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The U.N. Convention on International Bills of Exchange and International Promissory Notes with Some Comparisons with the Former and Revised Article Three of the UCC

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ARTICLES

THE U.N. CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES WITH SOME COMPARISONS WITH THE FORMER AND REVISED ARTICLE THREE OF THE UCC

D.E. Murray*

I. INTRODUCTION .......................................................... 191

II. WHAT IS AN INTERNATIONAL BILL OF EXCHANGE OR PROMISSORY NOTE? . 193

III. FORMAL REQUIREMENTS FOR THE INTERNATIONAL BILL OF EXCHANGE AND PROMISSORY NOTE ........................................... 194

IV. TRANSFER OF INSTRUMENTS ........................................ 196

V. FORGERY OF ENDORSEMENTS ..................................... 198

VI. UNAUTHORIZED AGENCY ENDORSEMENTS ........................... 199

VII. THE RIGHTS OF A "HOLDER" AND A "PROTECTED HOLDER" .......... 199

A. Rights of a "Holder" .................................................. 199

B. Rights of a "Protected Holder" .................................... 202

VIII. LIABILITIES OF THE PARTIES ................................... 204

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A. Signatures ............................................ 204
B. Alterations ........................................... 204
C. Signatures by Agents ............................... 205
D. The Bill of Exchange Is Not an Assignment .......... 206
E. Liabilities of the Drawer and Maker .................. 206
F. Liabilities of the Maker ............................... 206
G. Liabilities of the Drawee and Acceptor ................ 207
H. Qualified and Unqualified Acceptances ............... 208
I. Liabilities of the Indorsers ........................... 209
J. Transfer Warranties by the Indorser .................. 209
K. The Guarantors of Instruments ........................ 210

IX. PRESENTMENT, DISHONOR BY NON-ACCEPTANCE OR NON-PAYMENT,
AND RECOURSE ........................................... 213
A. Presentment ........................................... 213
B. Protest .................................................. 214
C. Notice of Dishonor ..................................... 215

X. AMOUNT PAYABLE ........................................ 216

XI. DISCHARGE ............................................. 218
A. Partial Payments ........................................ 219
B. Currency of Payments ................................... 219
C. Exchange Control Regulations .......................... 221

XII. LOST INSTRUMENTS ..................................... 221

XIII. STATUTE OF LIMITATIONS (PRESCRIPTION) ............. 223

XIV. CONCLUSION ........................................... 224
I. INTRODUCTION

The United Nations Convention on International Bills of Exchange and International Promissory Notes is the result of years of drafting designed to merge the Geneva Convention of Uniform Law on Bills of Exchange and Promissory Notes (and codifications based on the Uniform Law) with the English Bills of Exchange Act and the Uniform Commercial Code (UCC). The United States, the USSR, and Canada signed the Convention, but have not yet ratified it.

Major criticism of the non-signing countries primarily centers on four areas. The first problem is with the style of drafting. Allegedly, the authors "exaggerated [the] use of the technique of cross-references . . . which makes the reading of the text extremely difficult and which inevitably entails the danger of contradictions and uncertainties in interpretation." The second area of criticism focuses on "holders" and "protected holders" who resemble, to a limited degree, the notions of "holders" and "holders in due course" found in the Anglo-American codifications. These terms are foreign to many civil law lawyers who think that they are a needless complication.

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6. Id. at 5, 10-12, 15, 24-25, 29 (official comments of the Chilean, French,
The third criticism concerns forged indorsements. Under the Geneva Convention, if the signature of the payee or special indorsee is forged, the immediate innocent taker may still be a holder. The contrary is true under the Anglo-American system. The new Convention tries to merge these dual systems into a “two-step laundering” process which puts the risk of loss upon the first taker from the forger—later takers would thus take good title.

The fourth major objection concerns the attempt to adopt a dual system of the Anglo-American “accommodation party” and the civil law “aval.” Under the U.S. system, the “accommodation party” guarantees the creditworthiness of the principal debtor, but can escape liability where the principal debtor’s signature is forged or made without authority. Under the civil law approach, however, forgery or the making of a principal debtor’s signature without authority does not give the “accommodation party” a defense. Further complicating this matter, it appears that under articles 47 and 48, if the guarantor uses the word “guarantor,” her liability is governed by the common law rules, whereas if she signs as an “aval” or “good as aval,” she will be subject to the civil law system. If she does not use these terms, a court will have difficulty in deciding the case.

In addition to these major areas of concern, if not outright rejection, some countries also object to the variable interest rate provisions.

This Article discusses the proposed Convention, compares its provisions with former and revised article 3 of the UCC, and explores the objections to the Convention’s adoption. It is evident that the Convention’s provisions bear a startling resem-
II. WHAT IS AN INTERNATIONAL BILL OF EXCHANGE OR PROMISSORY NOTE?

An international bill of exchange or international promissory note must contain a heading stating "International Bill of Exchange (UNCITRAL Convention)" or "International Promissory Note (UNCITRAL Convention)," with the same words repeated in the text. In addition, the international bill of exchange must specify at least two of the following places, and that any two are located in different countries:

1. The place where the bill is drawn;
2. The place indicated next to the drawer's signature;
3. The place indicated next to the drawee's name;
4. The place indicated next to the payee's name;
5. The place of payment.

The place where the bill is drawn or the place of payment must be located in a Contracting State, and must be stated on the bill. The international promissory note has the same requirements, with the omission of the place of the drawee's name. In spite of these elaborate requirements, article 88 provides that "[a]ny State may declare at the time of signature, ratification, acceptance, approval or accession that its courts will apply the Convention only if both the place where the bill is drawn, or the note is made, and the place of payment indicated in the instrument are situated in Contracting States."

15. Convention of Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 1(1) and (2), at 2-3.
16. Id. art. 2(1)(a), at 3.
17. Id. art. 2(1)(b).
18. Id. art. 2(1)(c).
19. Id. art. 2(1)(d).
20. Id. art. 2(1)(e).
21. A Contracting State is a state bound by the Convention, rather than the UCC.
22. Convention of Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 2(1), at 3.
23. Id. art. 2(2).
24. Id. art. 88(1), at 39.
The reader should take note that the Convention does not contain any express formal method of "contracting out" of the Convention in the manner specified in article 6 of the Convention on Contracts for the International Sale of Goods. Article 6 of that Convention provides that "parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." Of course, article 6 encourages various countries to half-heartedly adopt the Sales Convention, since its citizens can contract out of the Convention at every opportunity. The typical English trade association form sales contract, for example, expressly excludes the Sales Convention and adopts English law. The negotiable instrument Convention, on the other hand, is much more subtle. One cannot expressly contract out of this Convention, but can prevent it from applying by omitting any of the above textual and/or geographical articulations.

III. FORMAL REQUIREMENTS FOR THE INTERNATIONAL BILL OF EXCHANGE AND PROMISSORY NOTE

The Convention requires that bills of exchange and promissory notes be in writing, contain an unconditional order or promise, be payable at a definite time or on demand, and be dated and signed by the drawer or maker of the instrument. The Convention does deviate from the usual rule that an instrument must be made payable to order by stating that the instrument must contain an order or promise "to pay a definite sum of money to the payee or to his order." This lan-
THE U.N. CONVENTION

guage seems to dispense with the necessity of using the magic words "to the order of" on these instruments. This new approach parallels the method of section 3-104(a) of the revised article 3 of the UCC, which makes all checks negotiable even where the magic words are omitted or stricken from the check form.33

Instruments may be payable with interest.34 This is unusual with bills of exchange, but common for promissory notes in the United States. The instrument may be payable in installments at successive dates and may contain a stipulation that, if a default occurs on any installment, the unpaid balance becomes due.35 The instrument can be payable in a stated rate of exchange or "to be determined as directed by the instrument; or [i]n a currency other than the currency in which the sum is expressed in the instrument."36

If the instrument provides for payment of interest, it must specify the rate or the clause shall be deemed not to have been written on the instrument.37 As an exception to this rule, if the instrument provides for a variable rate of interest:

it must vary in relation to one or more reference rates of interest in accordance with provisions stipulated in the instrument and each such reference rate must be published or otherwise available to the public and not be subject, directly or indirectly, to unilateral determination by a person who is named in the instrument at the time the bill is drawn or the note is made, unless the person is named only in the reference rate provisions.38

The instrument may provide a floor and a ceiling for the amount of any variable interest rate.39 If the variable interest rate does not qualify under article 8, or for any reason it is not possible to determine the rate, the rate is calculated under article 70.40

34. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 7(a), at 5.
35. Id. art. 7(b) and (c).
36. Id. art. 7(d) and (e), at 6.
37. Id. art. 8(5).
38. Id. art. 8(6).
39. Id. art. 8(7).
40. Id. art. 8(8).
Section 3-106 of the former article 3 of the UCC required that instruments be payable for a sum certain, but did allow instruments with “stated different rates of interest before or after default or a specified date.” Most U.S. courts held that if the interest rate was not stated, but variable with reference to an outside source for the rate, the instrument was not negotiable. Today, under revised section 3-112, variable rate instruments that “require reference to information not contained in the instrument” are negotiable.

IV. TRANSFER OF INSTRUMENTS

Articles 13 and 14 provide for blank and special indorsements in a manner greatly resembling sections 3-201 and 3-204 of the revised article 3.

In the United States, a possessor of an instrument that bears the forged signature of the payee or a special indorsee cannot be a “holder.” The Convention directly contradicts this approach by saying that the possessor is a holder if he is:

[i]n possession of an instrument which has been endorsed to him, or on which the last endorsement is in blank, and on which there appears an uninterrupted series of endorsements, even if any endorsement was forged or was signed by an agent without authority.

Article 15 further says that a person is not prevented from being a holder even if the holder (or a previous holder) obtained the instrument “under circumstances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or a defence against liability on, the instrument.”

41. U.C.C. § 3-106(b) (1989).
42. For a current review of the case law, see Amberboy v. Societe de Banque Privee, 831 S.W.2d 793 (Tex. 1992).
44. The Uniform Commercial Code spells the word as “indorse.” Other sources, such as the Convention, spell this term as “endorse.” Except for direct quotations to the Convention, the term used herein shall be the former usage.
46. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 15(1)(b), at 9 (emphasis added).
47. Id. art. 15(3).
These seemingly dramatic definitions of a "holder" become less dramatic when, as we shall see, the Convention draws large distinctions between a mere "holder" and a "protected holder."  

The Convention articulates methods for the drawer, maker, and indorser to destroy negotiability. If either of the aforementioned parties places the phrase "not negotiable," "not transferable," "not to order," "pay (x) only," or similar words on the instrument it may not be transferred, except for collection. Under revised section 3-104(d), the maker or drawer of a note or draft can destroy negotiability by placing the words "not negotiable" on the instrument. Revised article 3 makes no similar provision for an indorser to destroy negotiability. Under revised section 3-206, an indorser does not have the power to restrict further indorsements by stating "pay (x) only."  

Article 18 of the Convention and revised section 3-206 of the UCC agree that a conditional indorsement is ineffective to parties subsequent to the conditional indorsee. There is a latent ambiguity to this language: is the drawee subsequent to the indorsee?

The restrictive indorsement provision of the Convention uses more phrases than its counterpart, revised section 3-206 of the UCC. Under the Convention, an indorsement "for collection," "for deposit," "value in collection," "by procuration," or to "pay any bank," allows the indorsee to indorse the instrument only for purposes of collection. This indorsement grants the indorsee all rights arising out of the instrument, subject only to the same claims and defenses which parties may assert against the indorser. If an indorsement contains the words "value in security," "value in pledge," or similar words indicating a pledge, the indorsee becomes a holder who can exercise all rights accru-

48. See infra text accompanying notes 69-97.
50. Rev. U.C.C. § 3-104(d) & cmt. 3 (1990).
54. Id. art. 21(1)(c).
ing from the instrument, but can indorse for collection only. This holder is also subject to the defenses articulated in articles 28 and 30 of the Convention.

V. FORGERY OF INDORESMENTS

The most dramatic difference between the Convention and the Uniform Commercial Code is their treatment of forged indorsements. In the United States, the forgery of a necessary indorsement (payee or special indorsee) does not convey good title. The real payee or special indorsee may sue the drawee for conversion and force a paying maker to pay again, unless the payee's negligence or other actions or non-actions preclude the payee from asserting that there was a forgery.

The Convention attacks the forgery of the payee or special indorsee's name by saying that "the person whose endorsement is forged, or a party who signed the instrument before the forgery" may seek damages against the forger and the first taker from the forger. In addition, the aggrieved party may have recourse against "the party or the drawee who paid . . . the forger directly or through one or more endorsees for collection." An indorsee for collection, however, is not liable if she lacks knowledge of the forgery, unless her lack of knowledge is the result of her "failure to act in good faith or to exercise reasonable care." This latter rule is limited. A party or a drawee who pays an instrument is not liable if she lacked knowledge of the forgery at the time she paid the instrument, unless her lack of knowledge resulted from her "failure to act in good faith or to exercise reasonable care."

It is interesting to note that the English Cheques Act and

55. Id. art. 22(a).
56. Id. art. 22(b).
57. Id. art 22(c).
60. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 25(1)(a) and (b), at 11-12.
61. Id. art. 25(1)(c), at 12.
62. Id. art. 25(2).
63. Id. art. 25(3).
64. English Cheques Act, 1957, 5 & 6 Eliz. 2, ch. 36.
section 60 of the Bills of Exchange Act\textsuperscript{65} protect the drawee banker when she pays a check bearing the forged indorsement of the payee, if the banker paid the check in good faith and in the ordinary course of business. This English model may have had some effect in the drafting of the Convention, although the Convention excludes checks from coverage. Fortunately or unfortunately, depending upon one's point of view, U.S. law does not embrace this principle.

VI. UNAUTHORIZED AGENCY INDORSEMENTS

The Conventions' rules regarding forged indorsements are, to a large degree, replicated in the rules governing unauthorized agents' indorsements. "If an endorsement is made by an agent without authority or power to bind his principle," the principal or a party to the instrument who signed before the unauthorized indorsement has the right to damages against the agent and the person who directly took from the agent.\textsuperscript{66} Notably, the rule is silent as to a person who purports to act as an agent, but is not one. The language of the rule is directed toward an actual agent of the principal who acts without authority.

The principal and one who signed before the unauthorized indorsement can recover from a party or the drawee who paid the unauthorized agent directly or through indorsees for collection.\textsuperscript{67} An indorsee for collection and the drawee, however, are not liable if they are without knowledge that the indorsement does not bind the principal, unless their lack of knowledge results from their failure to act in good faith or to exercise reasonable care.\textsuperscript{68}

VII. THE RIGHTS OF A "HOLDER" AND A "PROTECTED HOLDER"

A. Rights of a "Holder"

As previously stated, the Convention distinguishes between

\begin{itemize}
\item \textsuperscript{65} Bills of Exchange Act, 1882, 45 & 46 Vict., ch. 61.
\item \textsuperscript{66} Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 26(1), at 12.
\item \textsuperscript{67} Id. art. 26(1)(c).
\item \textsuperscript{68} Id. art. 26(2) and (3), at 12-13.
\end{itemize}
a "holder" and a "protected holder" in a manner analogous to the terms "holder" and "holder in due course" under article 3 of the UCC.

The following defenses can be asserted against both "holders" and "protected holders":

a. The person did not sign the instrument;\textsuperscript{69}

b. The person's signature was forged;\textsuperscript{70}

c. The instrument was materially altered;\textsuperscript{71}

d. The person's signature was signed by an unauthorized agent;\textsuperscript{72}

e. The bill was required to be presented for acceptance and it was not presented, resulting in the discharge of the drawer, indorsers and their guarantors;\textsuperscript{73}

f. The instrument was required to be protested for non-acceptance or for non-payment, but was not; which results in the discharge of liability for the drawer, indorsers, and their guarantors;\textsuperscript{74} or

g. The prescriptive period has passed.\textsuperscript{75}

In addition to the above defenses, the mere "holder" can be met with additional defenses:

a. Defences based upon the underlying transaction between the holder and the drawer or between the holder and her transferee, provided the holder took the instrument with knowledge of the defence or obtained the instrument by fraud or theft;\textsuperscript{76}

b. Any contractual defences between that person and the holder;\textsuperscript{77} or

\begin{itemize}
\item 69. Id., art. 33(1), at 15.
\item 70. Id. art. 34.
\item 71. Id. art. 35, at 16.
\item 72. Id. art. 36(3).
\item 73. Id. art. 53(1), at 23.
\item 74. Id. art. 63(1), at 28.
\item 75. Id. art. 84, at 37-38.
\item 76. Id. art. 28(1)(b), at 13.
\item 77. Id. art. 28(1)(d).
\end{itemize}
c. Any other defences under the Convention.\textsuperscript{78}

In addition to the above defenses, the mere "holder" is subject to property claims to the instrument from other persons.\textsuperscript{79} The holder is liable on these property claims only if the holder took the instrument with knowledge of the claim or by fraud or theft.\textsuperscript{80} The mere "holder" of an instrument taken after the expiration of the presentment for payment time limit is also subject to the same claims or defenses against liability as her transferor.\textsuperscript{81}

The Convention nicely handles the troubling \textit{jus tertii} or rights of a third-party problem:

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

(a) The third person asserted a valid claim to the instrument; or

(b) The holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in the theft or the forgery.\textsuperscript{82}

The Convention's treatment of the \textit{jus tertii} problem greatly resembles former section 3-306 of the UCC:

Unless he has the rights of a holder in due course any person takes the instrument subject to:

(a) all valid claims to it on the part of any person; and

(b) all defences of any party which would be available in an action on a simple contract; and

(c) the defences of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (Section 3-408); and

(d) the defence that he or a person through whom he holds the instrument acquired it by theft, or that payment or satis-

\textsuperscript{78} \textit{Id.} art. 28(1)(e).
\textsuperscript{79} \textit{Id.} art. 28(2), at 13-14.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} art. 28(3), at 14.
\textsuperscript{82} \textit{Id.} art. 28(4).
faction to such holder would be inconsistent with the terms of a restrictive endorsement. The claim of any third person to the instrument is not otherwise available as a defence to any party liable thereon unless the third person himself defends the action for such party. 83

Revised section 3-305(c) carries forward much of the same concept:

(c) Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defence, claim in recoupment, or claim to the instrument (Section 3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument. 84

B. Rights of a "Protected Holder"

One who takes a complete instrument is a "protected holder." 85 In addition, one who takes an incomplete instrument is a protected holder if the instrument was completed in accordance with a given authority, provided the taker lacks knowledge of certain defenses against liability concerning the instrument. 86 The protected holder must also lack knowledge of a valid claim to the instrument by any person, 87 and be without knowledge that the instrument has been dishonored by non-acceptance or non-payment. 88 The time limits stated in article

84. Rev. U.C.C. § 3-305(c) (1990).
86. Id. art. 29(a). This provision cross-references the defenses listed in article 28(1).
87. Id. art. 29(b).
88. Id. art. 29(c).
55 for presentment for payment must not have expired.\textsuperscript{89} Further, one cannot be a protected holder if she took the instrument by fraud or theft.\textsuperscript{90}

In addition to the defenses previously listed, the protected holder is subject to any defenses arising from the underlying transactions between herself and the holder, or growing out of "any fraudulent act on the part of [the] holder in obtaining the signature on the instrument of that party."\textsuperscript{91} A party may assert her incapacity to incur liability on the instrument or that she did not know her signature made her a party to the instrument, provided her unawareness was not due to her negligence and her signature was fraudulently induced.\textsuperscript{92}

The \textit{jus tertii} defense is further stated:

The rights to an instrument of a protected holder are not subject to any claim to the instrument on the part of any person, except a valid claim arising from the underlying transaction between himself and the person by whom the claim is raised.\textsuperscript{93}

The Shelter Principle codified in revised section 3-203 of the UCC is paralleled in article 31 of the Convention:

1. The transfer of an instrument by a protected holder vests in any subsequent holder the rights to and on the instrument which the protected holder had.

2. Those rights are not vested in a subsequent holder if:

   (a) He participated in a transaction which gives rise to a claim to, or a defence against liability on, the instrument;

   (b) He has previously been a holder, but not a protected holder.\textsuperscript{94}

Under the Convention, "[e]very holder is presumed to be a

\textsuperscript{89} Id. art. 29(d).
\textsuperscript{90} Id. art. 29(e).
\textsuperscript{91} Id. art. 30(1)(b).
\textsuperscript{92} Id. art. 30(1)(c), at 15.
\textsuperscript{93} Id. art. 30(2).
\textsuperscript{94} U.N. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, \textit{supra} note 1, art. 31, at 15.
protected holder unless the contrary is proved." 95

It should be noted that the Convention does not require the protected holder to be in good faith and to pay value. 96 Consequently, a bad faith donee could be a "protected holder." This would not be true under the UCC, 97 unless the bad faith donee took from a holder in due course under section 3-203(b) of revised article 3.

VIII. LIABILITIES OF THE PARTIES

A. Signatures

A person is not liable on an instrument unless the person or her agent signed her name. 98 In accord with the UCC rule, 99 a person signing in an assumed name "is liable as if he had signed it in his own name." 100 Although a forged signature does not place liability upon the person whose name was forged, when the person consents to be bound by the forgery or represents that the forgery is her signature, then the person is bound. 101

B. Alterations

When an instrument has been materially altered and a party signs if after the alteration was made, she is liable in accordance with the terms of the alteration. 102 A person who signs before the alteration is liable in accordance with the original wording. 103 When a material alteration occurs, the law presumes that a signature was signed after the material alter-

95. Id. art. 32.
96. See id. art. 29, at 14.
100. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 33(2), at 15.
101. Id. art. 34, at 15. This rule is, of course, consistent with section 3-403(a) & cmt. 3 of revised article 3.
102. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 35(1)(a), at 16.
103. Id. art. 35(1)(b).
ation "unless the contrary is proved." Under the Convention, an "alteration is material [if it] modifies the written undertaking on the instrument of any party in any respect." Notably, this definition of material alteration fails to discuss the issue of fraudulent intent. Section 3-407 of the revised UCC, by contrast, discharges some parties from fraudulently made discharges. The Convention also appears to sanction the use of the defense of material alteration even in cases of innocent alteration. Under the UCC, by contrast, an innocent alteration is not a complete defense because the instrument can be enforced according to its original terms.

C. Signatures by Agents

An authorized agent may sign her name and her principal's name (in some way indicating her "representative capacity"), or her principal's name alone. In both cases, the principal is liable and the agent is not. Where the agent lacks authority to sign or exceeds her authority to sign, where an authorized agent signs her name but fails to name her principal, or where the agent signs in a representative capacity but fails to name the principal on the instrument, the agent is personally liable and the principal is not.

Under revised section 3-402(a), where an agent merely signs her own name and fails to name the principal, but the holder can prove that the agent had authority to bind the principal, the principal will be liable. This is a dramatic change from the former rule that no one was liable on a negotiable instrument unless her name was on the instrument.

The Convention also deftly deals with the parol evidence

104. Id. art. 35(2).
105. Id. art. 35(3).
110. Id. art. 36(2).
111. Id. art. 36(3).
problem: "[t]he question whether a signature was placed on the instrument in a representative capacity may be determined only by reference to what appears on the instrument." 113

D. The Bill of Exchange is Not an Assignment

Article 37 of the Convention succinctly states that "[t]he order to pay contained in a bill does not of itself operate as an assignment to the payee of funds made available for payment by the drawer with the drawee." 114 This sentence shows an obvious conceptual relationship with the one line statement in the UCC: "a check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it." 115

E. Liabilities of the Drawer and Maker

The drawer promises "that upon dishonour of the bill by non-acceptance or by non-payment, and upon any necessary protest, he will pay the bill to the holder, or endorser or any endorser's guarantor who takes up and pays the bill." 116 The drawer may, however, stipulate in the bill to exclude or limit her liability, but this exclusion of liability will be effective only if another party will become liable on the bill. 117 United States law, on the other hand, allows the drawer of a draft (excluding a check) to draw the draft without recourse, whether or not anyone else will become liable on the draft. 118

F. Liabilities of the Maker

The maker, like the drawer, promises to pay the promissory note to the holder or to any party who takes it up and pays

114. Id. art. 37.
117. Id. art. 38(2).
The maker cannot limit or exclude her own liability on the note by stipulation.\textsuperscript{120}

\textbf{G. Liabilities of the Drawee and Acceptor}

The drawee does not become liable on a draft until she accepts it.\textsuperscript{121} Once accepted, the drawee promises to pay the bill to the holder or to any party who takes up and pays the bill, under the terms of the drawee’s acceptance.\textsuperscript{122} An acceptance must be written on the bill and it can be made on the front or back of the bill.\textsuperscript{123} Acceptance can consist of merely the signature of the drawee or the drawee may add the word “accepted” or a similar word.\textsuperscript{124}

The drawee may, if desired, accept an incomplete bill; the drawee can accept the bill before or after maturity or after dishonor by non-acceptance or non-payment.\textsuperscript{125} If a bill is payable at a fixed period after sight or the bill must be presented for acceptance before a specified date, the acceptor must date her acceptance.\textsuperscript{126} If the acceptor fails to write the date of acceptance, the holder may write in the date.\textsuperscript{127}

Articles 40 through 42 are very closely related conceptually to sections 3-409 and 3-410 of the original article 3.\textsuperscript{128} Revised

\footnotesize
\textsuperscript{119} Convention on Int’l Bills of Exchange and Int’l Promissory Notes, supra note 1, art. 39(2), at 17.
\textsuperscript{120} Id.
\textsuperscript{121} Id. art. 40(1).
\textsuperscript{122} Id. art. 40(2).
\textsuperscript{123} Id. art. 41(1) and (2).
\textsuperscript{124} Id. art. 41(1)(a) and (b).
\textsuperscript{125} Id. art. 42(1) and (2), at 18.
\textsuperscript{126} Id. art. 42(3).
\textsuperscript{127} Id.
\textsuperscript{128}
section 3-409 continues much of the same language; however, revised section 3-413(b) provides:

If the acceptance of a draft states the amount accepted, the obligation of the acceptor is that amount. If (i) the acceptance does not state an amount, (ii) the amount of the instrument is subsequently raised, and (iii) the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course.129

Under the above language, only an ignorant or careless acceptor would fail to clearly indicate the amount of the acceptance.

H. Qualified and Unqualified Acceptances

Article 43130 is ambivalent. The lead sentence says that

(b) By the signature alone of the drawee.

2. An acceptance may be written on the front or on the back of the bill.

Article 42

1. An incomplete bill which satisfies the requirements set out in paragraph 1 of article 1 may be accepted by the drawee before it has been signed by the drawer, or while otherwise incomplete.
2. A bill may be accepted before, at or after maturity, or after it has been dishonoured by non-acceptance or non-payment.
3. If a bill drawn payable at a fixed period after sight, or a bill which must be presented for acceptance before a specified date, is accepted, the acceptor must indicate the date of his acceptance; failing such indication by the acceptor, the drawer or the holder may insert the date of acceptance.
4. If a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder is entitled to have the acceptance dated as of the date on which the bill was dishonoured.

Id. arts. 40-42, at 17-18.
129. Rev. U.C.C. § 3-413(b) (1990) (emphasis added).
130.
acceptance must be unqualified and the second sentence tells the acceptor how to qualify the acceptance. The Convention treats qualified acceptances similarly to revised section 3-410 of the UCC. If the paucity of reported case law in the United States is any indication of the use of qualified acceptances in the United States, any further discussion of the rule would be more academic than meaningful.

I. Liabilities of the Indorsers

The indorsers, like the makers, drawees, and acceptors, promise that upon dishonor by non-acceptance or nonpayment they will pay the holder, any subsequent indorser, or any indorser's guarantor who takes up the instrument and pays it. Indorsers can exclude or limit liability "by an express stipulation in the instrument." Unfortunately, the Convention does not suggest the appropriate language to use, although the words "without recourse" are accepted in the United States.

J. Transfer Warranties by the Indorser

The Convention provides that unless the transferor disclaims responsibility on the instrument, the transferor by indorsement and delivery or by mere delivery alone "represents" to the transferee that the instrument does not bear any forged or unauthorized signatures, that it has not been materially altered, and that at the time of the transfer the transferor had no knowledge of any fact that would impair the right of the

honoured by non-acceptance only as to the remaining part.

4. An acceptance indicating that payment will be made at a particular address or by a particular agent is not a qualified acceptance, provided that:
   (a) The place in which payment is to be made is not changed;
   (b) The bill is not drawn payable by another agent.

Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 43, at 18.

131. Id. art. 44(1), at 18-19.
132. Id. art. 44(2), at 19.
133. See Rev. U.C.C. § 3-415(b) (1990).
134. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 45(1)(a), at 19.
135. Id. art. 45(1)(b).
transferee to payment.\textsuperscript{136} The transferor incurs liability only if the transferee took the instrument without knowledge of the matter giving rise to liability.\textsuperscript{137} The cause of action of the transferee may arise even before maturity of the instrument, and the transferee can recover any amount paid plus interest under article 70.\textsuperscript{138}

**K. The Guarantors of Instruments**

It is common in the United States to issue promissory notes that contain the signatures of "accommodation parties" who sign in any capacity (maker, indorser, drawer, or payee) to guarantee the debt of one or more principal debtors on the instrument. "Accommodation parties" often sign on behalf of consumer and corporate debtors. However, it is much less common in the United States to have "accommodation parties" sign as guarantors of parties on bills of exchange (drafts).

In Europe and Latin America guarantors commonly sign bills of exchange on behalf of, for example, merchant-drawee-buyers asked to accept a draft for the sale of goods. If the sale is not conducted under a letter of credit with a substantial bank as the drawee, the merchant should at least require a very solvent guarantor to guarantee the bill of exchange (draft).

Under the Convention, payment of an instrument may be guaranteed in whole or in part, whether or not accepted.\textsuperscript{139} The guarantee must be written on the instrument or on a slip of paper fastened to it (allonge).\textsuperscript{140} One can make a guarantee by affixing her signature and using the words "guaranteed," "aval," "good as aval," or similar words evincing an intent to make a guarantee.\textsuperscript{141} The usual bank indorsement, "prior endorsements guaranteed" does not constitute a guarantee.\textsuperscript{142}

A signature alone (other than that of the maker, drawer, or acceptor drawee) on the face of an instrument constitutes a

\begin{flushleft}
\textsuperscript{136} Id. art. 45(1)(c).
\textsuperscript{137} Id. art. 45(2).
\textsuperscript{138} Id. art. 45(3).
\textsuperscript{139} Id. art. 46(1).
\textsuperscript{140} Id. art. 46(2).
\textsuperscript{141} Id. art. 46(3).
\textsuperscript{142} Id.
\end{flushleft}
guarantee. A guarantor may name the person for whom she has become a guarantor. If she fails to indicate this person she is deemed to guarantee the drawee or acceptor on a bill and the maker on a promissory note. This latter provision seemingly precludes the use of parol testimony that the guarantor signed on behalf of a different person. In the United States, by contrast, parol testimony is admissible to show that the guarantor signed on behalf of any party to the instrument.

Under the Convention, a guarantor may not use the defense that she signed the instrument before the person for whom she is the guarantor signed it, nor can she claim that the instrument was incomplete. The liability of a guarantor is the same as the liability of the accommodated person. If the accommodated person is the drawee, the guarantor promises to “pay the bill at maturity to the holder, or to any party who takes up and pays the bill.” If the bill is payable at a definite time and it is dishonored by non-acceptance prior to that time, then the guarantor must pay it to the holder or a party who takes it up and pays it.

The rather detailed defenses that a guarantor may assert which are personal to her are stated in the notes. Even a

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143. Id. art. 46(4), at 20.
144. Id. art. 46(5).
145. Id.
147. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 46(6), at 20.
148. Id. art. 47(1).
149. Id. art. 47(2)(a).
150. Id. art. 47(2)(b).
151. Article 47

3. In respect of defences that are personal to himself, a guarantor may set up:
(a) Against a holder who is not a protected holder only those defences which he may set up under paragraphs 1, 3 and 4 of article 28;
(b) Against a protected holder only those defences which he may set up under paragraph 1 of article 30.

4. In respect of defences that may be raised by the person for whom he has become a guarantor:
(a) A guarantor may set up against a holder who is not a protected holder only those defences which the person for whom he has
casual glance at the Convention references listed in the footnotes reveals extensive cross-referencing between articles dealing with protected and non-protected holders and the guarantor's so-called "personal defenses." Only a skilled jigsaw puzzlemaker could appreciate the drafting of these sections of the Convention. Surely, there must be a better way of drafting to avoid this sort of maze.

One author suggests that the proposed Convention ought to be revised to provide for only the civilian concept of an *aval* because it has stronger benefits for the creditor, and, with the proper re-drafting, Anglo-American lawyers and business people could be made acquainted with the ramifications.\(^{152}\)

Payment of an instrument by the guarantor discharges the accommodated party on the instrument, but the guarantor may recover from the accommodated party the amount paid plus interest.\(^{153}\)

become a guarantor may set up against such holder under paragraphs 1, 3 and 4 of article 28;

(b) A guarantor who expresses his guarantee by the words "guaranteed", "payment guaranteed" or "collection guaranteed", or words of similar import, may set up against a protected holder only those defenses which the person for whom he has become a guarantor may set up against a protected holder under paragraph 1 of article 30;

(c) A guarantor who expresses his guarantee by the words "*aval*" or "good as *aval*" may set up against a protected holder only:

(i) The defense, under paragraph 1(b) of article 30, that the protected holder obtained the signature on the instrument of the person for whom he has become a guarantor by a fraudulent act;

(ii) The defense, under article 53 or 57, that the instrument was not presented for acceptance or for payment;

(iii) The defense, under article 63, that the instrument was not duly protested for non-acceptance or for non-payment;

(iv) The defense, under article 84, that a right of action may no longer be exercised against the person for whom he has become guarantor;

(d) A guarantor who is not a bank or other financial institution and who expresses his guarantee by a signature alone may set up against a protected holder only the defenses referred to in subparagraph (b) of this paragraph;

(e) A guarantor which is a bank or other financial institution and which expresses its guarantee by a signature alone may set up against a protected holder only the defenses referred to in subparagraph (c) of this paragraph.

\(^{152}\) See Herrmann, supra note 1, at 534.

\(^{153}\) Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra
IX. PRESENTMENT, DISHONOR BY NON-ACCEPTANCE OR NON-PAYMENT, AND RECOURSE

A. Presentment

Articles 49 through 59 articulate the mechanics of presentment for acceptance or for payment and dishonor. In general, these rules greatly resemble sections 3-501 through 3-505 of revised article 3. There are, however, a few differences which merit discussion.

Article 51(a) provides that presentment for acceptance must be made to the drawee “on a business day at a reasonable hour.” The Convention does not mention a possible “cut-off” hour after which the drawee could treat a draft as coming on the following day. Article 51(d) provides that “[a] bill payable on demand or at a fixed period after sight must be presented for acceptance within one year of its date.” If the bill states a date or time limit for presentment for acceptance, then presentment must be made on the date or within the time limit stated.

If a bill requires presentment for acceptance and it is not presented for acceptance, “the drawer, endorsers and their guarantors are not liable on the bill.” However, failure to present does not discharge the guarantor of the drawee from liability.

Article 55 requires that presentment for payment be made to the maker of a promissory note. Section 3-502(a)(3) of the revised UCC dispenses with this necessity, while the previous

note 1, art. 48, at 21.
154. Id. arts. 49-59, at 21-26.
155. Id. art. 51(a), at 22.
156. Compare Rev. U.C.C. § 3-501(b)(4) (1990) (stating that a party may treat a presentment as occurring on the last business day, if the presentment was made after the cut off).
158. Id. art. 51(e).
159. Id. art. 53(1), at 23.
160. Id. art. 53(2).
161. Id. art. 55(a), at 24.
version required it. Under the Convention, any demand instrument must be presented for payment within one year of its date. The UCC contains no time restriction.

B. Protest

The Convention defines the word “protest” as “a statement of dishonour drawn up at the place where the instrument has been dishonoured and signed and dated by a person authorized in that respect by the law of that place.” The protest must state who requested it, the place of protest, the demand made and the answer given, or the protest must state the drawee, acceptor, or maker could not be found. The protest form can be attached to the instrument or can be a separate document.

The Convention downgrades the importance of the protest by noting:

Unless the instrument stipulates that protest must be made, a protest may be replaced by a declaration written on the instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument domiciled with a named person for payment, by that named person; the declaration must be to the effect that acceptance or payment is refused.

The same article then says that a written statement made in accordance with the above language “is a protest for the purpose of this Convention.” It thus seems now that the typical chit or memorandum attached to dishonored instruments by bankers throughout the world will now suffice as “protest.” Section 3-509 of former article 3 of the UCC noted in the comments that protest was not required in domestic instruments cases.

164. Id. art. 60(1), at 26.
165. Id. art. 60(1)(a)-(c).
166. Id. art. 60(2)(a) & (b), at 26-27.
167. Id. art. 60(3), at 27.
168. Id. art. 60(4).
Revised section 3-505 is in accord with this view.\textsuperscript{170}

Under the Convention, if an instrument is required to be protested for dishonor and protest is not made, the drawer, indorsers and their guarantors will not be liable.\textsuperscript{171} Failure to protest an instrument does not discharge the acceptor, maker, and their guarantors.\textsuperscript{172} Nor will failure to protest an instrument discharge the guarantors of the obligation to the drawee.\textsuperscript{173}

\textit{C. Notice of Dishonor}

Upon dishonor of an instrument, the holder must notify “the drawer and the last endorser,” and all other “endorsers and guarantors whose addresses the holder can ascertain on the basis of information contained in the instrument.”\textsuperscript{174} An indorser or guarantor who receives notice must notify the last party preceding him, and notice of dishonor operates for the benefit of any party who has a right of recourse against the party notified.\textsuperscript{175} “Notice of dishonour may be given in any form whatever . . . .”\textsuperscript{176} If notice of dishonor is appropriately sent, it is effective even if not received.\textsuperscript{177} The sender bears the burden of proving that she sent notice.\textsuperscript{178}

Notice of dishonor must be given within two business days of the day of protest.\textsuperscript{179} As previously noted, protest must be given on the day of dishonor or within four days thereafter.\textsuperscript{180} If protest is waived, protest must be given on the day of dishonor or on the day of receipt of the notice of dishonor.\textsuperscript{181} Under these rules, the maximum time for giving notice of dishonor appears to be six days. Under former article 3 of the

\begin{footnotes}
\footnote{170. Rev. U.C.C. § 3-505 (cmt.) (1990).}
\footnote{171. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 63(1), at 28.}
\footnote{172. Id. art 63(2).}
\footnote{173. Id.}
\footnote{174. Id. art. 64(1)(a) & (b).}
\footnote{175. Id. art. 64(2) & (3).}
\footnote{176. Id. art. 65(1).}
\footnote{177. Id. art. 65(2).}
\footnote{178. Id. art. 65(3).}
\footnote{179. Id. art. 66, at 28-29.}
\footnote{180. Id.}
\footnote{181. Id.}
\end{footnotes}
UCC, banks had to give notice by the midnight deadline, that is, by midnight of the banking day following the banking day of receipt. 182 Non-bankers had to give notice by midnight of the third business day after dishonor or receipt of notice of dishonor. 183 Under revised section 3-503, banks still must operate within the midnight deadline, but the third business day deadline has been enlarged to 30 days. 184 The former three day period was not realistic. Query whether requiring the giving of notice on the same day of dishonor in non-protest cases is equally unrealistic for non-bankers.

Under the Convention, "[d]elay in giving notice of dishonour is excused if the delay is caused by circumstances which are beyond the control of the person required to give notice . . . ." 185 Notice of dishonor is not required when it cannot be given after the use of "reasonable diligence," and if the drawer has waived the giving of notice in writing on the bill of exchange, then notice is waived for all parties thereafter. 186

If there is a failure to give notice, the party entitled to the notice can recover damages as provided in articles 70 and 71. 187 The damages are generally the face amount of the instrument plus interest. 188

X. AMOUNT PAYABLE

The holder may exercise her rights on the bill or note against any, all, or several of the parties, and she is not obliged to proceed in the order in which the parties are bound. 189 Any party who takes up and pays may proceed in the same way against any and all parties who are liable to her. 190 An action against one party does not prevent actions against other par

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183. Id.
185. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra note 1, art. 67(1), at 29.
186. Id. art. 67(a) & (b).
187. See id. arts. 70, 71, at 30-31.
188. Id.
189. Id. art. 69(1), at 29.
190. Id.
ties.\textsuperscript{191}

At maturity, the holder may recover the amount of the instrument plus interest, if interest was provided for in the instrument.\textsuperscript{192} After maturity the holder may recover the amount of the bill or note with the stipulated interest to the date of maturity.\textsuperscript{193} If interest was stipulated to be paid after maturity, the stipulated interest is payable.\textsuperscript{194} If, however, the amount is not stipulated the legal interest at the place of any legal proceedings shall be due.\textsuperscript{195} The party or parties liable shall pay any costs of protest and notice of dishonor given by her.\textsuperscript{196} In addition to the above damages, article 70 states that "[n]othing . . . prevents a court from awarding damages or compensation for additional loss caused to the holder by reason of delay in payment."\textsuperscript{197}

From the perspective of the UCC, article 70 contains a novel "discount provision." If no interest is specified and the person liable pays in advance of maturity, she is entitled to a discount from the date of payment to the date of maturity.\textsuperscript{198} This discount is calculated at the official discount rate (or other similar appropriate rate) at the place where the holder maintains her principal place of business, or her usual residence if she does not have a principal place of business.\textsuperscript{199} If the parties fail to provide a discount rate, the Convention states that it is "such rate as is reasonable in the circumstances."\textsuperscript{200}

When the party pays a bill or note she is discharged in whole or in part,\textsuperscript{201} and she may recover from parties liable to her the amount, interest, and notice expenses that she paid as provided in articles 70 and 71.

\textsuperscript{191} Id. art. 69(2), at 30.
\textsuperscript{192} Id. art. 70(1)(a).
\textsuperscript{193} Id. art. 70(1)(b)(i).
\textsuperscript{194} Id. art. 70(1)(b)(ii).
\textsuperscript{195} Id. art. 70(2).
\textsuperscript{196} Id. art. 70(1)(b)(iii).
\textsuperscript{197} Id. art. 70(3).
\textsuperscript{198} Id. art. 70(1)(c)(i).
\textsuperscript{199} Id. art. 70(4).
\textsuperscript{200} Id.
\textsuperscript{201} Id. art. 71, at 31.
XI. Discharge

A party to a draft or note is discharged of liability when she pays the holder, or when a subsequent party pays the instrument and takes possession of it.\textsuperscript{202} The discharge is effective if full payment is made at or after maturity.\textsuperscript{203} If the discharge is made before maturity, however, the discharge is only effective if the instrument was previously dishonored by non-acceptance.\textsuperscript{204}

A paying party "is not discharged if [s]he pays a holder who is not a protected holder, or a party who has taken up and paid the instrument," if she knows at the time of payment that this person acquired the instrument by theft or through forgery of the signature of the payee or an endorsee.\textsuperscript{205}

The recipient of payment must, unless otherwise agreed, surrender the instrument to the paying drawee.\textsuperscript{206} The instrument must be surrendered to any other paying person together with a receipt and any protest.\textsuperscript{207} If the instrument is payable in instalments, the drawee or other paying party may insist that mention of each payment (except the last) be made on the instrument or on an allonge plus delivery of a written receipt.\textsuperscript{208} The persons called upon to make payment may refuse to do so until the instrument is surrendered to the payor, and this refusal does not constitute dishonor.\textsuperscript{209} A paying party, other than the drawee, who fails to obtain delivery of the instrument cannot assert the defense that she is discharged against a protected holder to whom the instrument was subsequently negotiated.\textsuperscript{210}

\textsuperscript{202} Id. art. 72(1).
\textsuperscript{203} Id. art. 72(1)(a).
\textsuperscript{204} Id. art. 72(2).
\textsuperscript{205} Id. art. 72(3).
\textsuperscript{206} Id. art. 72(4)(a)(i).
\textsuperscript{207} Id. art. 72(4)(a)(ii).
\textsuperscript{208} Id. art. 72(4)(b).
\textsuperscript{209} Id. art. 72(4)(d), at 32.
\textsuperscript{210} Id. art. 72(4)(e).
A. Partial Payments

The holder is not required to accept a partial payment.\textsuperscript{211} If the holder refuses the partial payment the instrument is dishonored.\textsuperscript{212} The effect of partial payments is stated in article 73, reprinted in the footnote.\textsuperscript{213}

B. Currency of Payments

Article 75 (reprinted below)\textsuperscript{214} advances two intriguing

\begin{itemize}
  \item 3. If the holder takes partial payment from the drawee, the guarantor of the drawee, or the acceptor or the maker:
      \begin{itemize}
          \item (a) The guarantor of the drawee, or the acceptor or the maker is discharged of his liability on the instrument to the extent of the amount paid;
          \item (b) The instrument is to be considered as dishonoured by non-payment as to the amount unpaid.
      \end{itemize}
  \item 4. If the holder takes partial payment from a party to the instrument other than the acceptor, the maker or the guarantor of the drawee:
      \begin{itemize}
          \item (a) The party making payment is discharged of his liability on the instrument to the extent of the amount paid;
          \item (b) The holder must give such party a certified copy of the instrument and any necessary authenticated protest in order to enable such party to exercise a right on the instrument.
      \end{itemize}
  \item 5. The drawee or a party making partial payment may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.
  \item 6. If the balance is paid, the person who receives it and who is in possession of the instrument must deliver to the payor the receipted instrument and any authenticated protest.
\end{itemize}

\textsuperscript{211} Id. art. 73(1).
\textsuperscript{212} Id. art. 73(2).
\textsuperscript{213} Id.
\textsuperscript{214} Article 75

1. An instrument must be paid in the currency in which the sum payable is expressed.
2. If the sum payable is expressed in a monetary unit of account within the meaning of subparagraph (1) of article 5 and the monetary unit of account is transferable between the person making payment and the person receiving it, then, unless the instrument specifies a currency of payment, payment shall be made by transfer of monetary units of account. If the monetary unit of account is not transferable between those persons, payment shall be made in the currency specified in the instrument or, if no such currency is specified, in the currency of the
advancements into the law of negotiable instruments. The first concerns instruments that do not specify a currency of payment but rather a "monetary unit of account" which is, of course, already in use in the EEC. The second advancement provides that the "monetary unit of account" may be in one currency which must be exchanged for the money of payment. For place of payment.

3. The drawer or the maker may indicate in the instrument that it must be paid in a specified currency other than the currency in which the sum payable is expressed. In that case:

(a) The instrument must be paid in the currency so specified;
(b) The amount payable is to be calculated according to the rate of exchange indicated in the instrument. Failing such indication, the amount payable is to be calculated according to the rate of exchange for sight drafts (or, if there is no such rate, according to the appropriate established rate of exchange) on the date of maturity:

(i) Ruling at the place where the instrument must be presented for payment in accordance with subparagraph (g) of article 55, if the specified currency is that of that place (local currency); or
(ii) If the specified currency is not that of that place, according to the usages of the place where the instrument must be presented for payment in accordance with subparagraph (g) of article 55;
(c) If such an instrument is dishonoured by non-acceptance, the amount payable is to be calculated:

(i) If the rate of exchange is indicated in the instrument, according to that rate;
(ii) If no rate of exchange is indicated in the instrument, at the option of the holder, according to the rate of exchange ruling on the date of dishonour or on the date of actual payment;
(d) If such an instrument is dishonoured by non-payment, the amount payable is to be calculated:

(i) If the rate of exchange is indicated in the instrument, according to that rate;
(ii) If no rate of exchange is indicated in the instrument, at the option of the holder, according to the rate of exchange ruling on the date of maturity or on the date of actual payment.

4. Nothing in this article prevents a court from awarding damages for loss caused to the holder by reason of fluctuations in rates of exchange if such loss is caused by dishonour for non-acceptance or by non-payment.

5. The rate of exchange ruling at a certain date is the rate of exchange ruling, at the option of the holder, at the place where the instrument must be presented for payment in accordance with subparagraph (g) of article 55 or at the place of actual payment.

Id. art. 75, at 33-34.
215. Id. art. 75(2), at 33.
216. Id. art 75(2) & (3).
example, the “monetary unit of account” might be English Pounds, while the money of payment might be in United States Dollars. English sale of goods contracts have used this latter arrangement for a number of years.217

C. Exchange Control Regulations

The Convention provides for exchange control regulations.218 Hopefully, the adoption of a common currency in the EEC may eventually render this provision obsolete in Europe.

XII. LOST INSTRUMENTS

Articles 78 through 83219 are a needlessly long rendition of

218. Convention on Int’l Bills of Exchange and Int’l Promissory Notes, supra note 1, art. 76, at 34.
219. Article 78

1. If an instrument is lost, whether by destruction, theft or otherwise, the person who lost the instrument has, subject to the provisions of paragraph 2 of this article, the same right to payment which he would have had if he had been in possession of the instrument. The party from whom payment is claimed cannot set up as a defence against liability on the instrument the fact that the person claiming payment is not in possession of the instrument.

2.

(a) The person claiming payment of a lost instrument must state in writing to the party from whom he claims payment:
   (i) The elements of the lost instrument pertaining to the requirements set forth in paragraph 1 or paragraph 2 of articles 1, 2 and 3; for this purpose the person claiming payment of the lost instrument may present to that party a copy of that instrument;
   (ii) The facts showing that, if he had been in possession of the instrument, he would have had a right to payment from the party from whom payment is claimed;
   (iii) The facts which prevent production of the instrument.
(b) The party from whom payment of a lost instrument is claimed may require the person claiming payment to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.
(c) The nature of the security and its terms are to be determined by agreement between the person claiming payment and the party from whom payment is claimed. Failing such an agreement, the court may determine whether security is called for and, if so, the
nature of the security and its terms.

(d) If the security cannot be given, the court may order the party from whom payment is claimed to deposit the sum of the lost instrument, and any interest and expenses which may be claimed under article 70 or 71, with the court or any other competent authority or institution, and may determine the duration of such deposit. Such deposit is to be considered as payment to the person claiming payment.

**Article 79**

1. A party who has paid a lost instrument and to whom the instrument is subsequently presented for payment by another person must give notice of such presentment to the person whom he paid.
2. Such notice must be given on the day the instrument is presented or on one of the two business days which follow and must state the name of the person presenting the instrument and the date and place of presentment.
3. Failure to give notice renders the party who has paid the lost instrument liable for any damages which the person whom he paid may suffer from such failure, provided that the damages do not exceed the amount referred to in article 70 or article 71.
4. Delay in giving notice is excused when the delay is caused by circumstances which are beyond the control of the person who has paid the lost instrument and which he could neither avoid nor overcome. When the cause of the delay ceases to operate, notice must be given with reasonable diligence.
5. Notice is dispensed with when the cause of delay in giving notice continues to operate beyond thirty days after the last day on which it should have been given.

**Article 80**

1. A party who has paid a lost instrument in accordance with the provisions of article 78 and who is subsequently required to, and does, pay the instrument, or who, by reason of the loss of the instrument, then loses his right to recover from any party liable to him, has the right:
   (a) If security was given, to realize the security; or
   (b) If an amount was deposited with the court or other competent authority or institution, to reclaim the amount so deposited.
2. The person who has given security in accordance with the provisions of paragraph 2(b) of article 78 is entitled to obtain release of the security when the party for whose benefit the security was given is no longer at risk to suffer loss because of the fact that the instrument is lost.

**Article 81**

For the purpose of making protest for dishonour by non-payment, a person claiming payment of a lost instrument may use a written statement that satisfies the requirements of paragraph 2(a) of article 78.

**Article 82**

A person receiving payment of a lost instrument in accordance with article 78 must deliver to the party paying the written statement required under paragraph 2(a) of article 78, receipted by him, and any protest and a receipted account.
former section 3-804 and revised section 3-309 of the UCC. Both
the UCC's approach and the Convention's approach suffer from a
common deficiency. Each "codification" provides that a holder
who has lost a negotiable instrument must furnish some kind of
security to protect the party who pays the former holder from
claims by potential holders in due course or "protected"
holders. Yet neither "codification" clearly tackles the dur-
ation or type of the security, usually some kind of surety bond. If
the loser of the instrument must pay for a surety bond that lasts
two, five, or ten years, the premiums could become enormous.
Fortunately, the Convention seems to provide (perhaps inadvert-
ently) a partial solution to the problem:

If the security cannot be given, the court may order the party
from whom the payment is claimed to deposit the sum of the
lost instrument, and any interest and expenses which may be
claimed under article 70 or article 71, with the court or any
other competent authority or institution, and may determine
the duration of such deposit. Such deposit is to be considered
as payment to the person claiming payment.

Under the above provision, the recipient may lose the use of
the money while it is in the registry of the court, but at least the
deposit may be earning interest and the recipient is not required
to pay a surety company.

XIII. STATUTE OF LIMITATIONS (PRESCRIPTION)

A cause of action on a demand note against the maker or
her guarantor lapses at the end of four years after the note's
date. This period applies to an instrument payable at a defi-

Article 83
1. A party who pays a lost instrument in accordance with article 78 has
the same rights which he would have had if he had been in possession
of the instrument.
2. Such party may exercise his rights only if he is in possession of the
receipted written statement referred to in article 82.

Id. arts. 78-83, at 35-37.
220. Rev. U.C.C. § 3-309(b) (1990); Convention on Int'l Bills of Exchange and
Int'l Promissory Notes, supra note 1, art. 78(2)(b)-(d), at 35-36.
221. Convention on Int'l Bills of Exchange and Int'l Promissory Notes, supra
note 1, at 193, art. 78(2)(d), at 36.
222. Id. art. 84(1)(a), at 37.
nite date, with the time starting on the date of maturity.\textsuperscript{223} The four year period also applies \textquotedblleft[a]gainst the guarantor of the drawee of a bill payable at a definite time\textquotedblright with the period starting from the maturation date.\textsuperscript{224} If the bill is dishonored by non-acceptance, however, the time runs from the date of protest for dishonor.\textsuperscript{225} If protest is dispensed with, time starts from the date of dishonor.\textsuperscript{226} The four year period further applies \textquotedblleft[a]gainst the acceptor of a bill payable on demand or his guarantor, from the date on which it was accepted, or if no such date is shown, from the date of the bill.\textsuperscript{227} In suits against the guarantor of the drawee of a demand bill, time runs from the date she signed the bill, or from the date of the bill if the signing date is not shown.\textsuperscript{228} Finally, the four year period against the drawer, the indorser, or their guarantors starts to run from the date of protest for dishonor by non-acceptance or non-payment from the date of dishonor where protest has been waived.\textsuperscript{229} A party who pays the instrument in accordance with articles 70 or 71 must institute suit against a party liable to her within only one year from the date when she paid the bill or note.\textsuperscript{230}

\textbf{XIV. CONCLUSION}

It seems tragic that years of work should founder in a sea of needless complexity and the introduction of needless new concepts when the basic Convention is relatively clear-cut and understandable. Future drafters should make the following changes:

First, the \textquotedblleft revised\textquotedblright Convention should avoid the over-use of cross references within the text. Each major section ought to be self-contained, even to the point of repetition, if it increases clarity. Commercial law codifications, whether national or international, ought to be relatively clear to the sophisticated user, whether she be a lawyer or a business person. The present

\begin{itemize}
\item \textsuperscript{223} \textit{Id.} art. 84(1)(b).
\item \textsuperscript{224} \textit{Id.} art. 84(1)(c).
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{Id.} art. 84(1)(d).
\item \textsuperscript{228} \textit{Id.} art. 84(1)(e).
\item \textsuperscript{229} \textit{Id.} art. 84(1)(f), at 38.
\item \textsuperscript{230} \textit{Id.} art. 84(2).
\end{itemize}
Convention does not meet this test.

Second, the "revised" Convention ought to simplify and clarify the classifications of holders in such a way that it is very clear that one class of holders is subject to certain defenses and another class is subject to still other defenses.

Third, the "revised" Convention should not try to combine the Anglo-American "accommodation party" with the civil law "aval." The Anglo-American lawyer can absorb the civil law aval concept much easier than the civil law lawyer can absorb some of the esoteric notions found in the Anglo-American system. In fact, future revisers of UCC article 3 should acquaint themselves with the aval.

Fourth, the "revised" Convention should not attempt to combine the civil law rule that a forger of the payee's indorsement can pass on good title with the U.S. view that he cannot. In law, as in other areas, one cannot always please everyone; sometimes, a choice must be made. In this narrow area both systems seem to have survived, and it might be wise and gracious for the Anglo-Americans to give in to the civil law view.

Finally, the "revisers" from the United States should exercise restraint in using the "Uniform" Commercial Code as a model for world adoption because:

(a) the advent of revised articles 3 and 4 of the "Uniform" Commercial Code clearly alleges that the original articles 3 and 4 were not ideal, and in fact, some commentators think that the revised articles are far from ideal;[231] (b) negotiable instruments were invented in Western Europe, and the civil law lawyers have had a longer experience in their use and development than have U.S. lawyers; and (c) some drafters' chauvinistic insistence on adoptions of their own system does not endear them to drafters from other systems, and any one-sided Convention will simply not be adopted.

The Convention should be revised and re-submitted for signing and ratification.