an approach would leave current problems unresolved and only create additional problems.

B. Draft Convention on International Cheques

4. The comments of Switzerland on the draft Convention on International Cheques take up the gist of the comments made in respect of the draft Convention on International Bills of Exchange and International Promissory Notes: the creation of a third system applicable to international cheques is inadvisable and the work of unification should be directed towards a convention, acceptable to both common law and civil law countries, which contracting States would incorporate in their domestic law.

5. Switzerland is moreover of the view that the cheque, as a widely used payment instrument, requires special collection rules and that a convention on international cheques should set forth rules dealing with the technical aspects of this type of instrument, such as standardization of size of and indications on the cheque, lines of printed numerical symbols (encoding), etc., which would facilitate the electronic processing of cheques.

PART II: MAJOR CONTROVERSIAL ISSUES

6. The issues referred to under A, B and C below are presented here in respect of the draft Convention on International Bills of Exchange and International Promissory Notes but concern equally the draft Convention on International Cheques.

A. Forged endorsements (articles 14 (1) (b) and 23)

7. Switzerland approves of the principle stated in article 14 (1) (b) in that it facilitates the circulation of the bill of exchange. However, the proposed scheme in respect of forged endorsements presents, in the view of Switzerland, certain disadvantages. In particular, article 23 imposes on the transferee the obligation to verify the authenticity of the signatures on the bill of exchange. Such an obligation has drawbacks on the national level but these would become almost insurmountable on the international level. Article 23 would thus adversely affect two essential properties of the bill of exchange: its ease of circulation and its negotiability. The Swiss comments give the following example: assume a bill is drawn in Hong Kong in favour of a payee domiciled in Switzerland; the payee endorses the bill to an American citizen living in New York. If the signature of the Swiss payee has been forged, the American endorsee would, under article 23, incur liability because he does not know the Swiss payee personally and is not in a position to verify rapidly and correctly the authenticity of the latter's signature.

8. In the opinion of Switzerland the risk of a forged endorsement should be borne by the person who is at fault or has been negligent, i.e. by the person who lost the instrument and by the forger. However, with regard to cheques, Switzerland notes that the solution of the draft Convention may have certain advantages in view of the growing practice of "cheque truncation".

B. The concept of holder and protected holder

9. Switzerland is of the view that the concept of "protected holder" may give rise to confusion. The position of a protected holder seems to correspond to that of a holder under the Geneva uniform law. In the result, the holder under the draft Convention is, from a legal point of view, in a far less favourable position than the holder under the Geneva system.

10. Switzerland further expresses the view that, by establishing a special category of privileged holders (protected holders), the draft Convention introduces the notion of causality and all kinds of defence may be set up against the non-protected holder. Grave negligence may prevent a holder from being a protected holder. However, under article 17 of the Geneva uniform law on bills of exchange and promissory notes, protection is denied only if the holder has knowingly acted to the detriment of the debtor. In the opinion of Switzerland the approach of the draft Convention would impair the circulation of the international bill of exchange. Moreover, that approach is thought to be too complicated. Preference is given to the more simple approach of the Geneva uniform law which has proved to be entirely satisfactory.

C. Liability of the transferor by mere delivery

11. According to the Swiss comments the provision laid down in article 41 is contrary to the Swiss legal order in that it imposes liability on a transferor who has not signed the instrument and who has no knowledge of the irregularities referred to in the article. The provision is not in accordance with the principle of good faith and must, for that reason, be rejected.

PART III: ADDITIONAL ISSUES

A. Draft Convention on International Bills of Exchange and International Promissory Notes

12. Article 4 (10): "signature"

- (a) Romania is of the opinion that the draft Conventions should not allow a signature being made by facsimile, because of the inherent danger of forgery.
- (b) Switzerland states that this provision could give rise to difficulties under current Swiss law which does not recognize a signature by facsimile.

13. Article 4 (11): "definition of 'money' "

- (a) Romania is opposed to the inclusion of monetary units of account in the definition of "money" since this may create difficulties as regards the circulation of negotiable instruments.
- (b) Switzerland finds the definition of "money" unacceptable in that it includes a monetary unit of account. It is stated that at present the use of negotiable instruments denominated in a unit of account is unknown.

14. Article 6: "stipulation of interest"

Switzerland would prefer the provision of the Geneva uniform law on bills of exchange and promissory notes to article 6 of the draft Convention. Under article 5 of the Geneva uniform law a stipulation of interest is admissible only in respect of a bill drawn payable at sight or at a fixed period after sight. In respect of bills with a fixed maturity date interest may be calculated in advance and included in the amount of the instrument. It is pointed out that the stipulation of a rate of interest in the bill might give rise to problems particularly when bills are discounted in that the discounting bank applies a discount rate that is independent from the interest rate stipulated.

15. Article 8 (3) (c) and (d): "instruments payable by instalments"

Switzerland suggests that sub-paragraphs (c) and (d) of paragraph (3) of article 8 be deleted.

16. Article 9: "plurality of drawers or payees"

Switzerland states that the plurality of drawers or payees is almost never encountered in practice, and it doubts the usefulness of article 9 (1) and (2). It is suggested that, if the provision were retained, the presumption of paragraph (3) be reversed and that an express statement in the bill be required for those cases where payment must be made to two or more payees.

17. Article 22: "transfer after maturity"

Switzerland notes that article 22 does not specify the effect of a transfer after protest for non-payment. It is suggested that, in this respect, article 22 should follow article 20 of the Geneva uniform law on bills of exchange and promissory notes according to which such a transfer operates only as an ordinary assignment.

18. Article 27: "shelter rule"

Switzerland is opposed to the shelter rule in that it may violate the principle of good faith.

19. Article 34 (2): "liability of the drawer"

Switzerland is opposed to a provision permitting the drawer to exclude his liability.

20. Article 42 (5): "guarantee"

Switzerland objects to the presumption that if a guarantor has not specified the person for whom he has become guarantor, that person is the acceptor or the drawee in the case of a bill and the maker in the case of a note.

21. Article 46 (1): "presentment for acceptance"

Switzerland doubts the appropriateness of the rule that the drawer may stipulate on a bill that it must not be presented for acceptance before the occurrence of a specified event.

22. Article 48: "dispensation of presentment for acceptance"

Switzerland suggests that article 48 (a) specify that a necessary or optional presentment for acceptance is dispensed with only if no person or authority entitled under the applicable law to accept the bill can be found. On the other hand it is submitted that the notion of "reasonable diligence" is too vague and would create a degree of legal insecurity that must be considered inadmissible.

23. Article 51 (e): "due presentment for payment of an instrument not payable on demand"

Switzerland suggests that article 51 (e) should follow the rule of article 38 of the Geneva uniform law on bills of exchange and promissory notes according to which a bill not payable on demand may be presented on the date of maturity or on one of the two business days which follow. The Geneva rule is particularly commendable in the context of international payment transactions.

24. Article 52: "presentment for payment excused"

In the view of Switzerland the fact that article 52 recognizes that delay in making presentment for payment may be excused for reasons which are personal to the holder might create legal insecurity.

Objection is also made to waiver of presentment for payment by implication.

25. Article 60: "notice of dishonour"

Switzerland prefers the approach of the Geneva uniform law under which the holder is required to give notice of dishonour merely to his endorser and to the drawer, and every endorser is required to notify his endorser of the notice he has received.

26. Article 66: "reimbursement of costs"

Switzerland notes that article 66, as currently drafted, does not make clear whether or not the holder may recover costs he incurred by exercising his right of recourse.

27. Article 71: "payment in the currency expressed"

In the opinion of Switzerland the provisions of article 71 are often repetitive and of a too great complexity.

28. Suggested new article on enforceability

Romania suggests inclusion in the draft Convention of a new article providing for the enforceability of bills of exchange, as found in certain legal systems (e.g. Italian and Romanian law). Such simplified enforcement procedure would be of advantage to the creditor in that it would ensure speedy recovery of the sum due.

B. Draft Convention on International Cheques

29. Article 4: "date of issue"

Switzerland expresses the view that article 4 is not acceptable if it is to be interpreted as stating the rule that the date of issue on a cheque is of secondary importance. Amongst other things the time within which a cheque must be presented for payment depends on the date of issue (cf. article 43).

30. Article 6 (3): "definition of 'banker' "

It is suggested by Switzerland that the commentary to article 6 (3) specify that "any person or institution assimilated to a banker" refers only to such person or institution which is subject to adequate supervision by the State. The reason for this suggestion is that there exist in many countries financial establishments, analogous to banks, that do offer certain banking services but, because they do not refinance themselves from deposits, are not subject to supervision designed to protect the creditors of these establishments. The view is expressed that if such establishments were considered as "bankers" for purposes of the Convention, confidence in the international cheque as a means of payment would be seriously impaired.

31. Article 8: "definite sum"

Switzerland notes that this article does not deal with the question whether the sum payable by a cheque may be expressed in more than one currency and, therefore, does not answer the question whether a so-called multiple currency clause meets the requirement of a "definite sum of money". It is further noted that multiple currency clauses are frequently used in practice in connection with the issue of bonds and notes. A multiple currency clause in a cheque could, for instance, read as follows:

"Pay £ 5,000 in Swiss francs at the rate of exchange of (x) Swiss francs for one pound sterling or in German marks at the rate of (y) German marks for one pound sterling."

It is suggested that the Convention give a clear answer (positive or negative) to this question.

32. Article 36: "certification, confirmation, acceptance, etc. of a cheque"

Switzerland is of the view that the provision of article 36 is contrary to the very nature of the cheque which is an instrument of payment and not of credit. The provision would create risks for the drawee banks in light of the rule that, under the draft Convention, the time-limit for presentment is 120 days.

33. Article 43: "time-limit for presentment"

Switzerland is of the opinion that the time-limit of 120 days within which a cheque must be presented for payment is too long and would transform the cheque into an instrument of credit. It is suggested that the time-limit of 70 days laid down in the Geneva uniform law on cheques (art. 29) in cases where the place of issue and the place of payment are situated in different continents should be the maximum period of time allowed for presentment.