



# BANKING LAWS COMMITTEE

(GOVERNMENT OF INDIA)

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REPORT ON  
NEGOTIABLE  
INSTRUMENTS  
LAW

1975



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**BANKING LAWS COMMITTEE**

(GOVERNMENT OF INDIA)

**REPORT**  
ON  
**NEGOTIABLE INSTRUMENTS LAW**

**1975**

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**BANKING LAWS COMMITTEE**  
**(GOVERNMENT OF INDIA)**

White House, 91, Walkeshwar Road, Bombay-400 006.

**CHAIRMAN**  
**Dr. P. V. Rajamannar.**

*Chairman's Office :*  
9, Victoria Crescent Road,  
MADRAS-600 008.

*Date 7th February 1975*

Dear Shri Subramaniam,

I have great pleasure in sending herewith the Report of the Banking Laws Committee dealing with negotiable instruments law.

2. Having regard to the importance of the subject, the Committee decided to send its Report as far as negotiable instruments law is concerned as the first part of its Report. The Committee hopes that the matter would receive early consideration by the Government and necessary legislative and administrative action would be undertaken to give effect to such of the recommendations of the Committee as may be accepted by the Government.

3. Simultaneous with the review of the negotiable instruments law, the Committee has also been gathering material on the other subjects covered by its Terms of Reference. The Committee will take up the other subjects, including the law relating to indigenous negotiable instruments, and send the other parts of its Report as early as possible.

4. I would like to express my gratitude for the confidence shown by the Government of India in entrusting this important work to me as Chairman and sole Member of the Committee.

Yours sincerely,

(P. V. RAJAMANNAR)

Hon'ble Shri C. Subramaniam,  
Finance Minister,  
Government of India,  
New Delhi.

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## CHAPTER 1

### INTRODUCTORY

By their Resolution No. F. 10(5)-BC/71 dated 24th November 1972, the Government of India constituted the Banking Laws Committee as a one-man Committee, under the Chairmanship of Dr. P. V. Rajamannar, retired Chief Justice of the High Court of Madras, to review the following subjects :

1. Codification of commercial laws affecting banking;
2. Law relating to negotiable instruments and codification of practices and usages relating to indigenous negotiable instruments;
3. Laws relating to—
  - (a) bank deposits and collections;
  - (b) documents of title to goods;
  - (c) loans and advances generally with particular reference to banks and financial institutions;
  - (d) guarantees issued by banks;
  - (e) letters of credit, unsecured advances and special provisions relating to recovery of loans.

The constitution of this Committee was due to the recognition by the Government of the imperative need to rationalise the credit and commercial laws affecting banking and financial institutions, in the context of the developmental role the banks are expected to play in the fulfilment of the socio-economic objectives set before them.

#### GENESIS.

1.2 On many matters entrusted to the Committee, considerable spade work had been done by the Banking Commission's Study Group constituted to review legislation affecting banking. In order to facilitate such review, that Study Group issued a questionnaire after making preliminary studies and considering several technical papers. The

questionnaire had been issued, *inter alia*, to experts, authorities and associations connected with law, banking and accountancy, and organisations representing trade, industry and commerce. In this review, the assistance of certain foreign experts and of leading organisations and authorities outside India was also solicited. At that stage, in order to adjust the work within the tenure of the Banking Commission, the Study Group had to concentrate its efforts on the finalisation of its review on matters pertaining to the regulation of banking and allied matters.<sup>1</sup> Then the Banking Commission took up with the Government the necessity for a comprehensive review of the several other branches of the laws affecting banking in the light of the studies and the spade work done by the aforesaid Study Group. Realising the importance of the review, Government have appointed the Banking Laws Committee under the Chairmanship of Dr. P. V. Rajamannar.

### CONSTITUTION AND SET-UP

1.3 The Government of India provided for the continuity in work by their appointing the Chairman of the Study Group as the Chairman and sole member of the Committee. The services of Shri R. Krishnan, Convener-Member of the Study Group (Deputy Legal Adviser to the Reserve Bank of India), were placed at the disposal of the Committee, and Shri Krishnan was appointed as its Secretary.

1.4 As desired by the Government, the Reserve Bank, which had made available all relevant data and organised such research and studies as the Banking Commission and the Study Group required for the purposes of their work and also assisted them in other ways including staffing, accommodation, transport facilities and the like, continues to render such assistance to the Banking Laws Committee. The Special Cell of the Reserve Bank, which had assisted the Banking Commission, is likewise assisting the Banking Laws Committee.

### PROCEDURE ADOPTED BY THE COMMITTEE

1.5 While inviting the views of experts, concerned authorities, organisations and interested public on matters covered by its Terms of Reference, the Committee also gave a fresh opportunity to all of them

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<sup>1</sup>Please see "First Report of the Study Group Reviewing Legislation Affecting Banking—Banking Regulation", Banking Commission (Government of India), published by the Manager of Publications, Civil Lines, Delhi.

to place before the Committee their views on the several matters referred to in the relevant Parts of the said Study Group's questionnaire. The Terms of Reference and the questionnaire were also translated into Hindi and distributed in the several States and to persons who desired to offer their views based on the Hindi version. A press communique was issued inviting the views of the members of the public interested in the matters referred to the Committee.

1.6 Under the joint auspices of the Indian Institute of Bankers and the Committee, the chief executives of banks and financial institutions were requested to circulate the Terms of the Committee and the questionnaire to all their senior and middle level officers who were requested to place before the Committee any views or suggestions they might like to offer.

1.7 Since banking and commercial laws of the different nations have several common features and many branches of the laws required to be reviewed by the Committee are really part of the Law Merchant which is not the law of any one nation and which really transcends national barriers, the Committee realised the need for assistance and collaboration from experts and other authorities in various countries. It was also realised that on banking and commercial matters, there has been a noticeable trend to simplify, rationalise and unify as far as possible the national laws of different countries and that in this effort both national and international agencies have made a signal contribution. Hence, contacts were established with some experts and expert bodies in countries like the U.S.A., the U.K., Canada, Australia and certain other countries and also with international bodies interested in the work entrusted to the Committee. They were requested by the Committee for their views and for necessary information on the law and practice in their respective countries.

1.8 As could only be expected, the intensive study, organisation of research in the several technical branches of laws with which the Committee is concerned, the consideration of the experts' views, the collection, tabulation and analysis of the required material, and the processing of the views and suggestions, though valuable and fruitful, are time-consuming. The aim has been to pursue the studies and examine the matters with a view to arrive at certain precise and concrete recommendations capable of implementation by appropriate governmental and legislative action.

## COMPLETION OF THE REVIEW OF THE NEGOTIABLE INSTRUMENTS LAW

1.9 In arriving at final recommendations and drawing up its Report on the subjects referred to it, the Committee had to take up the several subjects one by one. Among them, the Committee gave priority to the revision of the negotiable instruments law, while simultaneously collecting material on the other subjects.

1.10 There are special reasons which weighed with the Committee for giving preference to the revision of the general negotiable instruments law. This branch of the law has been pending revision for a long time. Though, in 1958, the Law Commission had given a Report on the subject, several major developments, both within the country and outside, have necessitated a fresh review. The subject falls exclusively within the legislative competence of the Union and admits of expeditious legislative as also necessary administrative action. The Report on this subject will afford a basis and facilitate consideration of the allied branches of laws, viz., the law relating to documents of title to goods, the law relating to the negotiation of investment securities and the indigenous negotiable instruments.

1.11 In the revision of the general law relating to negotiable instruments (which comprise mainly bills, cheques and notes), the necessity for replacing the Negotiable Instruments Act, 1881 (NIA) with a modernised statute suited to the present day conditions has been recognised for over a decade since the Law Commission gave its Report in 1958. Though far reaching changes within and outside the country have necessitated a fresh review, the model suggested by the Law Commission may be retained as a base with reference to which and the provisions in the NIA, most of the required changes in legislation may be considered. Hence, the questionnaire of the Study Group has posed with reference to them the specific areas and situations where the desirability of changes in the existing law requires expert scrutiny.

1.12 With reference to the specific questions posed, a comparative study of the position in different countries was undertaken and in this effort the Committee obtained also the opinions of the foreign experts, viz., Mr. Maurice Megrah, Q.C. of the U.K. and Mr. Carl W. Funk of the U.S.A. In coming to conclusions, the views expressed, the replies given and the memoranda received from institutions and individuals in our country were also given careful consideration. Several technical papers were also prepared for the use of the Committee by

the Secretary assisted by the officers in the Reserve Bank Cell. Valuable material was received from the International Chamber of Commerce, the Chief of the International Trade Law Branch of the United Nations, the central banks of different countries, the American Law Institute, the Institute of Bankers, London, and several other agencies.

1.13 As desired by the Committee, the National Institute of Bank Management, in collaboration with the Committee, conducted a survey on the several aspects of the banking, trade and commercial patterns relating to the handling, negotiation and honouring of cheques and bills (including documentary bills). The Secretary and the officers of the Committee were closely associated with the survey.

1.14 Thus, the Report is the product of a comparative study of the law and practice in India and in other countries with reference to negotiable instruments. The review comprises all aspects of the general law relating to negotiable instruments, particularly bills cheques and notes. Hence, it has resulted not only in recommendations for appropriate provisions to replace those of the NIA, but also in recommendations for legislation in new fields, such as those for the setting up of a bureau for disseminating information on unpaid cheques and for changes in the penal law to deal with economic offences like obtaining of pecuniary advantage by deception.

1.15 Now that the review of this subject is complete, in order to facilitate expeditious follow-up action, the Committee has decided to submit this Report on the revision of the negotiable instruments law without waiting for the completion of its consideration of, and the finalisation of its recommendations on, the other subjects.

## OUTLINE OF THE REPORT

1.16 In Chapter 2, the Committee sets out its general approach and also deals with the general considerations relevant for the revision. Questions pertaining to the formal requisites of the negotiable paper, matters pertaining to the rights and obligations of the parties to the instrument, and the procedure to govern the honour or dishonour of the instrument, etc., are considered in Chapters 3, 4 and 5 respectively. In Chapter 6, special consideration has been given to the conflict of laws questions as they have an important bearing on the development of the country's foreign trade and commerce. The Committee has bestowed special attention on the various measures necessary for the promotion of cheque habit and the results of its study are found in

Chapter 7. In Chapter 8 the special features of bank drafts and in Chapter 9 the special provisions necessary in recognition of the banker's role with reference to payment and collection of negotiable instruments are dealt with. In Chapter 10 the Committee sets out the summary of its various conclusions and recommendations. The relevant Parts of the Study Group's questionnaire, the classified list of persons who were addressed by the Committee for their views on the matters referred to the Committee and for their replies to the Study Group's questionnaire, the list of persons who responded, the expert views on this subject of Mr. Carl W. Funk of the U.S.A. and those of Mr. Maurice Megrah, Q.C. of the U.K., and the Survey Report re: cheques and bills are given as Appendices I to VI respectively to this Report.

### ACKNOWLEDGEMENTS

1.17 In making this Report, the Committee would like to acknowledge with thanks the assistance it has received from the Government of India, State Governments, the Reserve Bank of India, the Indian Banks' Association, the Indian Institute of Bankers, the National Institute of Bank Management, the Law Commission of India, the commercial and co-operative banks and other financial institutions. The Committee also thanks the various associations of trade, industry and commerce and law who have responded to the Committee's request and have assisted it with their views on the several questions.

1.18 The Committee would like to make a special mention of the assistance by way of valuable material and information received from the Chief of the International Trade Law Branch of the United Nations, the International Chamber of Commerce, the American Law Institute, the National Conference of Commissioners on Uniform State Laws (U.S.A.), Bank of England, Bank of Canada, Bank of France, Reserve Bank of Australia, Deutsche Bundesbank, Bank of Japan, Bank Indonesia, Bank of Ceylon, Central Bank of the Philippines, Reserve Bank of New Zealand, Committee of London Clearing Bankers, Canadian Bankers' Association, Midland Bank Ltd., Barclays Bank International Ltd., and other expert bodies, which were found very useful in the preparation of this Report. The Committee would also like to thank Mr. Maurice Megrah, Q.C. of the U.K. and Mr. Carl W. Funk of the U.S.A. for assisting its work with their expert views.

1.19 The Committee wishes to record its high appreciation of the work of its Secretary, Shri R. Krishnan, for his great initiative and industry, wide and intensive study and research, and for his special



knowledge on the subjects referred to the Committee of the legal provisions and current practices and precedents in India as well as in foreign countries. The Committee also commends his drafting ability which has greatly helped it in drawing up its Report.

1.20 In his work, the Secretary has been assisted by the officers (*vide* Appendix VII) and staff of the Reserve Bank's Cell who have spared no pains in making the efforts of the Committee successful. Shri N. K. Ramaswami, Private Secretary to the Chairman, has been attending to his work with efficiency. The Committee commends all their work.

## CHAPTER 2

### REVISION OF THE NEGOTIABLE INSTRUMENTS LAW—GENERAL CONSIDERATIONS

We deal in this chapter with the general considerations relevant to the revision of the negotiable instruments law and also set out our general approach to the subject. The relevant historical background for such considerations is also set out. The succeeding chapters deal specially with the various facets of this branch of the law.

2.2 Though its name so suggests, the Negotiable Instruments Act, 1881 (NIA) does not comprise laws governing the entire body of negotiable instruments. The NIA does not *proprio vigore* apply to indigenous negotiable instruments. It does not also deal with the negotiation of other instruments for payment of money which are recognised by usage or custom as negotiable, *e.g.*, bonds, debentures, deposit receipts, share certificates, etc.: these may generally be grouped under the head "investment securities". The negotiable documents for delivery of goods, known as documents of title to goods, do not come within its scope. Though these three categories come under the generic group of negotiable instruments/documents, they have their own peculiarities and merit separate consideration. Accordingly, we propose to deal with them separately, except where reference is necessary to sketch the historical background relating to negotiable instruments in general. Hence, in the following chapters our attention is generally confined to the main stream of negotiable instruments, comprised of bills, cheques and notes; the NIA also deals only with them.

2.3 Edward Jenks pointed out long ago that "bills of exchange, with their kindred documents, have rendered international commerce possible. They are familiar to the businessman, the lawyer, the impecunious—a category somewhat comprehensive. They have been the occasion of scores of statutes and thousands of reported decisions. Without them modern life would be impossible or unrecognisable."

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<sup>1</sup>Edward Jenks, "On the Early History of Negotiable Instruments", L.Q.R. Vol. IX (1893), p. 70.

That was in 1893. With the increase in the development of trade, commerce, industry and the spread of the banking system throughout the country, how much the mechanism of the settlement of claims by the negotiable instruments has become important today needs no elaboration. But the law on the subject has remained as adapted to the commercial practices and commercial institutions of the previous century. Before considering the developments that suggest the replacement of the 1881 enactment by a modernised version suited to our present day needs, we may make a mention of the historical developments which led to this enactment.

### LEGISLATIVE HISTORY

2.4 A reference to the legislative history behind the enactment of the Negotiable Instruments Act, 1881 (NIA) and a mention about the banking and commercial practices and usages which then prevailed in India would explain several matters relevant to a review of this branch of the law. The NIA was conceived originally in 1866 by the then Indian Law Commission. It was intended to be one of the chapters of the Indian Civil Code then envisaged for the country. The legislation was introduced in 1867 and referred to a Select Committee. In 1877, the Bill was recast by the then Legislative Secretary, Mr. Phillips. A preliminary report was presented by the Select Committee in October 1877, and comments were elicited on a revised Bill which was published. With certain further amendments the Bill was again published in February 1879. Then it was referred to a new Law Commission composed of the then Secretary of State, Sir Charles Turner and Mr. Justice West. The Bill, thus settled by the Law Commission, was again published and referred to a Select Committee which published its report in January 1881. It ultimately became a part of the statute book in December, 1881. Thus, conceived in 1866, it had a long gestation of 15 years before it became a statute. It was no wonder that Hon'ble Mr. Whitley Stokes, who moved the Bill in the Council of the Governor-General of India assembled for the purpose of making laws and regulations for India, was reported to have expressed:

“Considering the many years that the Bill had now been before the Council, the copious and searching criticism it had received from all or almost all competent persons in India, the number of times it had undergone revision, and the absence of all objection on the part of the Local Governments, Mr. Stokes had only to repeat what he said when presenting the Fourth Report last January,

namely, that without the *experience* derived from its actual operation the Bill was not likely to be further improved."<sup>1</sup>

### EXPERIENCE SHOWS NECESSITY FOR CHANGES

2.5 Thus, one has to acknowledge the fact that the NIA is the result of carefully considered measures and has withstood expert scrutiny. But the experience of nearly a century that has since then elapsed, has shown the scope and the need for considerable changes and improvement in the Act. The scheme of arrangement of the Act had been criticised as confusing<sup>2</sup> and illogical. The Law Commission had pointed out that the provisions which are of a general nature and applicable to all the instruments governed by the Act and provisions which are peculiar to any of them are not classified. That apart, while the Act suited the commercial practices of those days, it is obvious that it has failed in several respects and there are also adaptations necessary to suit the banking and commercial practices of modern days.

### EXCLUSION OF HINDU LAW MERCHANT

2.6 We have also to mention that when the Act was conceived and ultimately enacted, there was a fairly well organised system of payments by indigenous negotiable instruments known as hundis. While the framers of the NIA were well aware of this, their efforts were not to standardise the usages and practices governing the indigenous system, but essentially to confine the provisions of the statute to facilitate commercial and trading transactions involving British banks, merchants and traders. Time and again we find that the original draft was changed to bring about conformity with the English law. It is also seen that the Digest of the Law of Bills of Exchange of Sir McKenzie Chalmers had been kept as a model and this had ultimately resulted in the substantial agreement between the provisions of the Bills of Exchange Act, 1882 (BEA) of the U.K. and the NIA. While the extent to which indigenous negotiable instruments (hundis) should come within the scope of the Act had been a bone of contention from the very beginning, by confining itself to the three types of negotiable instruments, viz., cheques, bills and notes, and by saving the local usages relating to any 'instrument' (which is either a 'cheque', 'bill' or 'note') written

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<sup>1</sup>Supplement to the Gazette of India No. 27—Calcutta, Saturday, July 2, 1881, pp. 1409-1411.

<sup>2</sup>Benares Bank Ltd. v. Hormusji, (1930) 52 All. 696 (697).

in oriental language the NIA has excluded from its scope either totally or substantially the rules governing the payment mechanism relating to a considerable volume of commercial transactions.

2.7 The NIA codified the practices and usages of the Law Merchant as prevalent in England with reference to cheques, bills and promissory notes, though the English statute (BEA) was enacted a year later. But even before the NIA, the practices and usages relating to hundis and their different types had already crystallised into a set of rules for payment and collection of hundi paper and were found in the 'Hundi rules' of the different associations of native merchants and traders. Though the practices and usages relating to hundis were referred to as uncertain and undefined in the Report of the Select Committee, dated 19th February 1879, on the Bill to define and amend the law relating to promissory notes, bills of exchange and cheques, it is seen from the case *Jadowji Gopal & others vs. Jetha Shamji & others*,<sup>1</sup> that the rules and other particulars in regard to jokhmi and non-jokhmi hundis were settled by the principal dealers in such hundis and signed by them on 15th August 1870.<sup>2</sup> These rules had been judicially recognised and acted upon even prior to the NIA. In *R. D. Sethna vs. Jwalaprasad Gayaprasad*<sup>3</sup>, and in *Champaklal Gopaldas and another vs. Keshrichand Naganmal and another*,<sup>4</sup> the rules relating to hundis have been referred to as part of the Hindu Law Merchant.<sup>5</sup>

2.8 But with the spread of joint stock banking, instruments had come to be increasingly drawn in one or the other of the forms governed by the NIA and the volume of commercial transactions evidencing payments by hundis had been considerably shrinking. Nevertheless, substantial are the volume and spread of business in Hundis even now in terms of current estimates. This Committee is dealing separately with the review of the law relating to indigenous negotiable instruments including the codification of the practices and usages governing such instruments.

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<sup>1</sup>ILR. 4 Bom. (1880) 333.

<sup>2</sup>The Gujarati pamphlet had been printed at Bombay in 1871 at Daftar Ashkar Press.

<sup>3</sup>ILR. 39 Bom. (1915) 513.

<sup>4</sup>ILR. 50 Bom. (1926) 765.

<sup>5</sup>Please see also (1870) 7 Bom. HCR. 137 at p. 142.

## LAW MERCHANT AND NEGOTIABLE INSTRUMENTS

2.9 The usages and practices that govern the mechanism for financing the purchase, sale and movement of goods and the transmission of funds from one place to another belong to the Law Merchant. In his work on "Foundations of Legal Liability", T.A. Street says that "notwithstanding the fact that the law of bills and notes is in a sense very modern, it is necessary for us first to obtain a clear conception of the ancient law merchant (*lex mercatoria*), for the law of bills and notes is one of its offshoots".<sup>1</sup> As part of the Law Merchant, the law relating to negotiable instruments is not really part of the law of any one nation but belongs to the commercial world in general, transcending national barriers.

2.10 Lord Cockburn, C.J., in *Goodwin v. Roberts*<sup>2</sup> traced the origin and history of bills of exchange and other negotiable instruments in England. It is seen that bills of exchange were first brought into use by the Florentines in the twelfth, and by the Venetians about the thirteenth century. Their use gradually found its way into France, and, still later, but slowly, into England. In England, the use of bills seems to have at first, been confined to foreign bills between British and foreign merchants. It was afterwards extended to domestic bills between traders and finally to bills of all persons, whether traders or not.

2.11 In England, the law relating to bills of exchange and other negotiable instruments was not originally a part of the Common Law and the principles were imported into England from the Continent. Blackburn pointed out that "as the Courts of the Staple decayed away, and the foreign merchants ceased to live subject to a peculiar law, those parts of the law merchant which differed from the common law either fell into disuse or were adopted into the common law as the custom of merchants".<sup>3</sup>

2.12 As T. A. Street pointed out, "the interplay between the custom of merchants and the common law has produced highly specialized results. Here legal development has reached a degree of finality not to be found elsewhere. The bill of exchange is the best illustration. This instrument is an ambulatory contract circulating like money, and

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<sup>1</sup>Street, T.A., "The Foundations of Legal Liability", Vol. II, 1906 edn., p. 324.

<sup>2</sup>(1875) L.R. 10 Ex., pp. 346-358.

<sup>3</sup>Lord Blackburn in his work on Sale, 2nd edn., p. 317.

in a large degree it performs the functions of money. It has aptly been termed a 'courier without luggage'. Being backed by the needs of the commercial world, it has triumphed in many successive encounters with common law principle."<sup>1</sup>

2.13 The Law Merchant and as part of it the rules governing negotiable instruments have throughout evolved on the custom of merchants respecting them. But as Chalmers points out, the development of the law by ascertaining the custom regarding them was arrested, first in the Continent, and later perhaps also in the Common Law countries, by the process of codification, which was perhaps unavoidable. And this raised the problem of bringing the codified law, from time to time, in line with the commercial needs of the country.

#### CODIFICATION OF THE LAW

2.14 The principles governing the bills of exchange were codified into law, in France, by the "Ordonnance de 1673" which was amplified but substantially adopted by the Code de Commerce of 1818. In 1881 when the NIA was considered in India for adoption, the Hon'ble Mr. Stokes who moved the Bill mentioned, after referring to the several changes made in the earlier drafts prepared for the purpose, that India would follow the example of more than forty countries which had by then codified their rules on the subject.<sup>2</sup> In the next year, the English Act, viz., the Bills of Exchange Act, 1882 (BEA), was enacted. The BEA was drafted by and was mainly based on the earlier Digest prepared by Sir McKenzie Chalmers. Since in drafting the NIA reliance had been based on the principles laid down in England and on the Digest prepared by Chalmers, the NIA is more or less on the lines of the BEA.

2.15 As the Privy Council pointed out in the case of the Bank of Baroda Ltd. v. Punjab National Bank Ltd.,<sup>3</sup> "there are certain differences between the English Act and the Indian Act, which preceded the former by a year. But substantially the two Acts correspond. Both have been based on the law developed by the English Courts as a part of the law merchant, which the common law originally received on the

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<sup>1</sup>Street, T. A., "The Foundations of Legal Liability", Vol. II, 1906 edn., pp. 324-325.

<sup>2</sup>Supplement to the Gazette of India, No. 27, Calcutta, Saturday, July 2, 1881.

<sup>3</sup>A.I.R. 1944 P. C. 58.

basis of what was proved to the Court to be the custom of European businessmen in their dealings, but which eventually, under the name of the law merchant, was integrated with and became a part of the common law. The law of negotiable instruments was peculiarly adapted to codification, because it was so largely precise and formal. Hence the English Act was described as a codifying Act, and so was in fact the Indian Act. Both were based on the English decisions and hence these and later decisions of either country are commonly cited and relied upon. And in addition, decisions from other common law jurisdiction are frequently cited..... But the law merchant is not a closed book nor is it fixed or stereotyped..... Practices of businessmen change, and Courts of law in giving effect to the dealings of the parties will assume that they have dealt with one another on the footing of any relevant custom or usage prevailing at the time in the particular trade or class of transaction. Hence evidence is admitted of custom and usage, which when juridically ascertained and established become incorporated in the common law.”

2.16 In the U.S.A., Mr. J. J. Crawford of New York was appointed in 1896 to draft a statute to make uniform the law of negotiable instruments. The statute, when drafted, was recommended for adoption and in 1897 was enacted for the State of New York. With minor variations this was adopted by the other States of the U.S.A. It may be observed that while some of the sections of the Uniform Negotiable Instruments Law (UNIL) were identical with the BEA, the others were not entirely identical. However, the American cases decided on the UNIL sections were of use to the practitioner where there was no domestic authority on the point. Sir McKenzie Chalmers has observed that “the decision of an American Court, trained in the common law, and interpreting a statutory provision common to both countries, must always be relevant when a similar question arises in England, though it is not, of course, a binding authority”. In Canada, the BEA has been adopted in 1890, with very minor changes. Evidently, the Commonwealth countries have adopted the BEA model without many changes.

2.17 The negotiable instruments laws of the U.S.A. were revised and redrafted as Article 3 of the Uniform Commercial Code (UCC).<sup>1</sup>

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<sup>1</sup>The idea of the Uniform Commercial Code was conceived in 1942, the first draft of it was prepared in 1952 and subsequently it has been frequently reviewed and the latest version is of the year 1972. This Code is a joint product of the efforts of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. A Permanent Editorial Board has been set up which reviews constantly the several decisions affecting the Articles of the Code and suggests appropriate amendments for further action.



2.18 As an improved version of the UNIL, the provisions of Article 3 of the UCC<sup>1</sup> stand out for comparative study. It is also the latest national version of the negotiable instruments law in a Common Law country.

2.19 It has been pointed out that the law on bills of exchange (and other negotiable instruments) was originally a universal law and that it acquired diversity through legislation and codification in the various countries. Dr. Josephus Jitta had observed that "the law on bills of exchange was originally established by universal usage, and.....during the course of history it had become a law bearing the stamp of many national legislatures".<sup>2</sup> But legislation has also served to secure partial unification of the laws on the subject in the various countries of the world.

### REGIONAL UNIFICATION OF THE LAWS

2.20 Consequent on the codification of the law in different countries, the differences in the provisions of the national laws became conspicuous and claimed attention as they hampered trade and commerce between countries. This development first led to a movement for the regional unification of the laws, which was followed in due course by the movement for international unification of the national laws on the subject.

2.21 In 1857, the Assembly of German Confederation entrusted a commission with the study of amendments to the General Ordinance on bills of exchange. The suggested changes were adopted by all the states of the Confederation. This became the model for the laws of other countries. The Uniform Scandinavian law was almost a literal transcription of the German code, which was adopted in Denmark, Sweden and Norway on May 7, 1880. The Swiss Code of Obligations brought about uniformity between Cantonal laws of Switzerland. The German law served also as a model for the laws of Bulgaria, Hungary, Italy, Japan, Peru, Portugal, Russia, San Salvador and Venezuela.

2.22 The codification and unification of the Anglo-American law rest largely on the work of Sir McKenzie Chalmers who was asked

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<sup>1</sup>The text of Article 3 of the UCC is given as Appendix E to Bhashyam and Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974).

<sup>2</sup>Dr. Josephus Jitta in League of Nations, Unification of laws relating to bills of exchange and promissory notes, 13.

by the Institute of Bankers, London, to prepare a draft bill. The bill was introduced in the U.K. Parliament by Sir John Lubbock, who was also the President of the Institute, and was passed in 1882 as the Bills of Exchange Act, 1882. The colonies and dependencies of the U.K. made similar enactments and thus the law was substantially unified within the Common Law countries. In the U.S.A., the BEA had served as a model for the draft of a uniform negotiable instruments law. However, there were substantial differences between the UNIL and the BEA. As earlier indicated, the UNIL was replaced in all the States of the U.S.A. (except Louisiana) by Article 3 of the UCC.

2.23 It had also been pointed out that the source of the law of many countries leads back to the French Law.<sup>1</sup> While Chalmers had referred to the salient features differentiating the French law and the English law on the subject, he had also pointed out that "French law is worthy of attention in another respect. In the absence of English authority, our Courts have, in some instances, consciously taken it as their guide".<sup>2</sup> The laws of Netherlands, Serbia, Argentine, Egypt, Russian Poland, Haiti, Greece, Dominican Republic were stated as based on the French model.

## INTERNATIONAL UNIFICATION OF LAWS

2.24 The movement for the international unification started bearing fruit after the movement for the regional unification of such laws. The formation of the International Law Association in 1873 gave impetus to the movement for the unification of various branches of commercial law. In 1885, an international congress on commercial law was convened at Antwerp on the invitation of the King of Belgians, to examine, among other questions, the possibility of a uniform law relating to commercial instruments.

2.25 The next important step in this movement was the Hague Conference held from June 23 to July 25, 1910 in which 35 states were represented. Both Great Britain and the U.S.A. had also sent delegates to this Conference. There was a second Hague Conference held from June 15 to July 23, 1912. The second Conference succeeded in drawing up a convention on the unification of the law relating to bills of

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<sup>1</sup>XLIV Har. L. Rev. (1931) 333 at 337.

<sup>2</sup>Chalmer's Introduction to the third edition of his Digest on Bills of Exchange; please see also Foster v. Dawber, 6 Exch. 852, COX. v. Troy, 5 B & Ald. 481.

exchange and promissory notes. It also drew up a series of resolutions on the unification of the law relating to cheques. The United States and Great Britain were, however, not parties to these agreements.

2.26 The further continuation of the movement for international unification received a set-back when the World War began in 1914. After the War, in 1920, the Council of the League of Nations instructed its Economic Committee to consider the question. The Economic Committee invited four experts, viz., Dr. Josephus Jitta, Prof. Lyon-Caen, Sir McKenzie D. Chalmers and Prof. Franz Klein, to draw up a report on the legal aspects of the question. This was further considered by the other expert groups of the Economic Committee and ultimately the efforts led to the Geneva Conventions of 1930 and 1931.

### GENEVA CONVENTIONS

2.27 The international conference for the unification of laws on bills of exchange, promissory notes and cheques, which met at Geneva from May 13 to June 7, 1930, it has been rightly remarked, was the culmination of a long effort to unify the laws of various countries with reference to Commercial Paper, and represented an interesting development of a more general movement towards the unification of national laws.

2.28 Thirtyone states participated in the conference, and in addition, the U.S.A. was represented by an observer. Three Conventions were adopted, namely,

- (1) a Convention providing a uniform law for bills of exchange and promissory notes, with two annexes and a protocol;
- (2) a Convention for the settlement of certain conflicts of laws in connection with bills of exchange and promissory notes, with a protocol; and
- (3) a Convention on stamp laws in connection with bills of exchange and promissory notes.

There were also three other Conventions which were adopted on March 31, 1931, with reference to cheques, namely,

- (1) a Convention providing a uniform law relating to cheques;
- (2) a Convention for the settlement of certain conflicts of laws in connection with cheques; and

(3) a Convention on stamp laws in connection with cheques.

These Conventions, subject to the reservation which the respective participants had indicated at the time of their agreeing to the Conventions, have now become the law in the European Continent, Japan and several other countries, barring significantly countries which derived their legal foundations from those of the English Common Law.

## GENEVA CONVENTIONS AND COMMON LAW COUNTRIES

2.29 As Sir McKenzie Chalmers had explained at the time when the Hague Regulations which preceded these Conventions were drawn up, the reason for which the English Common Law countries stood outside the ambit of the Conventions was due to the fact that the U.K. and its colonies and dependencies, which then included India, had already framed statutes more or less on the lines of the Bills of Exchange Act, 1882 of the U.K. and had thus secured a certain measure of uniformity of law on this subject between themselves, and that the U.K. was not in favour of upsetting this. Thus, there stood out, in the main, two systems, one the system followed in the Anglo-Saxon countries, and the other followed in countries which are generally termed as Civil Law countries. It was hoped at the time of the 1930-31 Conventions that ultimately the time would come for the differences in these two systems being reconciled and by and large all the nations of the world having only one unified scheme of law.

## EFFORTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

2.30 Under the auspices of the United Nations, its Commission on International Trade Law (UNCITRAL) has, in collaboration with other international agencies like the International Chamber of Commerce and other bodies, taken up the task of evolving a model law to govern international payments. The UNCITRAL appointed a Committee which has now drafted a model law which would be adopted by the different nations to govern international payments. Though this draft does not fully cover all the aspects which a national law dealing with the negotiable instruments may have to provide for, it is desirable that, unless there are compelling reasons, the provisions of a national law are drawn up to be in step with this model, so that there could be a desirable uniformity of laws on the subject and this would further the development of international intercourse in industry, trade and commerce.

2.31 The study so far conducted by the UNCITRAL has revealed that "there is an area of negotiable instruments law involving a network of inter-relationships on the instrument; this area needs to be dealt with as a unit. Selecting only some of these issues for inclusion in the uniform rules and remitting related issues to the rules of national law would lead to various difficulties. In some situations there will be doubt as to which national law is applicable, and the parties in one country cannot readily understand or comply with the rules of foreign legal systems. In other cases, even where the rules of the existing systems of negotiable instruments law seem, at first glance, to be compatible with each other, closer examination of the judicial interpretation given these rules shows that they do not mesh precisely with each other or with any limited set of uniform rules applicable to an international instrument."<sup>1</sup>

2.32 The UNCITRAL has now drawn up a draft uniform law to govern "international bill of exchange" which is, *inter alia*, a bill drawn in a country other than the country of the drawee or of the payee or at the place where payment is to be made. There are also efforts to draw up similar model rules to govern "international cheques/promissory notes". The results of the several papers and studies conducted by the UNCITRAL have kindly been made available to the Banking Laws Committee.

#### ELEVENTH REPORT OF THE LAW COMMISSION

2.33 The Law Commission of India had earlier considered the revision of the NIA, and its recommendations are contained in its Eleventh Report. The model suggested by the Law Commission was based on the provisions of the BEA and the UNIL. As we indicated earlier, the UNIL of the U.S.A. has since been replaced by Article 3 of the UCC. Since the Report of the Law Commission there have been several significant changes in the spread of the banking industry within the country and there have also been major developments at the international level. We have also to consider the experience gained on the U.K. Cheques Act<sup>2</sup> and the work of the UNCITRAL and the several other developments. Thus, the changes within the country and outside have necessitated a fresh review of the subject.

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<sup>1</sup>United Nations Commission on International Trade Law, Year Book 1972, Vol. III, p. 146.

<sup>2</sup>Please see the Chapter on Bankers' Protection.

## OUR APPROACH TO THE SUBJECT

2.34 Thus, this Committee has before it, on the one hand, the BEA of the U.K. and Article 3 of the UCC of the U.S.A. and, on the other hand, the Geneva Conventions and the drafts now being processed by the UNCITRAL to regulate the international payments mechanism. It is but natural that in view of our past links and the fact that by and large our laws have been modelled on the lines of those of the U.K. and the other Common Law countries, our main reliance is even today on the provisions that are found to be in force in the Common Law countries. But that does not mean that wherever we find that for cogent reasons it would be desirable for us in certain respects to adopt provisions found in the Geneva Conventions or in the other Continental laws, we should be inhibited from adopting such provisions. Ultimately, the question is what would be suitable for the commercial and economic development of our country. Taking into consideration the fact that the U.K. has already joined the European Common Market and that serious attempts are being made to reconcile the economic and commercial laws of the European Continent and the U.K., the distinction based on the Common Law system and the Civil Law jurisprudence is proving to be gradually of lesser importance. Hence, we have kept all the different provisions in view in suggesting the framework of the law that should replace the Negotiable Instruments Act, 1881, which, as the Law Commission had indicated as early as in 1958, is overdue for replacement by a more simplified and modernised statute.

2.35 After having set out our general approach, we would also like to deal in this chapter with a few general questions relating to negotiable instruments. The first relates to the need for a substantive definition of a "negotiable instrument" in the statute. This question has to be considered in the light of the economic factors which favour the trend to increase the types of negotiable instruments in order that the overall liquidity in a developing economy may be sufficiently elastic to allow development processes.

### NEGOTIABLE INSTRUMENT—DEFINITION

2.36 As per the NIA, a "negotiable instrument" means a note, a bill or a cheque payable to order or to bearer. But this does not set out the essential requisites of a negotiable instrument *per se*. The

BEA provisions also are not helpful to decide this question. But section 3-104(1) of the UCC provides that—

“Any writing to be a negotiable instrument within this Article\* must

- (a) be signed by the maker or drawer; and
- (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article;\* and
- (c) be payable on demand or at a definite time; and
- (d) be payable to order or to bearer.”

The requirements stated in the UCC definition are, however, implied in the definitions of negotiable instruments dealt with in the NIA and the BEA. In the result, for the purpose of considering the basic requisites of a negotiable instrument, we have to refer to other authorities.

2.37 Justice Blackburn had suggested the following definition of negotiable instrument:

“Where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in marked overt.”<sup>1</sup>

This clearly signifies that we have to have regard to the custom of trade. But, then, what about customs which are of recent origin?

2.38 Dealing with the question as to whether by mercantile usage of recent origin an instrument could be regarded as having the status of a negotiable instrument, Cockburn, C.J., in *Goodwin v. Roberts*,<sup>2</sup> observed:

“Usage, adopted by the Courts having been thus the origin of the whole of the so-called law merchant as to negotiable securities,

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\*Article 3 of the UCC.

<sup>1</sup>*Crouch v. The Credit Foncier Co.*, (1873), L.R. 8 Q.B. 374 at page 381.

<sup>2</sup>(1875) L.R. 10 Ex. 337.

what is there to prevent our acting upon the principles acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security not for money, but for the delivery of a bond; nevertheless, we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such."

Against the recognition of the recent origin of a mercantile custom to treat a particular class of instruments as negotiable, it has sometimes been urged that the negotiability of certain instruments was recognised by the ancient Law Merchant and without statutory sanction there can be no addition to this category. This view has been convincingly negated by Kennedy, J. in *Bechuanaland Exploration Co. v. London Trading Bank Ltd.*<sup>1</sup> and Bigham, J. followed it in *Edelstein v. Schuler & Co.*<sup>2</sup> As Paget has pointed out, "it hardly appears conducive to national prosperity that an important part of the circulating medium of the country should be once and for all limited to that which sufficed for the comparatively small commerce of earlier days, with no possibility of expansion to meet the larger needs of modern times."<sup>3</sup>

2.39 Thus, the Law Merchant is not a closed book and the categories of negotiable instruments are also neither fixed nor stereotyped. In this context, WE CONSIDER that it is not necessary to suggest a general statutory definition of the basic requisites of a negotiable instrument, and the method adopted by the NIA would serve the purpose of the statute. As and when it is considered necessary for the legislation to cover negotiable instruments other than the specified categories covered by the statute, the definition need concern itself

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<sup>1</sup>(1898) 2 Q.B. 658.

<sup>2</sup>(1902) 2 K.B. 144.

<sup>3</sup>"Paget's Law of Banking", Butterworths, 8th edn. (1972), p. 515.



only with the particular criteria to be fulfilled by instruments coming within such category. The features of negotiable instruments in general are sufficiently well-known and they require no express statutory incorporation.

### CERTIFICATES OF DEPOSIT

2.40 While referring to usages of recent origin by which the family of negotiable instruments in general is widened, one may refer to the negotiable certificates of deposit. Negotiable certificates of deposit are a class of instruments of comparatively recent origin known to the banking industry in other countries, but as yet not introduced by banks in this country. This form of instruments is widely used in the U.S.A. and recently numerous banks in the U.K. have also issued such instruments.<sup>1</sup>

2.41 In the U.S.A., negotiable certificates of deposit "were issued primarily to halt the movement of demand deposit funds from large commercial banks by corporate money managers into investment in various money market instruments, for example, treasury bills, commercial paper, and bankers' acceptances".<sup>2</sup> But the negotiable certificates of deposit have grown in the U.S.A. at a considerably faster rate than the rate of growth of the total of time and savings deposits.<sup>3</sup> It is said that the appeal of the negotiable certificates of deposit reflects in part their attractive yields, and it also reflects their marketability, something that traditional time deposits lacked.<sup>3</sup>

2.42 Because of their sensitivity to interest rates and the fact that in many cases the negotiable certificates of deposit may represent temporarily idle funds which in former years might have contentedly remained as demand deposits with banks, it has also been pointed out that the negotiable certificates of deposit are not necessarily so pleasing to bankers. But they represent "a potentially volatile source of funds, in contrast to the traditional savings, or even time, deposit. In this respect, CDs bear a strong resemblance to demand deposits".<sup>3</sup> The issuance of negotiable certificates of deposit has been "the most widely discussed aspect of the renewed vigour with which commercial banks

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<sup>1</sup>"Paget's Law of Banking", Butterworths, 8th edn. (1972), p. 515.

<sup>2</sup>"Innovations in Bank Management: Selected Readings", edited by Paul F. Jessup, Holt, Rinehart & Winston Inc., (1969), p. 161.

<sup>3</sup>*ibid.*, p. 162.

have sought to strengthen their commanding position as a financial intermediary".<sup>1</sup>

2.43 Obviously from the point of view of deposit mobilisation by commercial banks, the desirability of introducing the negotiable certificates of deposit is a question that requires careful consideration. But ultimately the question has to be decided on economic considerations having regard to the considerable potential this class of instruments has evinced in other countries in attracting deposits. But our consideration here is limited to seeing whether the statute relating to negotiable instruments would require any special provisions so that the law may not hamper the introduction of negotiable certificates of deposit, if their introduction is considered beneficial for the economic development of the country.

2.44 It is true that Article 3 of the UCC, which deals with Commercial Paper, specifically defines a certificate of deposit, and, by express reference, negotiable certificates of deposit come within the scope of that Article. No specific provision in this regard is found in the BEA or in the Canadian statute. Nevertheless, negotiable certificates of deposit have also been introduced in the U.K. and Canada.

2.45 As Falconbridge has observed, "there is high authority in favour of the view that a document which is a receipt for a certain sum 'payable to' the depositor or order, or 'which the bank will repay' to the depositor or order, possesses all the qualities of a promissory note, notwithstanding that it also contains clauses providing that the sum deposited, in order to bear interest, must remain in the bank for a certain period, and that it cannot be withdrawn except on a certain number of days' notice, and that the receipt must be given up to the bank when payment is required".<sup>2</sup> However, if the deposit receipt states that it is not transferable, then clearly it is not a negotiable instrument, though an endorsement thereon of an order to pay and the delivery of the document may operate as an equitable assignment of the fund.<sup>3</sup>

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<sup>1</sup>"Innovations in Bank Management: Selected Readings", Edited by Paul F. Jessup, Holt, Rinehart & Winston Inc., (1969), pp. 162-163.

<sup>2</sup>"Falconbridge on Banking and Bills of Exchange", Canada Law Book Ltd., 7th edn. (1969), p. 292; *Richer v. Voyer* (1874), L.R. 5 P.C. 461 at p. 477; *Re Central Bank, Morton and Block's Claims* (1889), 17 O.R. 574; *Provincial Treasurer of Manitoba v. Bennett*, (1937) 2 D.L.R. 1, (1937) S.C.R. 138.

<sup>3</sup>"Falconbridge on Banking and Bills of Exchange", Canada Law Book Ltd., 7th edn. (1969), p. 293; *Re Griffin*, (1899) 1 Ch. 408; cf., *Re Commercial Bank of Manitoba, Barkwell's Claim* (1897), 11 Man. R. 494.

2.46 Thus, though deposit receipts *per se* are not negotiable instruments, there is nothing in the provisions of law applicable now which precludes a negotiable deposit receipt being issued by a bank, apart from the liability that may arise for the payment of *stamp duty*.

2.47 Though the UCC specifically provides that a certificate of deposit is an acknowledgement by a bank of receipt of money with an engagement to repay it, the writing should also conform in other respects with the requirements of a negotiable instrument which, *inter alia*, require that the instrument should be payable to order or to bearer and be payable on demand or at a definite time. The UCC definition of a "note" specifically excludes certificate of deposit, implying that but for such exclusion, certificate of deposit may be considered as a time promissory note.<sup>1</sup>

2.48 In the light of the position set out above, we do not consider it necessary to introduce any special provision in the statute to provide for the issue of negotiable certificates of deposit by banks. But, WE RECOMMEND that the desirability of banks introducing negotiable certificates of deposit merits careful consideration by the Reserve Bank of India and the Government, having regard to the needs of our country's banking and economic development. WE RECOMMEND also that when a decision is taken that it is desirable that banks should introduce negotiable certificates of deposit, Government may, by notification, exempt such certificates of deposit from liability to be stamped as a time promissory note.

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<sup>1</sup>This is also seen from the following references in Paton's Digest: " 'A certificate of deposit ordinarily constitutes, in effect, a promissory note', 5 Michie, Banks and Banking, §313, p. 599, note 14. See also 7 Am. Jur. Banks, §492: 6 Zollmann, Banks and Banking, §3997, note 63."

## CHAPTER 3

### NEGOTIABLE INSTRUMENTS—FORMAL REQUISITES

Negotiable instruments evidence contracts of a special kind. The history of their growth reveals that the principles governing them are a judicious mixture of the principles underlying both the law of property and the law of contract, which are most favourable to safe, easy and rapid circulation. They borrow from the law of property the easy method of assignment by means of an endorsement and delivery, or a delivery merely, of the instrument. They borrow from the law of contract the principle that the person primarily liable is personally bound by his contract to pay the endorsee or bearer producing the instrument; and that, therefore, no defences which he might have had to claims of other persons, and no question of title to the instrument, can be any answer to an endorsee or bearer producing the instrument, who has acquired it in good faith and for value. In addition, they borrow from mercantile system the principle that normally good faith and value will be presumed.<sup>1</sup> In England, as Chalmers points out, bills developed into a perfectly flexible paper currency, though they do not imply an absolute payment unless the creditor chose to take them as such.<sup>2</sup> In view of these special characteristics, it is necessary that the instruments should in *form* comply with certain essential requisites.

3.2 The history of the development of negotiable instruments shows that methods had been devised by legal theory and commercial practice for breaking-down the archaic formalism of primitive law, which would otherwise have prevented the growth of anything like a negotiable instrument. In this, it had been pointed out that legal theory was for a time hostile to their development until it was realised that the technical rules must in the long run accommodate themselves to business needs and that commercial law exists primarily to settle

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<sup>1</sup>Holdsworth, W. S., "The Origin and Early History of Negotiable Instruments II", Law Q. Rev. (1915) Vol. XXXI, p. 173 at 186.

<sup>2</sup>Chalmers' introduction to the third edition of his Digest on the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities.

mercantile disputes.<sup>1</sup> These instruments were absolutely necessary to commerce; and it was therefore inevitable that legal technicalities should in the long run yield to mercantile necessities.<sup>2</sup> While it is necessary that in view of their special character and incidents negotiable instruments should conform to certain essential formal requisites, in considering such requisites we have to allow for suitable adaptations and give greater importance to the mercantile necessities of modern times, for the healthy development of commerce and trade.

3.3 The formal requisites of negotiable instruments, which we intend dealing in this chapter, can be considered with reference to four aspects:

- (i) the essential features to be satisfied before the drawing or making of an instrument can be considered to be complete in form;
- (ii) the rules to be applied when doubts arise by reason of the incompleteness or ambiguity in the instrument;
- (iii) the principles to regulate cases of alteration or cancellation in the instrument; and
- (iv) cases of forgery.

Consistent with the essential requirements as to form, generally the aim should be to validate the instrument as far as possible, as this would be conducive to expeditious settlement of commercial claims.

#### A. FORMAL REQUISITES FOR THE DRAWING OR MAKING OF AN INSTRUMENT

3.4 It is necessary that the instrument should contain an unconditional order to pay a definite sum within a definite or determinable time and that such order should be signed by the maker or the drawer. It is also obvious that having regard to the fact that the maturity of the instrument and similar other essential matters are to be determined with reference to the date the instrument bears, it should bear a date. Again, considerations of fiscal policies of countries have warranted legislation imposing stamp duties on the making of negotiable instruments. These aspects merit separate consideration.

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<sup>1</sup>Holdsworth, W. S., "The Origin and Early History of Negotiable Instruments I", Law Q. Rev. (1915) Vol. XXXI, p. 12 at 17-18.

<sup>2</sup>*ibid.*

**(1) UNCONDITIONAL ORDER**

3.5 While the “unconditional” character of a negotiable instrument is a universally recognised essential feature, the elucidation to be given to the concept “unconditional” raises a number of questions. Having regard to mercantile necessities, this concept has been changing. Section 5 of the NIA and sections 3(2) and 3(3) of the BEA specifically state some of the circumstances when an instrument may be regarded as unconditional. But the UCC provision is more comprehensive.

3.6 Section 3-105 of Article 3 of the UCC contains an exhaustive enumeration of the circumstances when an order can be considered as unconditional. As per this provision, a promise or order, otherwise unconditional, is not made conditional by the fact that the instrument—

- (a) is subject to implied or constructive conditions; or
- (b) states its consideration, whether performed or promised or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or “as per” such transaction; or
- (c) refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to pre-payment or acceleration; or
- (d) states that it is drawn under a letter of credit; or
- (e) states that it is secured, whether by mortgage, reservation of title or otherwise; or
- (f) indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or
- (g) is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or
- (h) is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

Subsection (2) of this section also provides that the promise or order is not unconditional if the instrument states that it is *subject to or governed* by any other agreement; or if it states that it is to be paid *only* out of a particular fund or source, unless it comes under clause (g) above.

3.7 It is desirable to have, if possible, a comprehensive provision which would facilitate a better understanding of the "unconditional" concept by, *inter alia*, bankers, traders and merchants. Mr. Maurice Megrah would view items (b) to (g) *supra* as not stating the law differently from that in force in the U.K. However, as Mr. Megrah has stated, clause (a) *supra* may not appear to be appropriate and this may make the instrument conditional. An instrument should not be treated as negotiable unless the holder can ascertain all of its essential terms from its face. While a mere recital of the existence of a separate agreement or a reference to it for information should not affect the negotiability, making the instrument subject to the conditions contained in a different agreement may bring about a different result and hence this should not be encouraged. Moreover, we would like to exclude from the scope of clause (c) *supra* the reference "to a separate agreement for rights as to pre-payment or acceleration".

3.8 Hence, WE RECOMMEND that paragraph 2 of section 5 of the NIA may be modified to provide, *inter alia*, that a promise or order to pay is not to be regarded as conditional in the circumstances stated in clauses (b) to (h) (with clause (c) subject to the modification indicated above), read with sub-section (2) of section 3-105 of the UCC.

#### *Documentary Bills*

3.9 Essentially, everybody understands payment on a documentary bill as subject to the delivery of the documents. Nevertheless, the condition as to delivery of the documents is expressed in a separate agreement mainly to avoid the bill being considered as invalid on the ground that it is conditional. In other words, the condition is always present with reference to a documentary bill but not *ex facie* stated on the bill. Why should we not recognise the commercial practice and allow such condition to be recognised by the negotiable instruments law?

3.10 In their origin, bills were instruments for settling and adjusting the dues of merchants of different countries *inter se*, though *later on* they developed in the U.K. as an effective substitute for paper currency. Thus, when we look into the role played by negotiable instruments that go to augment the money supply, we can readily understand that consistent with this role it is not desirable to permit payment on the bill being made conditional on the delivery or production of either

the goods or the documents. While this role of bills is readily recognised, we have also to see whether consistent with mercantile necessities of our days it is not desirable or necessary to provide *also* for the recognition, *under the Act*, of documentary bills which play a very vital role in the commercial development of a country.

3.11 Chalmers has explained that as against the banking or currency theory which ultimately gained supremacy, there is also the mercantile theory whereby the bill was considered to represent essentially a trade transaction. This view was steadily kept in view under the French law.<sup>1</sup> It may be of interest to mention that bills, in their origin, represented mainly trade transactions. The recognition of a documentary bill, *under the Act*, would be consistent with the mercantile theory. In ultimate analysis, we find that both these theories stress two vital functions of bills. Neither of the theories can entirely be lost sight of.

#### *Bilti Hundis*

3.12 There is also another relevant aspect which is peculiar to our country. We find that *bilti hundis* (hundis with documents) are a class of indigenous negotiable instruments, which bear on their face the reference to the document of title to goods and it is a *condition* of their payment by the drawee that the documents should be validly transferred and delivered by the holder to the drawee. In the course of the scrutiny of bills pending for collection or payment with some of the Bombay City branches of the banks selected for the Survey on Cheques and Bills, the officials of the Committee and of the NIBM found that on the date of the scrutiny such *bilti hundis* were pending for collection or payment<sup>2</sup>. It was also found that such *bilti hundis* are in general use and that they are also passing through commercial banking channels and serve as effective media for financing commercial transactions, especially the sale and purchase of foodgrains and other agricultural produce, textiles and also finished and processed goods. No doubt, this type of documentary hundis is in use only for financing the purchase/sale and movement of goods within the country.

3.13 We are separately examining the question of the codification of the practices and usages governing indigenous negotiable instruments.

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<sup>1</sup>Chalmers' introduction to the third edition of his Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities.

<sup>2</sup>Please see paragraph 17 of the Report on the Survey regarding Cheques and Bills (Appendix VI).



The aim of codification is to ascertain whether there are any general usages relating to such instruments which may merit recognition and, subject to this, try to link them within the framework of the law which is applied to bills, cheques and notes. On such codification, the purely local usages may no longer be recognised.

3.14 On codification, unless the condition aforesaid governing bilti hundis could be regarded, under the statute, as not thereby making the instrument conditional, how can we assimilate them with the bills of exchange now governed under the Act and which are treated as "unconditional orders"? Bilti hundis seem to have some merit. They evidence transactions relating to trade and commerce and provide an in-built device to ensure that an agency refinancing the transactions covered by such hundis is able to satisfy itself that the transactions refinanced are essentially towards the repayment of bills arising in the course of *bona fide* commercial and trade transactions. Having regard to the aim of the *new Bill Market Scheme* which the Reserve Bank of India has promoted and the objectives of credit policy, it may not be desirable to do away with bilti hundis.

#### *The New Bill Market Scheme*

3.15 In the context of the above discussion, it is of interest to note that the central bank of the country has been making special efforts for enlarging the use of the bill of exchange as an instrument of credit and the creation of a bill market. The Study Group appointed by it to go into this question has suggested that—

"The usance bills of exchange should provide a clause indicating the nature of the transaction out of which the bill has arisen. To give an illustration, a bill of exchange arising out of sale of 'X' bales of cloth may contain a foot-note to the effect that it has arisen out of the sale of 'X' bales of cloth covered by railway receipt No.....dated.....It may be mentioned here that it is the practice in U.K. to put a clause on the bill of exchange indicating that the bill has arisen out of sale of specified goods/, commodities and also to state the name of the carrier of the relative goods."<sup>1</sup>

It is true that this recommendation of the Study Group could be implemented even without changing the negotiable instruments law. But the objectives underlying this suggestion would be better served if we

<sup>1</sup>R.B.I. Bulletin, July 1970, p. 1143.

could expressly validate a bill of exchange with the condition that payment thereon is to be made only against transfer and/or delivery of the documents referred to in the bill.

3.16 Moreover, the visits, referred to above, by the officials of the Committee and of the NIBM to the different branches of banks in Bombay, have clearly shown that the essential distinction between reference in the bill to the fact that the bill is in payment for the sale or purchase of the goods covered by the document and the fact that payment of the bill is made *subject* to a valid transfer and delivery of the document, is not clearly recognised by many merchants and traders.<sup>1</sup> While this may be partly due to the understanding among local merchants and traders based on their handling of bilti hundis, it is also due to the fact that when they say on the bill that payment thereon is subject to delivery of the documents, they are only stating facts, no doubt in ignorance of the technical requirements of the Act.

3.17 Thus, though a documentary bill contains only a reference to a document and payment thereon is not expressed as conditional on the valid transfer and delivery of the document to the drawee, the real intention of all the parties is that payment on the bill would be made only after the document is duly transferred and delivered. But, now, this condition is not found in the bill, but is evidenced by a *separate agreement*.

3.18 The device of a separate agreement to provide for such a condition has been evolved just to make the relative bills conform, on their face (though not so in fact), to the condition that the documentary bills are "unconditional orders". Gutteridge and Megrah have observed that where the reference in the bill to another document is considered as implying a condition that payment on the bill is subject to the delivery of the document, the holder of the bill would be divested of title unless the credit condition is complied with, and that this would entail that the bill is conditional, in which case it would not be a bill of exchange.<sup>2</sup> But, as stated above, the condition is given force by a separate agreement. It is desirable to avoid, if it is possible, the necessity of the parties to a documentary bill entering into a separate agreement just for the purpose of providing that the drawee would

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<sup>1</sup>Please see paragraph 16 of the Report on the Survey regarding Cheques and Bills (Appendix VI).

<sup>2</sup>Gutteridge and Megrah, "The Law of Bankers' Commercial Credits", Europa Publications Ltd., (1968), p. 83.

make payment of the bill to the holder only on the valid transfer and delivery of the related document. This could be achieved if the negotiable instruments law would permit that merely by reason of the fact that the bill is made payable on such a condition, the bill shall not be regarded as "conditional".

3.19 Such a provision would considerably facilitate the measures taken by the central bank of the country for channelling credit towards *bona fide* trade and commercial transactions. This may also obviate in many cases the recourse to a separate agreement being drawn up to provide that payment on the bill would be made by the drawee only after the documents are delivered. This would also be consistent with the real nature of documentary bills which are becoming very much popular in our country. In fact, it has been pointed out that "the new Bill Market has grown, perhaps under the impetus of the credit squeeze, to dimensions, which might not have been credited even a few months ago, and notwithstanding the slack season curbs imposed by the Reserve Bank, is likely to grow further."<sup>1</sup> The Committee strongly feels that giving due recognition in the *negotiable instruments law* for documentary bills would be in furtherance of the objectives of the credit policy of our country.

3.20 Hence, WE RECOMMEND that the second paragraph of section 5 of the NIA should further be amplified to provide that with reference to a bill of exchange, *other than a cheque*, the mere fact that payment on the bill is made subject to the transfer and delivery of the documents of title to goods attached thereto does not make the instrument *per se* conditional.

## (2) SUM CERTAIN

3.21 The order has to be for a "sum certain". Paragraph 3 of section 5 of the NIA, section 9 of the BEA, section 3-106 of the UCC and Article 7 of the UNCITRAL draft indicate the circumstances when the amount payable on the negotiable instrument could be considered as a sum certain notwithstanding the fact that the amount payable is not merely the figure stated in the instrument.

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<sup>1</sup>Speech delivered by Shri R. K. Seshadri, Deputy Governor, Reserve Bank of India, while inaugurating the Seminar conducted by the Bankers Training College, Bombay, for Legal Officers of Banks and Other Financial Institutions on May 27, 1974.

could expressly validate a bill of exchange with the condition that payment thereon is to be made only against transfer and/or delivery of the documents referred to in the bill.

3.16 Moreover, the visits, referred to above, by the officials of the Committee and of the NIBM to the different branches of banks in Bombay, have clearly shown that the essential distinction between reference in the bill to the fact that the bill is in payment for the sale or purchase of the goods covered by the document and the fact that payment of the bill is made *subject* to a valid transfer and delivery of the document, is not clearly recognised by many merchants and traders.<sup>1</sup> While this may be partly due to the understanding among local merchants and traders based on their handling of *bilti hundis*, it is also due to the fact that when they say on the bill that payment thereon is subject to delivery of the documents, they are only stating facts, no doubt in ignorance of the technical requirements of the Act.

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3.18 The device of a separate agreement to provide for such a condition has been evolved just to make the relative bills conform, on their face (though not so in fact), to the condition that the documentary bills are "unconditional orders". Gutteridge and Megrah have observed that where the reference in the bill to another document is considered as implying a condition that payment on the bill is subject to the delivery of the document, the holder of the bill would be divested of title unless the credit condition is complied with, and that this would entail that the bill is conditional, in which case it would not be a bill of exchange.<sup>2</sup> But, as stated above, the condition is given force by a separate agreement. It is desirable to avoid, if it is possible, the necessity of the parties to a documentary bill entering into a separate agreement just for the purpose of providing that the drawee would

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<sup>1</sup>Please see paragraph 16 of the Report on the Survey regarding Cheques and Bills (Appendix VI).

<sup>2</sup>Gutteridge and Megrah. "The Law of Bankers' Commercial Credits", Europa Publications Ltd., (1968), p. 83.

make payment of the bill to the holder only on the valid transfer and delivery of the related document. This could be achieved if the negotiable instruments law would permit that merely by reason of the fact that the bill is made payable on such a condition, the bill shall not be regarded as "conditional".

3.19 Such a provision would considerably facilitate the measures taken by the central bank of the country for channelling credit towards *bona fide* trade and commercial transactions. This may also obviate in many cases the recourse to a separate agreement being drawn up to provide that payment on the bill would be made by the drawee only after the documents are delivered. This would also be consistent with the real nature of documentary bills which are becoming very much popular in our country. In fact, it has been pointed out that "the new Bill Market has grown, perhaps under the impetus of the credit squeeze, to dimensions, which might not have been credited even a few months ago, and notwithstanding the slack season curbs imposed by the Reserve Bank, is likely to grow further."<sup>1</sup> The Committee strongly feels that giving due recognition in the *negotiable instruments law* for documentary bills would be in furtherance of the objectives of the credit policy of our country.

3.20 Hence, WE RECOMMEND that the second paragraph of section 5 of the NIA should further be amplified to provide that with reference to a bill of exchange, *other than a cheque*, the mere fact that payment on the bill is made subject to the transfer and delivery of the documents of title to goods attached thereto does not make the instrument *per se* conditional.

## (2) SUM CERTAIN

3.21 The order has to be for a "sum certain". Paragraph 3 of section 5 of the NIA, section 9 of the BEA, section 3-106 of the UCC and Article 7 of the UNCITRAL draft indicate the circumstances when the amount payable on the negotiable instrument could be considered as a sum certain notwithstanding the fact that the amount payable is not merely the figure stated in the instrument.

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<sup>1</sup>Speech delivered by Shri R. K. Seshadri, Deputy Governor, Reserve Bank of India, while inaugurating the Seminar conducted by the Bankers Training College, Bombay, for Legal Officers of Banks and Other Financial Institutions on May 27, 1974.

3.22 Section 3-106 of the UCC, which runs as under, is more comprehensive than the other comparable provisions:

“Section 3-106. Sum Certain.

(1) The sum payable is a sum certain even though it is to be paid

- (a) with stated interest or by stated instalments; or
- (b) with stated different rates of interest before and after default or a specified date; or
- (c) with a stated discount or addition if paid before or after the date fixed for payment; or
- (d) with exchange or less exchange, whether at a fixed rate or at the current rate; or
- (e) with costs of collection or an attorney’s fee or both upon default.

(2) Nothing in this section shall validate any term which is otherwise illegal.”

Hence, views were elicited with reference to this provision.

3.23 There is general agreement for a provision on the above lines. However, as regards the provision for including “costs of collection and an attorney’s fee or both upon default”, there is considerable difference of opinion. Since these items are ascertainable only after the happening of the default and the quantum also is likely to vary between places and between persons, it is not desirable, having regard to the conditions of our country, to provide for a bill to cover also such contingencies. No doubt, we have seen, during our officials’ visits to branches of certain banks, that there is the practice for the bills to specify that the cost of collection is to be met by either the drawee or the holder. If the amount on this head is specifically indicated, then there should be no difficulty, since, on the face of the bill, the sum payable on the instrument would nevertheless be certain. But where the amount is not indicated, the instrument cannot be considered as drawn for a sum certain. In view of the element of uncertainty that would be introduced by permitting such a condition, it is desirable to omit clause (e) of section 3-106(1) of the UCC.

3.24 Hence, WE RECOMMEND that the amount payable on a negotiable instrument should be considered as certain in the circumstances indicated in clauses (a) to (d) of section 3-106(1) of the UCC and this position should be statutorily so clarified.

3.25 In making the above recommendation, we have taken note of the fact that where the payment is required to be made in instalments, this may or may not be subject to an acceleration clause whereby, upon default on payment of an instalment, the whole amount may become due. The acceleration clause may also apply with reference to default in payment of any interest that may be required to be paid at stated periods. But these are matters that may at best be left to be determined according to the agreement between the parties and the tenor of the instrument.

### (3) DEFINITE TIME

3.26 Section 11 of the BEA, section 3-109(1) and (2) of the UCC, Articles 33 and 34 of the Geneva Conventions on bills and Articles 9(3) and (4) of the UNCITRAL draft deal with the question as to when the amount payable on a negotiable instrument could be regarded as payable within a definite time. The UCC provision, which is given below, covers the circumstances specified in section 11 of the BEA and also provides for certain other eventualities.

#### "Section 3-109. Definite Time.

(1) An instrument is payable at a definite time if by its terms it is payable

(a) on or before a stated date or at a fixed period after a stated date; or

(b) at a fixed period after sight; or

(c) at a definite time subject to any acceleration; or

(d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(2) An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred."

3.27 Mr. Megrah would regard that a bill, the time for which is subject to extension at the option of the maker or acceptor, is not payable at a definite future time, or if the time is extended for any reason or in any manner whatever. Against this view, it could be urged

that though the time is not definite when the instrument is drawn or made, it becomes so when the option is exercised or the specified act or event takes place. The framers of the UCC have justified this provision by saying that—

“It adopts the generally accepted rule that a clause providing for extension at the option of the holder, even without a time limit, does not affect negotiability, since the holder is given only a right which he would have without the clause. If the extension is to be at the option of the maker or acceptor or is to be automatic, a definite time limit must be stated or the time of payment remains uncertain and the instrument is not negotiable. Where such a limit is stated, the effect upon certainty of time of payment is the same as if the instrument were made payable at the ultimate date with a term providing for acceleration.”

However, we would leave the question as to whether in the circumstances envisaged by clause (d) *supra*, the instrument could be considered as payable within a definite time, to be decided according to the facts of the case, and no express statutory clarification may be needed.

3.28 One other aspect relevant to this subject relates to the “definiteness” in point of time when the instrument is made payable not on a stated date but *on or before* a stated date. Though the majority of the House of Appeal held in *Williamson v. Rider*<sup>1</sup> that a note payable “on or before” a given date is not payable within a determinable future time, the minority view expressed by Ormerod, L.J., is that the instrument is nevertheless payable at a fixed or determinable future time, *viz.*, the date mentioned, even though the person primarily liable is given the right to pay earlier. This view has been adopted by the Supreme Court of Canada in *John Burrows Ltd. v. Subsurface Service Ltd.*<sup>2</sup> This view has been given effect to in the UCC and Byles<sup>3</sup> has also preferred this view.

3.29 WE RECOMMEND a statutory provision to provide that an instrument should be considered as drawn or made payable at a definite time when by its terms it is payable in the circumstances provided in section 3-109 [omitting sub-section (1)(d)] of the UCC.

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<sup>1</sup>(1963) 1 Q.B. 89.

<sup>2</sup>(1968) 68 D.L.R. (2d) 354.

<sup>3</sup>“Byles on Bills of Exchange”, Sweet & Maxwell, 23rd edn. (1972), p. 20.



## (4) SIGNATURE

(a) *Definition*

3.30 It is imperative that the order should be duly authenticated by the "signature" of the maker or the drawer of the instrument. "Signature" is not defined in the NIA or in the BEA or the UCC. The need for a suitable definition has been voiced by banks.

3.31 In L.R. 8 Q.B. 305, the House of Lords expressed that "signature" is "the writing or otherwise affixing a person's name or a mark to represent his name, by himself or by his authority with the intention of authenticating a document as being that of or as binding on the person whose name or mark is so written or affixed". As this would be conducive to clarity and precision, WE RECOMMEND giving statutory recognition to the definition of "signature" on these lines.

(b) *Use of Facsimile*

3.32 There is also a suggestion to include facsimile impressions within the scope of the definition of "signature", whether affixed in print or by perforation or in some other form. But here we have to proceed with certain amount of caution.

3.33 In *Goodman v. J. Eban Ltd.*,<sup>1</sup> Denning, L.J., doubted whether a bill of exchange or a cheque could be signed by means of a rubber stamp. He pointed out that the difference between a rubber stamp and a mark lies in the fact that signature by a mark is made by a person who cannot write his signature whereas a rubber stamp denotes "the thoughtless impression of an automaton in contrast to the reasoned attention of a sensible person". However, in *Lazarus Estates Ltd. v. Beasley*,<sup>2</sup> Denning, L.J., mentioned that it was held in the U.K. earlier that a private person could sign a document by impressing a rubber stamp, though a company could not. The practice seems to be that banks require an indemnity before they could permit use of facsimile signatures for the drawing of cheques.<sup>3</sup> Hence, though the UNCITRAL draft provides that a signature may be by facsimile, perforations, symbols, or any other mechanical means, we do not consider that it is safe, having regard to the conditions of our country, to expressly provide that facsimile signatures on negotiable instruments would be in order.

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<sup>1</sup>(1954) 1 Q.B. 550.

<sup>2</sup>(1956) 1 Q.B. 702.

<sup>3</sup>"Byles on Bills of Exchange", Sweet & Maxwell, 23rd edn. (1972), p. 9, and 'Brady on Bank Checks', *Banking Law Journal* (1969), 4th edn., p. 458.

Whether, in any instance, the facsimile would qualify as a "mark" validly affixed with the requisite intention and thus regarded as proper signature, could be left to facts of the particular case. But banks would seem to be in order to ask for a proper indemnity before agreeing to act on facsimile signatures as a matter of course.

(c) *Signature of corporate bodies*

3.34 Section 26 of the NIA states that a corporation may make, endorse or accept an instrument only in cases in which, under the law for the time being in force, it is so empowered. A positive provision is found in section 47 of the Companies Act, 1956, which states :

"A bill of exchange, hundi or promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of the company if drawn, accepted, made or endorsed in the name of, or on behalf or on account of, the company by any person acting under its authority, express or implied."

While this clarifies the position with reference to companies which are corporate bodies under the Companies Act, this provision does not apply with reference to other corporate bodies.

3.35 The general rule cannot operate differently with reference to companies and other forms of corporate bodies. Again, it would be more convenient if a provision on the lines of section 47 of the Companies Act, 1956, can be made in the negotiable instruments law as applicable to all corporate bodies.

3.36 Hence, WE RECOMMEND that the third paragraph of section 26 of the NIA may be substituted to provide that :

"An instrument shall be deemed to have been made, accepted, drawn or indorsed on behalf of a corporate body if drawn, accepted, made, or indorsed in the name of, or on behalf or on account of, a corporate body by any person acting under its authority, express or implied."

(5) DATE OF DRAWING/MAKING

3.37 It is true that the BEA and the UCC do not make the instrument invalid merely by reason of the fact that it is not dated. Nevertheless, it is necessary that a negotiable instrument should bear a date

to determine whether the instrument has matured or it has become "stale", etc. A person who takes an undated instrument cannot be considered a holder in due course, nor would a banker be justified in honouring an undated instrument. The Geneva Conventions expressly provide that an instrument which does not contain any statement as to the date on which it is drawn is invalid. In France, not only is an undated cheque void, but the drawer is also subject to a fine. We consider that for the healthy development of commerce and trade, it is necessary to discountenance instruments being made or drawn without a date.

3.38 When an instrument does not bear a date on which it is made or drawn but a date is subsequently inserted, a *bona fide* holder of the instrument can rely on section 118 of the NIA which raises the presumption that an instrument bearing a date was made or drawn on such date. But, as it is, this presumption operates "until the contrary is proved". What happens when a *bona fide* holder takes an instrument bearing a date and subsequently it is proved by independent evidence that the instrument did not bear a date when it was originally made or drawn? It is not fair that a holder in due course should be affected in such circumstances. His rights are independently taken care of. Section 120 of the NIA provides that as against a holder in due course, the maker or drawer or acceptor of an instrument is not permitted to deny the validity of the instrument as originally made or drawn. This provision would protect a holder in due course even when the challenge to the validity of the instrument is based on the fact that the instrument did not bear a date when made or drawn.

#### *Ante-dating and post-dating*

3.39 The fact that an instrument is *ante-dated* or *post-dated* does not affect the validity of the instrument. The BEA and the UCC specifically provide that an instrument which is ante-dated or post-dated does not become invalid merely because of the same. There is no specific provision in the NIA about this. The Privy Council in the Bank of Baroda case<sup>1</sup> held that post-dated cheques are not invalid.

3.40 The Law Commission had noted the existence in our country of the practice of ante-dating and post-dating of cheques. They had referred to section 13(2) of the BEA which provides that a bill is not

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<sup>1</sup>A.I.R. 1944 P.C. 58.

invalid by reason only that it is ante-dated or post-dated; and while suggesting a provision on these lines, they had also recommended a proviso to this to the effect—

“Provided that the instrument was not ante-dated or post-dated for an illegal or fraudulent purpose.”

It is true that ante-dating may amount to forgery where the object is to defraud a third party. Post-dating of instruments is in effect a means for avoiding stamp duty<sup>1</sup> which would otherwise be payable on an usance document. But the suggestion for such a proviso has raised an apprehension in the minds of banks and the IBA had submitted that this proviso would require reconsideration and revision, that in any event bankers must be protected against the possible effects of the provision and that no unnecessary or unreasonable burden should be placed on banks of ascertaining the purpose of ante-dating or post-dating of an instrument, assuming that it is possible for them (which it is not) to ascertain the ante-dating.

3.41 As regards immediate parties and those taking the instrument with notice, if the ante-dating or post-dating was effected for an illegal or fraudulent purpose, the negotiable instrument contract may be vitiated as contravening the provisions of section 23 of the Contract Act. As regards third parties and those taking the instrument without notice of the same, it is not desirable to affect their rights or interests. Section 12 of the UNIL, which was subsequently replaced by Article 3 of the UCC in the U.S.A., did provide that “the instrument is not invalid for the reason only that it is ante-dated or post-dated, *provided this is not done for an illegal or fraudulent purpose*”. But the corresponding provision, which is section 3-114(1), of the UCC omits the reference to “illegal or fraudulent purpose”, and the framers of the Code justify this omission, as these words, according to them, were “inaccurate and misleading”, and “any fraud or illegality connected with the date of an instrument does not affect its negotiability, but is merely a defence.....to the same extent as any other fraud or illegality”.

3.42 Hence, having regard to all aspects, WE RECOMMEND that while providing by statute that an undated instrument is invalid, the statute may also clarify that an instrument is not invalid by reason only that it is ante-dated or post-dated.

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<sup>1</sup>Please see section 68 of the Indian Stamp Act and our recommendations on post-dated cheques in the Chapter on Cheques.

*Effect of the stated date*

3.43 Section 3-114 of the UCC also provides that—

- “(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.
- (3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.”

As a complement to the provision regarding ante-dating and post-dating, it is desirable to have statutory provisions on the above lines, and WE RECOMMEND accordingly.

## B. INCOMPLETENESS OR AMBIGUITY IN THE MAKING OR DRAWING

### INCHOATE INSTRUMENTS

3.44 Section 20 of the NIA deals with inchoate stamped instruments. This raises a presumption of *prima facie* authority to make or complete the instrument by the *holder* when the maker has signed and delivered to another, a paper, which is either wholly blank or has written therein an incomplete negotiable instrument, and which is stamped in accordance with the law relating to negotiable instruments.

3.45 In *Tarachand v. Sikri Bros.*,<sup>1</sup> the Bombay High Court pointed out that the word “holder” creates difficulties. Again, under the BEA (and under the UNIL), the following additional conditions are also required to be satisfied before such an authority could be inferred, namely,

- (i) that the delivery of the inchoate instrument was “in order that it may be converted into a negotiable instrument”; and
- (ii) that the filling up has to be “within a reasonable time and strictly in accordance with the authority given”.

However, as it should be, item (ii) above is not allowed to be raised against a holder in due course. Having regard to these, the Law Commission had suggested modifications to section 20 of the NIA to overcome the difficulty as to construction pointed out by the Bombay High Court, and to include the additional requirements as above.

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<sup>1</sup>A.I.R. 1953 Bom. 290.

3.46 With reference to the additional requirements suggested by the Law Commission, banks have voiced some apprehension. The IBA had stated that the effect of the words "in order that it may be converted or completed into a negotiable instrument" in the provision suggested by the Law Commission would throw a burden on the party paying the instrument. They had said that if in some case, by reason of some factor, such as deceit, one person obtains from another a stamped paper without that other person intending to get the paper converted or completed into an instrument, the instrument would not be effective and the paying party may lose. But so long as the bank makes the payment in due course, it would be protected even if it turns out that the signatory to the paper never intended that the paper should be converted or completed into an instrument. Hence, the IBA's apprehension is not justified.

3.47 While so, the framers of the UCC have raised the basic question about the desirability or otherwise of having a provision conferring a *prima facie* authority in favour of the receiver of an incomplete instrument. While omitting the portion in section 14 of the UNIL which was comparable to section 20 of the NIA, the UCC framers have observed that the provision conferring such *prima facie* authority had utility only in connection with the ancient practice of signing blank paper to be filled in later as an acceptance, at a time when communications were slow and difficult. They have also mentioned that the practice has become obsolete for nearly a century, that it affords obvious opportunities for fraud, and that it should not be encouraged by express sanction in the statute. They have also pointed out that it is not intended that any person may not be authorised to write in an instrument over a signature either before or after delivery.

3.48 However, the BEA and the Geneva Conventions provide for a rule regarding presumption of authority when a blank signed and stamped paper is delivered. Though the practice of signing blank papers to be filled in later on might have originated in ancient times, still there may be a need for such a provision with reference to big commercial establishments where the filling up of the instrument may be left to a lesser authority than the person who is authorised to draw or make the instrument. Again, such a provision would help the freer circulation of negotiable instruments. Whatever difficulties noticed with reference to section 20 of the NIA would be remedied by the recommendations the Law Commission had made therefor.

### DELIVERY—SHOULD IT BE OF STAMPED PAPER?

3.49 The BEA and the NIA confine the scope of the provision raising such presumption of authority to delivery of stamped papers only. Though originally cheques attracted stamp duty in the U.K.<sup>1</sup> and in India<sup>2</sup> when BEA and the NIA were enacted, cheques do not now attract stamp duty in either country. Hence, the provision does not now apply to cheques.<sup>3</sup> There is no reason to exclude cheques from the scope of the provision and the principle of the provision has been applied to cheques by judicial decisions.<sup>4</sup> The corresponding provision of the UNIL,<sup>5</sup> which codified the law subsequently, did not confine the scope of the provision to stamped instruments only. Aggarwal has also pointed out that there is no reason to confine the scope of the provision to delivery of stamped papers only and that a stamp need not necessarily be cancelled by signature, so long as it is done in accordance with section 12 of the Indian Stamp Act.<sup>6</sup>

3.50 Hence, WE RECOMMEND that while section 20 of the NIA may be modified on the lines recommended by the Law Commission, its scope may not be confined only to delivery of signed papers which are stamped with duty as per the stamp law.

3.51 Bhashyam has pointed out that under the Indian law if an *incomplete instrument is stolen before it is issued*, and afterwards it is filled up and negotiated to an innocent party, whether or not he would be regarded as a holder in due course, it is not free from doubt.<sup>7</sup>

3.52 Under the BEA, delivery by the signer is essential. Byles has pointed out that when an instrument is stolen in an incomplete-

<sup>1</sup>Report of the Committee on Cheque Endorsement (Mocatta Committee), paragraphs 5 and 6.

<sup>2</sup>Krishnamurthy, K., "The Indian Stamp Act", Madras Law Journal, 3rd edn. (1968), p. 37.

<sup>3</sup>Dower v. Sohanlal, (1937) Lahore 816; Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 192.

<sup>4</sup>34 I.C. 315; 33 A. 430.

<sup>5</sup>Section 14.

<sup>6</sup>Aggarwal, C.L., "The Law of Hundis and Negotiable Instruments", Eastern Book Company, 9th edn. (1972), p. 164.

<sup>7</sup>Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 192.

form and passed on to an innocent party after filling up, he may not be a holder in due course and that where it is stolen in a complete state and an innocent party gets it, he may be a holder in due course.<sup>1</sup>

3.53 From the point of view of the innocent party, it matters not whether the instrument was stolen when it was in an incomplete form or in a complete form. As the framers of the UCC have pointed out, the holder in due course sees and takes the same paper, whether or not it was incomplete when stolen and completed afterwards by the thief; in each case he relies, in good faith, on the maker's signature. The loss should fall upon the party whose conduct in signing the blank paper has made the fraud possible rather than upon the innocent purchaser. The result is consistent with the theory of decisions holding the drawer of a cheque stolen and afterwards filled in to be estopped from setting up the non-delivery against an innocent party. The provisions of the Geneva Conventions also support this view. Mr. Maurice Megrah is also in favour of giving the person, who takes under the conditions applicable to a holder in due course, the right to sue on the instrument, and has expressed that it should not be defeated on the ground that the bill was originally inchoate and was filled up not in accordance with the directions of the drawer.

3.54 Hence, WE RECOMMEND an express provision providing that as against a holder in due course, the defence that when the instrument was signed it was inchoate and there was no "delivery" should not be allowed to be set up.

## AMBIGUOUS INSTRUMENTS

### (a) *Ambiguity between words and figures*

3.55 Section 18 of the NIA provides that where the words and figures used state differently the amount undertaken or ordered to be paid under the instrument, the amount stated in words shall prevail. To this, relying on section 17(1) of the UNIL, the Law Commission had suggested a proviso to provide that if the words are ambiguous or uncertain, reference may be made to the figures to fix the amount. In *Hutley v. Marshall*,<sup>2</sup> where the words were ambiguous, recourse was had to the figures and the stamp to determine the correct amount.

<sup>1</sup>"Byles on Bills of Exchange", Sweet & Maxwell, 23rd edn., p. 31; see also *Baxendale v. Bennett* (1878) 3 Q.B.D. 525; *Smith v. Prosser* (1907) 2 K.B. 735; and *Ingham v. Primrose* (1859) 7 C.B. (N.S.) 82.

<sup>2</sup>(1882) 46 L.T. 186 (C.A.)



Hence, WE RECOMMEND that section 18 of the NIA may be amplified to provide also that where the words are ambiguous or uncertain, reference may be made to the figures to fix the amount.

3.56 In the above context, we would also like to mention that it is the practice of banks in India to return a cheque where there is a discrepancy in the amount expressed in figures and the amount expressed in words. In the light of the express provision in the statute and having regard to the fact that the chances of the cheques being returned for needless causes should be reduced, this practice needs to be discontinued.

*(b) Ambiguity between handwritten and typewritten/printed terms*

3.57 Bhashyam has suggested that if an instrument is partly written and partly printed, and they differ, the written part ought to control the instrument as it is likely to be more in consonance with the intention of the parties.<sup>1</sup> In *Sha Moolchand Kesarimull v. Associated Agencies*,<sup>2</sup> the Madras High Court held that where the printed portion of a contract could not be reconciled with the typewritten portion, the typewritten portion must prevail.

3.58 These principles are explicitly recognised by the framers of the UCC which says that "Handwritten terms control typewritten and printed terms, and typewritten control printed". WE RECOMMEND that a specific provision may be made accordingly.

*(c) Ambiguity as to "order" or "bearer"*

3.59 The UCC specifically provides that "an instrument made payable both to order and to bearer is payable to order unless the bearer words are handwritten or typewritten". Sheldon has also expressed that where the word "bearer" is handwritten, it would override the printed words "or order".<sup>3</sup>

3.60 Mr. Carl W. Funk is not sure whether a provision on the above lines would be sufficient because it does not cover the case of

<sup>1</sup>Bhashyam & Adica, "The Negotiable Instruments Act, 1881", *Madras Law Journal*, 13th edn. (1974), p. 188; see also *Paul Beier v. Chotalal*, 30 Bom. 1; and *Haji Hasan v. Chotalal*, 29 Bom. 360.

<sup>2</sup>(1941) 2 M.L.J. 281; 1942 Mad. 130.

<sup>3</sup>Sheldon, H.P., "The Practice and Law of Banking", *Macdonald & Evans*, 9th edn. (1962), p. 24.

an instrument reading "Pay to the order of bearer" and he has said that this case had actually arisen in his practice many years ago and that such an instrument should also be treated as a bearer instrument.

3.61 In view of what we have recommended earlier that handwritten terms control typewritten and printed terms and having regard to the language adopted in the printed forms of cheques in vogue in our country, it may *not* be necessary to have any specific provision in India on the lines of section 3-110(3) of the UCC.

(d) *Ambiguity as regards payee*

3.62 Instruments drawn as payable to impersonalities pose certain special problems. A negotiable instrument, for its validity, has to be drawn in favour of a "certain person". Where the instrument is drawn as payable to or to the order of "cash", "wages", "office" or such other impersonal names, the question arises as to whether in such a case the instrument could be considered as made or drawn in favour of a "certain person".

3.63 In *North and South Insurance Corporation Ltd. v. National Provincial Bank Ltd.*<sup>1</sup> an instrument drawn in the form of a cheque as payable to "Pay cash or order" was considered as not a cheque and it was expressed that the words "or order" were to be disregarded with the result that the direction was to pay cash—"by necessary implication, to pay it to the bearer of the document".

3.64 Though such instruments may not be covered by the BEA,<sup>2</sup> they are yet covered by the provisions of the Cheques Act, 1957, as documents issued by a customer of the paying banker, which though not bills are intended to enable the person to obtain payment from the banker of the sums mentioned in the documents. In the chapter on Bankers' Protection, we have recommended the adoption in India of provisions similar to those of the Cheques Act which would cover also instruments akin to cheques. Again, from the practice prevailing in India, it appears that it is not uncommon to have cheques drawn in such impersonal names. The UCC also provides that "an instrument is payable to bearer when by its terms it is payable to 'cash' or the order of 'cash' or any other indication which does not purport to

<sup>1</sup>(1936) 1 K.B. 328 ; see also *Cole v. Milsome* (1951) 1 All E.R. 311.

<sup>2</sup>"Paget's Law of Banking", Butterworths, 8th edn. (1972), p. 234.

designate a specific payee". Having regard to the position in the U.K., the law in the U.S.A. and the practice in India, WE RECOMMEND a specific provision on the lines of section 3-111(c) of the UCC.

(e) *Ambiguity as regards capacity of the signer*

3.65 Section 15 of the NIA provides that if the maker or holder of an instrument signs the same otherwise than as such maker for the purpose of negotiation, he is said to endorse the same. The Law Commission had suggested an express provision to the effect that when a person places his signature otherwise than as a maker, drawer or acceptor, he should be presumed to be an endorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. The BEA, the UCC and the UNCITRAL draft support the view that a person signing an instrument otherwise than as a maker, drawer or acceptor, shall be presumed to be an endorser, unless he clearly indicates by appropriate words that he signs in some other capacity. Hence, WE RECOMMEND that it may specifically be provided that unless the instrument indicates that a signature is made in some other capacity, it should be regarded as an "indorsement".

(f) *Ambiguity as to the classification of the instrument*

3.66 Section 17 of the NIA provides that where an instrument may be construed either as a promissory note or as a bill of exchange, the holder may at his election treat it as either and the instrument shall thenceforth be treated accordingly. But the question arises mainly with reference to a bill of exchange drawn by a person upon himself. Now, such an instrument may, by reason of section 17 of the NIA, be treated either as a bill or as a note.

3.67 Though section 5(2) of the BEA expresses the same view, Byles<sup>1</sup> has pointed out that such an instrument is not strictly a bill, for it is not drawn by one person on another. In *re British Trade Corporation*,<sup>2</sup> Greer and Romer, L.JJ., held that a document drawn by a corporation on itself was neither a bill nor a promissory note.

3.68 While section 3-118(a) of the UCC states the general rule that where there is a doubt as to whether an instrument is a bill or a note the holder may treat it as either, it also provides that a bill drawn on the drawer is effective as a note.

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<sup>1</sup>"Byles on Bills of Exchange", Sweet & Maxwell, 23rd edn. (1972), p. 289.  
<sup>2</sup>(1932) 2 Ch. 1; 101 L.J. Ch. 273.

3.69 It is necessary that persons handling negotiable instruments should be clear in their minds as to the class of instruments handled by them. A bill drawn by a person on himself is in substance only a note. The requirements as to notice of dishonour, etc., which the holder is supposed to give to the drawer, would be inappropriate with reference to such instruments. Hence, WE RECOMMEND that section 17 of the NIA may be further clarified by adding thereto a statement that "a bill of exchange drawn on the drawer is effective as a promissory note". This would also be consistent with the recommendations we are making in the Chapter on "Banker's Drafts".

### C. ALTERATIONS AND CANCELLATIONS IN THE INSTRUMENT

#### (1) MATERIAL ALTERATION

##### (a) *What constitutes a material alteration?*

3.70 It is not every alteration that necessarily would affect the validity of an instrument or the rights of parties thereto (*vide* sections 87 to 89 of the NIA). Only when the alteration is "material", the validity of the instrument or the rights of parties would come in for question.

3.71 What constitutes a material alteration? Now the NIA is silent on the question. As the Law Commission had pointed out, courts in India have followed the English Common Law and held that anything which has the effect of altering the legal relations between the parties or the character of the instrument or the sum payable amounts to a material alteration. Section 64(2) of the BEA enumerates certain circumstances when an alteration can be considered as material. However, the UCC has attempted a definition of a material alteration, which runs as under :

"Section 3-407. Alteration.

(1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in—

- (a) the number or relations of the parties ; or
- (b) an incomplete instrument, by completing it otherwise than as authorised ; or
- (c) the writing as signed, by adding to it or by removing any part of it."

3.72 The framers of the UNCITRAL draft provide that any alteration which modifies the written undertaking of any party on the instrument in any respect is material. It has been pointed out that the test is : Is there any change in the "written undertaking on the instrument" ? They have illustrated that a bill originally drawn as payable to "P" when altered to read as "Pay to P or to order" or that where the sum payable was initially stated as 5 dollars was changed later to 500 cents, as instances of alterations not amounting to material alterations. Where there is change in the date of payment, or the sum payable, it would amount to a material alteration.

3.73 We consider it desirable to have a specific provision defining material alteration on the lines of the definition given in section 3-407(1) of the UCC. We also consider that this definition should also be supported by enumeration of illustrations. We consider that the definition of material alteration, which also gives the enumeration thereof, would considerably reduce the scope for doubts in the minds of parties as to whether or not an alteration of an instrument is material. In the result, WE RECOMMEND that "material alteration" may be statutorily defined on the following lines : "Material alteration" with reference to an instrument means any alteration which changes the contract of any party thereto in any respect, including any such change in--

- (a) the number or relations of the parties;
- (b) an incomplete instrument, by completing it otherwise than as authorised;
- (c) the writing as signed, by adding to it or by removing any part of it;
- (d) date, the sum payable, the time of payment, or the place of payment;
- (e) the addition of a place of payment where the instrument has been accepted generally, without the acceptor's assent;
- (f) the addition of the name of a new maker to a joint and several note, without the consent of the original maker;
- (g) an alteration in the name of the payee of an order cheque;
- (h) the description of the payee's name, which is not authorised;
- (i) the alteration of an inland bill to a foreign bill;

- (j) alteration of a foreign bill by adding either on the face of the bill or to the endorsements, the rate of exchange according to which the bill is to be paid;
- (k) the words requiring payment of interest at a specified rate, where originally the instrument has been drawn for the payment of "lawful interest".

(b) *Effect of material alteration*

3.74 The Law Commission had suggested a provision on the lines of section 64(1) of the BEA to provide that when a bill or acceptance is materially altered without the assent of all the parties liable on the bill, the bill is avoided except as against the party who has himself made, authorised or assented to the alteration, and his subsequent endorser.

3.75 The Law Commission had also suggested a proviso to such provision based on the decision in *Gourochandra v. Krishnacharana*<sup>1</sup> and *Honkong & Shanghai Banking Corporation v. Lo Lee Shi*<sup>2</sup> regarding material alterations which take place either accidentally or are made by a meddlesome or malicious stranger without the consent of the holder of the instrument and without any fraud or negligence on his part. The Comment to the UCC provision (section 3-407) relating to alteration is also to the point that spoliation by any meddling stranger should not affect the rights of the holder.

3.76 But under the UCC, an alteration by the holder discharges any party whose contract is thereby changed, only when the alteration is both fraudulent and material. A suggestion has been made, based on the UCC provision, that alteration by the holder should discharge a party whose contract is thereby changed, only when such alteration is both fraudulent and material. The framers of the UCC justify this position by stating that—

“A material alteration does not discharge any party unless it is made for a fraudulent purpose. There is no discharge where a blank is filled in the honest belief that it is as authorised; or where a change is made with a benevolent motive such as a desire to give the obligor the benefit of a lower interest rate. Changes

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<sup>1</sup>A.I.R. 1941 Mad. 383 at p. 385.

<sup>2</sup>(1928) A.C. 181.

favorable to the obligor are unlikely to be made with any fraudulent intent; but if such an intent is found the alteration may operate as a discharge.”

However, the views elicited by the Committee show that banks and other institutions do not consider it expedient to make such a distinction. We are inclined to accept this view.

3.77 Hence, WE RECOMMEND that the effect of a material alteration should be specifically stated in the statute on the lines of section 64(1) of the BEA (without the proviso thereto) and with the proviso on the lines suggested by the Law Commission.

*(c) Negligence contributing to alteration*

3.78 As Mr. Maurice Megrah has pointed out, the responsibility for facilitating alteration leading to loss should rest upon the drawer of the instrument, for its form and effect are clearly his to decide. Mr. Megrah has also expressed the view that in the U.K. this responsibility is now limited and could well be widened.

3.79 The UCC provides that—

“Section 3-406. Negligence contributing to Alteration or Unauthorised Signature.

Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorised signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.”

This provision is based on the doctrine adopted in *Young v. Grote*.<sup>1</sup>

3.80 The UCC provision extends the principle to the protection of the holder in due course and to payers who may not technically be drawees. It also rejects the decisions which have held that the maker of a note owes no duty of care to the holder because at the time he draws the instrument, there is no contract between them. We agree with the Comment to the said UCC provision in the view that by “drawing the instrument and setting it afloat upon a sea of strangers

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<sup>1</sup>4 Bing. 253.

the maker or drawer voluntarily enters into a relation with later holders which justifies his responsibility. In this respect an instrument so negligently drawn as to facilitate alteration does not differ in principle from an instrument containing blanks which may be filled." But no attempt is made to define "negligence" which will contribute to an alteration and this is left to be decided according to the circumstances of the particular case.

3.81 The UCC provision estops the negligent party from asserting a defence based on the alteration to which he has contributed. The holder or drawee is protected by the estoppel, and the task of pursuing the wrong-doer is left to the negligent party. The UCC provision applies the same rule to negligence which contributes to forgery or other unauthorised signature.

3.82 The UCC provision is an improvement in the sense that there was no such clear provision earlier under any other comparable codes. It is highly desirable that a person who has substantially contributed to the alteration of a negotiable instrument should not be allowed to take advantage of his negligence and escape his liability on the instrument. As between an innocent third party and the negligent party, it is only equitable if the latter is made to bear the loss. Hence, WE RECOMMEND a specific statutory provision on the lines of section 3-406 of the UCC.

(d) *Liability when alteration not apparent*

3.83 Section 89 of the NIA provides that when a note, bill or cheque is materially altered but such alteration is not apparent, or when a cheque is presented for payment and it does not appear that any crossing thereon has been obliterated, payment thereof in due course by the banker or other person liable to pay, according to the *apparent tenor* of the instrument discharges the banker or the other person from all liability thereon. Such payment is also not liable to question by reason of the instrument having been altered, or the cheque crossed.

3.84 In the U.K. when a bill is materially altered and such alteration is not apparent, the holder in due course may enforce its payment according to its *original tenor*.<sup>1</sup> But when a banker pays an altered cheque, when the alteration is not apparent, his payment thereof, as per the *apparent tenor* of the instrument, is protected.<sup>2</sup> But under

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<sup>1</sup>Proviso to section 64(1) of the BEA.

<sup>2</sup>Proviso to section 79(2) of the BEA.



the UCC, the payment of an altered instrument according to its *original tenor* is protected when the alteration is not apparent, whether it is a bill or a cheque [sections 3-407(3) and 4-401(2)(a)].

3.85 Under the Geneva Conventions, in the case of alteration of the text of a bill of exchange, parties who have signed subsequent to the alteration are bound according to the altered text; parties who have signed before the alteration are bound according to the original text. There is a similar provision with reference to cheques and promissory notes.

3.86 The principles underlying the provisions of the Geneva Conventions are more equitable. We do not consider it necessary that when an alteration is not apparent, a banker should be protected if he pays the cheque according to its apparent tenor, and with reference to his handling other instruments and any instrument handled by other persons, the instrument shall take effect according to its original tenor (about which parties taking the instrument after alteration are totally unaware). It is not desirable to subject the parties taking an instrument to a lurking apprehension about the possibility of the instrument having been altered, about which they have no apparent means of ascertaining. In our view, the provisions of the Geneva Conventions would permit freer circulation and ready acceptability of negotiable instruments. In the Chapter on Bankers' Protection we have considered the question of protection to a collecting banker receiving an altered item for collection, when the alteration is not apparent.

3.87 Hence, WE RECOMMEND that section 89 of the NIA may be substituted by a provision to the effect that in cases of material alterations of the text of a bill of exchange, promissory note or a cheque, parties, who have signed or acted thereon subsequent to such alterations when such alterations are not apparent, are bound according to the altered text; and parties, who have signed or acted thereon before such alterations, are bound according to the terms of the original text.

(e) *Alterations invisible to naked eye*

3.88 A suggestion has been made that banks may, besides scrutiny by the naked eye, scrutinise the instruments by ultra-violet ray lamps and thus detect alterations skilfully made by chemical process or by hand. In response to the Hindi questionnaire a suggestion has been made that banks should maintain photographs of depositors to facilitate

operations on the account. The Banking Commission has recommended that increased use of ultra-violet ray equipment should also be made by banks at their urban branches and they should also supply protectograph machines to all their offices which are authorised to issue drafts.<sup>1</sup> The Commission has also recommended that banks should make arrangements for taking and keeping on record photographs of illiterate depositors for facilitating their identification.<sup>2</sup> These recommendations have been accepted by the Government.<sup>3</sup>

3.89 The Committee would like to leave the matter to be considered by the authorities with a view to evolving in this regard some uniform code of conduct by banks, having regard to relevant practical considerations.

## (2) CANCELLATION

3.90 Section 82(a) of the NIA discharges the maker, acceptor or endorser of a negotiable instrument from liability to the holder and to all persons claiming under him when the holder cancels such persons' names with intent to discharge him.

3.91 The comparable provision in the BEA is section 63 and in the UCC it is section 3-605. The NIA provision does not specify that the cancellation of the instrument should be apparent to be effective. The NIA does not also give a clear indication as to how cancellation is to be effected. It is desirable to clarify these aspects. Section 3-605(1) of the UCC clarifies them as under:

“The holder of an instrument may even without consideration discharge any party

- (a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature ; or

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<sup>1</sup>Recommendation No. 106 (paragraph 11.25 of the Report).

<sup>2</sup>Recommendation No. 103 (paragraph 11.19 of the Report).

<sup>3</sup>*Vide* Reserve Bank's circular D.O. No. DBOD. Leg. BC. 76/C. 466(51)-74 dated the 8th August 1974 addressed to the chief executives of commercial banks.

- (b) ..... by surrender of the instrument to the party to be discharged.”

WE RECOMMEND that section 82(a) of the NIA may be substituted by a provision on the above lines.

#### D. FORGERY

3.92 Now we have no specific provision in the NIA dealing with forged or unauthorised signatures. Several chambers of commerce had suggested before the Law Commission the need for a specific provision dealing with forged or unauthorised signature. The Law Commission had suggested a provision on the lines of section 23 of the BEA.

3.93 Under the law in India and in the U.K., while an unauthorised signature could be ratified, a forged one cannot be. This principle has now been altered in the U.S.A. on the ground that the forged signature could at least be adopted without in any way affecting liabilities arising under the criminal law.

3.94 The IBA had suggested the need for a provision to be made to the effect that if in fact the account holder has received in some form or the other the benefit of the moneys paid against a forged cheque, then no claim shall lie against the paying bank in respect of such forgery. As the IBA had pointed out, there have been numerous instances of forgery, with which in the present times bankers are confronted.

#### FORGERY—COULD IT BE RATIFIED ?

3.95 It has been pointed out that while defining the effect of a forged signature on the rights and obligations of parties, it would also be proper to set at rest the doubt which still persists as to the effect of the subsequent conduct of the drawer on whose account cheques have been drawn by recourse to forged signatures.

3.96 Both in England and in this country, one of the defences which have been sought to be taken on behalf of the banker making payments on forged cheques is that the confirmation statements of account submitted to an account holder subsequent to the forgery and the omission on his part to draw the banker's attention to wrong debits in such statements of account arising out of forged signatures, should preclude the account holder from disputing the debits on the

ground of forgery. It has also been urged that it is desirable that protection is afforded to bankers in respect of payments against forged cheques, where the conduct of the account holder has led to the perpetration of the forgery, or the omission on the part of the account holder to promptly draw the bank's attention to the forgery has resulted in the bank being prevented from taking steps against the person guilty of the forgery. On this basis, a claim has been made for a provision to be made to the effect that if in fact the account holder has received, in some form or the other, benefit of the money paid against a forged cheque, then no claim shall lie against the bank in respect of such forgery. This problem has been effectively tackled by the framers of the UCC.

3.97 Section 1-201(43) of the UCC defines an unauthorised signature or endorsement as one made without actual, implied or apparent authority and *as including a forgery*. Section 3-404 of the UCC provides, *inter alia*, that an unauthorised signature (so defined) is wholly inoperative as that of the person whose name is signed, unless he ratifies it or is precluded from denying it. It also provides that any unauthorised signature may be ratified for all purposes of Article 3 (which deals with negotiable instruments) and it also clarifies that such ratification does not by itself affect any rights of the person ratifying against the actual signer.

3.98 Thus, in the scheme of the UCC, for purposes of Article 3, a forged signature is treated on par with an unauthorised signature, and both are allowed to be ratified. The rationale for this is best expressed in the following comment of the framers of the UCC :

“A forged signature may at least be adopted; and the word ‘ratified’ is used in order to make it clear that the adoption is retroactive, and that it may be found from conduct as well as from express statements. Thus it may be found from the *retention of benefits* received in the transaction with knowledge of the unauthorised signature; and although the forger is not an agent, the ratification is governed by the same rules and principles as if he were.

This provision makes ratification effective only for the purposes of this Article. The unauthorised signature becomes valid so far as its effect as a signature is concerned. The ratification relieves the actual signer from liability on the signature. It does not of itself relieve him from liability to the person whose name is signed. It does not in any way affect the criminal law. No policy of

the criminal law requires that the person whose name is forged shall not assume liability to others on the instrument; but he cannot affect the rights of the state. While the ratification may be taken into account with other relevant facts in determining punishment, it does not relieve the signer of criminal liability."

3.99 We may also note here that the UNCITRAL draft also affirms the principle that a forged signature could be ratified and that a person whose signature is forged may render himself liable on such signature if he has ratified the signature, or if by his conduct he has given an innocent holder or an intervening endorser reason to believe that the signature was his own or was by an agent with authority. The Working Group set up by the UNCITRAL to consider this draft has also expressed its agreement in favour of this provision. India is also one of the countries represented in this Working Group.

3.100 We are of the view that the UCC provisions are more equitable and do justice to all the parties concerned. This would also afford banks a reasonable measure of protection which it is desirable to give. Hence, WE RECOMMEND that in the place of the provision recommended by the Law Commission on the lines of section 24 of the BEA, adoption of a definition of unauthorised signature on the lines given in section 1-201(43) of the UCC and a provision stating that an unauthorised signature (which would include a forgery) is wholly inoperative as against the person whose name is signed unless he ratifies or is precluded from denying it, and that any unauthorised signature may be ratified for the purpose of the negotiable instruments law and such ratification does not *per se* affect any rights of the person ratifying, against the actual signer or liabilities arising under the criminal law.

3.101 The next question we would like to consider with reference to unauthorised signature (which would include a forged signature) is about its effect as against a person who, in good faith, takes the instrument for value. Section 3-404 of the UCC also provides that an unauthorised signature operates as a signature of the unauthorised signer in favour of any person who in good faith pays the instrument or takes it for value. It is true that a person, who knows that the signature is unauthorised, cannot recover from the signer on the instrument. But the unauthorised signature may operate in favour of a person who takes it or pays for it in good faith, to impose the liability on the actual signer or to transfer any rights which the person may have in the instrument.

3.102 WE RECOMMEND that it may be statutorily laid down that an unauthorised signature operates as a signature of the unauthorised signer, in favour of any person who in good faith pays the instrument or takes it for value.

### E. PAYMENT OF STAMP DUTY

3.103 Lastly, we would like to refer to an aspect we mentioned earlier regarding the formal requisites of negotiable instruments and this relates to the duty payable on the instruments under the stamp law.

3.104 Though earlier all classes of demand instruments were liable to payment of stamp duty, the requirements as to the payment of duty on cheques<sup>1</sup> and other demand bills<sup>2</sup> have subsequently been abolished. In the result, stamp duty is now payable only with reference to demand promissory notes and usance bills and notes.

3.105 But as regards usance bills and notes, with effect from 16th May 1957 the duty chargeable has been reduced by the Central Government to one-fifth of the rates specified in Article 13 of Schedule I to the Indian Stamp Act, 1899.<sup>3</sup> By notification dated 14th July 1961,<sup>4</sup> there has been a restatement of the rates of stamp duty payable on usance promissory notes. But the promissory notes drawn for securing finance from the Reserve Bank of India, State Financial Corporations, commercial banks and cooperative banks for *bona fide* commercial or trade transactions, seasonal agricultural operations or the marketing of crops and the production or marketing activities of cottage and small-scale industries continue to attract duties as reduced by Notification dated 15th May 1957.

3.106 In the U.K., both as regards time and demand bills and notes the stamp duty has been abolished,<sup>5</sup> and Byles has observed that "today the Stamp Acts are of no significance in relation to bills of exchange and notes".<sup>6</sup> Abolition of the stamp duty would certainly be a measure

<sup>1</sup>Please see paragraph 3.49 *supra*.

<sup>2</sup>Section 5 of the Indian Finance Act, 1927.

<sup>3</sup>By Government's Notification S.R.O. 1523-A dated 15th May 1957 published in Part II, Section 3, page 1613 of the Gazette of India Extraordinary dated 15th May 1957.

<sup>4</sup>Government Notification G.S.R. 950 dated 14th July 1961.

<sup>5</sup>Section 32 of the U.K. Finance Act, 1970.

<sup>6</sup>"Byles on Bills of Exchange", Sweet & Maxwell, 23rd edn. (1972), p. 7.

that would promote the spread of negotiable instruments, by encouraging the settlement of short-term claims, by means of usance bills. Thus, it may promote speedier settlement of commercial claims, considerably help the development of genuine trade and commercial bills and the growth of bill market, and facilitate further the provision of credit against such bills. However, the question will also have to be considered having regard to fiscal and other policies of the country. Hence, **WE RECOMMEND** that Government may consider, in consultation with the Reserve Bank of India, the feasibility of total remission of stamp duty payable on usance bills and notes, as has been done in the U.K., with a view to encouraging the settlement of short term trade and commercial claims and encourage the growth of bill market.

3.107 However, if total remission is not considered desirable, then some necessary changes may have to be made in the procedural requirements relating to the payment of stamp duty on usance bills. Now bills are required to be stamped either with "adhesive" stamps, under section 11 of the Indian Stamp Act, or with "impressed" stamps, as per Rule 4(1) of the Indian Stamp Rules. The "hundi papers" utilised for this purpose by the parties are impressed stamp papers issued under Rule 4(1).

3.108 Since the "hundi papers" are usually of specified denominations and the parties cannot anticipate their requirements, they are forced to use numerous sheets just to ensure that requisite stamp duty is paid. During their visits referred to earlier,<sup>1</sup> the officials of the Committee and of the NIBM have noticed that sheets of "hundi papers" are attached by staples or pins, and sometimes pasted, and bear a reference to the fact that they relate to the "hundi" or bill number referred to in the first sheet, and generally such sheets are initialled or signed by the drawer though not always so.<sup>2</sup> The practice of attaching additional sheets to the instrument, to make up for the required stamp duty, does not conform to the requirements of section 13 of the Stamp Act and its Rule 7(1). The consequence of an instrument being held as inadequately stamped is serious, as the instrument becomes inadmissible in evidence and cannot be enforced even by the payment of penalty.

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<sup>1</sup>Please see paragraph 3.12 *supra*.

<sup>2</sup>Please see paragraph 19 of the Report on the Survey regarding Cheques and Bills (Appendix VI).

3.109 The alternative method of affixing adhesive stamps to the instruments at the Stamp Office is not very popular because such stamping has to be done in each case by taking the instrument before the proper officer of the Stamp Office after the instrument is written and before its execution. This is a time-consuming process and does not facilitate the instrument being drawn at short notice.

3.110 The difficulties caused by the non-availability of "hundi stamp papers" of higher denominations have been brought to the notice of the Reserve Bank of India. The question of entrusting the selling of "hundi stamp papers" to scheduled commercial banks has been raised in this context. For facilitating the printing of "hundi stamp papers" of higher denominations, an attempt has been made, but without success, to have an advance assessment made through the commercial banks of the stamp paper requirements of their constituents.<sup>1</sup> If, as in the case of inward foreign bills which are allowed to be affixed with requisite Indian stamps of the appropriate State by special adhesive stamp labels (which are sold in loose form and which banks and constituents could buy and stock in adequate quantities), the other bills and notes are allowed to be stamped with special adhesive labels, the difficulties now faced in getting usance bills and notes of higher denominations drawn up at short notice would not be felt. This will also result in considerable saving of costly stamp paper in addition to avoiding the difficulties now felt by the constituents of banks and the banks themselves in ensuring that the usance bills and notes are adequately stamped. Hence, **WE RECOMMEND** that on the analogy of the procedure now followed with reference to foreign bills received in India, which are required to be stamped in this country, the other bills and notes also may be allowed to be stamped with special adhesive labels.

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<sup>1</sup>Circular DBOD. No. BM. 1261/C.297V(62)-72 dated 27th July 1972 issued by the Reserve Bank of India to all licensed scheduled commercial banks.



## CHAPTER 4

### NEGOTIABLE INSTRUMENTS—PARTIES THERETO

So soon as commerce between distant nations began to be developed, it became clear that some system of adjusting accounts was a far safer and easier way of making payments in distant places than the primitive method of handing over the actual money due.<sup>1</sup> The earliest bills of exchange were devised to obviate the risks in the physical transport of the money. Once the instrument emerged as an independent contract, possessing some very peculiar features of its own by reason of its negotiable character, the lawyer had to elucidate and give technical expression to the legal relations subsisting between the various parties to the instrument.

4.2 The legal relations subsisting between the various parties to the instrument can be considered as those subsisting between the immediate parties thereto and those deriving title thereto subsequently from the named payee as a result of negotiation. The contract between the drawer and the drawee, or the acceptor and the payee, as between themselves is subject to their mutual claims and defences which has led to the *issue* of the instrument. For instance, the accommodation character of a party, or the want or failure of consideration, may be a valid plea. But once the instrument is *negotiated*, third parties come to acquire title thereto and when such parties take in good faith and for value, their interests are protected and the instrument in their hands is freed of the claims or defences available to the immediate parties thereto. It is desirable that the rights *inter se* of the parties to the instrument are precise and do not leave any scope for ambiguity. It should also be conducive to commercial convenience and expeditious settlement of claims.

4.3 We divide this Chapter into two parts. The first part deals with definitional problems relating to the several parties to the instrument. In the second part, we consider certain questions relating to the immediate parties to the transaction as well as questions relating

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<sup>1</sup>Holdsworth, W.S., "The Origin and Early History of Negotiable Instruments II", Law Q. Rev. (1915) Vol. XXXI, p. 177.

to the rights and liabilities of parties to an instrument, arising as a result of negotiation.

## I. DEFINITIONAL ASPECTS

### (1) BANKER

4.4 In the Chapter on "Bankers' Protection", we consider the definition of "banker", for the purpose of the negotiable instruments law.

### (2) ALTERNATIVE DRAWEES

4.5 Though we do not have in the NIA a specific provision preventing alternative drawees to an instrument, as found in section 6(2) of the BEA, the provisions of the NIA have been understood as implying such a prohibition. The Law Commission had suggested an express clarification of the position by adopting a provision in this regard on the lines found in the BEA. But the UCC expressly permits an instrument being drawn with alternative drawees. Section 3-102(1)(b) of the UCC provides, *inter alia*, that an order may be addressed to one or more persons jointly or in the alternative, but not in succession. This provision recognises, according to the framers of the UCC, "the practice of corporations issuing dividend checks and of other drawers who for commercial convenience name a number of drawees usually in different parts of the country". Where there are alternative drawees, the UCC further provides that presentment may be made to any one of such drawees. However, drawees in succession are not permitted because the holder should not be required to make more than one presentment and upon the first dishonour he should have his recourse against the drawer and the endorsers.

4.6 The enquiry made of banking and trading institutions by the UNCITRAL has revealed that though a plurality of drawees is infrequently found in bills, the majority view among those consulted has favoured a rule which would permit such practice expressly.

4.7 In the case of dividend warrants, including the UTI warrants, and other instruments, which the holders thereof are enabled to present and obtain payment at any branch of a specified bank, or any branch of one or more banks, in effect there are alternative drawees for such instruments. The Privy Council held in *re Lovitt*,<sup>1</sup> with which our Supreme Court concurred in *Delhi Cloth Mills case*,<sup>2</sup> that although

<sup>1</sup>1912 A.C. 212.

<sup>2</sup>A.I.R. 1955 S.C. 590.

branch banks are agencies of one principal firm, for certain special purposes of banking business (which includes the purpose of payment on cheques), they will be regarded as distinct trading bodies. In this view, the fact that in our country we have more of branch banking than unit banking does not really affect the question.

4.8 The fact that there is provision for drawee in case of need is not adequate to meet the claim for permitting alternative drawees. The drawee in case of need is to be approached *after* dishonour by the drawee and is not competent, unlike an alternative drawee, to honour an instrument in the first instance.

4.9 However, where alternative drawees are permitted, the holder should not be required to make more than one presentment and upon the first dishonour he should be entitled to take his recourse against the drawer and endorsers. If this is ensured, there would not be any uncertainty and a provision for alternative drawees would prove beneficial to the holder, since he is at liberty to make presentment to any one of the drawees named in the alternative, whom it would be convenient for him to approach.

4.10 Hence, WE RECOMMEND that, for the sake of commercial convenience, the negotiable instruments law should be amended to permit an instrument being drawn with alternative drawees. It should also be provided that the holder of such an instrument, upon the first dishonour of the instrument by any of the named alternative drawees, is entitled to have his recourse against the drawer and endorsers.

### (3) "BEARER" AS HOLDER

4.11 Now there is no definition in the NIA to decide who could be regarded as the "bearer" of an instrument to enable him to claim as "holder" thereof. "Bearer" capacity is material only with reference to a bearer instrument; no endorsement is required for its negotiation since it is by mere delivery, and possession alone is material. Hence, though the wordings slightly differ, the BEA, the UCC and the UNCITRAL draft define "bearer" as the person in possession of the instrument payable to bearer.

4.12 The Law Commission, while recommending a provision to define "bearer", had suggested that "bearer" should be defined as a person who comes into possession of an instrument payable to bearer, *by negotiation*. Thereby, they sought to exclude "finders, thieves and such other persons as are enumerated in section 58" of the NIA.

4.13 As the Law Commission had pointed out, the BEA definition of "bearer" does not require that possession should be a lawful possession and the possession by a finder or thief may, therefore, be a good possession to make him a "bearer" and, therefore, a "holder". While public policy naturally would not like to countenance the recognition of the title of a person whose possession is wrongful, there are valid grounds for adoption of a definition in our Act on the lines found in the BEA, the UCC and the UNCITRAL draft without any material deviation therefrom. The party who makes or issues an instrument payable to bearer or a person who subsequently endorses it in blank and thereby makes it payable to bearer, has a responsibility to the subsequent holders who may take the instrument in good faith and for value, and to the drawee who is to honour the instrument. As the framers of the UCC have pointed out in a similar context, by drawing such instruments and setting them afloat upon a sea of strangers, the maker or drawer or the previous endorser in blank voluntarily enters into a relation with later holders, which justifies his responsibility to innocent third parties who may take the instrument without knowledge of the fact that the instrument was stolen or had got into wrongful hands. Again, as explained in Chapter 2, unless there are compelling reasons, it is desirable that the law relating to negotiable instruments is uniform in all countries. The reference to "negotiation" in the definition proposed by the Law Commission has raised the apprehension of banks and quite a number of them have expressed themselves as not in favour of such inclusion. The IBA had also represented that the definition as suggested by the Law Commission would create difficulties for banks.<sup>1</sup> If the reference to "negotiation" is made an essential requisite of "bearer" definition, then banks and others who handle bearer instruments either for collection or as security or for payment may be subjected to the onerous duty of verifying the bona fides of the possessor and of those from whom he claims title. Hence, WE RECOMMEND that "bearer" may be defined as "a person in possession of an instrument which is payable to bearer or endorsed in blank".

#### (4) "PURCHASER" AS HOLDER

4.14 The purchaser of a banker's draft (please see the discussion in the Chapter on "Banker's Draft") may not be a party to the instrument. Though the instrument is issued to him, until he delivers it

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<sup>1</sup>Please see also Aggarwal, C.L., "The Law of Hundis and Negotiable Instruments", Eastern Book Company, 9th edn. (1972), p. 120.

to the named payee, none else has a title to it. The legal status of the remitter (who is also the purchaser) developed early in the Law Merchant; although he was not the payee of the instrument, he was considered its owner, and generally had the right to recover the face value thereof from the drawer if he did not deliver the instrument to the named payee or if the payee refused to accept it.<sup>1</sup>

4.15 Though the purchaser has no express recognition of his status in the framework of the NIA, the right of a purchaser to ask for refund, cancellation or other appropriate remedy with reference to banker's draft has been judicially recognised in India, so long as the purchaser establishes that the named payee has not obtained title to the instrument by delivery to him, actual or constructive.

4.16 In the U.S.A., according to commercial custom, either the purchaser of an instrument may obtain from the bank the instrument made out in his own name and then endorse it in favour of the third party to whom he desires to send the funds, or he may purchase the instrument as payable directly to that party. Where the purchaser's name does not appear on the instrument and the instrument is made directly payable to a third party, the purchaser's rights against the issuing bank are approximately the same as those of a payee,<sup>2</sup> but he is liable to subsequent parties only in warranty for negotiation of the instrument when he delivers it to the named payee and he has no conditional secondary liability.<sup>3</sup>

4.17 The position of the purchaser of a banker's draft may be clarified by bringing him within the framework of the negotiable instruments law. The position of the purchaser of a banker's draft is approximately the same as that of the payee and the Law Merchant has also recognised him as owner of the instrument. Where the purchaser takes the banker's draft in his own name, there is no difficulty. Where he takes it in the name of a third person, he cannot

<sup>1</sup>See Moore, "The Rights of a Remitter of a Bill or Note", 20 Colum. L. Rev. 748 (1920); Britton, W., "Bills and Notes", 2nd edn. (1961), p. 179; and the Article on "Personal Money Orders and Tellers Checks: Mavericks under the UCC", 67 Colum. L. Rev. 524 (1967).

<sup>2</sup>Sutherland State Bank v. Dial, 103 Neb. 136. 170 N.W. 666 (1919); Cross v. Rowe, 22 N.H. 77 (1850).

<sup>3</sup>UNIL section 65; see Beutel, "Rights of Remitters", 12 Minn. L. Rev. 584 (1928); Moore, "The Rights of a Remitter of a Bill or Note", 20 Colum. L. Rev. 749 (1920); UCC section 3-417 (2). See also Beutel, Frederick K., "Bank Officer's Handbook of Commercial Banking Law", Banking Law Journal, Third (Commercial Code) edn. (1970), pp. 249 and 250.

transfer the same by endorsement but can transfer the same by delivery only to the named payee. Since the instrument is not drawn in his favour, the paying bank may not be aware of his title to the instrument, and his claims would be mainly against the issuing bank. Subject to such limitations, which may be clarified separately, the purchaser of a banker's draft not made out in his own name may nevertheless be recognised as the holder thereof. This could be done by defining "holder" as including a person to whom the instrument has been issued, whether or not it is made out in his own favour. WE RECOMMEND accordingly.

(5) HOLDER—EXCLUSION OF BENEFICIAL OWNER

4.18 Section 8 of the NIA defines a holder of an instrument as a person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. It has been pointed out that the expression "entitled in his own name" excludes the "bearer". The Madras High Court pointed out in *Subba Narayana v. Ramaswami*<sup>1</sup> that the expression "in his own name" had been included in the section to exclude from the scope of the definition a beneficial owner claiming through a benamidar in whose favour the instrument had been made or drawn. In other words, the beneficial owner cannot by himself maintain an action on the instrument.

4.19 The Law Commission had suggested the redrafting of the definition of "holder" on the lines of section 2 of the BEA but with the addition of the words "but does not include a beneficial owner who claims through the benamidar". Since the definition of "holder" under the BEA does not contain the expression "entitled in his own name", such a specific exclusion may be necessary regarding beneficial owners generally and not merely those claiming through benamidars. Such exclusion would not affect the principle recognised by the Patna High Court<sup>2</sup> that although as a rule a beneficiary cannot maintain a suit on the instrument without any reservation or restriction, yet, where the suit is in form on behalf of the beneficiary but in reality and substance on behalf of the holder and the plaintiff is in a position to give a discharge to the drawer through the holder, different considerations arise and the suit is maintainable at the instance of the beneficiary.

<sup>1</sup>(1907) 30 Mad. 88 (F.B.)

<sup>2</sup>*Ramnagina Prasad v. Vishwanath Prasad and others*, A.I.R. 1934 Patna 85; and *Sarjug Singh v. Deosaran Singh*, A.I.R. 1930 Patna 313.

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*"Holder"—Definition*

4.20 In the light of the foregoing, WE RECOMMEND that "holder" may be defined as a person in possession of an instrument which is either drawn or endorsed to him or to his order or to bearer or in blank, and as including also the purchaser to whom the instrument is issued but not including a beneficial owner.

(6) ISSUE

4.21 The making or drawing of an instrument is not complete until the instrument is delivered to the payee. Section 2 of the BEA provides, *inter alia*, that "issue" means the first delivery of a bill or a note *complete in form* to a person who takes it as a holder. Section 191 of the UNIL was on the same lines. Though the position is similar in India, there is no definition of "issue" in the NIA and the Law Commission had suggested one on the lines of the BEA provision.

4.22 The UCC has improved on the UNIL definition (corresponding to the BEA) and has defined "issue" as "the first delivery of an instrument to a holder *or a remitter*". The words "complete in form" have been deleted in the UCC since they are inconsistent with the provisions relating to incomplete instruments. The reference to "or a remitter", in addition to the reference to "a holder", is due to the fact that the remitter may not be a party to the instrument and thus may not be a holder. As Mr. Maurice Megrah has pointed out, in English law the expression "remitter is not a term of art and may require further definition".

4.23 The idea behind the reference to "or a remitter" is to provide for the case of a purchaser of an instrument, who makes use of the instrument to transmit the funds covered thereby; though the instrument is issued to him, until he delivers the same to the payee in whose favour it is drawn (unless the purchaser has obtained the instrument in his own favour), the payee does not derive any title thereto. Until then, the purchaser may have some rights on the instrument *vis-a-vis* the drawee/acceptor, though he is not named in the instrument. Hence, WE RECOMMEND the adoption of a definition of "issue" on the lines of the UCC provision, substituting the words "or a purchaser" for the words "or a remitter".

## (7) HOLDER IN DUE COURSE

4.24 The kingpin of the Negotiable Instruments Act relates to the status of the holder in due course. The Law Merchant has elevated the status of a *bona fide* holder who takes the instrument in good faith and for value, and enabled him to claim a better title to the instrument than that of his transferor. Similar position is given also to persons claiming under such a holder. Hence, it is necessary that the circumstances when a person could claim to be a holder in due course and the defences that may or may not be raised against him are indicated with as much precision as possible.

(a) *Distinction between "payable" and "overdue"*

4.25 Section 9 of the NIA defines a holder in due course, *inter alia*, as a person taking the instrument before the instrument "*became payable*". The Law Commission had suggested the substitution of the words "*became payable*" by the words "*becomes overdue*" in the definition of "*holder in due course*". This change is necessary as otherwise, as pointed out by the Law Commission, with reference to a demand instrument a person may not be considered as a "*holder in due course*". Hence, WE RECOMMEND that the definition of "*holder in due course*" may be so modified.

(b) *Necessity of consideration*

4.26 Section 9 of the NIA is not quite clear on the point whether or not a holder of an instrument payable to order should take it for consideration before he could claim to be a holder in due course. This has led to an assumption that consideration may not be necessary for a holder to claim to be a holder in due course when the instrument is payable to order, and that it may be necessary only when the instrument is payable to bearer. Such a distinction is not warranted. Both the BEA and the UCC are clear on the point that for a person to claim as a holder in due course he should take the instrument for value. Mr. Maurice Megrah has pointed out that "if the giving of value was not essential, the same rights would be obtained by transferees not in the same category of entitlement; confusion would inevitably follow and the certainty of indefeasible right of action would disappear" and that it would not "matter whether the instrument is payable to bearer or order". WE RECOMMEND that section 9 of the NIA may be suitably modified to make clear the position that a person can claim as a holder in due course only when he takes the instrument, *inter alia*, for consideration, whether the instrument is payable to bearer or order.



(c) *Without knowledge of defect in title*

4.27 Section 9 of the NIA defines a "holder in due course", *inter alia*, as a person who takes the instrument without having sufficient cause to believe that any defect existed in the title of the person from whom he received his title. But the NIA has no provision clarifying the position as to when a defect in title can be considered to exist. Hence, the Law Commission had suggested an Explanation to the definition of "holder in due course" to indicate when a defect could be said to exist in the title of a person to an instrument. This is desirable. WE RECOMMEND that to the definition of "holder in due course" an Explanation may be added to draw reference to the provisions which indicate when a defect may be said to exist in the title of a person to an instrument.

## (8) RESTRICTIVE ENDORSEES

4.28 Section 50 of the NIA provides that the endorsement of a negotiable instrument followed by delivery transfers to the endorsee the property therein with the right of further negotiation; but the endorsement may, by express words, restrict or exclude such right or may merely constitute the endorsee an agent to endorse the instrument, or to receive payment for the endorser or for some other specified person. Where the endorsement is so restrictive, it is called a "restrictive endorsement" and the person taking the instrument under such endorsement is a "restrictive endorsee". As Bhashyam has observed, the relation between a restrictive endorser and a restrictive endorsee is substantially that of a principal and agent.<sup>1</sup>

4.29 The Law Commission had suggested a definition of "restrictive endorsement" on the lines of section 35(1) of the BEA and section 36 of the UNIL. But the UCC (section 3-205) has made some improvements in the definition of "restrictive endorsement". This is more comprehensive and is on the following lines :

"An endorsement is restrictive which either

(a) is conditional ; or

(b) purports to prohibit further transfer of the instrument ; or

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<sup>1</sup>Bhashyam & Adiga. "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 392.

- (c) includes the words 'for collection', 'for deposit', 'pay any bank', or like terms signifying a purpose of deposit or collection ; or
- (d) otherwise states that it is for the benefit or use of the endorser or of another person."

The UCC definition of restrictive endorsement covers also conditional endorsement. Whether this is desirable requires special consideration.

*Conditional endorsement and restrictive endorsement*

4.30 The BEA distinguishes between "conditional endorsement" and "restrictive endorsement", and its rule is different as regards the effect of a "conditional endorsement". While section 35 of the BEA would validate "restrictive endorsement", section 33 of the BEA provides that "where a bill purports to be indorsed conditionally, the condition may be *disregarded* by the *payer* and the payment to the endorsee is valid whether the condition has been fulfilled or not". Section 52 of the NIA provides that an endorser may make the liability or right of the endorsee to receive the amount dependent on the happening of a specified event, although such event may never happen. Thus, while the BEA would ignore the condition in an endorsement, the NIA would uphold it. While the NIA states the law that prevailed prior to the codification,<sup>1</sup> the BEA has altered the law. Section 39 of the UNIL was on the lines of the BEA provision. Bhashyam has pointed out that the present position in the Indian law is not satisfactory as it is still based on the old Common Law rule which operates harshly upon the acceptor of an instrument, who cannot readily ascertain whether the condition has been fulfilled and yet he may not be in a position to risk dishonour of the instrument.<sup>2</sup>

4.31 The BEA and the UNIL provisions would validate the conditional endorsement as between the endorser and the endorsee, but the *payer* is permitted to disregard the same and payment to the endorsee is held valid whether the condition has been fulfilled or not. The Law Commission had suggested a provision on the lines of the BEA and the UNIL. But the UCC has altered the UNIL rule and placed conditional endorsement on par with restrictive endorsement, by including

<sup>1</sup>Robertson v. Kensington (1811) 4 Taunt, 30; "Byles on Bills of Exchange", Sweet & Maxwell, 23rd edn. (1972), p. 85.

<sup>2</sup>Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 400.

within the scope of the expression "restrictive endorsement" conditional endorsement as well. We consider that the position under the BEA is more satisfactory. Hence, WE RECOMMEND that "restrictive endorsement" may be defined on the lines of section 3-205 of the UCC excluding therefrom the reference to "conditional" endorsement. A "restrictive endorsee" would be a person taking the instrument under such endorsement. As regards the effect of a conditional endorsement, WE RECOMMEND a provision on the lines found in the BEA.

(9) PURCHASER AS 'HOLDER'—HIS RIGHTS

4.32 Earlier we have recommended that the purchaser of an instrument may be regarded as a "holder", though the instrument is not drawn or made out in his favour. Therein we have also pointed out that where the instrument is not drawn or made out in his favour, the purchaser can negotiate it only by delivery to the named payee and that since the drawee is not aware of the purchaser's title to the instrument, he cannot directly claim payment thereon from the drawee. Hence, WE RECOMMEND a specific provision to provide that the holder of an instrument which is drawn or made out in favour of a third party can negotiate the same by mere delivery thereof to the named payee only and that such holder cannot directly enforce payment on the instrument from the drawee.

(10) ACCOMMODATION PARTY

4.33 There is no definition of "accommodation party" in the NIA, and the Law Commission had suggested one on the lines found in section 28(1) of the BEA. The BEA defines an accommodation party as a person who has signed the instrument as drawer, acceptor or endorser, without receiving value therefor and for the purpose of lending his name to some other person. But in the definition suggested by the Law Commission on the lines of the BEA provision, there was a change which was perhaps not intentional. The definition as suggested by them refers to the accommodation party as one who has not received the value of the instrument; what is needed is that he should not have received value for the instrument. In other words, any person who has received value for the instrument would not qualify as an accommodation party whether or not the value is more or less than the value for which the instrument is made or drawn. This is clear under the BEA provision, the adoption of which the Law Commission had recommended. Hence, WE RECOMMEND that accommodation party may be defined on the lines found in section 28(1) of the BEA.

## II. DEFENCES AND RIGHTS OF PARTIES *INTER SE*

4.34 : The three main characteristics of negotiability are assignability, presumption of value received, and the acquisition of a good title by a *bona fide* holder for value irrespective of any defects in or want of title on the part of his assignor. In an ordinary assignment it is necessary that a designated payee has to prove that the creditor has appointed him as his agent, or that he has ceded to him the right to receive the debt. This burden is lightened by the practice of *endorsement* and by the legal effects which are attributed to it. In effect, the endorsee becomes the actual transferee entitled to collect the debt on his own account and in a similar way capable of appointing another procurator *in rem suam* and so on indefinitely.<sup>1</sup> In the case of "bearer" instruments, the law recognises transfer of title thereto by mere delivery, though the transferee thereof may have a right to obtain an endorsement. M'Debray had pointed out that the attainment of this result at the close of the seventeenth century was due partly to a larger appreciation of the needs of the world of commerce and partly to the decline of the influence of the school of the renaissance jurists.<sup>2</sup>

4.35 We have considered the several situations and in the circumstances stated herein there is need to clarify the rights and liabilities of immediate parties to an instrument and of those who become holders thereof as a result of negotiation. Such circumstances may be grouped into the following categories :

- (i) negotiation of an instrument by means of endorsement, or purported endorsement, or by mere delivery;
- (ii) warranties on presentment and transfer;
- (iii) holder's right to obtain duplicate;
- (iv) the rights and defences a purchaser-holder may be considered as having notice of;
- (v) defences that may be raised against a holder in due course;

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<sup>1</sup>Holdsworth, W.S., "The Origin and Early History of Negotiable Instruments II", Law Q. Rev. (1915) Vol. XXXI, p. 181.

<sup>2</sup>*ibid.*

(vi) when endorsement fails as "negotiation", its effect as "assignment"; and

(vii) cases of special contracts, namely, of guarantors and minors.

A. NEGOTIATION BY MEANS OF ENDORSEMENT, OR PURPORTED ENDORSEMENT, OR BY MERE DELIVERY

(1) "*Holder*" misspelt or wrongly designated :

4.36 The NIA has no express provision dealing with cases where a transferee of an instrument is wrongly named or his name is misspelt. Section 32(4) of the BEA specifically states that where the instrument is payable to order and the payee or endorsee is wrongly named, or his name is misspelt, he may endorse the instrument as therein described, adding, if he thinks fit, his proper signature. Section 3-203 of the UCC is to the like effect, but with this *addition*, namely, that "signature in both names may be required by a person paying or giving value for the instrument".

4.37 Mr. Maurice Megrah has stated that a misnamed payee or endorsee should endorse in the same way, adding his own signature, if he so wishes, and that "this is important because a transferee cannot be a holder in due course unless the bill is regular on the face of it, which includes the endorsements". He is also in favour of the transferee's right to require the true signature of his transferor, if the name is wrongly spelt. The framers of the UCC have commented that the party whose name is wrongly designated or misspelt may make an endorsement effective for negotiation by signing in his true name only, but this is not commercially satisfactory, since any subsequent purchaser may be left in doubt as to the state of the title; "but whether it is done intentionally or through oversight, the party transfers his rights and is liable on his endorsement, and there is a negotiation if identity exists. He may make an effective endorsement in the wrongly designated or misspelt name only. This again is not commercially satisfactory, since his liability as an endorser may require proof of identity. He may endorse in both names. This is the proper and desirable form of endorsement and any person called upon to pay an instrument or under contract to purchase it may protect his interest by demanding endorsements in both names, and is not in default if such demand is refused." WE RECOMMEND a statutory provision providing that "where in an instrument payable to order the payee or indorsee is wrongly named, or his name is misspelt, he may indorse the instrument as

therein described, adding, if he thinks fit, his proper signature; but signature in both names or both designations (as the case may be) may be required by a person paying or giving value for the instrument.”

(2) *Payee imaginary or unintended person*

4.38 A person may be misled by a fraud or deceit of another to make or draw an instrument as payable to ‘X’. There may or may not be such a person, and the maker or drawer may or may not really intend to benefit ‘X’. In such conditions of fact, how the instrument is to be treated, especially in the hands of third persons handling the instrument as holders for value, or a banker who has paid such an instrument? The NIA does not help to decide the validity of an endorsement on the instrument purporting to be that of ‘X’. Bhashyam has also referred to this lacuna in the Act.<sup>1</sup>

4.39 The Law Commission had suggested that this omission in the NIA may be rectified by adopting a provision on the lines of section 7(3) of the BEA which provides that where the payee is a fictitious or non-existing person, the instrument may be treated as payable to bearer. While it is necessary to have a provision to clarify the position, we feel that adoption of the BEA provision would give room for further difficulty.

4.40 Having regard to the “conditions of fact which have evoked decisions on this sub-section and the decisions thereon”, Paget has pointed out<sup>2</sup> that so far as any general principle can be extracted from the decisions on section 7(3) of the BEA, it would seem that the primary factor is the state of mind and intention of the drawer, that if the mind of the drawer is directed to a specific existing individual, whom he intends to receive the money, such a payee is not a “fictitious” or “non-existing” person, although by reason of fraud on the part of a third party in obtaining the instrument, such individual could never have acquired or exercised any rights in relation thereto; that if, by fraud of a third party, a man is induced to draw an instrument in which the name inserted as the payee’s is that of an imaginary person (though people of that name may and do exist), such payee is a “non-existing person”, although the drawer contemplated someone of that name receiving the money by himself or a transferee by his endorsement. Paget has also observed

<sup>1</sup>Bhashyam & Adiga, “The Negotiable Instruments Act, 1881”, Madras Law Journal, 13th edn. (1974), p. 353.

<sup>2</sup>“Paget’s Law of Banking”, Butterworths, 8th edn. (1972), pp. 231-232.

that where a man accepts a bill payable to an existing person known to him and whom he intends to receive the money, but whom the fraudulent person who inserted his name never intended to get hold of the bill or have any rights thereon, the acceptor is liable on the bill as payable to bearer.

4.41 But the solutions found in the BEA (and similarly in the UNIL earlier) to the conditions of fact based primarily on the intention of the drawer or maker, and to a lesser extent on the existence or otherwise of a person of the description of 'X', though the maker or drawer never intended him to take any benefit under the instrument, are not satisfactory, since it would be unreasonable to make third parties and bankers handling an instrument to enquire into the state of the mind of the drawer or maker of the instrument and go into the effect of such intention having regard to the existence or otherwise of a person of the name of 'X'.

4.42 The introduction of the concepts of "fictitious payee" and "non-existing payee" in the BEA provision and the earlier UNIL provision on similar lines has come in for considerable criticism and has been the cause of confusion.<sup>1</sup> Again, though section 7(3) of the BEA makes such instruments payable to bearer, they do not become instruments transferable by mere delivery. Endorsement (which may be a forgery) in the name of the purported or assumed payee is necessary. Mr. Maurice Megrah agrees that introduction of a "fictitious" or "non-existing" payee gives rise to confusion. Paget has pointed out that "fictitious" and "non-existing" are "terms suitable rather for a philosophic treatise than an Act dealing with mercantile instruments; interpretation is complicated by ante-thesis necessitating differentiation of meaning; and, not unnaturally, judgments dealing with the question exhibit refinements, if not inconsistencies, which render it *almost impossible* to formulate the general effect of the section".<sup>2</sup>

4.43 Thus, the result of the authorities and the expert views on the matter are to the point that adoption of a provision on the lines of section 7(3) of the BEA would *not* satisfactorily solve many of the problems which arise when an instrument is issued as payable to or to the order of 'X' (whether or not there is any person bearing such name) either without intending 'X' to get any benefit or in circumstances when

<sup>1</sup>"The Fictitious Payee and the UCC—The Demise of a Ghost", 18 University of Chicago Law Review (1957), p. 281.

<sup>2</sup>"Paget's Law of Banking", Butterworths, 8th edn. (1972), p. 231.

'X' could not get any benefit therefrom. These situations, which arise mainly due to the fraudulent act or deceit of another, have been dealt with in section 3-405 of the UCC which runs as under:—

“Section 3-405. Impostors; Signature in Name of Payee.

(1) An indorsement by any person in the name of a named payee is effective if

- (a) an impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or
- (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or
- (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.”

4.44 The rationale of the UCC provision which is really an exception to the rule that forged endorsements are ineffective to pass title or authorise drawee to pay,<sup>1</sup> is summed up in the following comment of the framers of the UCC:

“The words ‘fictitious or non-existing person’ have been eliminated as misleading, since the existence or non-existence of the named payee is not decisive and is important only as it may bear on the intent that he shall have no interest in the instrument. The instrument is not made payable to bearer and indorsements are still necessary to negotiation. The section, however, recognises as effective indorsement of the types of paper covered no matter by whom made. This solution is thought preferable to making such instruments bearer paper; on the face of things they are payable to order and a subsequent taker should require what purports to be a regular chain of indorsements. On the other hand it is thought to be unduly restrictive to require that the actual indorsement be made by the impostor or other fraudulent actor. In most cases the person whose fraud procured the instrument to be issued will himself

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<sup>1</sup>White & Summers, “Uniform Commercial Code”, West Publishing Co. (1972), p. 541.



indorse; when some other third person indorses it will most probably be a case of theft or a second independent fraud superimposed upon the original fraud. In neither case does there seem to be sufficient reason to reverse the rule of the section. To recapitulate: the instrument does not become bearer paper, a purportedly regular chain in indorsements is required, but any person, first thief, second impostor or third murderer—can effectively indorse in the name of the payee.”

Hence, instead of a provision on the lines of section 7(3) of the BEA, WE RECOMMEND a provision on the lines of section 3-405 of the UCC.

### (3) *Estoppel regarding payee's existence and capacity*

4.45 Section 121 of the NIA now estops the *maker* of a note or the acceptor of a bill payable to order from denying to a holder in due course, the payee's capacity to endorse the instrument as on the date of the note or bill.

4.46 The section is not happily worded. The reference to “the date of the note or bill” is not sufficient. As against a holder in due course, want of capacity of the payee shall not be permitted to be pleaded, not merely on the date of the bill or the note, but also on the date of the endorsement by such payee. Otherwise, a *bona fide* transferee for consideration from a named payee, who is a minor, may not succeed against the drawer who can contend that while he cannot deny the validity of the instrument (under section 120 of the NIA) on the date it was drawn and under section 121 he cannot deny the payee's capacity on that date, he is not precluded by section 121 from denying the payee's *capacity to endorse* on the date of the endorsement if it happens to be a date subsequent to the date of the drawal.

4.47 Again, section 121 of the NIA does not preclude the *drawer* of a bill from denying the capacity of the payee to endorse, in an action by a holder in due course, consequent on the dishonour of the bill by the drawee/acceptor. Further, the provision does not cover questions as to the existence of the payee, and Bhashyam has said that “under section 121 of this Act, it is doubtful whether the acceptor is estopped from denying the existence of the payee”.<sup>1</sup>

<sup>1</sup>Bhashyam & Adiga, “The Negotiable Instruments Act, 1881”, Madras Law Journal, 13th edn. (1974), p. 354.

4.48 Section 55(1)(b) of the BEA provides that a drawer of a bill by drawing it is precluded from denying to a holder in due course the existence of the payee and his *then* capacity to endorse. Similar provisions are found in the BEA with reference to the acceptor of a bill [section 54(2) (c)] and the maker of a note [section 88(2)]. The UCC provides<sup>1</sup> that by making, drawing or accepting, the party admits, as against all subsequent parties including the drawee, the existence of the payee and his *then* capacity to endorse. The BEA and the UCC provisions are also not clear as to whether this provision would permit the maker, drawer or acceptor to raise a defence as to want of capacity on the part of the payee to endorse when the date of endorsement happens to be a date subsequent to the date of making, drawing or accepting, though the defect in capacity was existing even on the date of making, drawing or accepting.

4.49 In the light of the foregoing, WE RECOMMEND that section 121 of the NIA may be substituted by a provision on the following lines :

“By making, drawing or accepting, the party admits as against all subsequent parties including the drawee, the existence of the payee and his then capacity to indorse”

and that

“such party is also precluded from denying as against all subsequent parties including the drawee, the payee’s capacity to indorse on the ground of any defect which existed on the date of such making, drawing or accepting”.

#### (4) *Order of endorsements and effect of irregular endorsements*

4.50 Then, we have to consider about any intrinsic evidence which the instrument may bear on itself and which may have the effect of giving notice to subsequent parties about the accommodation character of a prior party. There are two rules which we consider as worthy of adoption in our statute. Section 32(5) of the BEA provides that where there are two or more endorsements on a bill, each endorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. On the lines of this provision, the Law Commission had recommended that a presumption should be drawn that until the contrary is proved the endorsements appearing

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<sup>1</sup>U.C.C., Section 3—413(3).

upon an instrument were made in the order in which they appear thereupon. WE RECOMMEND such a provision.

4.51 Section 3-415(4) of the UCC provides that "an indorsement which shows that it is not in the chain of title is notice of its accommodation character". Since indorsements are presumed to be, as stated above, in the order in which they are made, the UCC rule naturally follows and an irregular or anomalous indorsement which is not in the chain of title may be considered as giving to the subsequent parties notice of the accommodation character of the person so indorsing. Hence, WE RECOMMEND a specific provision on the lines of section 3-415(4) of the UCC.

(5) *Rights of restrictive endorsees*

4.52 The NIA, the BEA and the UNIL allow a restrictive endorsee to negotiate the document only when the indorsement *specifically authorises him* to do so. But the UCC provision would permit a restrictive endorsee to further transfer the instrument, and this would seem to be so even where the indorsement expressly prohibits further transfer of the instrument.

4.53 As section 60 of the NIA provides, a negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) *until payment or satisfaction* thereof by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction. Lord Lindley pointed out that it is important that a mercantile instrument should not be an "embarrassing document" and any restriction on the right to negotiate cannot be presumed.<sup>1</sup> Consistent with the principle pointed out by Lord Lindley, WE RECOMMEND that restrictive endorsee's right to further transfer or negotiate the instrument should not be affected unless the indorsement though restrictive in any respect also *specifically precludes* negotiation.

4.54 Under the BEA and the UNIL, a restrictive endorsee cannot claim as a holder in due course. But section 3-206 of the UCC provides that the transferee under a restrictive indorsement, if otherwise qualified, may be a "holder in due course" if he acted consistent with such indorsement. Subsequent holders may also so qualify if they take without notice that the holder who first took under such indorsement has *not* acted inconsistent with the restriction. The UCC provision is

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<sup>1</sup>National Bank v. Silke, (1891) 1 Q.B. 435.

more equitable and **WE RECOMMEND** that it may be provided that the first holder claiming under a restrictive endorsement, if otherwise qualified, may be a "holder in due course" provided he acts consistent with such endorsement; and that a subsequent holder could also be, if otherwise qualified, a holder in due course, if he has no notice of the fact that the previous holders have not acted consistent with the endorsement. The case for special position of banks with reference to restrictive endorsements is considered by us in the chapter on "Bankers' Protection".

(6) *Holder's right to ask for endorsement*

4.55 Section 31(4) of the BEA confers on the transferee for value without endorsement of a bill all the rights which the transferor had in the bill and in addition the right to have the endorsement of the transferor or his legal representative, as the case may be. Section 3-201(3) of the UCC and Article 14 of the UNCITRAL draft also confer such rights on the "holder". We have no specific provision in the NIA dealing with this position. **WE RECOMMEND** an express provision in our Act on the lines of section 31(4) of the BEA; but the right to ask for an endorsement should not apply to the case of a purchaser obtaining an instrument in the name of another, which he may transfer to such person by mere delivery.

**B. WARRANTIES ON PRESENTMENT AND TRANSFER**

4.56 There are no express provisions in the NIA and the BEA dealing generally with the warranties a transferor is deemed to make to a transferee taking the instrument for value and in good faith. But section 58 of the BEA enumerates certain warranties a transferor by mere delivery is deemed to make in favour of a transferee. The Law Commission had recommended a provision in our Act on the lines of section 58 of the BEA. We consider it desirable that the warranties that a transferor is deemed to make in favour of his transferee, and to subsequent holders who take the instrument for value and in good faith, should be clearly specified so as to cover both kinds of transfers, namely, by endorsement and delivery, and by mere delivery.

(1) *Warranties implied in any transfer*

4.57 Section 3-417(1) of the UCC states that any person who obtains payment or acceptance, or any prior transferor warrants to a person who in good faith pays or accepts, that—

- (a) he has a good title to the instrument or is authorised to obtain payment or acceptance on behalf of one who has a good title; and

- (b) he has no knowledge that the signature of the maker or drawer is unauthorised, except that this warranty is not given by a holder in due course acting in good faith
- (i) to a maker with respect to the maker's own signature; or
  - (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
  - (iii) to an acceptor of a bill if the holder in due course took the bill after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorised; and
- (c) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith
- (i) to the maker of a note ; or
  - (ii) to the drawer, of a bill whether or not the drawer is also the drawee ; or
  - (iii) to the acceptor of a bill with respect to an alteration made prior to the acceptance if the holder in due course took the bill after the acceptance, even though the acceptance provided 'payable as originally drawn' or equivalent terms ; or
  - (iv) to the acceptor of a bill with respect to an alteration made after the acceptance.

The framers of the UCC have clarified that as per the above rules, the party who accepts or pays, however, does not admit the genuineness of the endorsement, and may recover from the person presenting the instrument when the endorsement turns out to be forgery. The justification for the distinction between the forgery of the signature of the drawer and the forgery of an endorsement is that the drawee is in a position to verify the drawer's signature by comparison with one in his hands, but has ordinarily no opportunity to verify an endorsement. The warranties prescribed and the exceptions thereto follow closely principles established at Common Law.<sup>1</sup> We consider that a provision stating the warranties a transferor is deemed to make in favour of the transferee who in good faith pays or accepts the instrument is highly desirable and WE RECOMMEND accordingly.

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<sup>1</sup>Please see *Price v. Neal*, 3 Burr. 1354 (1762).

(2) *Warranties by a transferor by endorsement and delivery*

4.58 Section 3-417(2) and (3) of the UCC states the warranties a person who transfers an instrument by endorsement and delivery is deemed to make to his transferee *and* to any subsequent holder who takes the instrument in good faith and for value. Under section 3-417(2), such a person warrants that—

- (a) he has a good title to the instrument or is authorised to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
- (b) all signatures are genuine or authorised; and
- (c) the instrument has not been materially altered; and
- (d) no defence of any party is good against him; and
- (e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

Section 3-417(3) provides that by transferring “without recourse” the transferor limits the obligation stated in sub-section (2)(d) to a warranty that he has no knowledge of such a defence. The provisions relating to estoppel found in the NIA and the BEA no doubt safeguard to a considerable extent the interests of a holder in due course. But the addition of the more positive provisions of the UCC would help to clarify the position precisely and eliminate to a great extent conflicts on understanding. WE RECOMMEND a specific provision on the lines of the UCC provisions 3-417(2) and (3), stating the nature and the scope of the warranties a transferor by endorsement and delivery is deemed to make.

(3) *Transferor by delivery*

4.59 Since a transferor by delivery is not an endorser, he does not become *ex facie* liable under the instrument by reason of his negotiation thereof by mere delivery. Section 58 of the BEA clarifies that a transferor by delivery is not liable on the instrument and that his liability is that he warrants by his negotiation that he has the right to transfer the instrument and that at the time of the transfer he was not aware of any fact which renders the instrument valueless. The UCC provides that a transferor by delivery is deemed to make in

favour of his *immediate transferee* the warranties stated in section 3-417(2) and (3). WE RECOMMEND that the warranties the transferor by delivery is deemed to make should be statutorily clarified on these lines.

(4) *Section 43 of the NIA vis-a-vis transferor by delivery*

4.60 Section 43 of the NIA provides, *inter alia*, that a transferee for consideration and every subsequent holder claiming under him may recover the amount due on the instrument from the transferor for consideration, whether or not the transfer was with or without endorsement. As regards the liability of a transferor by delivery, this provision is somewhat inconsistent in that, as we discussed above, the liability of such transferor is confined to the giving of certain warranties and subject to that he does not undertake to be bound for the amount due on the instrument. It may be that a transferee taking an instrument by mere delivery may ask for his transferor's endorsement and thereby be entitled to proceed against him when the instrument is dishonoured; but the rule should be that no party whose name does not figure in the document shall become liable thereon in an action on the instrument. Hence, WE RECOMMEND that the scope of section 43 of the NIA may be confined only to transferees of instruments who take by endorsement and delivery.

C. HOLDER'S RIGHT TO OBTAIN A DUPLICATE DOCUMENT

4.61 Section 45A of the NIA enables a holder to ask for a duplicate of a bill, when he claims that it is lost, after furnishing an indemnity. In *State Bank of India v. Jyoti Ranjan Mazumdar*,<sup>1</sup> in the case of a draft issued by the State Bank, the holder's claim for a duplicate thereof, on his loss of the instrument, was resisted by the State Bank on the ground that since the draft is not a bill of exchange, the holder thereof is not entitled to claim a duplicate under section 45A.<sup>2</sup> We are recommending that a "draft", as defined in section 85A of the NIA, *i.e.*, an order to pay money drawn by one office of a bank upon another office of the same bank should be really classed as a "note". The provision recommended by the Law Commission with reference to the right to claim duplicate would enure to the benefit of the holder of the instrument whether it is a bill, a note or

<sup>1</sup>A.I.R. 1970 Cal. 503.

<sup>2</sup>But the Court did not uphold this plea in the view that "draft" may qualify as a bill of exchange.

a cheque. The right of a holder to claim a duplicate of the lost instrument need not be circumscribed by the fact whether it is a bill or a note or a cheque. Hence, **WE RECOMMEND** that the scope of section 45A of the NIA should be widened to cover also other forms of negotiable instruments covered by the Act.

*Proof of loss and quantum of indemnity*

4.62 Where a holder claims a duplicate, all the codes agree that such a right is subject to his proving the loss and on his offering satisfactory indemnity. As the framers of the UCC have commented, the person claiming a duplicate, who claims to be the owner of a lost instrument is not strictly a "holder" since he is not in possession of the paper and he does not have the holder's *prima facie* right to recover. He must establish the terms of the instrument and his ownership and must account for its absence. The extent of proof of loss and the nature of indemnity that have to be offered would depend on the facts of the case and, in the absence of mutual agreement between the parties, have to be to the satisfaction of the court.

4.63 The UNCITRAL draft contains some special provisions dealing with lost instruments and Article 80(2)(c) of the draft provides that the amount of security and its terms shall be determined by an agreement between the parties. Failing such agreement, the amount of security and its terms shall be determined by the court. **WE RECOMMEND** a specific provision accordingly.

**D. RIGHTS AND DEFENCES THAT A PURCHASER-HOLDER MAY BE CONSIDERED AS HAVING NOTICE OF**

**(1) *Notice of any claim or defence affecting the title to the instrument***

4.64 The views we have elicited from the chambers of commerce, banks and other representative bodies favour the adoption of specific provisions which would indicate some clear guidelines for deciding as to when the purchaser of an instrument can be considered as having notice of any claim or defence affecting the title to the instrument. The usefulness of such provisions is obvious.

4.65 The NIA does not indicate when the purchaser of an instrument can be considered to have notice of a claim or defence based on any defective title. The UCC provisions lay down some clear



guidelines in the matter and in our view the adoption of similar provisions in our country would help to solve the question whether under the stated circumstances the purchaser can be considered to have constructive notice of a claim or defence which would go to affect title to the instrument. The views we have elicited generally favour the adoption of a provision on the lines of the UCC.<sup>1</sup> WE RECOMMEND specific provisions in our statute on the following lines :

- “(1) The purchaser has notice of a claim or defence if
- (a) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay ; or
  - (b) the purchaser has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.
- (2) The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.”

4.66 The UCC further provides that knowledge of the following facts *per se* cannot be considered to give the purchaser notice of any defence or claim pertaining to the instrument. Having regard to the circumstances stated therein, WE RECOMMEND a similar express provision for our country to provide that in the following circumstances the purchaser of an instrument cannot be considered as having notice of any claim on or defect in the instrument :

- (a) that the instrument is ante-dated or post-dated ;
- (b) that it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defence or claim has arisen from the terms thereof ;
- (c) that any party has signed for accommodation ;
- (d) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion ;

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<sup>1</sup>Section 3—304 of the UCC.

- (e) that any person negotiating the instrument is or was a fiduciary ;
- (f) that there has been default in payment of interest on the instrument or in payment of any other instrument, unless it is one of the same series.

(2) *Notice that the instrument is overdue*

4.67 A person taking an overdue instrument as holder, all the codes agree, is not competent to qualify as a holder in due course. Hence, a *bona fide* purchaser of an instrument would like to be satisfied that the instrument has not become "overdue" at the time of his purchase. But when can any person dealing with the instrument be considered as having notice of the fact that it is "overdue"? Under the NIA we have no clear indications as to when an instrument can be considered as "overdue". Though the question has quite often arisen with reference to "on demand" instruments, and with reference to "cheques", it is common to all types of negotiable instruments.

(i) *When instruments can be regarded as "overdue" generally*

4.68 The Law Commission had suggested a provision on the lines of the BEA (and the UNIL provision) to provide that a bill payable on demand shall be deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonably long time. The following UCC provision which has effected an improvement in the earlier UNIL provision, is more clear on the point and helps to decide when the purchaser of an instrument can be considered as having notice of the fact that the instrument is overdue, not only with reference to on demand instruments but generally :

"A purchaser has notice that an instrument is overdue if he has reason to know—

- (a) that any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series ; or
- (b) that acceleration of the instrument has been made ; or
- (c) that he is taking a demand instrument after demand has been made or more than a reasonable length of time after it is issued....."

**WE RECOMMEND** a statutory provision on the aforesaid lines to clarify when the purchaser of an instrument can be considered as having notice of the fact that the instrument is overdue.

(ii) *When a "cheque" can be considered as "overdue"*

4.69 An instrument payable on demand is generally considered as overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. How does this rule work with reference to cheques? In the U.K., the courts have not laid down any definite rule of law as to what constitutes a reasonable time beyond which a cheque in circulation can be presumed as overdue; in one case<sup>1</sup> a cheque which was five days old was regarded as overdue, in another<sup>2</sup> a cheque in circulation eight days after its issue was held as not overdue, and in a third case<sup>3</sup> a cheque was held as "overdue" after two months. In India, where a plaintiff took on 28th September a cheque drawn on 5th June, it was held that he was not a holder in due course as by then the instrument was overdue<sup>4</sup>. In this state of authorities, at least with reference to cheques, it is desirable to specify the period, circulation beyond which could raise the presumption that the cheque is overdue. Such a provision would facilitate freer circulation of cheques and help the spread of banking habit.

4.70 As we have seen above, in the U.K. and in India, there is no specified period. Though it was so in the U.S.A. when the UNIL was in force, the UCC has changed the position. Section 3-304(2)(c) of the UCC provides that a reasonable time for a cheque drawn and payable within the States and territories of the United States and the District of Columbia is presumed to be 30 days. The Geneva Conventions allow eight days for domestic cheques, 20 days for European foreign cheques and 70 days for non-European foreign cheques for *presentment* for payment. Actually, the rule of the Geneva Conventions is relevant for the drawee bank to honour the instrument and does not deal with the question when a cheque can be considered as overdue; but the time when a cheque can be considered as overdue has necessarily to be less than this period in the countries which have adopted the Geneva Conventions.

4.71 What should be the period that could be specified in India with reference to cheques for this purpose? The fact that a cheque

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<sup>1</sup>Down v. Halling, (1825) 4 B & C 330.

<sup>2</sup>London and County Banking Co. v. Groome, (1881) 8 Q.B.D. 288.

<sup>3</sup>Serrell v. Derbyshire etc. Railway Co., (1850), 9 C.B. 811.

<sup>4</sup>Ramsarup v. Hardeo Prasad, I.L.R. 50 Allahabad 309=A.I.R. 1928 Allahabad 68.

may be presumed as overdue does not thereby mean that the drawee is not free to honour the same. It only implies that any transferee thereafter would take it subject to the equities subsisting in favour of the earlier parties. While we should have regard to the vastness of our country and the fact that though transport and communications have advanced there are still several areas of the country where communication may reach only after several days or weeks, we should also take note of the fact that, as Mr. Megrah has pointed out, a cheque is intended for a relatively quick payment of a debt. Having regard to all aspects, we consider it desirable to provide that a cheque which has been in circulation for over three months from the date it bears shall be presumed to be overdue. WE RECOMMEND accordingly.

4.72 There is in our country the practice of banks considering as "stale" a cheque presented for payment six months after the date it bears, and honour it thereafter only after obtaining the confirmation of the drawer. The need for giving statutory recognition to this practice is considered by us in the "Cheques Chapter".

(3) *Effective notice of claim or defence*

4.73 We have made our recommendations about the circumstances when the purchaser of an instrument can be said to have notice of any defence or claim which would affect the title to, or the amount payable on, the instrument. On the lines of section 3-304(6) of the UCC, WE RECOMMEND also that, to be effective, a notice must be received by a person at such time and in such manner as to give him a reasonable opportunity to act on it.

E. DEFENCES AVAILABLE AGAINST A HOLDER IN DUE COURSE

4.74 The NIA and the BEA do not contain any provision specifically enumerating the claims or defences that may be raised against a holder in due course.

4.75 Section 3-305 of the UCC provides that to the extent that a holder is a holder in due course he takes the instrument free from all claims to it on the part of any person, and of all defences of any party to the instrument with whom the holder has not dealt, except—

- (a) infancy, to the extent that it is a defence to a simple contract ;  
and

- (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity ; and
- (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms ; and
- (d) discharge in insolvency proceedings ; and
- (e) any other discharge of which the holder has notice when he takes the instrument.

The views we have elicited favour the adoption of a provision on the above lines. Such a provision would contribute to clarity and certainty regarding the rights of parties *inter se*. WE RECOMMEND a specific provision on the lines of section 3-305 of the UCC.

*Defence based on non-delivery etc.*

4.76 Under the NIA, negotiation of an instrument is not complete without delivery. The position is similar in the BEA and the UCC. But as against a holder in due course, it is not desirable to allow a defence based on "non-delivery", "conditional delivery" and "delivery for a special purpose". Now there is no specific provision in this regard in the NIA. Section 21(2) of the BEA provides, *inter alia*, that if the bill be in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed. The comment of the framers of the UCC on section 3-305 of the UCC explains that the reference in the section to the holder in due course taking the instrument free of "all defences" would cover all defences based on non-delivery, conditional delivery, or delivery for a special purpose. As we consider it desirable not to leave any scope for ambiguity on this point, WE RECOMMEND a statutory provision to provide that as against a holder in due course a defence based on non-delivery, conditional delivery or delivery for a special purpose shall not be set up.

*Proof of accommodation character*

4.77 There is the question as to whether the accommodation character of a party can be allowed to be set up by means of oral proof; and if so, whether it could be set up against a holder in due course. Section 3-415(3) of the UCC provides that "as against a holder in due course and without notice of the accommodation, oral

proof of the accommodation is not admissible to give the accommodation party the benefit of discharge dependent on his character as such" and that "in other cases, the accommodation character may be shown by oral proof". WE RECOMMEND a specific provision on these lines.

F. WHEN ENDORSEMENT FAILS AS "NEGOTIATION", ITS EFFECT AS "ASSIGNMENT"

4.78 Section 130 of the Transfer of Property Act, 1882 specifies a method of assignment of actionable claims by an instrument in writing. But, section 137 of that Act provides, *inter alia*, that nothing in that section shall apply to mercantile documents which include negotiable instruments. Nevertheless, decisions have construed section 137 as conferring only an extended privilege to mercantile documents including negotiable instruments and not denying to such documents the method of assignment specified in section 130 of the Transfer of Property Act,<sup>1</sup> namely, by an instrument in writing and effective against the debtor after due notice to him of the transfer. Where the purported endorsement on an instrument is not effective as negotiation of the instrument under the Act to transfer title thereto, still it may operate as an assignment thereof and the endorsement regarded as execution in writing signed by the transferor conveying title to the debt covered to the purported endorsee.<sup>2</sup> Thus, an endorsement which fails to be effective as "negotiation" to transfer title thereto may nevertheless be effective as an assignment of the claim.

4.79 But where the endorsement purports to transfer only a part of the claim, what is the position? The NIA, the BEA and the UCC provide that a partial endorsement shall not be effective as negotiation thereof. But can such a partial endorsement which fails to operate as "negotiation" be effective as a partial assignment of the claim? There has been considerable controversy<sup>3</sup> on the question whether an assignment of a part of an actionable claim is valid or not. Hence,

<sup>1</sup>Venkatarama Ayyar v. Krishnaswami Chettiar, (1933) 138 I.C. 262, (33) A.M. 133; Ghanashyamdas v. Sahu, (1936) 16 Pat. 74, 167 I.C. 51, (37) A.P. 100; See Srinivasulu v. Kondappa, (1960) A. Andh. Pra. 166.

<sup>2</sup>Muhammad Kumarali v. Ranga Rao, (1901) 24 Mad. 654.

<sup>3</sup>Please see "Paget's Law of Banking", Butterworths, 8th edn. (1972), pp. 112 to 115 for the discussion of the English law on the subject, and "Mulla on the Transfer of Property Act", N. M. Tripathi Pvt. Ltd., 5th edn. (1967), pp. 797 and 798.

it is desirable that the effect of a partial assignment of an amount covered by a negotiable instrument (which may be by means of a purported endorsement) is statutorily clarified.

4.80 Now, there is a conflict between the decisions of the Patna and Lahore High Courts as to the effect of a partial assignment of an actionable claim.<sup>1</sup> We have two alternative provisions to consider. While the Geneva Conventions provide that a partial endorsement is null and void, the UCC says expressly that the partial endorsement operates only as a partial assignment. The transferee claiming under such an endorsement cannot be a "holder" and consequently can never be a "holder in due course". But there need not be any bar to his claiming on the instrument subject to the equities and the rights of the prior parties to the instrument. The UCC rule is more equitable. Hence, WE RECOMMEND a statutory provision clarifying expressly that an endorsement which purports to transfer to the endorsee only a part of the amount payable operates only as a partial assignment and is not effective to operate as a negotiation thereof.

#### G. CASES OF SPECIAL CONTRACTS, NAMELY, OF GUARANTORS AND MINORS

##### (1) *Guarantors*

4.81 There is no specific provision in the NIA dealing with the person who may become bound under the instrument as guaranteeing the payment or collection of the instrument. Section 3-416 of the UCC states "the commercial understanding as to the meaning and effect of the words of guarantee added to a signature". It is a matter of business convenience that the terms of a contract of a person guaranteeing the payment of an instrument or the fulfilment of an obligation arising thereon of any party to the instrument are expressly stated and scope for any ambiguity thereon is avoided. In view of this, WE RECOMMEND a specific provision on the following lines, which is on the lines of section 3-416 of the UCC:

##### *"Contract of Guarantor*

- (1) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.
- (2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only

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<sup>1</sup>Please see A.I.R. 1940 Patna 170 and A.I.R. 1941 Lahore 337.

after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

- (3) Words of guaranty which do not otherwise specify guarantee payment.
- (4) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.
- (5) When words of guaranty are used presentment, notice of dishonour and protest are not necessary to charge the user."

*"Aval" and section 56 of the BEA*

4.82 A suggestion has also been made about the desirability of making provisions in our negotiable instruments law for the recognition of a system of "Aval" which is a form of guarantee of the payment of a bill by the signature of a third person and which is expressed by words such as "good as Aval". Such provisions are found in the laws of countries which have adopted the Geneva Conventions. Section 56 of the BEA has been understood as introducing the principle of the "Aval" into the English law. Section 56 provides that where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course. Mr. Megrah has expressed that the position of "Aval" (unknown in English law) is quite well met by section 56 of the BEA and India might well choose the one or the other. Mr. Carl W. Funk has expressed that it is not desirable to provide for the recognition of the system of "Aval" in India, that it may not be necessary to add it to the law of a country which has not employed it in the past, and that he would prefer to retain the terms expressed in a language which is commonly used, as English is in India, rather than to import additional foreign words. We agree with these views and WE RECOMMEND a provision on the lines of section 56 of the BEA instead of having provisions in our law on the lines found in the Geneva Conventions regarding the system of "Aval".



(2) *Minors*

4.83 In India under the Contract Act, a person who has not attained the age of majority is not competent to enter into a contract<sup>1</sup>. A minor's contract is void *ab initio* in India<sup>2</sup>. However, in the U.K. while contracts entered into by a minor for repayment of money lent or to be lent, or for goods supplied or to be supplied (other than "necessaries") and all accounts stated with the minor are void, a minor's contracts with reference to "necessaries" supplied to him are valid. In certain types of continuing contracts, the minor is bound unless he repudiates them within a reasonable time after attaining majority. In other cases, contracts are unenforceable against the minor either during or after the minority. But the minor can enforce them and the contracts are not void<sup>3</sup>. The Law Merchant has recognised the necessity for special provisions for a minor's contracts with reference to negotiable instruments.

4.84 As the Law Commission had pointed out, section 26 of the NIA is inconsistent with the provisions of the Contract Act regarding the effect of a minor's contract. The Law Commission had recommended a provision to the effect that where an instrument is made, drawn or negotiated by a minor, the making, drawing or negotiation would entitle the holder to receive payment of the instrument and to enforce it against any other party thereto except the minor. The provision suggested by the Law Commission is wider in scope than the existing NIA<sup>4</sup> and the BEA<sup>5</sup> provisions, in that it covers also the making of an instrument though it excludes the acceptance thereof. The aim of the provisions dealing with minor's contracts with reference to negotiable instruments is to ensure that while a minor may not undertake any personal liability on an instrument, he can effectively negotiate or deal with the instrument so as to bind other parties thereto. Consistent with this, while a minor may draw or negotiate an instrument, he cannot validly bind himself either as maker or as acceptor of an instrument. This is also the position under the BEA<sup>5</sup>. Hence, WE RECOMMEND a provision to the effect that where an instrument

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<sup>1</sup>Section 11 of the Indian Contract Act, 1872.

<sup>2</sup>*Mohori Bibi v. Dharamdas Ghosh*, I.L.R. (1903) 30 Cal. (P.C.) 539.

<sup>3</sup>Reeday, T.G., "The Law Relating to Banking", Butterworths, 2nd edn., (1972), p. 14.

<sup>4</sup>Section 26 of the NIA.

<sup>5</sup>Section 22(2) read with section 89(2) of the BEA.

is drawn or negotiated by a minor, the drawing or negotiation, as the case may be, shall entitle the holder to receive payment of the instrument and to enforce it against any party thereto other than the minor.

(3) *Corporation*

4.85 Section 26 of the NIA provides that a corporation can make, endorse or accept a negotiable instrument only in cases in which, under the law for the time being in force, it is so empowered to act. Section 47 of the Companies Act, 1956 requires that such contract should be *ex facie* shown to have been entered into on behalf of the company by any person acting under its authority, express or implied. We have earlier recommended that a provision on the lines of section 47 of the Companies Act should apply to all corporate bodies and that to ensure this, such a provision should be incorporated in the negotiable instruments law.<sup>1</sup> But, such a provision requires also to be supplemented by a provision, on the lines found in the BEA, to the effect that when a negotiable instrument contract is entered into on behalf of a corporation by a person acting without authority, such a contract may nevertheless be valid in order to bind other parties thereto. Such a provision is highly desirable and WE RECOMMEND accordingly.

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<sup>1</sup>Vide Paragraph 3.36 of this Report.

## CHAPTER 5

### NEGOTIABLE INSTRUMENTS—THEIR HONOUR AND DISHONOUR

The instrument achieves its objective when it is honoured. The procedure for its honour has to be clear, leaving no scope for ambiguity. It should also be consistent with business convenience. If the instrument is dishonoured, the secondary parties who may become thereby liable have to be promptly apprised of the dishonour in order that they may take proper steps to protect their interests. The procedure for recovery of the amount due on the instrument from the parties liable thereon, in the event of dishonour, should contribute to the expeditious settlement of the claims. With these primary considerations we have considered the relevant legal provisions governing the steps to be taken for determining the quantum and liability of the parties.

#### EFFECT OF UNDERLYING OBLIGATION

5.2 Before we go into the procedure for and the provisions relevant to honour and dishonour, we would like to clarify the effect of taking a negotiable instrument on the underlying obligation. Now, the NIA does not clearly specify the effect on the underlying obligation, or the original cause of action when a negotiable instrument is taken. It would reduce litigation if this position is statutorily made clear. As the framers of the UCC have said:

“It is commonly said that a check or other negotiable instrument is ‘conditional payment’. By this it is normally meant that taking the instrument is a surrender of the right to sue on the obligation until the instrument is due, but if the instrument is not paid on due presentment the right to sue on the obligation is ‘revived’.”

The comment further says that this provision

“states this result in terms of suspension of the obligation, which is intended to include suspension of the running of the statute of limitations. On dishonour of the instrument the holder is

given his option to sue either on the instrument or on the underlying obligation. If, however, the original obligor has been discharged on the instrument (see Section 3-601) he is also discharged on the original obligation.”

The House of Lords explained to the same effect the consequences of cheque payment in *Reg. v. Turner*.<sup>1</sup> Section 3-802(1)(b) of the UCC states this position. WE RECOMMEND a statutory provision on the following lines:

“Unless otherwise agreed, where an instrument is taken for an underlying obligation, the obligation is suspended *pro tanto* until the instrument is due or if it is payable on demand, until its presentment. If the instrument is dishonoured, action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.”

5.3 The procedure to be gone through and the provisions relevant thereto for invoking and determining the liabilities of the parties to an instrument may be considered under the following heads:

- (i) provisions to determine the quantum of the amount payable;
- (ii) provisions to decide the date and time for obtaining payment;
- (iii) procedure for presenting the instrument for acceptance/payment;
- (iv) procedure for invoking the liabilities of the secondary parties to the instrument; and
- (v) procedure for recovery of dues on the instrument.

Under the above heads, we discuss here the provisions of the NIA which require to be modified and/or amplified.

## A. PROVISIONS RELEVANT TO DETERMINE THE AMOUNT PAYABLE

### INTEREST CLAIMS

5.4. While dealing with the provisions to indicate what could be regarded as a *sum certain*, we have indicated in Chapter 3 the several factors which as per the terms of the instrument may go to determine

the quantum of liability. Here we would like to deal with the provisions to govern *interest claims* on the amount for which the instrument is made or drawn. With reference to interest payable, the following questions merit consideration:

- (a) variation of the rate specified in the instrument by State legislation;
- (b) where the instrument is silent, whether interest is payable and if so, the rate at which it should be paid;
- (c) whether the rate specified should cover the currency of the debt evidenced by the instrument or should it be confined only to the period from the date of default, or should it cover both;
- (d) where the instrument is silent as to the rate, should a local custom or usage be allowed to be set up to justify a claim for a rate higher than that specified in the statute; and
- (e) whether the ceiling rate of 6 per cent for the amount payable from the date of decree requires any change with reference to a negotiable instrument.

(a) *Variation of the rate specified in the instrument by State legislation.*

5.5 Under our Constitution, the competency to legislate with reference to "moneylending and moneylenders" and "relief of agricultural indebtedness" is with the States; the competency to legislate with reference to "bills of exchange, cheques, promissory notes and other like instruments" is with the Union, and in the Concurrent field comes the jurisdiction to legislate with reference to "contracts". Similar position prevailed under the Government of India Act, 1935. The States have enacted statutes to regulate moneylending and to grant relief to agricultural debtors. As part of this measure, the rate of interest payable by small borrowers in general, and agricultural debtors in particular, has been affected even though the debt is evidenced by a negotiable instrument, which is usually in the form of a promissory note. In *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna*,<sup>1</sup> the Privy Council considered and upheld the validity of such statutes, since in pith and substance the legislation dealt with matters which were essentially Provincial subjects. The Law Commission had also

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<sup>1</sup>A.I.R. 1947 P.C. 60.

suggested a specific provision in the Act to clarify that the provisions therein relating to payment of interest are subject to any law for the time being in force for the relief of debtors which authorises the courts to scale down the interest. We consider such a statutory clarification desirable and WE RECOMMEND accordingly.

*What about "holder in due course"?*

5.6 While as between the immediate borrower and the lender the position as regards the rate of interest payable may be subject to the State enactment for the relief of debtors, should it be the same as against a "holder in due course"? A *bona fide* transferee taking the instrument in good faith for consideration acquires a better title than his transferor. The disability of the transferor to ask for payment of interest on the amount of the instrument at a rate higher than the rate permitted under State enactment for the relief of debtors may not, and in our view need not, affect the title of the holder in due course who sees the paper and takes it for value in good faith without any cause to believe that the maker of the note is an agriculturist or a person entitled to the benefit of the local enactment for the relief of debtors. However, any person taking it under circumstances when he would be presumed to have knowledge of such a claim or defence of the maker of the note, is not a "holder in due course".

5.7 Before the Federal Court, while defending the vires of the Bengal Moneylenders Act, the Advocate-General of Bengal contended<sup>1</sup>, *inter alia*, that the impugned Act did not encroach on Entry 28 of List I (Government of India Act, 1935) and he endeavoured to show that the Act had carefully refrained from touching the principle of negotiability or the consequent rights of holder in due course. It would seriously restrict the negotiability of an instrument if, in the hands of a holder in due course, the maker or other obligor is allowed to raise the plea that his liability on the instrument should be modified as per the provisions of the State enactment relating to relief to debtors. The position needs express clarification. Hence, WE RECOMMEND an express provision to the effect that as against a holder in due course no claim or defence based on any relief available under any statute for the relief of debtors shall be allowed to be set up.

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<sup>1</sup>A.I.R. 1945 F.G. 2.

(L) *Instrument is silent as to interest—whether interest is payable*

5.8 Under the general law, unless there is an express stipulation for payment of interest, there is no liability to pay interest except in a case where it could be justified as warranted by mercantile usage.<sup>1</sup>

5.9 Section 80 of the NIA provides, *inter alia*, that when no rate of interest is specified in the instrument, interest on the amount due shall be calculated at the rate of 6 per cent per annum from the date on which the sum ought to have been paid. Bhashyam has observed that though the language of the section is not felicitous, it governs alike the case in which interest but not the rate is specified and the case where there is no interest mentioned at all.<sup>2</sup>

5.10 When the instrument is silent as to payment of interest and when it is silent merely as to the rate at which interest is payable, the NIA has been understood as providing for payment of interest and limiting the same to 6 per cent. The Law Commission had also expressed themselves in favour of this position.

5.11 WE RECOMMEND that the rate of interest specified in the Act should apply both to a case where the instrument is silent as to payment of interest and to a case where the instrument is silent only as to the rate for such payment. But, with reference to instruments payable on demand, this provision should be made applicable only to instruments other than cheques. With reference to cheques, the provision should apply only from the date of dishonour.

*Appropriateness of the NIA rate of interest*

5.12 Now what is the rate that could be specified when the agreement between the parties is silent as to the payment of interest or the rate at which interest is payable? Several suggestions have been made

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<sup>1</sup>Hirabai Gendalal v. Bhagirath Ramchandra & Co., A.I.R. 1946 Bom. 174 at 224; Mahamad Abdul Hasim v. Srimat Jagatram, A.I.R. 1942 Allahabad 96; Dinanath v. Divanchand, A.I.R. 1930 Bom. 444.

<sup>2</sup>Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 496; Best v. Haji Muhammad Sait, 23 Mad. 18; Bishun Chand v. Babu Audh, 2 P.L.J. 451; Framroz v. Essa, 50 Bom. 266: 1926 Bom. 241; Ganpat v. Sopana, 52 Bom. 88 (F.B.): 1928 Bom. 35; Amar Singh v. Pratab Singh, (1935) Oudh 518; Prem Lall v. Radha Bullav, 34 C.W.N. 779; Khurshid v. Ram Ditta, (1928) Lah. 665; Bhanwarlal v. Sm. Ratanjot, (1955) Ajmer 13; Seth Tulsidass Lalchand v. Rajagopal, (1967) 2 M.L.J. 66: J.L.R. (1968) Mad. 646.

pointing out that the rate of 6 per cent referred to in section 80 of the NIA is highly inadequate with reference to present market conditions. In somewhat similar circumstances, the UCC provides for payment of judgment rate of interest, the Geneva Conventions the rate of 6 per cent and the UNCITRAL draft the rate of 5 per cent. One has to remember that we are here discussing the rate of interest that is payable when the agreement between the parties is silent. In other words, the Act does not *per se* affect or come in the way of the parties specifying what in their opinion is just as regards the rate of interest. *The Act rate is the minimum applicable when the parties have not cared to provide for payment of interest at a specified rate.* In this view of the matter and having regard to comparable provisions elsewhere, **WE DO NOT RECOMMEND** any upward revision of the rate at which interest should be payable under the Act, if the instrument is silent as to interest/rate.

*(c) Interest for the usance period and thereafter*

5.13 When the instrument is silent and where the interest is payable as above, the question is whether the provision should extend also to cover the period of the usance of a bill or a note. Section 80 of the NIA states that "notwithstanding any agreement relating to interest between any parties to the instrument", interest on the amount due thereon shall be calculated at 6 per cent per annum "from the date at which the sum ought to have been paid by the party charged, until tender or realisation of the amount due thereon...". The policy underlying a provision for payment of interest at a specified rate when the instrument is silent is that no collateral or independent contract should be allowed to be set up or oral evidence allowed to be let in regarding the rate of interest payable on an instrument. This principle cannot be different and has validity both as regards the rate of interest payable for the period of usance of a bill and for any period subsequent to the usance (*i.e.*, from the date of default). Especially with reference to "*Multani bills*",<sup>1</sup> we have been told that the practice now is to state the rate of interest as payable only from the date of default and not to mention the rate at which interest is now calculated which is possibly recovered in advance.

5.14 **WE RECOMMEND** a statutory provision which would indicate that with reference to a usance bill or a note, the rate of interest specified under the Act would apply, when the instrument is silent,

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<sup>1</sup>Since the instruments are in English and comply in form with the requirements of a "bill" or "note", now they are no longer "Multani hundis".



for determining the interest payable either for the usance period or for the period commencing from the date of default, or both, as the case may be.

(d) *Inconsistent usage or custom*

5.15 Though section 80 of the NIA is "notwithstanding any contract to the contrary", still by reason of the proviso to section 1 thereof, which has expressly saved any local usage relating to any instrument in oriental language, with reference to suits on hundis, local usages have been adduced to claim payment of interest at a rate exceeding 6 per cent notwithstanding the section.<sup>1</sup> The codification of the practices and usages relating to indigenous negotiable instruments is a matter that has been specifically referred to the Banking Laws Committee. Consequent on the codification of the local usages, the question of the rate at which interest should be charged when the instrument is silent on this point may not also survive. However, we propose to consider this question while dealing with the task entrusted to the Committee, of the codification of the practices and usages relating to indigenous negotiable instruments.

(e) *Whether the rate in section 34 of the Civil Procedure Code requires any change?*

5.16 While section 80 of the NIA provides a rate which would apply in the absence of any stipulation between the parties (as seen from the instrument), and in effect works as the *minimum* rate at which interest is recoverable, section 34 of the Civil Procedure Code provides a *ceiling* as to the rate at which interest is recoverable. The rate specified in section 34 is the maximum rate at which the court may allow interest from the date of decree to the date of payment, or to such earlier date as the court thinks fit. This rate now applies irrespective of the nature of the borrower and has no relation to any measure for the relief of debtors. The parties have now no choice for contracting out of this provision. Hence, the appropriateness or otherwise of the rate specified in section 34 has to be considered with reference to market conditions.

5.17 Several banks, trading and merchants' bodies and others have pointed out to this Committee the inadequacy of the rate specified in section 34 of the Civil Procedure Code having regard to the conditions prevailing in the money market. In considering this question, we have

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<sup>1</sup>Har Narain v. Biharilal, A.I.R. 1932 Lahore 582; Komalsingh v. Ram-bharosa, A.I.R. (30) 1943 Nag. 99 (F.B.).

also to take note of the fact that after default, even after a decree is obtained, it takes much longer time in our country, than possibly in the U.K. or the U.S.A., for a debt to be recovered. This provision also works adversely against banks, since the funds which would have gone to several better purposes are not only stagnated, but by committing default the concerned parties may continue to avail themselves of the benefit of the funds at a rate much lower than the rate prevailing in the market from the date of decree to the date of realisation, a period which is usually extended to a very considerable length of time by unscrupulous parties by adopting a variety of dilatory tactics. As the Privy Council had said, the woes of an Indian litigant commences *after* he obtains a decree.

5.18 WE RECOMMEND that with reference to claims on negotiable instruments,<sup>1</sup> the rate at which the decretal amount is recoverable from the date of the decree should be the rate specified in the instrument so long as it is not unreasonable or unconscionable. What is "unreasonable" or "unconscionable" would vary with the facts and may also vary having regard to the nature of the lending institution and this may be left to be decided by the court. In other words, the rule should be that on a suit on a negotiable instrument, the decree should provide for interest, from the date of suit to the date of realisation, on the principal amount at the rate specified in the instrument or the minimum rate specified in section 80 of the NIA when the instrument is silent as to the rate, as the case may be, unless the court reduces the rate of interest specified in the document on the ground that it is unreasonable or unconscionable. *The position may be statutorily so clarified.*

#### ASCERTAINMENT OF AMOUNT DUE REGARDING INSTALMENT PAYMENTS

5.19 When an instrument is payable in instalments and default is made in payment of any one of them, in the absence of an acceleration clause, can the subsequent instalments be regarded as having become due? If not, it may be necessary to present the instrument again for payment as regards subsequent instalments. Section 67 of the NIA provides that a promissory note payable by instalments must be presented for payment of each instalment and that non-payment on such presentment has the same effect as the non-payment of the note at maturity. Commenting on this section Bhashyam has pointed out that "it is not clear whether a default made in presenting a note

<sup>1</sup>There may be similar justification for suits based on other money claims as well.

when the first instalment falls due discharges the endorser altogether or only for that instalment; nor is it clear whether presentment is necessary in the case of each instalment, even though there has already been default in the payment of some instalments. Again, it is doubtful whether a fresh notice of dishonour is necessary on each default. These points have not been settled by text writers....."<sup>1</sup>

5.20 Theoretically a promissory note payable in instalments may be regarded as so many promissory notes for the several instalments payable at the times stated. Daniel seems to be of that view.<sup>2</sup> In this view, default in payment of one instalment cannot dispense with the requirement as to presentment as regards other instalments due under the note. But business convenience seems to dictate otherwise. When a person has defaulted in the payment of an instalment, the note cannot be considered as not overdue and it may not be of any real benefit to require further presentment with reference to subsequent instalments on dates when, but for such previous default, they would fall due.

5.21 Nowadays it is usual to find an acceleration clause with reference to notes payable by instalments. Mr. Carl Funk has advised that in the U.S.A. the practice of including an acceleration clause in an instalment note has become so widespread that he would favour a statutory rule accelerating maturity of such a note upon the default in the payment of any instalment, even though the note itself does not contain an acceleration clause. In other words, he favours a statutory presumption of acceleration as an implied term of a note payable in instalments, unless the parties specifically provide otherwise. The commercial practice in our country is not in any way different. It would be conducive to clarity if we specifically provide that when a note is payable in instalments, on the default in the payment of any instalment thereof, the balance amount due under the instrument shall also become payable unless the instrument states otherwise. Such a provision would also remove the doubts now entertained on the scope of section 67 of the NIA. WE RECOMMEND such a provision.

## B. DUE DATE FOR THE INSTRUMENT

5.22 With reference to the ascertainment of the date when the instrument is due for payment, there are two aspects on which there has been a claim for change in the relevant provisions of the NIA. One

<sup>1</sup>Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 451.

<sup>2</sup>*Ibid.*

relates to the provision for days of grace in a usance document and the other as to the position when the due date happens to fall on a holiday. On both these aspects, we consider that the provisions of the NIA require suitable change.

(a) DAYS OF GRACE

5.23 "Days of grace" are now allowed with reference to usance instruments. The person making or drawing, if he knows that no days of grace will be available, may very well include them in the period of the usance if he really feels that the instrument should be payable only three days after the date specified in the instrument for its maturity. In this view, the abolition of the provision for days of grace is not likely to create any real and practical difficulty. We understand that parties now show the usance of a bill as 87 days when they really intend to have it retired after 90 days; thus, because of the existence of the "days of grace", usance period is deliberately reduced by such grace period.

5.24 A suggestion to abolish days of grace, to be in accord with many foreign laws, was made when the BEA was enacted, but was withdrawn. Even when the NIA was enacted, the need for "days of grace" was questioned. Chalmers had said: "The number of days of grace allowed in different countries differed considerably, but it is believed that they have now been abolished in all countries except England and parts of the Empire and some States in the United States. As the name implies, *days of grace were in origin a matter of favour; they have long been a matter of right*".<sup>1</sup> Now in the U.K., days of grace have disappeared with the passing of the Banking and Financial Dealings Act, 1971 [Section 3(2)].<sup>2</sup>

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<sup>1</sup>"Chalmers' Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities", Stevens & Sons Ltd., and Sweet & Maxwell Ltd., 11th edn., p. 36.

<sup>2</sup>"For section 14(1) of the Bills of Exchange Act 1882 (under or by virtue of which the date of maturity of a bill or promissory note that does not say otherwise is arrived at by adding three days of grace to the time of payment as fixed by the bill or note, but is advanced or postponed if the last day of grace is a non-business day) there shall be substituted, except in its application to bills drawn and notes made before this subsection comes into force, the following paragraph:

(1) The bill is due and payable in all cases on the last day of the time of payment as fixed by the bill, or, if that is a non-business day, on the succeeding business day."

The section came into force "at the expiration of one month beginning December 16, 1971."

5.25 Under the Geneva Conventions, "no days of grace, whether legal or judicial, are permitted". The UCC does not permit, nor does the UNCITRAL draft provide for, "days of grace".

5.26 In India, with reference to indigenous negotiable instruments also, now there is no standard practice of permitting days of grace. The views we have ascertained by and large favour the abolition of days of grace. It is desirable to be in step with the laws of other countries. Hence, WE RECOMMEND the abolition of the days of grace by a provision on the lines of section 3(2) of the Banking and Financial Dealings Act, 1971 of the U.K.

(b) WHEN DUE DATE FALLS ON PUBLIC HOLIDAY

5.27 Section 25 of the NIA provides that where the date on which an instrument is at maturity is a public holiday, the instrument shall be due on the "next preceding business day". The Law Commission had noted that this section "causes inconvenience to the business people" and they had suggested the adoption of the rule of "succeeding business day" in line with section 10 of the General Clauses Act, 1897.

5.28 The Geneva Conventions provide that payment of an instrument which falls due on "legal holiday" cannot be demanded until the next business day. The BEA, after amendment by the Banking and Financial Dealings Act, 1971, has also adopted the succeeding business day rule.

5.29 Section 3-503(3) of the UCC provides that "where any presentment is due on a day which is not a full business day for either the person making the presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties". Under such a provision, Saturdays, which are half-holidays in our country for banking establishments, would be excluded. The Banking and Financial Dealings Act, 1971, has also brought about the same result in the U.K. where Saturdays are now treated as full holidays. Having regard to the fact that the pressure of work is quite considerable now on Saturdays which are half-holidays for banking institutions in India, it is desirable to adopt the UCC rule.

5.30 Hence, WE RECOMMEND that when the maturity date of an instrument falls on Saturday, Sunday, or a public holiday, the instrument shall become due on the succeeding full business day.

(e) AUTHORITY TO DECLARE PUBLIC HOLIDAYS

5.31 The Explanation to section 25 of the NIA enables the Central Government by notification in the official gazette to declare "public holidays". There is no specific provision in the NIA empowering the Central Government to delegate this power to the State Governments. But by Home Department Notification No. 228/37-Public dated 1st April 1938,<sup>1</sup> (which is still in force), issued under section 124 of the Government of India Act, 1935, the Governor-General in Council delegated to the Provincial Governments the power to declare "public holidays" under section 25 of the NIA.

5.32 We consider it desirable that in line with other statutes, the State Governments' power to notify a day as a public holiday under section 25 of the NIA need not be left to be traced by the aforesaid order. Hence, WE RECOMMEND that the section may be suitably amended to declare that the State Governments shall *also* be entitled to declare "public holidays" for their territory under section 25 of the NIA.

C. PRESENTMENT FOR ACCEPTANCE/PAYMENT

5.33 When the instrument becomes due for payment, and in order to get the assent of any party to be liable on the instrument, the instrument has to be presented for acceptance or payment, as the case may be. We have considered the present provisions of the NIA with reference to presentment and the comparative provisions in other codes and have felt the need for stating the rules as to presentment in as simple and precise a manner as possible. It has to be stated that the UCC has considerably simplified the provisions governing presentment and set at rest many of the doubts that used to crop up concerning several aspects of presentment. We would classify the provisions to be made in this regard into the following categories:

- (a) what is presentment and how it should be made;
- (b) whose liability depends on presentment; and
- (c) the circumstances when presentment is either excused or is otherwise considered unnecessary.

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<sup>1</sup>With reference to new States formed after the Constitution, similar notifications seem to have been issued under Article 253, *vide* Ministry of Home Affairs Notification No. 39/1/68-Judl.III dated the 8th May 1968.

## (a) WHAT IS PRESENTMENT AND HOW IT SHOULD BE MADE

5.34 The practice the banks follow now in making presentment is not strictly in conformity with the procedure warranted by the provisions of the NIA. The IBA had indicated that where a bank has to present an instrument for payment, it gives only an intimation to the person liable to pay or his representative without actually sending the original instrument or a copy thereof to him. They had also submitted that there would appear to be a clear case for giving legal sanction for this banking practice. Again, when the Foreign Exchange Dealers' Association of India considered the provisions of the Uniform Rules for the Collection of Commercial Paper drafted by the International Chamber of Commerce *vis-a-vis* the requirements of the NIA, they advised<sup>1</sup> the Banking Commission that —

- (1) the Uniform Rules require presentment to the drawee of the commercial paper in the form in which it is received and that this may include also shipping documents forming part of the paper ;
- (2) the Uniform Rules require presentment for payment even for an accepted bill, but the banks in India follow a practice of not presenting the accepted bill to the acceptor on the ground that he is the principal debtor ; and
- (3) under the Uniform Rules, in the absence of contrary instructions, the collecting bank is not responsible for failure to have the commercial paper protested, while the NIA makes it incumbent.

Thus, the practice followed in our country with reference to presentment, especially by banks, and the requirements of the NIA, are not entirely consistent nor are both in conformity with the procedure suggested by the Uniform Rules.<sup>2</sup> Hence, we have considered the question with reference to precedent and practice in India and elsewhere.

5.35 Mr. Maurice Megrah has advised that in the U.K. "at any rate the rules relating to presentment are strict.....and that generally they are strictly followed. The only licence is that offered by the statute". Under the BEA, where the holder of a bill presents it for

<sup>1</sup>FEDA's letter dated 24th September 1969 to the Banking Commission.

<sup>2</sup>The Uniform Rules do not have any statutory force and the provisions may be binding only as terms of contract between the parties; hence, to the extent to which the Uniform Rules are not consistent with the requirement of the statute of any country, the provisions of the statute will prevail.

acceptance or payment he shall exhibit the bill to the person from whom he demands acceptance or payment. Thus, in the U.K., unlike the position in India, there seems to be no difference between the requirements of the law and the practice that is being followed.

5.36 In the U.S.A., the UCC provisions are more flexible. While they permit presentment of an instrument for acceptance or payment, especially by banks, even by an intimation or demand, they also provide for the exhibition or production of the instrument where the acceptor or the drawee insists on that. Having regard to the vastness of our country and the numerous constituents with whom banks have got to deal, we feel that provisions on the lines found in the UCC would be more suitable and such provisions would also impliedly recognise the practice now the banks are following in our country.

*Presentment—a definition*

5.37 Under section 3-504(1) of the UCC, presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder. This provision makes it clear that “any demand upon the party to pay is a presentment no matter where and how. Former technical requirements of exhibition of the instrument and the like are not required unless insisted upon by the party to pay”. WE RECOMMEND that presentment may be statutorily defined as “a demand for acceptance or payment made upon the maker, acceptor, drawee or other party liable on the instrument by or on behalf of the holder”.

*Rights of party presented*

5.38 Section 3-505 of the UCC provides that the party to whom presentment is made may without dishonour require—

- “(a) exhibition of the instrument ; and
- (b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another ; and
- (c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances ; and
- (d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.



Failure to comply with any such requirements invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.”

We consider provisions on the above lines are desirable as a corollary to the definition we have suggested about presentment, and WE RECOMMEND such provisions.

*Presentment by a collecting bank*

5.39 Section 4-210 of the UCC provides that unless otherwise instructed, a collecting bank may present an instrument not payable by, through or at a bank by sending to the party to accept or pay a written notice that the bank holds the instrument for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirements of such party as aforesaid, by the close of the bank's next banking day after it knows of the requirements. Where presentment is made by notice and neither honour nor request for compliance with any such requirements is received by the close of business on the day after maturity or in the case of a demand instrument by the close of business on the *third banking day after notice is sent*, the presenting bank may treat the instrument as dishonoured and charge any secondary party by sending him notice of the facts. The above provisions codify a practice “extensively followed in presentation of trade acceptances and documentary and other drafts drawn on non-bank payors”. We consider such provisions desirable for our country, subject to certain modifications.

5.40 With reference to the period within which the bank is to comply with such requirements, WE RECOMMEND that the bank should be allowed 48 hours (exclusive of public holidays) from the close of business of the day on which the bank receives notice of such requirements, for complying with such requirements. WE RECOMMEND also that the drawee or other party liable should have 48 hours (exclusive of public holidays) from the close of business of the day on which such notice is received from the bank, for asking the bank to comply with any such requirements. When presentment is made by notice, if neither acceptance/payment nor request for compliance with any such requirements is received within the specified time, the presenting bank may treat the instrument as dishonoured and charge any secondary party by sending him notice of the facts.

*Instruments accepted or payable at a bank*

5.41 Section 4-210 of the UCC does not apply to a bill to be accepted by, or a note payable at, a bank. The UCC has a special provision with reference to such an instrument, which provides that presentment should only be by production of the instrument. Having regard to the special position occupied by banks and banking convenience and the need for expeditious settlement where a bank has to meet the claim, it may be necessary to provide for an exception and require actual production of the instrument on the lines found in the UCC. Hence, WE RECOMMEND a specific provision to provide that where a bill is to be accepted or a bill or note is payable at a bank, it should be presented at such bank.

*Presentment in person or through post*

5.42 Under section 62 and paragraph 4 of section 61 of the NIA, presentment by post for payment and/or for acceptance is permissible only where authorised by agreement or usage. The position under the BEA is similar. The Law Commission had suggested the giving of a choice to the party presenting the instrument for *payment* to present "either personally or by registered post or by other effective means". No change had been suggested with reference to presentment for acceptance. Having regard to the present day conditions and the convenience of parties, especially of banks, we do not consider it necessary that the validity of presentment for acceptance or payment by post should be dependent on proof of any such usage. It may not always be possible, even where an agreement or usage cannot be established, to conveniently make presentment in person. There is no particular objection for permitting presentment by post, especially when it is already recognised in the Act, though it is made subject to proof of agreement or usage.

5.43 The UCC provisions in this regard are far more clear. Section 3-504(2) of the UCC provides that presentment may be made—

- (a) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or
- (b) through a clearing house; or
- (c) at the place of acceptance or payment specified in the instrument or if there be none, at the place of business or residence of the party to accept or pay. If neither the party to accept

or pay nor any one authorised to act for him is present or accessible at such place, presentment is excused.

WE RECOMMEND specific provisions in our statute on the above lines, subject to a change. Even now the NIA would require a registered letter where agreement or usage would permit presentment by post. We would like to maintain this position.

(b) WHOSE LIABILITY DEPENDS ON PRESENTMENT

5.44 The party to the instrument whose liability is ordinarily subject to presentment may be considered separately with reference to presentment for acceptance and presentment for payment.

(i) *Presentment for acceptance*

5.45 The drawee of a bill is not liable on it until he assents and accepts. The Law Commission had suggested a specific provision to clarify the position in the light of the observations of the Supreme Court in *Jagjivan v. Ranchhoddas*<sup>1</sup> that in order to fix the drawee with liability, a bill must be presented for acceptance before it is presented for payment. In the case of a bill payable on demand, as the Supreme Court pointed out, both the stages of presentment for acceptance and presentment for payment synchronise. Hence, WE RECOMMEND a clarification of the drawee's liability on the lines recommended by the Law Commission.

5.46 The further question is about the liability of the drawer or endorser of a bill which is not presented for acceptance. The views we have elicited favour a clarification of the circumstances when presentment for acceptance is necessary to charge the drawer and endorser.

5.47 Under section 61 of the NIA presentment for acceptance is necessary to charge the drawer and endorser when a bill is payable after sight. In that case, such presentment is necessary to determine the due date for payment. But under the other codes, presentment for acceptance is *also* necessary when

- (1) there is an express stipulation to that effect; and
- (2) a bill is drawn payable elsewhere than at the residence/place of business of the drawee.

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<sup>1</sup>A.I.R. 1954 S.C. 554.

5.48 The UCC also gives an option to the holder to present a bill for acceptance in other cases. The UCC provision states the rule of the decisions both at Common Law and under the statute that the holder is not required to wait until the due date and that the holder may at his option present any usance bill for acceptance to know whether the drawee will honour it; but that if he does make presentment and acceptance is refused, he must give notice of dishonour. As regards bills payable on demand, the holder is entitled to demand immediate payment.

5.49 WE RECOMMEND a statutory provision to provide that presentment for acceptance is necessary to charge the drawer and endorsers of a bill where the bill so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its maturity depends upon such presentment, and that the holder may at his option present for acceptance any other bill payable on a specified date.

(ii) *Presentment for payment*

5.50 Now the NIA is not clear on the point whether presentment for payment of a cheque is necessary to charge the drawer and endorsers. In other words, is it open to a holder who has accepted a cheque for payment to turn round and demand payment thereon from the drawer or endorsers without presenting the cheque for payment and proving dishonour thereof? Though payment by cheque is conditional on its ultimate realisation, subject to this condition, the payment has to be treated as effective. Hence, WE RECOMMEND a specific provision that a cheque must be presented for payment before the drawer and endorsers thereof could be made liable thereon.

5.51 Under the BEA, the UCC and the Geneva Conventions, to charge the maker of a note and the acceptor of a bill, presentment for payment is not necessary. However, under the BEA, to charge the maker of a note payable at a specified place, presentment for payment is necessary. This exception is found also in the NIA, but it is restricted to a note which is *not* payable on demand. We do not consider it necessary that presentment for payment should be insisted to charge the maker of a note or the acceptor of a bill and it makes no material difference whether the note is payable at a specified place or whether it is payable on demand or otherwise. Hence, WE RECOMMEND that presentment for payment is not necessary to charge the maker of a note or the acceptor of a bill.

**(c) WHEN PRESENTMENT IS EXCUSED OR IS UNNECESSARY**

5.52 The IBA had suggested the consideration of the feasibility of bringing in further circumstances which may be held as rendering presentment unnecessary. Generally speaking, presentment, whether for acceptance or for payment, is unnecessary, or may be excused, in circumstances where non-presentment is not likely to prejudice or otherwise affect the parties whose liability is dependent on such presentment. Again, in conditions where presentment would be an empty formality and is not likely to result in the instrument being accepted or honoured, as the case may be, there is no point in insisting on presentment. Keeping these considerations in view, we have examined the circumstances when at present presentment for acceptance or payment, as the case may be, is excused under the NIA with reference to the position in this regard in other countries. There is considerable scope for bringing in further circumstances which may be held as rendering presentment unnecessary.

*(i) Presentment for acceptance and payment*

5.53 Where the instrument is not accepted, or payment is refused, and the ground for rejection is not related to any defect in presentment, then the want of proper presentment should not be allowed to be set up as a defence. Section 3-511(3)(b) of the UCC entirely excuses presentment when acceptance or payment is refused but not for want of proper presentment. As the framers of the UCC put it, "the purpose of presentment is to determine whether or not the maker, acceptor or drawee will pay or accept; and when that question is clearly determined the holder is not required to go through a useless ceremony". The UCC provision is based on sound policy and WE RECOMMEND a specific provision in our Act on these lines.

*(ii) Presentment for acceptance*

5.54 There are certain circumstances when presentment for payment is excused but not presentment for acceptance. Mr. Maurice Megrah and Mr. Carl W. Funk favour excusing presentment for acceptance in such circumstances. There seems to be no particular reason why in such cases presentment for acceptance should be required. Hence, WE RECOMMEND a statutory provision to provide that in the following circumstances, presentment for acceptance may be excused:

- (a) if the maker, acceptor or drawee intentionally prevents the presentment;

- (b) as against any party to be charged therewith, if he has engaged in writing to pay without such presentment;
- (c) as against any party if, after maturity, with knowledge that the instrument has not been presented for acceptance, he makes a part payment on account of the amount due on the instrument, or promises to pay the amount due thereon in whole or in part, or otherwise waives his right to take advantage of any default in presentment;
- (d) as against the drawer, if he cannot suffer damage from such non-presentment; and
- (e) as regards an endorser, where the instrument was made, drawn or accepted for the accommodation of that endorser and he has no reason to expect that the instrument would be paid even if presented for acceptance.

(iii) *Presentment for payment*

5.55 When the party to pay is either dead or bankrupt, the holder may be required to present the instrument to the legal representative or assignee, or he may be permitted straightaway to have his recourse against the secondary parties to the instrument. While the NIA and the BEA provisions make presentment *for acceptance* optional in such circumstances, they would require in such cases presentment *for payment* on the legal representative or assignee, as the case may be. The UCC would excuse also presentment for payment in such cases in the view that these are circumstances when immediate payment is impossible or is so unlikely that the holder cannot reasonably be expected to make presentment. Instead, the holder, while he has the choice to make presentment, is permitted, under the UCC, to have his immediate recourse on the drawer and endorsers and let the drawer and endorsers file necessary claims in probate or insolvency proceedings.

5.56 Negotiable instruments are drawn with a view to have them honoured on their maturity. Where the person to pay is dead or bankrupt, the chances of *immediate* payment either are not there or are remote. Hence, we do not consider that in such circumstances the holder should be required to make any presentment for payment on the legal representative of the deceased or on the assignee in whom the assets of the insolvent would have vested. WE RECOMMEND that though the holder should have the choice to make presentment, he should not be required to make presentment for payment when the drawee or maker is dead or bankrupt.

### SPECIAL POSITION OF DOCUMENTARY BILLS

5.57 For the above rule, the UCC has an exception with reference to documentary bills. With reference to a documentary bill, it is possible that the goods covered by the documents may fetch a value which may even be higher than the value of the bill; in such cases, the general body of the creditors, or the estate of the deceased, may be affected if they are deprived of this benefit. It is also possible that the legal representative or the assignee may readily accept or pay. Hence, WE RECOMMEND that the provision excusing presentment when the maker or the drawee/acceptor is dead or insolvent should not apply in the case of documentary bills.

### D. LIABILITIES OF SECONDARY PARTIES

#### CASE OF ALTERNATIVE DRAWEES

5.58 We have earlier recommended a specific provision to provide for an instrument being drawn with alternative drawees. But therein we have also recommended that the holder should *not* be required to make more than one presentment and upon the first dishonour, he should be entitled to take his recourse against the drawer and endorsers. Section 3-504(3)(a) of the UCC specifically provides that presentment in such cases need not be to all and may be made to any one of two or more drawees named in the instrument.

#### NOTICE OF DISHONOUR—CAN IT BE ORAL?

5.59 Now a notice of dishonour can be given orally or in writing. This is also the position in the U.K. and the U.S.A. The Law Commission had suggested that in order to impart more certainty to this important act, the notice should be required to be given in writing. Though we have received some opinion that would favour the continuance of the present position on the ground that with reference to notice of dishonour orally given the question is mainly a matter of evidence and proof, we feel that it would reduce disputes and eliminate scope for controversy if notice of dishonour is required to be given in writing, signed by or on behalf of the holder. WE RECOMMEND a specific provision to provide for this.

#### HOLDER OF BANKRUPT'S ACCEPTANCE

5.60 Under the Geneva Conventions, the holder of a bankrupt's acceptance is straightaway allowed to exercise his right of recourse. But under the BEA and the NIA, the holder is required to wait till the bill

falls due before he can sue any party and the protest for better security does not excuse a subsequent protest for non-payment, if the bill is not met at maturity. We consider that the Geneva Conventions rule is more sound and appropriate. Though Mr. Maurice Megrah has felt that the Geneva Conventions rule might enable the holder of a bill, on which a bankrupt is liable, to obtain priority over the other creditors of the bankrupt, we do not consider that such apprehension is justified, since it is against the drawer and other secondary parties that the holder may be proceeding. **WE RECOMMEND** that the holder of a bankrupt's acceptance should be allowed to exercise his right of recourse against the drawer and endorsers without waiting till the bill falls due for presentment for payment.

#### **OTHERS TO PERFORM NOTARIAL FUNCTIONS**

5.61 When there is a dishonour, especially with reference to foreign bills, there is the requirement for noting and protest. This involves the availing of the services of a notary public. A notary public is not available at all places and even in the major cities, where they are available, it may not be convenient to have all cases of dishonour certified by a notary. Section 94 of the BEA provides that in the absence of a notary, a protest could be effected by any householder or substantial resident of the place by attesting the dishonour of the bill in the presence of two witnesses.

5.62 The IBA had pointed out the absence of the services of notaries at all places in India. While considering this the RBI had suggested a provision to provide that a bill or note can be noted and certified also by:

- (a) Members of Parliament or of any State Legislature;
- (b) gazetted officers of the Central or of any State Government;
- (c) sub-divisional magistrates or officers;
- (d) tahsildars, naib or deputy tahsildars authorised to exercise magisterial powers;
- (e) block development officers;
- (f) post-masters;
- (g) panchayat inspectors.



We consider that it is necessary to specify such categories of personnel who could be approached when the services of a notary public cannot conveniently be availed of. In this view, WE RECOMMEND a specific provision empowering also the above categories of persons by whom a protest or other notarial function with reference to negotiable instruments could be effected. In view of the recent decision of the Government to abolish the distinction between gazetted and non-gazetted officers, Government may indicate the class of officers of the Central and of any State Government who would have qualified as gazetted officers.

#### NOTARY MAY DEMAND BY REGISTERED LETTER

5.63 Under the NIA, a notary is allowed to make a demand by a registered letter where it is authorised by agreement or usage. WE RECOMMEND that, consistent with our recommendations on the mode of presentment, it is necessary to permit a notary or other authorised person to make presentment by registered letter with acknowledgement due without reference to any agreement or usage regarding the same.

#### NOTARY MAY ACT ON SATISFACTORY INFORMATION

5.64 Under the UCC, a person is authorised to protest "upon information satisfactory to such person". This provision is not intended to affect any personal liability of the officer making a false certificate, but leaves it to his responsibility for determining whether he has satisfactory information. Moreover, it has been pointed out that the requirement that the person making protest must certify as of his own knowledge, has been more honoured in the breach than in the observance, and in practice, protest is made upon hearsay which the officer regards as reliable. The position in our country as regards the practice cannot be considered as in any way different. So long as the notary or other authorised person takes the responsibility, it is not necessary to go beyond except where want of *bona fides* is attributed to him. Hence, ordinarily, there should be no objection for a notary or other authorised person being allowed to certify a protest "upon information satisfactory to such person". WE RECOMMEND that this may be statutorily clarified by a provision on the lines found in section 3-509(1) of the UCC.

## E. PROCEDURE FOR RECOVERY OF DUES ON NEGOTIABLE INSTRUMENTS

5.65 Several countries have devised special measures for expeditious recovery of commercial claims, especially amounts due under negotiable instruments. Generally with reference to negotiable instruments, it is appropriate to provide for the recovery of the amount due by such expeditious methods.

### ORDER 37 OF C.P.C.

5.66 Order 37 of the Civil Procedure Code in our country provides for the application of summary procedure for recovery of debts due under negotiable instruments. These provisions are not now extended to all the courts of the original jurisdiction. It is necessary, and hence **WE RECOMMEND**, that all the courts in the country having original civil jurisdiction should be permitted to decide claims arising on negotiable instruments by applying the summary procedure provided for in Order 37 of the Civil Procedure Code.

5.67 **WE RECOMMEND** also that the adequacy and effectiveness of the present provisions providing for summary procedure in Order 37 of the Civil Procedure Code should be gone into by the Government in consultation with High Courts and to the extent possible its provisions should be modified to ensure that the summary procedure is really effective and enables the decision on the questions in the least possible time.

## CHAPTER 6

### CONFLICT OF LAWS

International trade and commerce cannot develop without rules to reconcile the conflicts arising by reason of the differences in the legal effect according to the several systems of the national laws. The conflict of laws rules are really a part of the national system of administration of justice. Negotiable instruments being the medium for settling claims arising out of international trade and commerce, the imperative necessity for clear provisions for reconciling such differences is obvious. Hence, we find that though there is no law either in the U.K. or in India dealing with conflict of laws questions *in general*, with reference to negotiable instruments such rules are given prominence in the laws of many countries including the U.K. and India.

6.2 The principles governing negotiable instruments were originally established by universal usage as part of the law merchant, transcending national barriers. When codification was attempted by legislation, the need for conflict of laws rules was readily felt. In fact, as we saw in Chapter 2, the dominant aim was to eliminate as far as possible differences in the principles governing negotiable instruments and thus try to avoid/reduce the area of conflict. This was the prime objective of the Geneva Conventions which were drawn up under the auspices of the League of Nations. This objective is being pursued now by the United Nations Commission on International Trade Law. Though the efforts for international unification have met with substantial success, this process is still not complete. Apart from this, the unification proposals adopted by the Geneva Conventions, and those currently considered by the UNCITRAL, do not cover all the areas of conflict. In fact, recognising the area of conflict, the framers of the Geneva Conventions drew up two separate Conventions on Conflict of Laws, one to deal with bills and notes, and the other to deal with cheques.

6.3 Having regard to our expanding export and import trade and the diversification thereof, it is necessary that the conflict of laws rules in our Act accord to bankers, merchants and traders a parity in the treatment their counterparts receive in other countries. Again, as

Dean Falconbridge says, an arbitral statutory rule is preferable instead of leaving the holders of the instruments to conjecture about the proper law applicable.<sup>1</sup> What businessmen need is a rule of law which can be stated to parties in advance of action and upon which they can act with ease and certain.<sup>2</sup> In making our recommendations for the appropriate conflict of laws rules for our country regarding negotiable instruments, we have gone by these practical considerations, though, as Mr. Maurice Megrah has said, the conflict of laws questions show clearly the wisdom of reaching uniformity, where possible, between the countries of the world.

### (1) APPLICABILITY OF THE DOCTRINE OF PROPER LAW

6.4 Ordinarily, under the conflict of laws principles, the “proper law of a contract” is the system of law by which the parties intend the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.<sup>3</sup> The proper law doctrine has been applied in India with reference to disputes relating to debts evidenced by cash deposit, fixed deposit and debt covered by an insurance policy.<sup>4</sup> It is the subjective element that dominates the proper law doctrine. Importance is given to the intention of the parties. This doctrine is not consistent with the general principle of the negotiable instruments law that terms and conditions not *ex-facie* apparent in the instrument should not be allowed to be set up, especially against a holder in due course. Dicey has pointed out that “in view of the exigencies of commerce, the proper law doctrine cannot be applied to contracts embodied in negotiable instruments in the same way in which it is applied to other contracts and it is also clear that the Act (BEA) has not so applied it.”<sup>5</sup> As Cheshire has pointed out, “the correct enquiry is not—what law governs the contract? it is—what law governs the particular question raised in the

<sup>1</sup>“Falconbridge on Banking and Bills of Exchange”, Canada Law Book Ltd., 7th edn. (1969), p. 834.

<sup>2</sup>Beale, Joseph H., “What Law Governs the Validity of a Contract”, 23 Harv. L. Rev. (1910) 26.

<sup>3</sup>Dicey & Morris, “The Conflict of Laws”, Stevens & Sons Ltd., 9th edn. (1973), p. 721.

<sup>4</sup>A.I.R. 1955 S.C. 590; A.I.R. 1968 S.C. 1115; and A.I.R. 1964 Cal. 141.

<sup>5</sup>Dicey & Morris, “The Conflict of Laws”, Stevens & Sons Ltd., 9th edn. (1973), p. 845.

instant proceedings".<sup>1</sup> "The fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that that law is to be the proper law of the contract as a whole."<sup>2</sup> After stating that the BEA has rejected the "single law" doctrine and has adopted the "several laws" principle, Bhashyam says that the "several laws" doctrine prevails in the Continent and in the U.S.A. and may perhaps be regarded as one of the few aspects of the conflict of laws on which there exists a widespread consensus of opinion throughout the world.<sup>3</sup> Hence, we do not consider the conflict of laws questions regarding negotiable instruments by applying the "proper law doctrine".

## (2) RIGHT OF PARTIES TO CHOOSE THE APPLICABLE LAW

6.5 Before dealing with the choice of law rules appropriate for our country, one has to consider the question whether parties could be allowed to alter such rules, and, if so, the limitations subject to which this freedom may be exercised.

6.6 Section 134 of the NIA provides that with reference to a *foreign instrument* the rule laid down by the section as to "all essential matters" applies *in the absence of a contract to the contrary*. The NIA rule implies the existence of a choice though any limitation on the exercise of such choice would depend on the position that prevails now with reference to ordinary mercantile instruments. The BEA does not refer to any parties' choice to contract otherwise, and is understood as negating such choice. The position under the Geneva Conventions is similar to that of the BEA. However, the UCC would recognise the choice of the parties but would limit it to the law of the country with which the transaction has the most reasonable connection. The Law Commission had suggested a provision which would permit a choice to the parties not only with reference to "foreign instruments" but also with reference to "inland instruments".

6.7 With reference to parties' choice to choose the law to determine their capacity, a choice proposed by the Law Commission, Bhashyam has felt that this requires full consideration by the Parliament and that

<sup>1</sup>Cheshire, G.C., "Private International Law", Clarendon Press, Oxford, 6th edn., p. 213.

<sup>2</sup>*In re. United Railways of the Havana and Regla Warehouses*, (1960), Ch. 52 at 92.

<sup>3</sup>Bhashyam & Adiga. "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 693.

this is a departure from the position universally accepted by other legal systems and runs counter to the principle accepted in our country in other branches of law. Bhashyam has also felt that the sociological conditions of our country do not warrant it. The extent to which a choice, whether for determining capacity or any other matter of importance, could be given to the parties to a negotiable instrument contract to choose the applicable law, merits special consideration.<sup>1</sup>

6.8 The principle of giving choice to the parties to decide the applicable law has come in for considerable criticism. Professor Walter Wheeler Cook has thus summed up this criticism:

“Professor Beale, Professor Goodrich, and others, join in this condemnation of the theory. Professors Beale and Goodrich do so for substantially the same reasons as those given by Professor Lorenzen. Thus, the former says that the ‘intention of the parties’ theory ‘practically makes a legislative body of any two persons who choose to get together and contract’ and ‘allows the parties by their own will to create an obligation, where, by the law of the place under which they act, no legal obligation would be attached to the agreement’. With this Professor Goodrich agrees.”<sup>2</sup>

Professor Hessel E. Yntema has stated that “there are undoubted and widely accepted restrictions upon the power of the parties to elect the law of their contract and the opposed notion that there is no true autonomy, since this is generally contradicted by universal practice”.<sup>3</sup> Dicey says that “there is, however, nothing, either in the Act (BEA) or in any decided case, to compel an English court to apply to bills and notes the principle that the parties are free to choose the law applicable to their contract without reference either to the place where the contract was made or to the place where it was to be performed”.<sup>4</sup> Cheshire has also said that “there is no right in the parties to select their own proper law”.<sup>5</sup>

<sup>1</sup>Bhashyam & Adiga, “The Negotiable Instruments Act, 1881”, Madras Law Journal, 13th edn. (1974), p. 693.

<sup>2</sup>(1932) 32 III. L. Rev. 899.

<sup>3</sup>“Autonomy in Choice of Law”, 1 American Journal of Comparative Law, 341, (1952—This article in substance reproduces a general report prepared for the Third International Congress of Comparative Law.

<sup>4</sup>Dicey & Morris, “The Conflict of Laws”, Stevens & Sons Ltd., 9th edn., p. 845.

<sup>5</sup>Cheshire, G.C., “Private International Law”, Clarendon Press, Oxford, 6th edn., p. 269.

6.9 Even now the scope of the choice available in India with reference to negotiable instruments is not unfettered. Firstly, it is limited to foreign instruments, *i.e.*, the instruments which have their birth or demise, or both, outside the country, and not with reference to inland instruments negotiated outside the country. Secondly, while section 134 of the NIA refers to the choice, the validity of the agreement as to choice has to be decided by applying the conflict of laws rules that apply to ordinary mercantile contracts. In such cases, the English courts have held that the choice is limited to the law of the country with which the transaction has got a reasonable connection.<sup>1</sup> In other words, the UCC rule earlier stated is quite consistent with the principles already settled in the Common Law.

### (3) EXTENT TO WHICH CHOICE CAN BE ALLOWED

6.10 We do not consider that it is in public interest to allow the parties unfettered choice to select their own law for determining rights and liabilities with reference to negotiable instruments. Nor do we consider it correct to allow the parties the right to alter any rules stated in the Act by contracting otherwise. However, where the Act is silent and with reference to *foreign instruments* the parties may be permitted to choose a law that has a reasonable connection to the transaction and this could only be either the *lex loci contractus* or the *lex loci solutionis*. Even here, as Dicey, Wolff and Bhashyam<sup>2</sup> have indicated, the parties should not be permitted to set up as the applicable law what would not otherwise follow as per

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<sup>1</sup>Professor Walter Wheeler Cook has pointed out that in the English cases the same results that were reached ostensibly on the basis of the intention theory could have equally well been reached had the Courts there adopted Westlake's rule that the "law" to be applied is that of the "country with which the transaction has the most real connection" (W.W. Cook, "Contracts & the Conflict of Laws: 'Intention' of the Parties", Selected Readings on Conflict of Laws, published by the Association of American Law Schools, p. 642). Cheshire says that the latest judicial pronouncement on the matter is that the court will not necessarily regard the intention expressed by the parties "as being the governing consideration where a system of law is chosen which has no real or substantial connexion with the contract looked upon as a whole". (Cheshire, G.C., "Private International Law", Clarendon Press, Oxford, 6th edn., p. 223 and *in re* Claim by Helbert Wagg & Co. Ltd., (1956) Ch. 323, at p. 341, per Upjohn, J.).

<sup>2</sup>Dicey & Morris, "The Conflict of Laws", Stevens & Sons Ltd., 9th edn., p. 820; Wolff, "Private International Law", Clarendon Press, Oxford, 2nd edn., p. 483; and Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 688.

the conflict of laws rules stated if the contrary choice is not expressly stated in the instrument. WE RECOMMEND a specific statutory provision on these lines.

#### (4) SPECIAL POSITION OF BANKS

6.11 In *R. v. Lovitt*<sup>1</sup>, the Privy Council held that "although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business, they may be regarded as distinct trading bodies". Different branches of the same establishment may be endorsers from one to the other, and, in the case of dishonour, notice need not be given direct to the principal establishment, but each branch in succession is entitled to notice. In *Delhi Cloth and General Mills v. Harnam Singh*<sup>2</sup>, the Supreme Court referred to *R. v. Lovitt* and stated as a settled proposition the rule that the obligation of a bank to pay the cheques of a customer rests primarily on the branch at which he keeps his account.

6.12 In line with the decision of the Privy Council in *R. v. Lovitt*, section 4-102(2) of the UCC has made a specific provision that "the liability of bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or a separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located."

6.13 The UCC rule is designed to state "a workable rule for the solution of otherwise vexatious problems of conflicts of laws". The framers of the UCC have pointed out that "the routine and mechanical nature of bank collections makes it imperative that one law governs the activities of one office of a bank.....Justification lies in the fact that, in using an ambulatory instrument, the drawer, payee and endorsers must know that action will be taken with respect to it in other jurisdictions. This is especially pertinent with respect to the law of the place of payment. The phrase 'action or non-action with respect to any item handled by it for purposes of presentment, payment or collection' is intended to make the conflicts rule of subsection 2 apply from the inception of the collection process of an item through all phases of deposit, forwarding, presentment, payment

<sup>1</sup>1912 A.C. 212.

<sup>2</sup>A.I.R. 1955 S.C. 590.



and remittance or credit of proceeds. Specifically, the sub-section applies to the initial act of a depository bank in receiving an item and to the incidence of such receipt”.

6.14 A view has been expressed that “a bank is a specialised institution and its officials ought to have the knowledge of the different conflict of laws rules that may apply to negotiable instruments, so that no special provision.....seems to be called for”. The difficulty is not regarding the knowledge of the conflict of laws rules but in ascertaining the requirements to be complied with as per the foreign law if that is indicated by the relevant conflict of laws rule. Having regard to the complexity of their work and the speed with which they are required to function, we consider it just that banks and their branches should be saved from the botheration of ascertaining the procedural requirements under the foreign law with reference to matters covered by bank collection process. Hence, a provision on the lines of section 4-102(2) of the UCC is highly desirable in our country and WE RECOMMEND a specific provision on those lines in our statute.

**(5) LAW TO DECIDE “REQUISITES IN FORM” AND “LIABILITY”—PREFERABLY IT SHOULD BE ONE SYSTEM OF LAW**

6.15 With reference to foreign instruments, the NIA rule is that the liability of the maker or drawer is regulated *in all essential matters* by the law of the place where he made the instrument and the respective liability of the acceptor and endorser by the law of the place where the instrument is made payable. The provision which the Law Commission had suggested would apply the rule of *lex loci solutionis* to determine the liability of all the parties to the instrument and would apply the rule of *lex loci contractus* to determine matters of form and validity of the instrument. Such a distinction is not now made in the NIA or in other codes. In our view, the conflict of laws rules should indicate, unless unavoidable, both as regards matters of form and validity and with reference to matters of liability, that the same system of law is applicable; application of different systems to determine form and validity and to determine liability will not work well, will cause avoidable hardship to the parties and is likely to breed litigation as to whether a question is one of form and validity, or of liability since matters of form and validity generally determine also liability.

## LAW IN THE U.K.

6.16 Under section 72(1) of the BEA, the validity of a bill as regards requisites in form is determined by the law of the place of issue and the validity as regards requisites in form of a supervening contract by the law of the place where such contract is made. Section 72(2) of the BEA provides that "the interpretation" of the drawing, endorsement, acceptance and acceptance *supra* protest of a bill is determined by the law of the place where such contract is made. The expression "interpretation" has been understood as covering the legal effect and liability of the instrument. These provisions apply the rule of *lex loci contractus* both for determining formal and essential requisites and for determining the liability of the parties. In other words, the original contracting parties to an instrument are bound by the law of the place of contracting and the secondary parties are liable as per the law of the place where they become bound on the instrument.

## GENEVA CONVENTIONS

6.17 The Geneva Conventions on Bills and Notes provide that the form of the contract is regulated by the law of the territory where the contract is signed and the effects of the obligation of the acceptor of a bill or maker of a note are determined by the law of the place of payment, and the effects of signatures of other persons by the law of the place of signing. The form of any contract arising out of a cheque follows the law of the country where the contract is signed (but the form required by the place of payment suffices). The law of the country in whose territory the obligations arising out of a cheque have been assumed determines the effect of the cheque.

## SUBSTANTIALLY THE U.K. LAW ACCORDS WITH GENEVA CONVENTIONS

6.18 Dean Falconbridge has said that the result of the Geneva Conventions provisions is substantially, though not exactly, in accord with the BEA provisions, on two assumptions, *viz.*, first that the drawer or endorser undertakes to pay at the place at which he signs, and, second, that the place of signature is also the place at which he delivers the instrument<sup>1</sup>. In most cases, these assumptions would be valid.

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<sup>1</sup>"Falconbridge on Banking and Bills of Exchange", Canada Law Book Ltd., 7th edn., p. 835.

## INDIAN LAW AND THE U.K. LAW

6.19 On the assumption that the drawer/maker undertakes to pay at the place at which he signs and that the instrument is made payable at the place of acceptance of the bill, it would mean that in effect under section 134 of the NIA the law to be applied will be the same as that required to be applied by the BEA except with reference to the position of the endorser.

*Lex loci contractus* MAY DETERMINE FORMAL VALIDITY AND LIABILITY

6.20 For determining the validity of an instrument with reference to requisites in form, it is only the law of the place of contracting that has to be applied. If this system would also ordinarily be made applicable to determine the liability of parties, then our provisions would come in line with the provisions of the BEA and be substantially in line with the Geneva Conventions, apart from avoiding difficulties inherent in applying one system of law for requisites in form and another system of law to determine liability.

6.21 While considering what should be the proper law that should decide the liability of the parties to an instrument, Professor George W. Stumberg has pointed out that "general convenience would be best served by giving effect to the law of the place where the obligor assumes responsibility by putting his name on the paper".<sup>1</sup>

6.22 Hence, WE RECOMMEND that, subject to the exceptions discussed later on, both for determining the essential requisites as to form and for determining the liability of parties, the conflict of laws rule should provide for applying the law of the place of contracting.

## WHETHER THE POSITION OF AN ENDORSER REQUIRES DIFFERENT TREATMENT ?

6.23 Section 134 of the NIA obliges the endorser to be liable on the instrument by the law of the place where the instrument is made payable, which may not ordinarily be the place where the instrument has been endorsed. In this respect, the Indian law now differs from the BEA rule. Bhashyam would support the NIA provision in the view that being a surety, "his liability should naturally follow the

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<sup>1</sup>Stumberg, George W., "Commercial Paper and the Conflict of Laws", Selected Readings on Conflict of Laws (1956), p. 675.

liability of the principal debtor”<sup>1</sup>. The fact that an endorser is a surety does not affect this question. In *Sardar Sujan Singh case*,<sup>2</sup> with reference to sureties, the Privy Council preferred the application of the *lex loci contractus*. Again, the application of different rules to determine the liability of the drawer and endorser does not appear to be just.

6.24 Hence, WE RECOMMEND that the liability of an endorser of an instrument should also be governed by the same conflict of laws rules that determine the liability of the drawer of a bill.

#### EXCEPTIONS TO THE RULE OF *lex loci contractus*

6.25 All the codes now recognise certain exceptions to the rule of *lex loci contractus*. Where the requirements of the law of the place of payment differ from the law of the place of contracting, national laws now provide for validating the instrument or affirming the liability undertaken in certain circumstances. These circumstances could be classified as:

- (i) requirements as to stamp;
- (ii) where agreement is invalid in the place of contracting but a supervening contract complies with the requirements of the place of payment; and
- (iii) inland instruments endorsed in foreign countries.

#### (i) *Requirements as to stamp*

6.26 The NIA is silent on the question as to the legal effect when an instrument made or drawn outside the country but made payable in India does not comply with the stamp law requirements of the place where it is made or drawn. Now the effect of such unstamped or defectively stamped instrument is understood by considering the effect of such non-stamping or defective stamping under the foreign law, *i.e.*, whether the defect made the instrument void at the place of making or drawing, or it is regarded there as a mere irregularity not

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<sup>1</sup>Bhashyam & Adiga, “The Negotiable Instruments Act, 1881”, *Madras Law Journal*, 13th edn. (1974), p. 698.

<sup>2</sup>(1881) 8 I.A. 58.

affecting the basic validity of the instrument. This position in India reflects the position that prevailed in the U.K. prior to the BEA.<sup>1</sup>

6.27 There is no particular reason why the rights under an instrument executed outside India should be affected in India for its failure to comply with the stamp law requirements of the country of origin. The U.S.A., the U.K. and the countries which have adopted the Geneva Conventions have given up the Common Law position which is still prevailing in India. Mr. Maurice Megrah is also of the view that the "foreign stamp laws should have no effect on the efficacy of bills in India". The Law Commission had suggested a provision in our Act on the lines of section 72(1)(a) of the BEA. WE RECOMMEND accordingly.

(ii) *Validity of supervening contracts*

6.28 Proviso (b) to section 72(1) of the BEA provides that where a bill issued outside the U.K. conforms to the law of the U.K. as regards requisites in form, it may be treated as valid for the purpose of enforcing payment thereof as between all persons who negotiate, hold or become parties to it in the U.K. Section 136 of the NIA is to the same effect. The Law Commission had also expressed themselves in favour of retaining this exception.

6.29 We consider that the validity of supervening contracts made in India with reference to an instrument issued outside India but made payable in India should not be affected by reason of the instrument not conforming in any respect to the requirements of form of the place of issue. Hence, WE RECOMMEND retention of a provision on the lines of section 136 of the NIA.

(iii) *Inland instruments endorsed in foreign countries*

6.30 Under the proviso to section 72(2) of the BEA, where an instrument made or drawn and payable in the U.K. is endorsed in a foreign country, the legal effect of the endorsement *as regards the payer* is interpreted in the U.K. according to the U.K. law. The NIA is silent on this question. As regards inland instruments, the person to pay should not be put to the necessity of going into the efficacy and validity of the endorsement under the provisions of the foreign law.

<sup>1</sup>Chalmers on Bills of Exchange", Stevens & Sons Ltd., 13th edn., p. 240; Bhashyam and Adiga, "The Negotiable Instruments Act, 1881" Madras Law Journal, 13th edn. (1974), p. 695.

We consider it desirable to adopt a provision on the lines found in the BEA with reference to inland bills. Hence, WE RECOMMEND a specific provision to provide that where an inland instrument is endorsed in a foreign country, the legal effect of such endorsement as regards the payer shall be according to the law of India.

#### (6) LAW TO DETERMINE THE CAPACITY OF PARTIES

6.31 Section 11 of the Indian Contract Act and section 26 of the NIA refer to a person capable of contracting "*according to the law to which he is subject*". Under the Indian Majority Act, the age of majority specified therein applies to all persons domiciled in India, and as regards persons not so domiciled, the age of majority is to be determined by the law of his domicile. In *Rohilkhand and Kumaun Bank v. Row*<sup>1</sup> with reference to cheques, and in *Kashibabin Narasappa Nikada v. Shripat Narshiv*<sup>2</sup>, the rule of *lex domicilii* was applied to decide the capacity. Bhashyam has mentioned that "it is further said that section 11 of the Contract Act adopts" the rule of *lex domicilii*<sup>3</sup>.

6.32 Remfry pointed out in his *Tagore Law Lectures*<sup>4</sup> that "the contract Act section 11 and section 134 of the Negotiable Instruments Act do not enact the same rule as to the law governing capacity to contract". Again, following Dicey's view, in *T.N.S. Firm v. Mohamad Hussain*,<sup>5</sup> the Madras High Court held that capacity to enter into mercantile contracts is governed by *lex loci contractus*. But in *T.N.S. Firm's* case, neither section 11 of the Contract Act nor section 26 or section 134 of the NIA was specifically referred to. Hence, it is necessary to statutorily provide the conflict of laws rule to determine the capacity of parties.

#### T.N.S. FIRM'S CASE

6.33 In *T.N.S. Firm's* case, a Ceylonese national sought to avoid liability for a negotiable instrument contract entered into in India on the ground that according to the law of his domicile the age of majority is 21 years, though if he had attained 18 he was a major according to the Indian law. In such circumstances, a person should not

<sup>1</sup>7 All. 490.

<sup>2</sup>19, Bom. 697.

<sup>3</sup>Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", *Madras Law Journal*, 13th edn. (1974), p. 692.

<sup>4</sup>Remfry, C.O., "*Tagore Law Lectures (1910) 'Commercial Law in British India'*" Butterworth & Co. (India) Ltd., (1912), p. 21.

<sup>5</sup>(1933) 65 M.L.J., 458.

be allowed to escape liability by pleading incapacity by relying on the law of his domicile when the capacity will not be lacking according to the law of the place where he contracts. But what happens when an Indian national under 21 and above 18 enters into an obligation in Ceylon? There is no reason why the obligation undertaken by him should not be enforced and he should be considered as lacking in capacity simply because the contract is entered into in Ceylon and not in any place in India.

6.34 Under the Geneva Conventions, the capacity of a person is determined by his national law with this qualification, *viz.*, if the person lacks capacity as per his national law, he will nevertheless be bound if his signature is given in any territory in which, according to the law in force there, he would have the requisite capacity.

6.35 Hence, while affirming the rule of *lex loci contractus* to determine capacity, we would like to supplement this rule by a provision that even though a person lacks capacity according to the law of the place of contract, he cannot avoid liability if according to the law of his domicile he has capacity to contract. Though worded differently, the relevant provision in the Geneva Conventions is much to the same effect.

6.36 WE RECOMMEND that the general rule as to capacity should be one of *lex loci contractus* and that if the person lacks capacity according to the place of contract, he should nevertheless be bound if, according to the law of his domicile, he is not lacking in capacity.

#### (7) LAW TO DECIDE INCIDENCE AND MODE OF PERFORMANCE

6.37 Under section 135 of the NIA, where an instrument is payable at a place different from which it is made or endorsed, the law of the place where it is made payable determines what constitutes dishonour and what notice of dishonour is sufficient.

6.38 Section 72(3) of the BEA provides that the duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where "the act is done or the bill is dishonoured". The expression "where the act is done" has to

be considered as "where the act is done or to be done"<sup>1</sup>. The expression "the bill is dishonoured", Dicey has suggested, refers to protest and notice of dishonour<sup>2</sup>. This provision does not decide the necessity for presentment but only about the mode of presentment.

6.39 The principle of applying the law of the place of payment to decide procedural requirements relating to honour and dishonour has found recognition in section 135 of the NIA. But the scope of section 135 may have to be widened to cover also other allied aspects. Cheshire has explained that since the matters mentioned in the BEA provision concerning the payment of a bill come within the principle, the incidence and mode of performance are determinable by the law of the place of performance.<sup>3</sup> The Law Commission had recommended that the law of the place where the instrument is payable shall govern

- (i) the duties of the holder with respect to presentment for acceptance or payment ;
- (ii) the date of maturity ;
- (iii) what constitutes dishonour by non-acceptance or non-payment; and
- (iv) the necessity for and sufficiency of protest or notice of dishonour.

WE RECOMMEND statutory provisions on these lines.

## (8) QUESTIONS REGARDING PAYMENT AND SATISFACTION

6.40 The Law Commission had also suggested a specific provision to provide that all questions relating to payment and satisfaction including interest should be governed by the law of the place where the instrument is payable.

6.41 In the light of our earlier recommendations as regards form and validity of an instrument and regarding liability of parties, no such provision will be necessary. Substantive questions relating to payment and satisfaction would be decided by the law of the place of

<sup>1</sup>Dicey & Morris, "The Conflict of Laws", Stevens and Sons Ltd., 9th edn. (1973), p. 859 (ff), and "Falconbridge on Banking and Bills of Exchange", Canada Law Book Ltd., 6th edn. (1969), p. 847.

<sup>2</sup>*Ibid.*

<sup>3</sup>Cheshire, G.C., "Private International Law", Clarendon Press, Oxford, 6th edn. (1961), p. 274.



contracting and the mode of performance by the law of the place of payment.

#### (9) DETERMINATION OF RATE OF EXCHANGE

6.42 As regards the rate of exchange at which the amount payable is to be calculated, there is a specific provision in the BEA, adoption of which we consider would eliminate controversies that frequently arise on the point. The BEA provides that—

“Where a bill is drawn out of but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment *on the day the bill is payable*”.<sup>1</sup>

Such a provision is desirable especially when the parity of exchange between the currencies of different countries is not well settled. In view of this, WE RECOMMEND a specific provision on the lines of Section 72(4) of the BEA to determine the sum payable under the instrument when it is expressed in the currency of any other country.

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<sup>1</sup>Emphasis added.

## CHAPTER 7

### CHEQUES

The bank cheque or the cheque was the natural outgrowth of the development of banking.<sup>1</sup> The cheque functions as a medium for paying debts and has the pride of place in the credit transfer systems in force in the countries of the world, though the development of the Giro system has been found to eliminate, in other countries, the delays to which the cheque system is subject.<sup>2</sup> In our country, in the absence of a Giro system, the only available credit transfer system, barring traders credit transfers by bills or hundis which are not yet fully developed, is the cheque system. Hence, the importance of the cheque system in our economy is obvious.

#### EXTENT OF COVERAGE OF FINANCIAL TRANSACTIONS BY BANKING SYSTEM

7.2 The extent to which the cheque system is popular is an indication of the coverage of the financial transactions of a country by the banking system. It is obvious that this system is not as popular in India as it is in the U.K., the U.S.A. and other developed countries. In fact, even as early as in 1916 it was estimated that in the U.S.A. over 95 per cent of all financial transactions were handled by cheques.<sup>3</sup> While in the advanced countries practically the whole of the transactions are paid by cheque or other allied media through the banking system, cash transactions form a predominant part of the Indian economy.

#### DECLINING VELOCITY OF CIRCULATION OF DEPOSITS IN INDIA

7.3 Though in recent years there has been an increase in the volume of transactions through cheques, it has been the result only of rising

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<sup>1</sup>In the U.K. it was initially spelt as "check" (so spelt in the U.S.A. even now) and the modern spelling "cheque" was given by J. W. Gilbart. In his "Practical Treatise on Banking", Gilbart says: "Most writers spell it 'check'. I have adopted the above form ('cheque') because it is free from ambiguity and is analogous to ex-chequer, the royal treasury. It is also used by the Bank of England 'Cheque Office'."

<sup>2</sup>D. Robson, "Credit Transfers and Clearing", Ernest Sykes Memorial Lectures, 1961.

<sup>3</sup>1916, 9 American Bankers' Association's Journal, p. 249.

deposits and not due to larger turnover of deposits, which should have come about if the cheque habit on an average had gone up. Actually, it has been noted that the velocity of circulation of deposits has shown a marginal decline over the period 1965-66 to 1972-73.<sup>1</sup>

### NEED TO POPULARISE CHEQUE SYSTEM

7.4 While in the U.K., other European countries and the U.S.A. improvements and innovations in methods of payment, such as a Giro, credit card and credit transfer, are slowly reducing the importance of the cheque, in India we are faced with entirely different and difficult set of circumstances. Without any such alternative method of payment, the only choice for us is to popularise the cheque habit. Banks have to be assisted in the task of mobilising deposits and diversifying investments for a massive spread of the banking habit in the rural and urban areas by an extensive use of the cheque system.

### CHEQUEABLE DEPOSITS AND MONEY SUPPLY

7.5 Chequeable deposits are one form of money supply with the public and the higher its proportion to the total quantum of money supply, the lesser the need for paper currency and greater the coverage by the banking system of the payments for the total volume of the commercial, trade and agricultural transactions. From the point of view of the economic policy and monetary policy of the country, the spread of cheque habit is of very great importance.

### CHEQUE HABIT SPREADS SAVING HABIT

7.6 The spreading of cheque habit is vital for the garnering of domestic resources by the banking system of the country. The spread of the banking habit, resulting from the greater resort to cheques in settling transactions, will pave the way for the integration of the monetary system and will make the monetary policy more effective. Since it is generally felt that the preference for cash transactions is mainly due to the existence of tax-evaded income, the spreading of cheque habit is highly conducive to public interest. Having regard

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<sup>1</sup>As a rough indicator, the velocity of turnover of deposits has been assessed (in a Research Paper specially prepared in the Economic Department of the Reserve Bank for the use of the Banking Laws Committee) by dividing the amount of cheques cleared through clearing houses by the average demand deposits (including demand liability portion of savings bank deposits).

to the general feeling regarding the extent of the malaise of tax-evaded income and its adverse impact on the general economy of the country, there is an imperative necessity for adopting in our country adequate measures for the spread of cheque habit.

### COUNTRIES IMPORTING CHEQUE SYSTEM REQUIRE SPECIAL MEASURES

7.7 Unlike bills, which gained currency first in the Continent and later on in the U.K., cheques had their origin in the U.K. and found acceptance in the Continent much later. The cheque habit became native to the English people and hardly was there any need for any special measures to promote the cheque habit. The reverse was the position in the Continent, and special measures had to be taken there which ensured their readier acceptability and freer circulation. Partly this is also true with reference to the position in the U.S.A. *We are now faced with an analogous situation.* Just as in the Continent,<sup>1</sup> and to a certain extent in the U.S.A., special measures had to be resorted to, to popularise the cheque habit, we have also to consider similar measures to popularise the cheque habit. In fact, at the time of the drafting of the Geneva Conventions, it was recognised that the absolute discretion the drawer enjoys for countermanding payment on cheques in the U.K. could not be extended to "those countries where the check is but little used," since this "would probably lead to a weakening of the security of checks".<sup>2</sup> When we regard the extent to which the cheque habit is now present in our country and consider the same *vis-a-vis* the extent to which it has spread in developed countries, we are convinced about the need for such measures.

### ADAPTATIONS NECESSARY TO SUIT BANKING PRACTICE

7.8 Apart from the main theme of promoting measures to popularise cheque habit, we have also to consider suitable modifications to the provisions of the NIA in the light of current banking practices. Over the course of years, the banking practice in India has developed on certain lines and when this is viewed in the light of the provisions of the NIA, on some of the aspects relating to cheques, the necessity for statutory clarification is felt. Some topics which thus arise for consideration relate to "marking" or "certification" of cheques, cheque with receipt form, and the like.

<sup>1</sup>Please see also paragraph 7.93 *infra*.

<sup>2</sup>Feller, A. H., "The International Unification of Laws Concerning Checks", 45 Harv. L. Rev. 668 at 686.

7.9 They also bring in the question of bankers' protection for the bankers handling of cheques and instruments analogous to cheques. The need for, and the extent of, protection that the bankers should have both when they pay such instruments and when they act as collecting agents are considered in the Chapter on "Bankers' Protection".

### SCHEME OF THE CHAPTER

7.10 We divide this chapter into two parts. The first part deals with the necessity either for suitable changes in the NIA or for appropriate provisions in the enactment that would take its place. In the second part we consider questions which may necessitate fresh legislation or changes in other statutes.

#### A. WHAT THE NEGOTIABLE INSTRUMENTS LAW MAY PROVIDE

7.11 The following topics engage our attention in this category :

- (i) cheque as an assignment of funds,
- (ii) limitation on the right of countermand,
- (iii) post-dated cheques,
- (iv) death or insolvency of the drawer,
- (v) marking or certification of cheques,
- (vi) stale cheques,
- (vii) crossing provisions, and
- (viii) Cheque with receipt form.

##### (i) CHEQUE AS AN ASSIGNMENT OF FUNDS

7.12 In the U.K. (except Scotland) and in the U.S.A., cheque does not operate as an assignment of the funds of the drawer available to meet the cheque. But in many countries, which have adopted the Geneva Conventions, and in Scotland, cheque operates as an assignment, though there is some difference in the operative provisions.

##### *Practical advantages of the assignment theory*

7.13 It would considerably promote ready acceptability of the cheque if the issue of a cheque can be considered as operating as an

assignment of the available funds with the banker, in favour of the holder. A provision for the cheque to operate as an assignment of the available funds, if it can be given effect to without bringing the bankers into difficulties, would lay the foundation for the other recommendations which we are considering later on in this chapter for promoting cheque habit. If the cheque operates as an assignment of funds, necessarily the right to countermand may be available only in exceptional circumstances. *A fortiori* the drawer's authority cannot be considered as revoked by supervening factors such as his death. It would also protect a holder, in that, even where sufficient amount is not available to honour the cheque in full, he gets the right to claim the amount available. In this context, we may mention that very often a cheque is dishonoured for the balance in the account being short by a very small amount. On his getting the available funds, the holder may not resort to litigation in such circumstances, and if at all, his claim would be for a very small amount.

*Can cheque be treated differently from bills?*

7.14 Then, there is the question whether the cheque could be considered as an assignment of the available funds unless we apply the same principle also with reference to bills. This question naturally arises since in the U.K. and in other Common Law countries cheque is regarded as a demand bill drawn on a banker. In our view, there is justification for applying the principle of assignment only with reference to cheques and not with reference to bills in general. When the question was at large, in the U.S.A.—

“There has been more readiness to find a check amounting to an assignment than an ordinary bill not drawn on a bank. This is due, no doubt, to the contract between the depositor and the bank whereby the latter agrees to pay out the fund on the order of the former though piecemeal, and to the further fact that it is ordinarily taken for granted that the check is drawn on funds. A bank, other difficulties aside, could not very well complain that the check as an assignment is objectionable because it is only partial. Before the Uniform Negotiable Instruments Law there were a considerable number of states,<sup>1</sup>—a minority, however,

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<sup>1</sup>The following States are stated to have held this view: Illinois, Iowa, Kentucky, Louisiana, Minnesota, Nebraska, Oklahoma, South Carolina and South Dakota.

which adhered to the view that a check was of itself an assignment of the fund on deposit either in whole or part, as the case might be, depending on the amount of the check."<sup>1</sup>

We consider that there is sufficient justification for applying the principle of assignment of the available funds with reference to cheques, without extending the principle to bills in general. On practical considerations, such a distinction may be necessary having regard to our policy objectives. There is also theoretical justification.

*Pros and cons for cheque operating as an assignment*

7.15 In the U.S.A. the question whether the bill or the cheque should be considered as an equitable assignment of the available funds in the hands of the drawee came in for considerable discussion both before and after the adoption of the UNIL which answered the question in the negative. The UCC has a similar provision. In the U.S. case *Munn v. Burch*,<sup>2</sup> in support of the view that cheque should operate as an assignment, Chief Justice Caton said :

"It (commercial custom) shows that the banker, when he receives the deposit, agrees with the depositor to pay it out on the presentation of his checks, in such sums as those checks may call for, and to the person presenting them, and with the whole world he agrees that whoever shall become the owner of such check, shall, upon presentation, thereby become the owner and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit. Who shall object to that portion of the contract which the law raises by implication on the part of the banker to the third person—to anybody and to everybody? Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check created by the implied promise held out to the world by the banker, on the one side, and the receiving of the check for value and presenting it, on the other."

In that case, the Court held as follows :

"We hold then, that the check of a depositor upon his banker, delivered to another for value, transfers to that other, the title to so much of the deposit as the check calls for, which may

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<sup>1</sup>Aigler, Ralph W., "Rights of Holder of Bill of Exchange against the Drawee", 38 Harv. L. Rev. (1925) 857 at 867-868.

<sup>2</sup>25 Ill. 35, 40 (1860).

again be transferred to another by delivery, and when presented to the banker, he becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount, provided the party drawing the check has funds to that amount on deposit, subject to his check *at the time* it is presented."

7.16 The view negating the privity of contract between the holder of a cheque and the bank was expressed by the Supreme Court in *Bank of the Republic v. Millard*.<sup>1</sup> There it was pointed out that if there is such a contract relation,

"the bank could be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor".

But the difficulties pointed out against the cheque operating as an assignment are all related to the question as to the point of time when the assignment can be considered to have taken place, that is, whether it so operates at the time of issue or at the time of presentment. The difficulties pointed out by the court in the *Bank of the Republic v. Millard* would not be felt if the assignment operates only on the presentment of the cheque either across the counter or on clearing. No doubt, the banker should have a reasonable time in either case for acting on the cheque before the assignment can be considered as effective. The practical difficulties in recognising the cheque operating as an assignment of the *available funds* at the time of presentment would be eliminated, if the drawer's right to countermand could be restricted and the assignment can be held to operate only at the time it is presented for payment and after the bank has reasonable time to act on that. Substantially, this is the position now in Scotland.

*Even now in Common Law countries including India cheque operates as an assignment in certain circumstances*

7.17 Even now in the U.S.A., *orders drawn on particular funds* are generally construed as assignments in whole or in part, as the case may be, of the designated fund.<sup>2</sup> But such orders are regarded as conditional, the instruments not qualifying as bills or cheques. But even where the instrument is not drawn on any particular fund, "it is

<sup>1</sup>10 Wall (U.S.) 152, 156 (1869).

<sup>2</sup>Aigler, Ralph W., "Rights of Holder of Bill of Exchange against the Drawee", 38 Harv. L. Rev. (1925), p. 857.



clear that an order, in form a mere bill of exchange, may be given under such circumstances that the payee acquires an interest in a fund in the hands of the drawee and may proceed against him in whatever proceeding may be appropriate to the purpose".<sup>1</sup> In the U.S.A., it has also been held that the cheque may operate as an assignment where so agreed to by the parties, and that the cheque for the entire amount of the drawer's account in the bank operates as an assignment.<sup>2</sup>

7.18 In the U.K. excluding Scotland and in the U.S.A., their statutes have always been to the effect that the bill (or the cheque) does not *of itself* operate as an assignment, that is, when read with other facts in certain circumstances, an assignment may be implied.<sup>3</sup> Chalmers says that between the holder and the drawee "privity may be created by agreement external to the bill, and the relations of the parties are then regulated by the terms of the agreement".<sup>4</sup> He also says that "in one instance, too, a quasi-privity has been created..... when the holder of a cheque omits to present it within a reasonable time, whereby the drawer has been damnified, (*i.e.*, by the bank failing), the drawer is *pro tanto* discharged, and the holder is substituted as a creditor of the bank."<sup>5</sup> The framers of the UCC have commented :

"As under the original sections, a check or other draft does not of itself operate as an assignment in law or equity. The assignment may, however, appear from other facts, and particularly from other agreements, express or implied; and when the intent to assign is clear *the check may be the means by which the assignment is effected.*"

7.19 The position would be the same in India though there is no specific statutory provision dealing with the question whether the cheque (or the bill) does or does not either by itself or coupled with other circumstances operate as an assignment of the funds in the hands of the drawee. Thus, it is not as if the assignment theory has become foreign to the Common Law countries as it is even now applied in specified circumstances.

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<sup>1</sup>Aigler, Ralph W., "Rights of Holder of Bill of Exchange against the Drawee", 38 Harv. L. Rev. (1925), p. 867.

<sup>2</sup>"Brady on Bank Checks", Banking Law Journal, 4th edn. (1969), p. 28.

<sup>3</sup>Aigler, Ralph W., "Rights of Holder of Bill of Exchange against the Drawee", 38 Harv. L. Rev. (1925), p. 857.

<sup>4</sup>"Chalmers on Bills of Exchange", Stevens & Sons Ltd., 13th edn. (1964), p. 178.

*Geneva Conventions favour assignment theory*

7.20 The provisions of the Geneva Conventions clearly favour the assignment theory though "questions as to whether or not rights in the cover (*i.e.*, the available balance in the account) are transferred and the consequences of these rights are expressly excluded from the scope of the Convention".<sup>1</sup> The operative provisions of the Conventions clearly favour the doctrine that the cheque would operate as an assignment, if not on its issuance, at least on its presentment.

7.21 Article 33 of the Geneva Uniform Law on Cheques provides that "neither the death of the drawer nor his incapacity taking place after the issue of the cheque shall have any effect as regards the cheque". Again, the holder is not allowed to refuse partial payment; "in case of partial payment the drawee may require that the partial payment shall be mentioned on the cheque and that a receipt shall be given to him."<sup>2</sup> Article 3 of the Geneva Law on Cheques provides that "a cheque must be drawn on a banker holding funds at the disposal of the drawer and in conformity with an agreement, express or implied, whereby the drawer is entitled to dispose of those funds by cheque. Nevertheless, if these provisions are not complied with, the instrument is still valid as a cheque". Though the instrument is valid even if there is no cover, it is almost a mandatory requirement that the banker should have funds at the disposal of the drawer before the drawer could issue the cheque. Whether it is a pre-arranged credit or it is a credit balance with the drawee-bank, it makes no difference in principle.

7.22 Though Article 3 of the Geneva Uniform Law on Cheques fails to settle definitely the important question as to the time when cover must exist, "it is obvious there must be cover at some time".<sup>3</sup> In many countries, cover must exist at the time of issue.<sup>4</sup> Others require it only at the moment of presentment. Article 5 of Annex II to the Geneva Law on Cheques provides that "each of the High Contracting Parties may determine the moment at which drawer must have funds available with the drawee".

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<sup>1</sup>Feller, A. H., "The International Unification of Laws Concerning Checks", 45 Harv. L. Rev. 668.

<sup>2</sup>Article 34 of the Geneva Uniform Law on Cheques.

<sup>3</sup>Feller, A. H., "The International Unification of Laws Concerning Checks", 45 Harv. L. Rev. 668 at p. 677.

<sup>4</sup>Germany, Belgium, Spain, Mexico.

### France

7.23 The French rule is the intermediate one, requiring cover at the time of issue, but holding it sufficient if the cover consists of a debt, provided it be liquidated and subject to demand payment.<sup>1</sup> In France, the payee has a right of direct recourse against the drawee based on the *provision*. He has a claim only to the funds in the hands of the drawee at the time of the issuance of cheque, though the bank would probably honour the cheque even out of funds deposited after the date of issue of the cheque. If a cheque is void as a cheque because there is no *provision* at the time of issuance, the instrument may nevertheless be valid as a bill, note or order for collection. Where funds are insufficient to pay the cheque, the payee may demand partial payment from the drawee.

### Scotland

7.24 Section 53(2) of the BEA provides: "In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee". The above provision applies with reference to cheques as well. Where the balance at credit of a customer's account is insufficient to meet in full the amount of a cheque presented, the balance is attached by such cheque and cannot be used to meet cheques subsequently presented. The amount available is transferred to a separate account, bearing reference to the cheque by which it is attached.<sup>2</sup> In Scotland, where a customer is deceased, the funds are nevertheless attached on presentment.<sup>3</sup> Where the holder offers to deliver the cheque against payment of the balance attached, the banker cannot refuse to pay the amount. In Scottish law, the assignment to be effectual must be intimated to the drawee by the presentment of the bill.<sup>4</sup>

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<sup>1</sup>Feller, A. H., "The International Unification of Laws concerning checks", 45 Harv. L. Rev. 668 at p. 677-678.

<sup>2</sup>Scottish Banking Practice, "Cheques—The Paying and Collecting Banker" by Peter Campbell, 2nd edn. (1971), The Institute of Bankers in Scotland, pp. 17-19.

<sup>3</sup>Bank of Scotland v. Reid and Royal Bank of Scotland, 1886 (2 S.L. Rev. 376).

<sup>4</sup>"Byles on Bills of Exchange", Sweet & Maxwell, 23rd edn. (1972), p. 6 f.n. 23.

Section 53(2) of the BEA "shall not have effect in relation to funds being savings account deposits or special investments of a person at a trustee savings bank".<sup>1</sup>

*Scottish view preferable*

7.25 It is obvious that if the assignment is held to operate as on the date of issue, as is stated to be the position in France, it will give room for considerable practical difficulties, and hence the position that prevails in Scotland as set out in section 53(2) of the BEA is preferable, though we would confine the scope of such a provision only to cheques. We would also like to ensure that a banker has a reasonable time after presentation to ascertain the extent and availability of funds to meet the cheque.

7.26 Hence, WE RECOMMEND a statutory provision to the following effect :

"Where a drawee-banker has in his hands funds available for the payment of a cheque which has not become stale, the cheque operates as an assignment of the sum for which it is drawn, or of the sum available to meet the cheque, as the case may be, in favour of the holder, from the time when the cheque is presented to the drawee-banker. The drawee-banker may ask for a receipt on the cheque, and an additional receipt, where he makes a partial payment on the cheque."<sup>2</sup>

*Explanation:* For the purpose of this provision, the cheque shall be deemed to be presented to the drawee-banker only after the banker has had a reasonable time to ascertain the extent and availability of funds to meet the cheque."

(ii) LIMIT FOR RIGHT TO COUNTERMAND

7.27 In England and in the U.S.A., the drawer of a cheque has an unfettered power to stop payment thereon by the bank. The bank will dishonour the cheque and the holder will have to proceed against the drawer. As Professor Farnsworth says, whether the holder's "action is upon the check or upon the underlying obligation, the payee must take the initiative and will be subject to all other drawer's defences. *Had the drawer paid in money, he would have had the*

<sup>1</sup>Section 20 of the Trustee Savings Banks Act, 1969.

<sup>2</sup>Vide also Article 34 of the Geneva Conventions on Cheques.

burden of affirmative action to adjust any subsequent dispute. Since he paid by check, he may use a stop order to shift the burden to the payee".<sup>1</sup> Professor Farnsworth has further pointed out that the observance of a stop order continues to be a practical problem since, although payment is stopped on only a tiny fraction of all cheques,<sup>2</sup> each stop order must be specially handled, and whether his order is observed or not, it throws a substantial burden on the holder and the drawee.

### *Geneva Conventions*

7.28 We have earlier referred to the limitations on the power to countermand under the Geneva Conventions. *Under the Geneva Conventions, the right to countermand can be exercised only after the expiry of the limit of time prescribed for presentment for payment of the cheque.* However, the municipal law may provide for the extent and nature of such restriction both during and after the expiry of the time limit specified for presentment for payment. In the result, in the majority of countries of the world, there are severe restrictions on the drawer's right to countermand.

### *France*

7.29 In France, upon the issuance of a cheque, the drawer loses his right to the *provision* and is not entitled to countermand payment except in two exceptional cases, *viz.*, loss or theft of the cheque and insolvency of the holder. The bank which receives notice of stop payment may observe it without liability *even if it was given for an improper reason*, but the holder may obtain a court order to have the *provision* released if any one of the exceptions is not applicable. The issuance of a wrongful stop order is, in France, a criminal offence punishable just as an issuance of a cheque without *provision*.

7.30 The French rule is usually justified on the ground that it increases the security of those who take cheques in payment. It also comports with the necessity for bulk handling of cheques. Professor Farnsworth has observed that considering the troubled history of stop

<sup>1</sup>Farnsworth, "The Check in France and the United States: A Comparative Study", 36 Tulane L. Rev. 245-70 (1962).

<sup>2</sup>The Survey regarding Cheques and Bills has shown that nearly 2% of all cheques returned are due to countermand by the drawers (*vide* paragraphs 55, 56, 61 and 62 of Appendix VI).

order in the United States, it may be wondered if the same rule would not be desirable in the U.S.A. He has said that it would be a simple enough change in the law to deprive the drawer of his power to stop payment and this would relieve the drawee of his burden and give the holder more protection.

### *Scotland*

7.31 "When a cheque, payment of which has been countermanded, is presented for payment to the banker upon whom it is drawn, the banker cannot pay the cheque, but he must, in Scotland, although not in England, *retain sufficient money to meet the cheque, if there is enough in the customer's account*, since a cheque, duly presented, is, as has been seen, equivalent to an intimated assignation in favour of the payee of any funds of the customer in the banker's hands available to meet it".<sup>1</sup>

7.32 Though in England and in other Common Law countries the right to countermand payment is now unrestricted, there is considerable merit in limiting this right. Such limitation is found in the majority of the nations of the world. Only we have to ensure that the restraints on the right to countermand do not place the banker in any difficult position.

### *Provisions to apply on countermand*

7.33 The French law allows the holder to have direct recourse against the drawee by reason of the concept of *provision*. But we do not consider that the drawee should be made directly responsible to the holder in respect of any wrongful countermand of the instrument by the drawer. We consider that as between the drawer and the drawee, the drawee should be protected if he acts on the instructions of the drawer. But the drawer's liability to the holder for damages for his wrongful action should be clearly provided for. We consider later a provision to provide for penal consequences if the drawer exercises his right to countermand without good faith. Where the drawer countermands, the drawee-banker shall, when the countermanded cheque is presented before it becomes stale, set apart the available funds towards the cheque, advise the presenter about the countermand and the drawer about the presentment, *and* shall hold

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<sup>1</sup>Lillie, J. A., Q. C., "The Mercantile Law of Scotland", W. Green & Son Ltd., 6th edn. (1970), p. 205.

the amount in a separate account for a period of three months. If within this period the presenter or the holder does not serve the bank with notice of his having taken legal proceedings to establish his title to the amount so set apart, the banker shall then re-credit the amount to the account of the drawer. )

7.34 In the light of the above, WE RECOMMEND a specific provision on the following lines :

- “(i) The duty and authority of a banker to pay a cheque are terminated by countermand of payment by the drawer thereof;
- (ii) notwithstanding the above, the drawer is not entitled to countermand payment unless he can show—
  - (a) that the cheque has been lost or stolen ; or
  - (b) that the holder thereof has become insolvent ;
- (iii) without prejudice to any penal liability he may become subject to, if the drawer is shown to have countermanded payment in other circumstances, he shall be liable to the holder of the cheque for damages ;
- (iv) where a countermanded cheque is presented to the banker for payment, the banker shall—
  - (a) advise the presenter about the countermand, and the drawer about such presentment ;
  - (b) set apart any available funds towards the cheque ; but if within a period of three months from the date of such presentment the presenter or holder does not serve the bank with notice in evidence of his having taken legal proceedings to establish his title to the set apart funds, the banker shall re-credit the account of the drawer with the amount so set apart; and where the presenter or holder takes suitable legal proceedings within such time, the banker shall abide by the direction of the court regarding the title to the amount so set apart.”

(iii) POST-DATED CHEQUES

7.35 While generally the drawing up of a post-dated cheque is not *per se* considered as affecting the validity of the instrument in any way, the banker has no authority now in India, the U.K., the

U.S.A. and other Common Law countries to honour a post-dated cheque. Thus, in the Common Law countries the banker runs a risk if by inadvertence he honours a cheque prior to the date shown on the instrument. But under the Geneva Conventions, while the drawing up of a post-dated cheque does not affect the validity of the instrument, the instrument is nevertheless payable on presentation and the holder is not obliged to wait until the date of the cheque. Cheques are meant for immediate payment and the practice of issuing post-dated cheques is neither a healthy one nor is it in public interest.

*Geneva Law eliminates confusion*

7.36 It has been pointed out that—

“The Geneva Uniform Law eliminates a source of much confusion by prohibiting the post-dated check. Under Article 28, a check is payable at sight and any contrary stipulation is to be disregarded. A check presented for payment before the date stated as the date of issue is payable on the day of presentment. This solution, modeled on a recent German law, has the advantage of discouraging post-dating without entailing invalidity of the instrument. Post-dated checks have frequently been looked upon with disfavor.<sup>1</sup> Many countries impose penalties for post-dating.<sup>2</sup> There is no doubt that post-dating is permissible under the Negotiable Instruments Law<sup>3</sup> and the Bills of Exchange Act, but the practice has caused many difficulties.”<sup>4</sup>

*Post-dated cheque, an ambiguous instrument*

7.37 As Mr. Feller pointed out—

“In effect, a post-dated check is a time bill, or rather an intermediate instrument between the bill and the check. In some countries, a more frank recognition of the post-dated check as an instrument of credit has been achieved by allowing checks to be

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<sup>1</sup>It was formerly the custom of bankers in the City of London not to honour post-dated cheques. *Emanuel v. Robarts*, 9 B & S. 121 (1868).

<sup>2</sup>France, Law of February 19, 1874, Art. 6; Germany, Law of March 11, 1908; Italy, Codice Di Commercio, Art. 344. *Such laws existed in England but were repealed by Stamp Act, 1870.*

<sup>3</sup>UNIL of the U.S.A.

<sup>4</sup>Feller, A. H., “The International Unification of Laws concerning Checks”, 45 *Harv. L. Rev.* 668 at 682-3.



issued payable a certain number of days after sight.<sup>1</sup> At the Hague Conference of 1912; the delegations from the United States and Great Britain voted for the nullity of checks not payable at sight, but it is not clear whether the resolution adopted referred to post-dated checks, or checks payable a certain number of days after sight".<sup>2</sup>

*Public policy and post-dated cheques*

7.38 . Generally, post-dating of a cheque is a device to avoid stamp duty payable on a usance instrument. Thus, it is also not in the interests of public policy to countenance post-dated cheques.

*Section 68 of Indian Stamp Act*

7.39 Section 68 of the Indian Stamp Act provides, *inter alia*, that if a person, with intent to defraud Government of duty, draws, makes or issues any bill or note bearing a date subsequent to that on which such bill or note is actually drawn or made, he shall be punishable with fine which may extend to one thousand rupees.<sup>3</sup> The section also makes any person so liable if he, knowing such bill or note has been so post-dated, endorses, transfers, presents for acceptance or payment, or accepts, pays or receives payment of, such bill or note, or in any manner negotiates the same.

7.40 Since "cheque" is defined as a bill drawn on a banker payable on demand, normally the section could be considered as covering also cases of deliberate post-dating of cheques; but this section has been considered as not covering post-dated cheques, though the section has been applied to post-dated hundis.<sup>4</sup> In principle, there seems to be not much difference between a post-dating of a demand bill and post-dating of a cheque, from the point of avoidance of stamp duty.

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<sup>1</sup>Italy, Codice Di Commercio, Art. 340.

<sup>2</sup>Feller, A. H., "The International Unification of Laws concerning Checks", 45 Harv. L. Rev. 683.

<sup>3</sup>The sum of Rs. 1,000 has been indicated as the fine amount on the basis of its value in real terms in the year 1899 and may be regarded as intended to act *in terrorem*. But the erosion in the real value of money since then has probably made this offence look like a minor one.

<sup>4</sup>Krishnamurthy, K., "The Indian Stamp Act", Madras Law Journal, 3rd Edn. pp. 52-53 and 362-368.

7.41 However, we do not consider it necessary to specifically provide for any penalties for the issue of post-dated cheques, since the practice of issuing post-dated cheques may come to a natural termination if we follow the method adopted by the Geneva Conventions with reference to post-dated cheques.

*Effect of post-dating*

7.42 Having regard to the above, we are of the view that it is desirable to discountenance the practice of issuing post-dated cheques. This could be done by a provision on the lines adopted in the Geneva Conventions on cheques. Hence, WE RECOMMEND a specific statutory provision to the effect that "a cheque is payable at sight and on the day of presentment though it is post-dated".

(iv) DEATH OR INSOLVENCY OF THE DRAWER

7.43 We have no specific provision in the NIA dealing with banker's authority to pay a cheque when the drawer thereof is dead or insolvent. It is necessary to clarify the position in our Act. The provisions of the BEA and the Geneva Conventions are diametrically opposite; while the UNIL was silent on the point and the courts followed the English rule, the UCC strikes somewhat a mid-path.

7.44 Section 75 of the BEA provides that the duty and authority of a banker to pay a cheque drawn on him by his customer are terminated by notice of the customer's death. Under the Geneva Conventions, death or incapacity of the drawer after the issue does *not* affect the cheque.

7.45 Commenting on Article 33 of the Geneva Uniform Law, Feller pointed out that the Geneva Conventions depart in this regard from the Anglo-American system and that—

"The Bills of Exchange Act provides expressly that the duty and authority of a banker to pay a check drawn on him by his customer are determined by notice of the customer's death, and the rule would seem to be the same as regards notice of insanity. No such provision is contained in the Negotiable Instruments Law,<sup>1</sup> but the courts follow the English rule. *The rule of the Geneva*

<sup>1</sup>UNIL of the U.S.A.

*Uniform Law is clearly preferable from the standpoint of the banker, and it is in force in most countries.....*The differing rules as to revocation of authority to pay by death of the drawer spring from the conception of the operation of the check as an assignment, or to use the Continental terminology, a transfer of rights in the cover".<sup>1</sup>

7.46 Now, under the UCC, neither death nor incompetency of a customer revokes the authority to pay *until* the bank knows of the fact of death or of an adjudication of incompetency and has reasonable opportunity to act on it. *And* even with the knowledge of the death of the customer, a bank may, for ten days after the date of death of the customer, pay or certify cheques drawn on or prior to that date, unless ordered to stop payment by a person claiming an interest in the account.<sup>2</sup>

7.47 As part of the measures which we would like to recommend for the spreading of the cheque habit and consistent with the principle we have favoured that the cheque should operate as an assignment of the available funds at the hands of the banker on presentment of the instrument and as a corollary to the restriction on the rights of the drawer to countermand payment of the cheque, we consider it necessary to provide that the authority of a banker to pay a cheque should not be considered as terminated merely by notice of the death of the customer. At the same time, the banker should not be concerned with the question whether or not any person claiming to countermand payment of the cheque and acting for the estate of the deceased is validly entitled to do so.

7.48 The framers of the UCC state thus the rationale for enabling a banker to continue to pay cheques drawn by a customer for a limited period after the customer's death :

"The purpose of the provision..... is to permit holders of checks drawn and issued shortly before death to cash them without the necessity of filing a claim in probate. The justification is that such checks normally are given in immediate payment of an obligation, that there is almost never any reason why they should not

<sup>1</sup>Feller, A. H., "The International Unification of Laws concerning Checks", 45 Harv. L. Rev. 686-7.

<sup>2</sup>Section 4-405 of the UCC.

be paid, and that filing in probate is a useless formality, burdensome to the holder, the executor, the court and the bank.

This section (4-405) does not prevent an executor or administrator from recovering the payment from the holder of the check. It is not intended to affect the validity of any gift *causa mortis* or other transfer in contemplation of death, but merely to relieve the bank of liability for the payment.

Any surviving relative, creditor or other person who claims an interest in the account may give a direction to the bank not to pay checks, or not to pay a particular check. Such notice has the same effect as a direction to stop payment. The bank has no responsibility to determine the validity of the claim or even whether it is 'colorable'. But obviously anyone who has an interest in the estate, including the person named as executor in a will, even if the will has not yet been admitted to probate, is entitled to claim an interest in the account."

While we agree with the rationale of the UCC provision, we would make a slight alteration in the period after the death of the customer, during which the banker can continue to pay the customer's cheques. Instead of specifying the period as ten days after death, we would like to provide a period of ten days after notice of death of the customer; otherwise, both from the point of view of the banker and for the purpose for which the provision is intended, there would be avoidable difficulties. On any countermand of payment by a person claiming an interest in the account, the provisions, which we have earlier recommended in the case of countermand of payment by the drawer, should apply.

7.49 Hence, WE RECOMMEND a statutory provision that the death of a customer does not terminate the duty and authority of the banker to pay the customer's cheques until the expiry of a period of ten days from the date of the banker's knowledge of the death of the customer; however, within such period, any person claiming an interest in the account may, by notice in writing, ask the banker not to pay the customer's cheques, or not to pay a particular cheque of the customer. Any such notice shall have the same effect as an order issued to a banker by a customer countermanding payment of a cheque. In such a case, or when a cheque drawn by the customer is presented for payment after ten days from the date on which the banker has knowledge of the death of the customer, the provisions we have earlier

recommended for application when there is a countermand of a cheque by the customer shall apply.

*Adjudication of incompetence other than insolvency*

7.50 WE RECOMMEND that a provision, on the lines we have recommended in the case of the death of a customer, should be applied to any adjudication of incompetence (e.g.; lunacy) of a customer *other than* an adjudication of insolvency.

*Insolvency*

7.51 Where a customer is adjudicated as an insolvent under the insolvency law, his assets in the hands of the banker would vest with the official receiver or the official assignee as on the date of the adjudication. Here public policy requires that the interests of the general body of creditors should not be affected. Hence, the banker's authority to pay the cheque cannot survive *after the drawer is adjudged an insolvent*, and the holder will have to prove his claim before the assignee. But any payment by the banker until he has notice of such adjudication and has reasonable opportunity to act thereon shall nevertheless be valid. There is no need to apply the provisions relating to countermand when a cheque is presented after the banker knows of the adjudication of insolvency. WE RECOMMEND that this position should be statutorily clarified.

(v) MARKING OR CERTIFICATION OF CHEQUES

7.52 The question whether a banker in India could certify a post-dated cheque, and if so, with what consequences, came up before the Privy Council in the *Bank of Baroda Ltd. v. Punjab National Bank Ltd.*<sup>1</sup>

*Ratio of the Bank of Baroda case*

7.53 The Privy Council held that in the absence of any statutory provision, certification is not acceptance within the meaning of the English or Indian Act or under the Common Law, and that if the cheque had not been post-dated, certification might be held to include a representation as to the then sufficiency of the drawer's account though it did not operate as an estoppel if on the day the instrument

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<sup>1</sup>A.I.R. (31) 1944 P.C. 58.

was presented there was inadequate balance. But in the view the Privy Council took, namely, that the manager of the drawee bank had no ostensible authority to certify post-dated cheques, the Court held that it was not required to decide the legal effect of certification in India by a banker acting within the scope of his authority.

*Banker's word of honour*

7.54 In the Bank of Baroda case, the Privy Council referred to the fact that Cockburn C.J. in (1875) 10 Ex. 337 had judicially recognised that a custom has grown up among bankers themselves of marking cheques as good for payment for the purpose of clearance, by which they became bound to each other. In this context, the Privy Council made special mention of the banker's word of honour :

“Their Lordships are not unconscious that the bankers regard their word as their bond, and honour their signature even though they might have an answer in law. This is especially true as between banker and banker. Bankers would say that the bank making the mistake or whatever it was should stand by its act.....In any case, the Court is here called upon to decide how the law at present stands. It is not the arbiter on questions of banking ethics or etiquette or good banking policy as a matter of business. The high standards of bankers are too firmly established to be shaken.”

*Practice of banks after the Bank of Baroda case*

7.55 Subsequent to the decision of the Privy Council in the Bank of Baroda case, banks in India have reportedly discontinued the practice of certifying or marking cheques at the instance of parties.

7.56 But the rules of the Clearing Houses provide for certification between the member banks of items passing through the Clearing House. Rule 10 of the Bombay Bankers' Clearing House Rules provides that “it shall be permissible for any bank to apply for the acceptance of the cheque by the bank on which it is drawn.....”. The Privy Council referred in the Bank of Baroda case to a similar rule of the Calcutta Clearing House, but felt that the expression “acceptance” in the rule is not used in the sense implied in the Act. There are similar rules applicable to the other Clearing Houses throughout the country, though the IBA has suggested the deletion of such provisions. The relevant Clearing House rule of the Clearing Houses in

India is in line with the custom of bankers judicially noticed by Cockburn C.J. as prevalent in the U.K. amongst bankers in that country. This rule has also relevance to the banker's word of honour to which the Privy Council made pointed reference in the Bank of Baroda case.

*Legal effect of certification not yet settled in India*

7.57 We are not considering whether banks should be obliged to certify cheques in any conceivable circumstance. What we are concerned with now is the legal effect certification should have. The Privy Council pointed out that neither the NIA nor the BEA provides for certification and that at Common Law certification cannot amount to acceptance. The Privy Council referred to the American and Canadian theories on this subject. But, as earlier observed, since the cheque was post-dated, the Privy Council was not required to decide with reference to India the validity of any of these theories. Then, what certification means? What certification implies when a banker either does it pursuant to a Clearing House regulation, or makes it at the request of a holder or drawer (though the bankers in India, it is said, do not now certify at the instance of parties, there is nothing precluding them from doing so) is a question that remains still unsettled.

*Canadian theory*

7.58 While rejecting the view that certification may be considered as amounting to acceptance, the Privy Council referred in the Bank of Baroda case to the Canadian and American theories on this subject. In Canada where the practice of certifying cheques prevails, the Privy Council held that—

“Where a cheque is marked or certified by being initialled by the bank on which it is drawn, the marking operates as a representation that the bank, at the time of certifying, has funds of the drawer in its hands sufficient to meet payment of the cheque, but, at any rate, in the absence of any specific usage, the marking appears to have no other effect.”<sup>1</sup>

*American theory*

7.59 Under the American theory, where a holder procures certification, the drawer and other prior endorsers are discharged. The UCC

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<sup>1</sup>“Chalmers on Bills of Exchange”, Stevens & Sons Ltd., 13th edn. (1964), p. 250; *Gaden v. Newfoundland Savings Bank*, 1899, A.C. 281 (P.C.); *Imperial Bank of Canada v. Bank of Hamilton*, 1903, A.C. 49 (P.C.).

also clarifies that unless otherwise agreed, a bank has no obligation to certify a cheque. "While certification procured by a holder discharges the drawer and other prior parties, certification procured by the drawer leaves him liable."<sup>1</sup> Where a bank certifies a cheque before returning it for lack of proper endorsement, the drawer is discharged.

*Certification in Geneva Convention countries*

7.60 Even in countries where the assignment theory prevails (countries adopting the Geneva Conventions), certification by bankers is provided for; but the effect of such certification is left to be determined by the national law.<sup>2</sup> Articles 55 and 56 of the Japanese Law on Cheques provide that the drawer and other parties liable on a cheque are not discharged by reason of certification of payment and that the drawee who certifies is bound to make payment only when the cheque is presented before the expiration of the limit of time fixed for presentment. But the Geneva Conventions do not favour the acceptance of cheques,<sup>3</sup> though they permit confirmation of payment by the drawee. In other words, the Geneva Conventions do not go to the extent of what the UCC provides, though they do impose a definite liability on the drawee for a certain period, and in this regard they differ from the Canadian theory as well.

*Certification may have a place in banking business*

7.61 Thus, the negotiable instruments law of all systems envisages certification of cheques by banks, though judicial recognition thereof in this regard in the U. K. and in India is confined to the practice amongst clearing bankers. Since it usually involves undertaking some commitment or obligation to third parties, the reluctance of bankers to certify cheques, except in certain circumstances, is understandable. But while it may not be made obligatory for banks to certify, we consider it necessary to clarify statutorily the legal effect of certification in India.

7.62 Under two types of cases, a certification by a banker may be considered as useful. The first relates to certification between member banks of a Clearing House. The second type of cases relates to instances where a cheque is returned, not for any basic defect in the

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<sup>1</sup>UCC comment to section 3-411 of the UCC.

<sup>2</sup>Vide Art. 6 of Annex II to the Geneva Conventions on Cheques.

<sup>3</sup>Article 4 of the Geneva Conventions on Cheques.



instrument, but for lack of proper endorsement. In such cases, a provision for certification may be useful, though whether or not a banker should certify is a matter entirely left to his discretion.

7.63 Before the Law Commission, the IBA had pleaded for a provision to clarify that certification amounts to an acceptance. The IBA had expressed that "such a provision would be of great benefit to parties who have to pay or receive large sums of money against delivery of movable property or against execution of documents like Sale Deeds, Mortgage Deeds or Reconveyances of immovable properties. Owing to the inconvenience and risk of paying or receiving large sums in cash, parties would like to pay and receive large sums by cheques, but in transactions such as those mentioned above they often cannot do so on account of the risk of cheques being dishonoured. Under the law as it now stands, this risk is not completely obviated by the certification of a cheque by the banker on whom it is drawn, since the legal effect of such certification is doubtful."<sup>1</sup>

7.64 Though before the Banking Laws Committee the IBA has expressed itself as not favouring any statutory provision relating to certification of cheques, it had suggested before the Law Commission that "an addition be made in section 7 of the Act (NIA) or at some other appropriate place to provide that a cheque, though not requiring presentation for acceptance, may be so presented and that an endorsement on a cheque by the banker on whom it is drawn of the word or words : 'Accepted' or 'Certified good for payment' or any other words to the same effect amounts to an acceptance of the cheque by the banker and makes him liable to the holder of the cheque for the amount thereof."<sup>1</sup> The IBA had then urged that "all the difficulties pointed out.....in the way of a certification giving sufficient protection to the holder of the cheque would disappear, if the certification were treated as an acceptance of the cheque. It might also be made clear in the Act that a certification of a post-dated cheque made before its maturity is also valid"<sup>1</sup>

7.65 We consider that the American theory is preferable and makes it easy for the banker, if in the circumstances he considers it necessary, to debit the account of the drawer straightaway. Thus, while not being obliged to certify, the banker is fully protected if he certifies, since while certifying he could validly debit his customer's account with

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<sup>1</sup>Letter dated the 24th July 1956 from the IBA to the Law Commission.

the amount required to meet the cheque. Having regard to our recommendations with reference to a post-dated cheque, special difficulties posed by such instruments will not arise while a banker considers a request for certification.

7.66 Hence, WE RECOMMEND a provision relating to certification of cheques on the following lines:

- “(1) Certification of a cheque is acceptance. Where a holder procures certification, the drawer and all other prior endorsers are discharged.
- (2) Unless otherwise agreed, a banker has no obligation to certify a cheque.
- (3) A banker may certify a cheque before returning it for lack of proper endorsement. If he does so, the drawer is discharged.”

#### (vi) STALE CHEQUES

7.67 Earlier we have gone into the question as to when a cheque can be considered as overdue. But now we have to consider the practice the banks follow here and elsewhere of making payment on a cheque only when it is presented within a specified period and thereafter to consider payment thereof only after obtaining the confirmation of the drawer. Before considering the law and practice in this regard in India, we may make a reference to the position in other countries.

#### *Geneva Convention countries*

7.68 Under the Geneva Uniform Law, the limit of time allowed for presentment of a cheque is 8 days for domestic cheques and 20 days or 70 days according as to whether the place of issue and the place of payment are situated respectively in the same continent or in different continents. Though a bank may pay a cheque even after such period if the drawer has not countermanded it, actions of *recourse* are barred six months after the expiration of the period for presentment for payment.

#### *The U.K. position*

7.69 In the U.K., though in the BEA there is no specific provision regarding a stale cheque, bankers decline to pay a cheque they consider as stale, *i.e.*, one not presented within *periods varying from six months to a year* after issue.<sup>1</sup>

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<sup>1</sup>“Paget’s Law of Banking”, Butterworths, 8th edn. (1972), p. 222.

### *The U.S.A. position*

7.70 In the U.S.A., the UCC provides that a bank is not obliged to pay a cheque which is more than six months old from its date, but it may charge its customer's account for payment made thereafter in good faith.

### *In Australia*

7.71 In Australia, the Bills of Exchange Act, 1909-1971 provides that a stale cheque is a cheque which appears on the face of it to have been in circulation for more than twelve months. The statute also provides that in the absence of any agreement between the banker and the drawer of the cheque or of any direction of the drawer of the cheque to the contrary, a banker may refuse payment of a stale cheque.

### *Law and practice in India*

7.72 In India the practice followed by banks is that they do not pay a cheque presented after a period of six months from the date it bears, without obtaining the confirmation of the drawer. This practice, whereby a cheque is regarded as *stale* after such period, has no statutory sanction in India. Bhashyam has pointed out that there is no justification in law for this practice, though he has felt that since the custom has been long established, it may have to be recognised by courts as well.<sup>1</sup> Aggarwal has suggested that the period after which a cheque becomes "stale" should be defined.<sup>2</sup> We consider that there is need for a statutory clarification.

7.73 We consider that a provision on the lines found in the UCC would give statutory protection for the practice of bankers regarding stale cheques and would also give needed protection to bankers when they pay a cheque in good faith. WE RECOMMEND that it may be statutorily provided that a banker may refuse to honour a cheque presented six months after the date it bears though he may nevertheless charge his customer's account for payment made in good faith thereafter.

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<sup>1</sup>Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 523.

<sup>2</sup>Aggarwal, C. L., "The Law of Hundis and Negotiable Instruments" Eastern Book Company, 9th edn. (1972), p. 25.

## (vii) CROSSING PROVISIONS

(a) "*Account Payee*" crossing

7.74 In the U.K., the Mocatta Committee pointed out that "the crossing 'Account payee only' (or 'for the account of X') has no statutory recognition". The Indian position is the same. Nevertheless, it has been established that a bank collecting a cheque crossed in this way for a person other than the one named as payee on the cheque, without making reasonable enquiries and receiving satisfactory answers, would lose in an action, on grounds of negligence. The crossing in question affords the drawer some protection against loss. But, as the Law Commission had pointed out, it unnecessarily enhances the duty of enquiry by the collecting bank without a corresponding gain in security to the parties, which could be remedied only if cheques so crossed are made not negotiable. Hence, WE RECOMMEND that cheques crossed "account payee" should be statutorily made not negotiable. In the Chapter on "Bankers' Protection", we consider the question of protection to the bankers with reference to cheques so crossed.

(b) "*Not Negotiable*" crossing

7.75 "Not negotiable" crossing is allied to "account payee" crossing. The NIA and the BEA provide that notwithstanding the statement on the face of the instrument, the instrument is nevertheless transferable; the only consequence now is that the holder cannot qualify as a holder in due course. With reference to the corresponding BEA provision, it is stated that Chalmers apparently drafted the section in the present form only after some hesitation. It has been suggested that it was a mistake to introduce the "not negotiable" crossing which produces misunderstanding because of the inevitable difficulty of terminology.<sup>1</sup> Further, the Geneva Conventions on Cheques, which also provide for crossings on the lines found in the U.K., have not adopted the device of cheques being crossed "not negotiable".<sup>2</sup> We should give effect to the intention of the parties behind the "not negotiable" crossing and avoid scope for confusion. Hence, WE RECOMMEND a specific provision to provide that a cheque crossed "not negotiable" would cease to be negotiable.

<sup>1</sup>"Chalmers on Bills of Exchange", Stevens & Sons Ltd., 13th edn. (1964), p. 268.

<sup>2</sup>Feller, A. H., "The International Unification of Laws concerning Checks", 45 Harv. L. Rev. p. 689.

## (viii) CHEQUE WITH RECEIPT FORM

7.76 There has been a reluctance on the part of banks in India, and possibly also on the part of banks in the U.K., to issue cheques with receipt forms. The reluctance is mainly due to the *unsettled law*. If by asking a receipt the instrument is regarded as conditional, it may not qualify as "cheque", and the banker, in the absence of any other statutory provision giving him the protection he gets while he handles a cheque, may be not so well placed with reference to such instruments as he is with reference to cheques. But where the condition is considered as not imposed on the drawee but is considered as addressed to and affects only the payee or the holder, this does not make the cheque conditional. As Paget has pointed out, the distinction is somewhat a shadowy one.<sup>1</sup> In this state of law, the bankers' reluctance to handle cheque with receipt form is understandable.

7.77 The IBA has admitted that demand is made from time to time by many customers, particularly the Life Insurance Corporation, to allow them the facility of using cheques with receipt forms, and that in the U.K. the London Clearing Bankers Committee has asked the clearing bankers to allow, in special cases, cheques with receipt forms, which are marked with a big "R" on the face. In the U.K., the Mocatta Committee doubted whether drawers would be generally willing to immediately dispense with simple receipts for the payments by cheques. They considered that there must be some arrangement under which any simplification of endorsement procedures could be made acceptable to those who still wish to have receipts on their cheques examined by their banks. The Committee of London Clearing Bankers has, after full consideration of the matter, agreed to help. That Committee has stated that while the banks could not undertake to examine receipts on cheques without limit as to number and regardless of circumstances, they would be willing in principle to continue this work by arrangement with customers in suitable cases.

7.78 WE CONSIDER that it is necessary to take care of the special requirements of institutions like the Life Insurance Corporation, and public agencies like Government Departments. Such arrangement, between bankers and such special type of customers, as envisaged by the Mocatta Committee in the U.K., may become necessary in our

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<sup>1</sup>"Paget's Law of Banking", Butterworths, 8th edn. (1972), pp. 216 and 217.

country as well consequent on our recommendations for provisions in India with reference to the necessity of examination of endorsements on order cheques for purposes of collection and payment. For solving the legal difficulty, as has been done in the U.K., the law has to be made clear to extend to bankers the protection they have with reference to cheques also with reference to their handling of cheques with receipt forms. The question of protection to bankers is considered in the Chapter on "Bankers' Protection".

## B. SUGGESTIONS FOR FRESH LEGISLATION

7.79 Under this category, we consider the following specific items :

- (i) penalising issue of cheque without sufficient funds;
- (ii) penal consequences for countermand of payment;
- (iii) setting up of a bureau to furnish information about bouncing of cheques;
- (iv) making it compulsory to effect payment above a certain amount only by crossed cheque or draft;
- (v) making it compulsory for merchants and traders to have banking accounts; and
- (vi) providing for wages and salaries above a specified amount to be credited to bank accounts.

### (1) ISSUE OF CHEQUE WITHOUT SUFFICIENT FUNDS

7.80 Practically in all the countries of the world, the dishonour of a cheque for insufficiency of funds available to the credit of the drawer may give rise to penal consequences. Differences exist only with regard to attendant circumstances to be established before the penal consequences are brought home to the drawer.

#### *Common Law*

7.81 Under the Common Law, it amounts to cheating when a person issues a cheque to another taking in good faith, with no reason to believe when he issued the cheque that the cheque would be honoured on presentment. But to bring home the requisite *mens rea*, it had always been a difficult task. As we see later, the U.K. no longer follows the Common Law position.

*Position in the U.K.*

7.82 In the U.K., the Common Law crime of cheating has been considered as not adequate. The Theft Act, 1968, has abolished the offence of cheating at Common Law except as regards offences relating to public revenue.<sup>1</sup> This change is based on the U.K. Criminal Law Revision Committee's Eighth Report, presented to Parliament in May 1966. The Theft Act has created the new offence of criminal deception; its requirements are much less than those required to establish "cheating" under section 415 of the Indian Penal Code.

7.83 Now, in the U.K., a person, who by any deception dishonestly obtains for himself or another *any pecuniary advantage*, is made liable to imprisonment for a term not exceeding five years. The House of Lords in the case of *Reg. v. Turner*<sup>2</sup> finally settled a controversy which prevailed over the correct interpretation of the provision and held that irrespective of whether a person actually receives a pecuniary advantage or not, in the circumstances mentioned in section 16(2) of the Theft Act he should be *deemed to have obtained such advantage*. Thus, when any debt or charge for which a person makes himself liable or may become liable (including one not legally enforceable) is reduced or in whole or in part *evaded or deferred*, he is deemed to have obtained a pecuniary advantage. Again, "gain" or "loss" is defined under the Theft Act as referring to gain or loss (whether permanent or temporary) in money or other property. "Gain" includes a gain by keeping what one has as well as a gain by getting what one has not, and "loss" includes a loss by not getting what one might get as well as loss by parting with what one has.<sup>3</sup> Deception for the purpose of sections 15 and 16 of the Theft Act means a deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intention of the person using the deception or any other person.

7.84 Hence, in the U.K., a person now renders himself criminally liable when he gives a cheque to another without sufficient balance in his account and thereby evades payment of a debt even though such evasion is only short-lived. Again, he is considered to deceive even when he does not know the actual state of affairs of his account and

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<sup>1</sup>Section 32(1)(a) of the Theft Act, 1968 of the U.K.

<sup>2</sup>(1973) 3 All E.R. 124=(1973) 3 W.L.R. 352.

<sup>3</sup>Section 34(2) of the Theft Act, 1968.

issues a cheque thoughtless of the consequences or without any reasonable cause to believe that his account has necessary funds for the banker to honour the instrument, since under such circumstances he may be considered as acting recklessly though not deliberately. In *Reg. v. Turner*, the House of Lords held that when a creditor refrains from enforcing payment, an inference that he has agreed to postpone the performance of the obligation is justified and the debtor could be considered as having evaded payment if he has given a worthless cheque.

#### *Position in the U.S.A.*

7.85 In the U.S.A., the Common Law crime of cheating has never been deemed broad enough to act as an effective legal deterrent for the issuance of cheques without funds.<sup>1</sup> This awareness has led to the passing of what are called the Bad Check laws in the U.S.A. It has been noticed that *the growth of cheque transactions in the U.S.A. has approximated very closely with the increase in the bad check legislation.*<sup>2</sup>

7.86 While varying in particulars, this legislation has been of fairly uniform character. While the intent to defraud was made an essential element of the offence, the task of the prosecutor was rendered less difficult by a subsequent provision making the uttering of the cheque *prima facie* evidence of such intent. Over the passing of the years, lacunae found in such legislation have been taken care of by appropriate legislative action. But, any apparently undue severity in the law has been ameliorated by providing that payment within a certain period is a bar to further prosecution; or alternatively; payment within such period has the effect of preventing a statutory presumption of fraudulent intent from operating. Under the bad check laws of the different States of the U.S.A., the maximum penalties range from six months to 15 years imprisonment.<sup>3</sup>

#### *Position in the Continent and in other countries*

7.87 In the Continent, the issuance of a cheque without adequate funds generally renders the drawer criminally liable. In *France*, the

<sup>1</sup>*R. v. Lara*, 6 T.R. 565 (1793); 2 Bishop Criminal Law, 9th edn. (1923) p. 147; 44 Harv. L. Rev. p. 451.

<sup>2</sup>44 Harv. L. Rev. p. 451, f.n. 12; (1925) 18 American Bankers' Association's Journal, p. 135.

<sup>3</sup>Farnsworth, "The Check—In France and in the United States", 36 Tulane Law Review (1962), p. 253.



penalty for writing a cheque in bad faith is the same as that for obtaining money by false pretence, *i.e.*, imprisonment up to 5 years and a fine. But in France, the law also provides that whenever an instrument is dishonoured and protest is made, *a copy of the protest should be placed on public record and another copy should be given to the public prosecutor.*

7.88 In *Belgium*, drawing and transfer of a cheque with insufficient funds are subject to penalties provided by the Criminal Code. A drawer who knowingly withdraws all or part of the necessary funds after drawing a cheque, or who fraudulently instructs the bank not to pay, can be criminally prosecuted.

7.89 Article 232a of the Criminal Code of Yugoslavia makes the "issuance and use of cheque without funds" a criminal offence. The offence is punishable by detention and if the offender acquires unlawful material benefit by such offence, he shall be punishable by detention for not less than three months or by imprisonment not exceeding five years. The Law on Cheques also prescribes certain fine as punishment for drawing or using an improperly made cheque or issuing a cheque without adequate cover.

7.90 *The Portuguese Law* establishes the penal sanction of imprisonment from six months to two years for the drawer of a cheque when its payment is refused for lack of cash during the period of presentation for payment (eight days) provided such refusal is duly stated.

7.91 In *Tunisia*, under its Commercial Code as recently amended, a drawer who issues a bad cheque is guilty of an offence described as a felony. The amount of fine to be imposed cannot be less than the amount for which the cheque was drawn or the balance required to cover the amount of the cheque.

7.92 In *Argentina*, a person drawing a worthless cheque is liable to imprisonment for a term of six months to four years if he does not pay the cheque within 24 hours after the receipt of notice of its dishonour.<sup>1</sup> In *Syria*, if anyone draws a cheque without previous funds or with insufficient funds, or if he withdraws funds from the bank in whole or in part after the drawing of the cheque, the penal sanctions are three months to two years imprisonment, separately or together with a fine.

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<sup>1</sup>"Digest of the Commercial Laws of the World—Commercial Laws of Argentina", Oceana Publications, New York (1972), page 33.

7.93 In *Colombia*, if a cheque which is not post-dated is not paid for—

- (i) lack of or insufficient funds,
- (ii) unjustified order of the drawer,
- (iii) account was cancelled or attached, or
- (iv) does not correspond to the drawer's account,

the drawer who issues such a cheque, and any other person who knowingly transfers such a cheque are liable to imprisonment from one to three years. The punishment is increased by one half if the amount of the cheque is over 10,000 pesos. If the person is a first offender, any criminal action taken on account of the cheque being returned for lack of or insufficient funds is halted by full payment of the cheque before the court of first instance passes the sentence.

7.94 We find that in Egypt, Haiti, Ecuador, Costa Rica and several other countries there are bad cheque laws intended to curb the evil of drawing cheques without adequate funds.

7.95 The extent to which the nations of the world consider the issue of a worthless cheque as a serious act of misdemeanour may be illustrated by citing the position in *Indonesia*, which perhaps is an extreme case. The Law No. 17 of 1964 enacted in Indonesia to prevent the circulation of "bad cheques" drawn by a person knowing that there are not sufficient funds in his bank account, considers the issue of a bad cheque as a serious economic crime, the maximum penalty for which is the *death penalty*, as in the case of "subversive actions", which seriously damages the country's economy by accelerating the circulation of money with inflationary results.<sup>1</sup> In *Peru*, it is now imperative for the bank to close a chequeing account when a cheque has been drawn on the relative account without having sufficient funds.

#### *Position in India*

7.96 Under section 415 of the Penal Code read with illustration (d) thereto, the issue of a bad cheque in certain circumstances is criminally punishable. Before the offence could be established, it has to be proved that by deception, which includes dishonest concealment, a

<sup>1</sup>"Digest of the Commercial Laws of the World—Commercial Laws of Indonesia", Oceana Publications, New York (1972), p. 59.

person fraudulently or dishonestly has either induced another to deliver to him a property or made him consent to the retention of the property by the person deceiving. The latter part of the definition of cheating, which deals with an intentional inducing of another to do or omit to do a certain thing, is not relevant here, since by giving a bad cheque the person giving may not be considered as causing damage or harm to body, mind, reputation or property of the person receiving.<sup>1</sup>

*Existing provisions totally inadequate*

7.97 Section 415 of the Penal Code is hopelessly inadequate to curb the evil resulting from the issue of bad cheques. The practical difficulties in proving a crime of cheating when a worthless cheque is passed on are formidable. The Survey regarding Cheques and Bills has established that dishonour of cheques for insufficiency of funds is the major cause and accounts for 53% of the total cheques returned unpaid.<sup>2</sup> Notwithstanding this position, the rarity of recourse to section 415 *per se* shows its utter inadequacy to curb the evil due to the issue of bad cheques. We may also indicate the following lacunae with reference to the coverage of this provision relating to cheating :

- (a) When a person gives a bad cheque in *repayment of an earlier debt*, he may not be considered as thereby inducing another to deliver to him, or consent for his retention of, any property.<sup>3</sup> When goods are delivered in anticipation of payment, say, for a period of one month, and a cheque is accepted in the month end, if the cheque bounces for lack of funds, "cheating" may not be established as the supplier of goods was not induced to deliver the goods by the issue of the bad cheque.
- (b) Again, when a bad cheque is given in payment of wages or other services rendered, there is neither delivery nor retention of property, and this may not amount to "cheating".
- (c) Now, before dishonesty could be established, there has to be a wrongful loss or wrongful gain, and such loss or gain can arise only when an *unlawful means* has been adopted. When a person gives a cheque, it is very difficult to consider that

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<sup>1</sup>1967 Ker. L.J. 804 ; 1967 Mad. L.J. (Cri.) 793.

<sup>2</sup>Actually the percentage goes as high as 82.9 in the rural areas and 69 in the urban areas on the current accounts (*vide* paragraphs 55 to 59 of Appendix VI).

<sup>3</sup>Ratra v. Ganesh Dass (1939) 41 Punj. L.R. 869; 41 Cri. L.J. 394.

he is employing any unlawful means, unless the facts are so extreme as to warrant a conclusion that he could have had no reasonable belief that he was passing a negotiable instrument of any real value.

- (d) There are no statutory inferences which are found in the provisions of other countries as to when a *prima facie* fraudulent or dishonest intention could be presumed.
- (e) There are also no provisions which would penalise a reckless issue of a cheque without reasonable cause to believe that the drawer had adequate funds in his account.
- (f) We do not also have adequate provisions giving any grace period within which a person whose cheque bounces can pay and thereby not only save his credit but also save the economic consequences flowing as a result of circulation of bad cheques.

7.98 Having regard to the position in other countries, the adverse effect on the economy when bad cheques are not severely dealt with and the damage to the cheque transfer system this causes, it is necessary to rectify the above lacunae found in the provisions at present applicable in India.

#### *Unjustified fear about bad cheque law*

7.99 Of late, in our country, quite a number of cheques, including some drawn by even reputed companies, have bounced. Partly this is attributed to the monetary measures the central bank of the country has initiated resulting in a certain amount of credit squeeze. Again, a fear has been voiced in certain quarters that the spreading of cheque habit may even be affected, since, in view of the serious consequences contemplated, people may be reluctant to issue cheques. We do not consider that such an apprehension is warranted.

#### *Publicity before enforcing bad cheque law*

7.100 Sufficient safeguards could be taken and innocent persons' interests amply protected if the measures we are recommending for the spreading of cheque habit including those with reference to the issue of bad cheques are brought into force *after a specified period, say, six months, from the date on which the provisions are enacted*. Within this period of six months, the central bank of the country and other

banks can adequately publicise the measures taken to popularise the cheque habit and the date from which such measures would come into force. Such a step would ensure that *bona fide* persons are not unnecessarily made to suffer.

*Bona fide cases not really affected*

7.101 It may sometimes happen that a person may draw against certain uncleared items and in some very rare cases the dishonour may be due to some inadvertent mistake of the bank in arriving at the balance available to meet the cheque. Though the general presumption<sup>1</sup> which we are suggesting later on could be raised in all cases, it operates only until the contrary is shown, and circumstances like the above would be considered as leading to a contrary inference.

*Economic advantages outweigh marginal hardships*

7.102 Moreover, the economic advantages far outweigh any possible marginal hardships that may occasion. The experience of the U.S.A. has shown that payments by the cheque transfer system have increased in the several States of the U.S.A. roughly approximating with the enactment of bad cheque laws. Bad cheque laws have helped in the popularity of cheques in the Continent. There is no reason to suppose that the results in our country would be otherwise. Now, bad cheque laws are a feature of practically all the developed and developing countries of the world. It may also have to be kept in view that *what we are recommending is only to fill certain gaps in the provisions at present applicable.*

*Persons liable for corporate action—Liability of corporations*

7.103 Section 18 of the Theft Act, 1968 of the U.K. deals with the liability of an officer of a corporate body in the above context. Where an offence is committed by a corporate body with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, *he as well as the body corporate* shall be guilty of that offence, and shall be liable to be proceeded against and punished accordingly. Where the affairs of a body corporate are managed by its members, the provision applies in relation to the acts and defaults of

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<sup>1</sup>Vide para 7.107 *infra*.

a member in connection with his functions of management as if he were a director of the body corporate. This provision "follows a form of provision commonly included in statutes where an offence is of a kind to be committed by bodies corporate and where it is desired to put the management under a positive obligation to prevent irregularities, if aware of them. Passive acquiescence does not, under the general law, make a person liable as a party to the offence, but there are clearly cases (of which this is one) where a director's responsibilities for his company require him to intervene to prevent fraud and where consent or connivance amounts to guilt."<sup>1</sup>

7.104 In the U.S.A., bad cheque laws have been enforced both against the corporation and against the corporate officer responsible for the issue of a bad cheque.<sup>2</sup> In *Esso Standard Inc. v. Udharam Bhagwandas Japanwalla*,<sup>3</sup> the Bombay High Court held that a company can be held liable for an offence involving proof of *mens rea* when such an offence is committed by its officer, provided it is proved as a matter of fact that in committing the offence the officer acted within the limits of his authority. But whether or not the officer acted within the scope of his authority, he cannot escape liability for the crime committed by him. Section 18 of the Theft Act of the U.K. is a salutary provision to ensure that those in charge of the management or otherwise responsible for the actions of the company are visited with consequences for the issuance of bad cheques.

*Obtaining pecuniary advantage by deception—a crime*

7.105 In the light of the foregoing, we consider that it is necessary for the penal law to deal with the crime of obtaining pecuniary advantage by deception or dishonest means.

*Offence should cover bouncing of cheques and allied matters*

7.106 The bad cheque laws of the U.S.A. and the Theft Act of the U.K. do not confine the offence of false pretence, or of obtaining pecuniary advantage by deception, as the case may be, only to cases of bouncing of cheques. In fact, the Theft Act provision has been held

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<sup>1</sup>"Current Law Statutes Annotated, 1968", Maxwell and Stevens, Commentary to section 18 of the Theft Act.

<sup>2</sup>"Bills and Notes—Checks—Criminal Liability of Corporate Officer under Bad Check Laws", 42 *Harv. L. Rev.* p. 824.

<sup>3</sup>LXXV Bom. L.R. 417.

applicable also to other types of cases of deception like that of using expired cheque-cards, etc.<sup>1</sup> The provision would cover also the case of a bill dishonoured in similar circumstances. In line with the provisions found in those countries, WE RECOMMEND that the new offence we are providing for should be a general one applicable to cover also other similar instances.

7.107 Issue of a bad cheque should *prima facie* raise an inference of bad faith and an allowance of grace period for immediate subsequent corrective action may lead to the displacement of such inference. Again, responsibility for corporate action should also be clearly provided for. Hence, WE RECOMMEND a provision on the following lines :

“(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction be liable to imprisonment for a term not exceeding five years;

*Explanations :*

- (i) Where any debt or charge for which a person makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred, he shall be deemed to have obtained a pecuniary advantage.
- (ii) As against the maker or drawer, the making, drawing, uttering or delivering by such maker or drawer of a cheque, bill or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in his possession or control, shall be *prima facie* evidence of knowledge of insufficient funds or credit with such drawee and of intent to obtain pecuniary advantage by deception :  
  
*Provided*, however, where such maker or drawer pays the holder of the instrument the amount due thereon within *five days* of his receiving notice in person or in writing that such instrument has not been paid, no such knowledge or intent shall be presumed.
- (iii) For the purposes of this section, ‘deception’ means any deception (whether deliberate or reckless) by words or

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<sup>1</sup>R. v. Kovacs, (1974) 1 All E.R. 1236.

conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or of any other person.

- (iv) For the purposes of this section, a person is said to act dishonestly by causing wrongful gain or wrongful loss whether such gain or loss of money or other property is temporary or permanent, and for this purpose—
  - (a) 'gain' includes a gain by keeping what one has, as well as a gain by getting what one has not; and
  - (b) 'loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has.
- (2) Where the person who has obtained the pecuniary advantage is a corporate body, any deception practised by, or with the consent or connivance of, any director, manager, secretary or other similar officer of the corporate body, or of a member acting in the course of his management of a corporate body, or of any person who was purporting to act in any such capacity, such person as also the corporate body shall be liable for the offence."

#### *Amendment to the Penal Code*

7.108 Then, there is the question as to whether the law should provide for dealing with such an offence by amending the Penal Code or by a special provision in the Negotiable Instruments Act. The appropriate place for such a law would be to amend the Penal Code for dealing with such an offence by inserting the same after section 415 of the Penal Code. WE RECOMMEND amendment of the Penal Code accordingly.

#### *Issue of bad cheque to be a cognisable offence*

7.109 WE RECOMMEND also that in order that the holder of a cheque is not put to heavy expenses and considerable loss of time and since it is considered as a serious economic crime, the obtaining of a pecuniary advantage by issuing a cheque with inadequate funds at credit should be made a cognisable offence, though it may be allowed to be compounded by the holder.



## (2) UNJUSTIFIABLE COUNTERMAND OF CHEQUES

7.110 Earlier we have said that the drawer should have the right to countermand a cheque only in two exceptional cases, viz., the loss or theft of the instrument and the insolvency of the holder, though a banker need not concern himself with the question whether the drawer was justified on the facts of any case to countermand the cheque.

7.111 Any unjustified countermand by the drawer should also be visited with penal consequences in the same way as the issuance of a cheque without funds or credit available to meet the cheque. Mere civil liability for damages (assuming damages could be proved) will not be a sufficient deterrent to guard against improper use by the drawer of his right to countermand. The position is similar in France. WE RECOMMEND the following provision for the purpose :

“The drawer of a cheque, who countermands payment thereon when he has no reasonable cause to believe that the cheque is either lost or stolen or that the holder of the instrument has either committed an act of insolvency or been adjudged an insolvent, shall be liable to imprisonment for a term not exceeding five years.

*Explanation (i)* : The burden of establishing that the drawer had reasonable grounds for believing that he was justified in countermanding the cheque on any one of the above grounds shall be on the drawer in any action against him instituted by the holder.

*Explanation (ii)* : Where the person who has countermanded payment is a corporate body, any unjustified countermand made by, or with the consent or connivance of, any director, manager, secretary or other similar officer of the corporate body, or of a member acting in the course of his management of a corporate body, or any person who was purporting to act in any such capacity, such person as also the corporate body shall be liable for the offence.”

7.112 WE RECOMMEND also that the above offence should be provided for by an amendment to the Penal Code by inserting it after the offence relating to obtaining pecuniary advantage by deception.

## (3) BUREAU TO DISSEMINATE INFORMATION ON UNPAID CHEQUES

7.113 France has found the necessity for the setting up of a bureau to disseminate information about unpaid cheques, and the drawers thereof, to supplement its other legal measures to curtail effectively the issue of cheques without adequate cover. The primary reasons which led to the setting up of the Central Card Index of Cheques by the Decree of 20th May 1955 modified by the Regulation of 28th September 1967 and the Law of 3rd January 1972, and which is managed by the Bank of France, were the following :

- (i) The authorities responsible to prosecute for swindling by the issue of a cheque without provision were not usually advised about the bouncing of cheques, unless the victim lodged a complaint, which was rare particularly when the cheque was for a small amount; and
- (ii) The bad faith of the drawer was difficult to prove and made the legislation to penalise the drawer for the issuance of a bad cheque difficult of application.

Hence, the Central Card Index of Cheques was set up in France to curb effectively the issue of a cheque without provision, which had to be discountenanced since "to issue a cheque without provision is in a way to create false money; to remit it in payment to a merchant is a dishonest action".<sup>1</sup>

*How the Central Card Index of Cheques functions in France*

7.114 The Central Card Index of Cheques managed by the Bank of France performs the following two prime functions :

- (i) collection of information about unpaid cheques; and
- (ii) dissemination of the information so collected.

*(a) Collection of information*

7.115 The drawee establishments (banks) are obliged to disclose to the Bureau, within four days from the date on which non-payment is verified, instances of cheques rejected for absence or insufficiency of provision. But they need not declare cheques unpaid on presentation but paid before the expiry of the period of four days. But this

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<sup>1</sup>Vide article in Quarterly Bulletin No. 4 of September 1972 of the Bank of France, on "The Central Card Index of Cheques".

grace period is only a matter of tolerance on the part of the banker and the Bureau would receive the information and index it even if the bank notifies such dishonour earlier. While the banks are not liable for any consequence arising from non-disclosure, the Bank of France is visited with the responsibility to ensure compliance by the banks. Since April 1969, the banks are also obliged to declare to the Bureau the closing of accounts effected on their initiative after repeated issue of cheques without provision.

7.116 The banks may, but are not obliged to, disclose to the Bureau instances of tardy payments of cheques, that is, cheques unpaid on first presentment but subsequently paid, the drawer having subsequently furnished or arranged for the necessary provision.

(b) *Dissemination of information*

7.117 The Bureau disseminates the information it has gathered about unpaid cheques to the two main bodies, namely, the banking profession and to the judicial authorities.

(i) *Information to the banking profession*

7.118 Before opening of an account (or as part of his credit-rating of a person), a banker may verify from the Bureau whether there is any recorded instance of the person having issued a cheque which has bounced for inadequacy of funds. If no such instance is recorded (or no dossier is maintained), the reply is sent by the Bureau on the same day. And if there are recorded instances during the past three years (that is the period of limitation in France for taking penal action for issue of dud cheques), the reply is sent within 48 hours.

7.119 The offices of the Bank of France distribute every month to the drawee-banks "*recapitulatory lists*" containing instances of unpaid cheques registered during the preceding month in the name of the drawers domiciled within the radius of action of the offices concerned. The Central Index similarly distributes *weekly lists* about such drawers in the Parisian region and in surrounding areas. The lists also reveal information about closing of accounts and partial and tardy payments. The Central Index distributes at the *national level* every month the list of persons against whom at least ten instances of such bouncing of cheques have been recorded.

7.120 All the information is furnished to the banks as confidential and as meant for their exclusive use.

(ii) Information to judicial authorities

7.121 The Official Markets, which are public bodies vested with responsibility and judicial authority to take appropriate legal action against the wrong-doers, are now advised systematically, since the Regulation of 28th September 1967, by the Bank of France about instances declared to the Central Card Index. The lists circulated to banks are also sent to these judicial authorities. The Public Prosecutor has access to this information.

*The Utility of the Bureau*

7.122 The Central Index avails itself of a computerized method. The branches of the Bank of France receive information from, and furnish information to, the banks within their respective areas. During the first quarter of 1972, the Central Index dealt with 1,60,000 requests for information. The Bank of France has noted that "in France for a long time cheque met with distrust from the public. If its use is now much spread it is known in our country a development rather late compared with certain foreign countries, especially the Anglo-Saxon countries".<sup>1</sup> It is noted that in spite of the very considerable increase both in the number and amount of transactions paid by cheques, the proportion of cheques dishonoured for want of funds has not increased. It is felt that it is to a large extent due to the measures taken for developing the use of cheques in France including the role played by the Central Card Index of Cheques.

7.123 The Card Index has been found to be beneficial for its preventive, repressive and curative roles. In its preventive role, the banker is helped in his assessment of a person whether or not he is creditworthy and it furnishes valuable information about the antecedents of a customer. In its repressive role, it clarifies and facilitates the process of law in dealing with those responsible for issue of bad cheques. In its curative role, thanks to the effect of intimidation and of education, a registration in the Card Index cannot fail to exert a healthy influence on certain drawers who may be more negligent than dishonest.

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<sup>1</sup>Vide article in Quarterly Bulletin No. 4 of September 1972 of the Bank of France, on "The Central Card Index of Cheques".

*The institution is also finding acceptance in other countries*

7.124 Of late, it has been found that the Bureau of Index of Unpaid Cheques, which is a novel institution set up in France, has been adopted in certain other countries as well. Articles 410 and 411 of the Commercial Code of Tunisia, as recently amended by Law No. 70/31 of July 3, 1971, establish that the bank refusing payment of a cheque due to total lack of funds or insufficient funds must give information thereof to the Central Bank of Tunisia, stating the reason why payment of the cheque has been refused. On the basis of this notice, the Central Bank may inform the District Attorney of the refusal of the payment of the cheque due to the lack of funds or insufficiency of funds and the drawer is liable for prosecution for having committed an offence described as felony.<sup>1</sup>

*Bureau of Index on Unpaid Cheques to be run by the Reserve Bank of India*

7.125 We consider that the measures we have recommended for curbing the issue of cheques without sufficient funds should be supplemented by a system which provides for the management by the central bank of the country, namely, the Reserve Bank of India, of a bureau for collecting and disseminating information on unpaid cheques, somewhat on the lines of the Central Card Index of Cheques maintained by the Bank of France. It is necessary to give legislative sanction for the furnishing of information by banks to the bureau and the dissemination of information by the bureau to banks and to investigating and judicial authorities. Such a bureau would be a very effective adjunct to the Credit Information Bureau now being operated by the Reserve Bank of India pursuant to the provisions contained in Chapter III-A of the Reserve Bank of India Act, 1934. WE RECOMMEND the setting up of a bureau to maintain an index of unpaid cheques in India on the above lines and that the legislation in this regard may find place as a separate chapter of the Reserve Bank of India Act, 1934.

*Identification of drawers*

7.126 About the actual operation of the bureau, it has been the experience in France that the professions and addresses of persons who issue bad cheques frequently change and it has been found necessary

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<sup>1</sup>"Digest of the Commercial Laws of the World—Commercial Laws of Tunisia", Oceana Publications, New York (1972).

to introduce a system of identification by numbers. Based on the Wanchoo Committee Report, Government of India have already introduced a system of identification by code numbers of all income-tax assesseees. It may be useful if persons opening chequeable accounts are required to disclose their income-tax code number to the banks concerned, which the banks may furnish to the bureau for identifying the drawers when their cheques bounce for inadequacy of funds. WE RECOMMEND that action may be taken accordingly. Somewhat a similar recommendation has already been made by the Wanchoo Committee in its report, where it has recommended that tax-payers should be required to quote in applications for bank drafts, mail transfers, telegraphic transfers, etc. their permanent account numbers when the transaction exceeds five thousand rupees.

(4) PAYMENTS ABOVE CERTAIN AMOUNTS TO BE BY CROSSED CHEQUE OR DRAFT

7.127 In France, the law makes it obligatory to accept a cheque for payment when the amount of the debt exceeds 1000 N.F. and whenever businessmen are involved. Section 40(A)(3) of the Income-tax Act requires that in order that an expenditure exceeding Rs. 2,500/- may qualify as an allowable item in computing the tax liability, the payment thereof has to be effected by means of a crossed cheque or crossed draft. Whether payments by indigenous negotiable instruments (hundis) should also be treated on par with payments effected by crossed cheques or crossed drafts, is a question to be considered while dealing with the codification of the practices and usages relating to indigenous negotiable instruments. WE CONSIDER that, subject to this reservation, the principle underlying section 40(A)(3) of the Income-tax Act is salutary and merits inclusion in the package of proposals for promotion of cheque habit.

(5) MERCHANTS AND TRADERS TO HAVE BANKING ACCOUNTS

7.128 In France, it is necessary for merchants and traders to have bank accounts. Though it sounds obvious that a merchant or trader should have a bank account, there may be many, especially cases of proprietary concerns which do not have chequeable accounts for a variety of reasons and not all of them *bona fide*. Having regard to commercial convenience and in public interest, WE RECOMMEND that it is necessary to provide statutorily for the compulsory maintenance of bank accounts by merchants and traders.

**(6) PAYMENT OF WAGES BY CHEQUE**

7.129 Now in most countries payments of wages are effected either by crossed cheques or by credit to the bank accounts of the employees. There are several countries in which this is required to be done pursuant to the requirements of law. Now in the U.K., the restrictions imposed by the Truck Act, 1831, the Hosiery Manufacture (Wages) Act, 1874 and the Stannaries Act, 1887, which required payment of wages in cash, have been removed by the Payment of Wages Act, 1960, which has authorised payment of wages by credit to a bank account or payment by postal order, money order or cheque. This permits the payment of the wages by direct transfer from the employer's account to the account of the employee. Though now there are no restrictions in India on the employees, being paid by cheques, or by their bank accounts being credited, it is necessary to provide by more positive measures for payment of salaries or wages by cheque or bank credit.

7.130 There are several merits in providing for payment of wages either by a credit to the employee's account or by issuing him a crossed cheque or draft. This measure would, in turn, facilitate the settlement of their personal transactions by the employees by means of cheques. This also has the merit of providing an involuntary saving for the employees concerned. This will also result in considerable saving in the foreign exchange necessary for importing the paper required for printing currency notes.

7.131 Hence, WE RECOMMEND that all payments of wages and salaries above Rs. 1,000/- should be compulsorily required to be made either by a credit to the bank accounts of the employees or by means of crossed cheques or drafts.

**TIME LIMIT FOR IMPLEMENTING MEASURES FOR SPREADING CHEQUE HABIT**

7.132 We have recommended several measures, the cumulative impact of which would be to ensure the safety, security and ready acceptability of cheques, and the coverage by the banking system to the maximum possible extent of all the financial transactions. But before these measures could be enforced, a period of time should be allowed for educating bankers, traders and the members of the public. *In our view*, a period of six months to one year from the date of the enactment may be allowed before the relative provisions are brought into force. This would ensure that honest and innocent persons are not affected by the measures.

**PUBLICITY FOR THE MEASURES**

7.133 Since it is necessary to acquaint bankers, merchants and traders and the public at large with the measures that are contemplated for the spreading of the cheque habit in the larger interests of the country's economy, banks may be required *to print in the inner cover of the cheque books* some important details of the measures introduced with reference to cheques. It would also be considerably useful and beneficial if public is made aware of these measures by the Reserve Bank of India by the issue of special pamphlets, bulletins and press releases specially prepared for this purpose. The Reserve Bank should also arrange for appropriate training programmes to impart special instructions to officers and other employees of banks to acquaint them with the new measures.



## CHAPTER 8

### BANKER'S DRAFTS

In banking parlance, "banker's drafts" cover both inter-bank and inter-branch instruments payable on demand. Nevertheless, their legal incidences are not the same. While the inter-bank instruments strictly qualify as cheques, the inter-branch items are specially dealt with for purposes of certain provisions of the NIA and with reference to other matters the treatment to be accorded to them is not quite clear. While there are some general problems regarding "banker's drafts", with reference to the second category of banker's drafts as understood in the banking parlance, there is need for statutory clarification as regards their legal status and their incidences on the rights and liabilities of those who handle them. Hence, to facilitate discussion, wherever we consider inter-bank and inter-branch items together, we refer to them as "banker's drafts", and when we consider *only* the inter-branch items, we refer to them merely as "drafts" consistent with the definition found in section 85A of the NIA.

#### A. BANKER'S DRAFTS

8.2 One common feature, alike to both inter-bank and inter-branch instruments, is the purpose for which the instruments are ordinarily employed. They serve as media for the remittance of funds. But this is not a function peculiar to drafts. The bill, since its origin, has been fulfilling this role. While a bill may circulate outside the banking system, the employment of the banking system is a necessary incident of a banker's draft. Ordinarily a bill may reflect a credit or a commercial transaction. But drafts usually represent the "purchase" of the instrument by a *remitter*.

8.3 There are a few aspects which are common to both categories of banker's drafts. The primary question relates to the nature of the transaction of purchase and its legal incidences.

#### PURCHASE OF BANKER'S DRAFT—ARE THERE ANY IMPLIED TERMS ?

8.4 The main question here is whether the purchase of a banker's draft justifies the raising of an inference of any implied term which may

be inconsistent with the negotiable character of the instrument. The discussion by Raman Nayar, J. in the Palai Central Bank Ltd. (in liquidation) case<sup>1</sup> is apposite to consider how the problem arises. As he said :

“There is no denying that a demand draft is nothing more or less than a negotiable instrument governed by the provisions of the Negotiable Instruments Act; and on the face of it, the obligations it creates are nothing more than ordinary debts. The question is whether there is anything more to the transaction, which is technically called the purchase of a draft, than what appears on the face of the draft, whether the draft embodies the whole of the contract between the parties, or whether usage, in other words, the established banking practice, implies something more so that the contract is really one for the carriage of money from one place to another.”

#### GENERAL POSITION

8.5 After considering the decisions on the point, he summed up the general position :

“...According to the established banking practice, the contract involved in the purchase of a draft is what appears on the face of the instrument and nothing more, in other words, that the terms of the contract are fully embodied in the draft, that the custom of the trade does not imply a contract for the carriage of money from one place to another, and that, therefore, the relationship created is that of an ordinary debtor and creditor.”

#### COULD BE SPECIAL CONTRACT FOR THE CARRIAGE OF MONEY

8.6 Nevertheless, as Raman Nayar, J., pointed out, all the decisions—“recognise the possibility of a special contract for the carriage of the money, the only written evidence whereof is the draft. In such a case, the draft would not embody the terms of the contract, and whether the special contract be express or implied, sections 91 and 92 of the Evidence Act would be no bar to its proof.”

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<sup>1</sup>A.I.R. 1962 Kerala 210 ; Raman Nayar, J. has used the expression “draft” or “demand draft” to refer to “banker’s draft”, that is, to cover both inter-bank and inter-branch items.

### IS EXCEPTION THE GENERAL RULE ?

8.7 Nevertheless, Raman Nayar, J., held that the exceptional position envisaged is ordinarily the rule under the Indian banking practice. He said that—

“According to the Indian banking practice, the sole purpose for which a person purchases a draft and the bank accepts his money is for the transmission of the money to some other place so that, whatever the draft itself might say, a special contract for the carriage of the money as contemplated by the decisions is necessarily implied in the transaction by reason of the established usage of the trade.”

### THE U.K. LAW IS DIFFERENT

8.8 But Raman Nayar, J., also noted that in the U.K.—

“Even payment to a bank with an express instruction to remit the money to a particular place for a particular purpose is regarded as creating no trust or agency and as nothing more than a deposit with promise to pay at the other end.”

Thus, in the U.K., by the purchase of a banker's draft, no special contract for the carriage of money as such is recognised.

### THE U.S.A. POSITION

8.9 While considering the purchaser's capacity as holder of the instrument in Chapter 4, we have referred to the position in the U.S.A. As may be seen therefrom, while the Law Merchant has recognised the purchaser's title to the instrument and the UCC approximates his position to that of the payee, the transaction is not regarded in the U.S.A. as a contract for the carriage of money.

8.10 While with reference to ordinary mercantile contracts, certain terms may be implied by usage of trade which may be established by collateral evidence, notwithstanding the fact that the contract has been reduced to writing,<sup>1</sup> to permit such usages being set up with reference to negotiable instrument contracts would run counter to the policy

<sup>1</sup>Please see also *in re Barned's Banking Co. Ltd.*, (1870) 39 Law J. Rep. (NS. Chanc. 635) and Scott on Trusts, 2nd edn. Vol. IV, paragraph 532.

<sup>2</sup>See also Salmond on Jurisprudence, 11th edn. p. 236; and Halsbury Vol. VIII, 3rd edn. p. 121.

of the negotiable instruments law. As pointed out in the Noakhali Union Bank's case,<sup>1</sup> "if the draft is negotiable it is difficult to see how there can be an agreement that the money represented by the draft would be paid to a specified person or would be spent in a specified manner".

8.11 We do not think it is correct<sup>2</sup> to regard a negotiable instrument as a form of receipt given for the transmission of money in the case of a purchase of a banker's draft. The fact that the object of the purchase is to remit the money should not affect this question. As we have earlier referred to, it is a recognised purpose throughout the world to use a negotiable instrument as medium for the transmission of funds. Nevertheless, the issue of the instrument is not considered as thereby creating a contract for the carriage of money. We do not also consider it correct to regard the purchase of a draft as in no way different from a mail or a telegraphic transfer where there is no question of the issue of any instrument. The fact that an instrument is negotiable does make a difference. It will not further international unification, if the purchase of a banker's draft can be allowed to be shown as attended with other implied usages not expressed in the instrument.

8.12 Hence, there does not seem to be much justification to sustain the distinction so far maintained by judicial decisions in India between the purchase of a banker's draft for the purpose of transmission, and purchase of a banker's draft ordinarily. Aggarwal has also pointed out with reference to the decision of Achhru Ram, J., in the case of the New Bank of India Ltd., Amritsar<sup>3</sup> that this distinction seems to have been originally made and sustained out of sympathy for displaced persons.<sup>4</sup> Aggarwal has pointed out that the holder of a

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<sup>1</sup>(1950) 54 Cal. W.N. 744.

<sup>2</sup>Raman Nayar, J. observed that as the evidence shows if "the real agreement is for the transmission of money, I do not follow why the token or the receipt given for the money should not take the form of a negotiable instrument, which the payee can, at his will, endorse for collection or for value (in which latter case, the endorsement transfers title to the money covered by the instrument), according to his convenience. That the draft is negotiable, that it can as it were be bought and sold, does not necessarily mean that the draft itself represents the value of the money, for what is bought and sold is the title to the money covered by the draft."

<sup>3</sup>A.I.R. 1949 E.P. 373.

<sup>4</sup>Aggarwal, C. L., "The Law of Hundis and Negotiable Instruments", Eastern Book Company, 9th edn. (1972), p. 22.

banker's draft is a creditor and his remedy is on the banker's draft and his rights are defined by the NIA. The holder of the banker's draft cannot claim the rights of a holder of a bill and the additional right to get the amount of the banker's draft in preference to the general body of creditors.<sup>1</sup> We consider that this is the correct view of the matter. Since the entire question is shrouded by conflicting judicial dicta, the position needs statutory elucidation.

8.13 Hence, WE RECOMMEND a specific provision in the Act to the effect that when a banker's draft (that is, an order to pay money, drawn either by one bank on another, or one office of a bank upon another office of the same bank, for a sum of money payable to order on demand) is purchased, no usage or practice inconsistent with the terms of the instrument shall be allowed to be set up.

#### RIGHT TO OBTAIN DUPLICATE OF BANKER'S DRAFT

8.14 Banks have to consider frequently claims for duplicate of a banker's draft from the purchaser, or the person claiming as "holder". The person who purchases the banker's draft, until he delivers the same to the named payee (if the banker's draft is not drawn or made in his own favour), is not the party named to whom the bank, whether as drawer or as drawee, is obliged under the banker's draft. But it is the purchaser, and not the named payee, who may be the person better known to the bank since it was at his instance the banker's draft has been issued.

8.15 But the right to obtain a duplicate of the banker's draft is a right of the person who was entitled to the instrument as "holder" thereof when it was lost. Since we have earlier recommended that the definition of "holder" should include also the purchaser of the instrument, banks may not have much difficulty in recognising the claim of the purchaser either for issue of a duplicate of the banker's draft, or for effecting payment to him of the amount covered by the instrument, when they are satisfied about the claim, after obtaining suitable indemnity.

8.16 The question whether title to the banker's draft remains with the purchaser or whether it has passed to the named payee rests *only* on proof of delivery to the named payee, actual or constructive. Essentially, it is a question of fact. No bank can ordinarily recognise a

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<sup>1</sup>Aggarwal, C. L., "The Law of Hundis and Negotiable Instruments", Eastern Book Company, 9th edn. (1972), p. 22.

person's claim on the instrument without the production of the instrument, and when he claims the rights of a holder of a lost instrument, his capacity as such *vis-a-vis* the instrument has to be adequately established.

#### PRESENT BANKING PRACTICE

8.17 We understand that the duplicate of a banker's draft is now issued by banks *only* on the application of the purchaser thereof. The IBA has pointed out that though this practice is not entirely consistent with the requirements of law, it may be justified on the ground that without the intervention of the purchaser it would be difficult for the bank to consider any person as the lawful claimant for a duplicate of a lost banker's draft.

8.18 No bank can be compelled to issue a duplicate of a lost instrument without proof of non-delivery to the named payee (which can only be circumstantial) if the claim is by the purchaser of the draft, and proof of delivery and identification if the claim is by a person purporting to be the named payee. If in the latter case the purchaser refuses to support the claim of the named payee, as happened in the *State Bank of India v. Jyoti Ranjan Mazumdar*,<sup>1</sup> that *per se* should not affect the merits of the claim by the named payee. Otherwise, whenever a holder loses a banker's draft, he will have unnecessarily to be placed at the mercy of the purchaser to establish his lawful rights. WE CONSIDER that the view taken by the Calcutta High Court that if the holder of a lost banker's draft is able to establish adequately his capacity as such, his claim for a duplicate thereof should not be denied merely for the reason that the purchaser refused to co-operate with such holder in approaching the bank for obtaining a duplicate, is sound.

#### CANCELLATION OF BANKER'S DRAFT

8.19 Considerations similar to those we have discussed earlier with reference to the issue of a duplicate of a banker's draft, would arise with reference to a claim for cancellation thereof. Generally, the claim will only be by or on behalf of the purchaser. The bank may have to be satisfied about non-delivery of the instrument to the named payee. But, in the absence of any suspicious circumstances, as pointed out by the Allahabad High Court in *S. N. Shukla's case*,<sup>2</sup> the production

<sup>1</sup>A.I.R. 1970 Cal. 503.

<sup>2</sup>A.I.R. 1960 Allahabad 238.

of the instrument itself would be the best evidence of non-delivery. But the bank would not be justified to cancel the draft or countermand payment thereof after it has been delivered to the named payee.<sup>1</sup>

## B. "DRAFT"—AN INTER-BRANCH INSTRUMENT

8.20 "Draft" is defined in section 85A of the NIA as "an order to pay money, drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand". It is not clear whether this definition has created a separate class of negotiable instruments under the NIA, or an instrument of this description is specially referred to only for bringing it within certain provisions of the NIA which give the bankers a discharge when they handle such items in their ordinary course of business.

8.21 Section 85A was enacted "to make it clear that it affords protection to bankers in India against forged or unauthorised indorsements on demand drafts, drawn by one branch of a bank upon another branch of the same bank".<sup>2</sup> Since section 85A was concerned only with the protection to paying bankers, in Sanyasilingam's case<sup>3</sup> the Bombay High Court held that collecting banker is not entitled to similar protection with reference to drafts; this protection was given by Amendment Act of 1947 which introduced section 131A. Now whether the other provisions of the NIA apply to draft, and if so, whether it is to be regarded as a bill or note or cheque are not clear.

8.22 In Haji Sheikh Hasanoo's case,<sup>4</sup> Mudholkar, J., held that only certain provisions of the NIA which are expressly made applicable to drafts would apply to them. In State Bank of India v. Jyoti Ranjan Mazumdar,<sup>5</sup> the Calcutta High Court held that draft is a bill and the other provisions of the NIA would apply to draft on this basis. The Law Commission had recommended the extension of its cheque chapter provisions to drafts, and the IBA had pointed out that all the cheque-chapter provisions cannot extend to drafts. It is necessary to clarify

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<sup>1</sup>Please see Malik Barkat Ali v. The Central Board, Imperial Bank of India, Calcutta, through the Imperial Bank of India, Lahore and another, A.I.R. 1945 Lahore 213.

<sup>2</sup>Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 536.

<sup>3</sup>A.I.R. 1948 Bom. 1.

<sup>4</sup>A.I.R. 1959 Bom. 267.

<sup>5</sup>A.I.R. 1970 Cal. 503.

the nature of drafts and clearly specify the provisions of the Act which are applicable thereto.

8.23 It is said that according to the present banking practice in India, drafts are to be classified as "cheques", though the practice is different in the U.K. and the U.S.A. As we see later on, there is no valid reason for the difference in the law and practice in India. In the U.K. and in the U.S.A., an inter-branch item of the nature specified in section 85A of the NIA is classified only as a note. What is really important is that whether viewed as a cheque or as a note, it is obvious that certain special provisions have to be made with reference to drafts.

8.24 In Gordon's case,<sup>1</sup> drafts drawn by one branch on another branch or on the head office of the same bank or *vice versa* were held as neither cheques nor bills, there being no distinct drawer and drawee. Byles has said that a bill drawn by a banking company in one place on the same banking company in another place may be treated as a note.<sup>2</sup> In the U.S.A., when the drawer and the drawee are the same person, the instrument takes effect as a note. Falconbridge has said that a "bank cheque" or banker's draft, *i.e.*, a document in the form of a cheque drawn by the bank upon itself or by one branch of a bank upon another is, of course, not a cheque.<sup>3</sup>

8.25 Since the Geneva Conventions assimilate notes with bills and consider cheques as a separate class of instruments, unlike in the U.K., India, other Commonwealth countries and the U.S.A., where cheque is considered as a specie of bill, the provisions of the Geneva Conventions do not help us in the matter.

8.26 Whether the inter-branch instrument issued by a bank is treated as a cheque or a note, it is clear that all the provisions applicable to cheques or notes cannot be extended to such an instrument. In fact, when the Law Commission had recommended the application of the cheque chapter provisions to drafts, the IBA had pointed out that the reference to provisions like countermanding, etc., will not be appropriate with reference to drafts. Since no third person is involved and

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<sup>1</sup>1903 A. C. 240. The contrary decision in *Ross v. London County Westminster & Parrs Bank Ltd.* (1919) 1 K.B. 678, is now admittedly wrong—see "Paget's Law of Banking", Butterworths, 8th edn., p. 271.

<sup>2</sup>"Byles on Bills of Exchange", Sweet & Maxwell, 23rd edn., p. 29.

<sup>3</sup>"Falconbridge on Banking and Bills of Exchange", Canada Law Book Ltd., 7th edn. (1969), p. 857.



both the drawer and the drawee are the same, the obligation is on the bank to pay the draft, and the liability of the maker of a note and that of the drawer of the draft are not in any way different. The draft is on all fours in its legal effect with a promissory note payable on demand at a specified place. Since it is a question of basic liability and not merely a matter as to where the instrument is payable, the fact that for certain procedural requirements as to the performance of the obligation (*vide R. v. Lovitt's case*) branches of the same bank are considered as distinct should not affect this question. What the banker really needs with reference to drafts is the application of certain special provisions which do not now extend to notes, to facilitate the issue and handling of such instruments by him. This is the method that has been adopted in the U.K., and we consider that it is most appropriate for our country.

#### EXTENSION OF SECTION 84A OF THE NIA TO DRAFTS

8.27 In Sheikh Hasanoo's case, section 84 of the NIA was held as inapplicable to drafts. But this was with reference to the discharge of the purchaser and would not have helped him even if section 84 applies, since "the drawer or person on whose account" the draft is drawn is the bank. Hence, it may not be appropriate to extend a provision on the lines of section 84 of the NIA to drafts. But this would not affect the purchaser's position since, under section 64 read with section 74 of the NIA, the "purchaser", who would be a holder until delivery, as per our earlier recommendation, would be the "other party" who would be discharged by the failure of the actual holder to present the instrument for payment within a reasonable time.

#### EXTENSION OF OTHER PROVISIONS

8.28 The special provisions that have to be extended with reference to draft, when understood as a note, would relate to the following:

- (i) provisions relating to crossing ;
- (ii) the extension of the provisions granting protection to the paying and collecting bankers in handling drafts—the crossing and protection provisions are now found in sections 85A and 131A of the NIA, and this position will have to be continued ;
- (iii) the exemption from stamp duty to ensure that drafts are not made liable to duty as demand promissory notes.

8.29 In the light of the foregoing, WE RECOMMEND a special provision with reference to drafts on the following lines :

- (i) "draft" *i.e.*, an order to pay money, drawn by one office of a bank upon another office of the same bank, for a sum of money payable to order on demand, shall be regarded as a note ;
- (ii) the provisions relating to crossing and the provisions relating to banker's protection shall extend to drafts ;
- (iii) notwithstanding anything contained in the stamp law for the time being in force, drafts shall not be liable for any stamp duty.

## CHAPTER 9

### BANKERS' PROTECTION

Having regard to the volume of cheque transactions and the expedition with which they have to be handled, the special role of banks in the cheque transfer system has been recognised both in the U.K. and in our country. From time to time the extent of protection available has been revised with reference to the actual requirements.<sup>1</sup> As banks undertake and play a more positive and active role in the fulfilment of the country's socio-economic objectives and venture out of their conventional and narrow confines, it is but natural that the range of protection to them requires to be broadened in content and coverage to facilitate banks to effectively perform the special tasks assigned to them.

9.2 The comparative study of the position prevailing in other countries *vis-a-vis* the position in our country also favours the recognition of the special role banks play, and points to the need for appropriate provisions applicable to them to facilitate expeditious and effective functioning of the country's cheque transfer system. The results of the Survey, which the National Institute of Bank Management has conducted in collaboration with the Committee, have also come out clearly in favour of the need for such provisions. Again, our study has also brought out the gap in the applicable protective provisions of our law with reference to instruments analogous to cheques.

#### *Rationale of the Protection*

9.3 Briefly stated, the rationale of the protection to the paying and collecting bankers handling cheques and other allied items could be thus explained. While the paying banker knows the state of, and takes the responsibility for the authenticity of the signature of, the drawer, and the collecting banker similarly may know the holder for whose

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<sup>1</sup>Please see the following Acts amending the NIA:—

- (i) Act 18 of 1922, section 2 ;
- (ii) Act 25 of 1930, section 2 ;
- (iii) Act 17 of 1934, section 2 ; and
- (iv) Act 33 of 1947, section 2.

account he collects, the former cannot be presumed to have any special knowledge about the payee or other holders of the instrument and the latter about the drawer and the previous holders of the instrument. Again, the banker, collecting in good faith an instrument to the credit of an ostensible payee or endorsee, should not be saddled with responsibility if his constituent's title is subsequently found to be defective or wanting. Responsibility when it attaches can only relate to areas in which in his respective roles the banker has means, access and duty to undertake such responsibility. We have studied the position that prevails in this regard in the U.K., in the Continent and the U.S.A. and have suggested in this chapter the broadening and refashioning of the protective provisions applicable to bankers in India under the negotiable instruments law.

#### *Standard of Care and Changes in Banking Practice*

9.4. As Diplock, L. J., pointed out in *Marfani & Co. Ltd. v. Midland Bank Ltd.*,<sup>1</sup> with the spread of banking facilities, the banking practices also change and the standard of care required of bankers should at any given point of time be decided with reference to established banking practices. We should be hesitant before condemning as negligent a practice generally adopted by bankers.

#### *Review undertaken in the U.K.*

9.5 A major development as regards the nature of banking practices was achieved in the U.K. by the Cheques Act, 1957. This was preceded by an extensive review of the statutory safeguards available to paying and collecting bankers acting in the course of their business in good faith and without negligence. Such a review was necessitated by the awareness amongst bankers and others concerned with the banking profession of the need to rationalise procedures and in the process to eliminate avoidable delays in the collection and payment of cheques and instruments allied to cheques.

#### *Magnitude of the Problem*

9.6 This awareness was the natural outgrowth of the stupendous increase in the number and value of the cheques handled over the years and the business exigencies of the banking world. "Cheques have to be honoured or rejected promptly. This is the basis on which clearing

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<sup>1</sup>(1968) 1 W.L.R. 956.

houses function. ....The banker does not have the time, nor necessary experience, to enable him to enquire into or investigate the regularity of acts of agents appointed by the customer."<sup>1</sup>

9.7 The extent of growth in the number of offices of commercial banks and the increase in the number and value of cheques handled by banks for more than a decade past (see table below) give sufficient indication about the magnitude of the problem and of the consequent need for clear statutory provisions to facilitate utmost expedition in the handling of cheques by banks.

*Increase in Commercial Bank Offices and the Increase in the Handling of Cheques\**

	1960-61	1973-74	Percentage of increase
(1) No. of offices of commercial banks . . . . .	4,993	16,700	234.5
(2) Number of cheques cleared . . . . .	691 lakhs	1,782 lakhs	157.9
(3) Amount of cheques cleared . . . . .	Rs.14,478 crores	Rs. 71,600 crores	394.5

It is a reasonable assumption that in the years to come this rate of increase will not only be maintained but will go up. With the emphasis on the spread of banking and with the introduction of the special measures we have recommended in the Cheques Chapter for the spread of cheque habit, we have to consider adequate provisions for the protection of banks in India. In this context, provisions on the lines of the U.K. Cheques Act merit special consideration.

9.8 When the Law Commission considered the need for special protective provisions on the lines of the Cheques Act of the U.K. for the bankers in India, there was not this phenomenal increase in the spread of the banking system. When the Law Commission reported on the

<sup>1</sup>Ellinger, P. E., Prof., "Collection and Payment of Cheques—The Current Law and the Need for a Reform", article based on a paper presented at the A.U.L.S.A. Conference in Wellington on August 18, 1969, and published in University of Western Australia Law Review, December 1969, pp. 101-145.

\*Tables Nos. 12, 44 and 52 of the Reserve Bank of India Bulletin, September 1974.

revision of the NIA, the U.K. Cheques Act had just been brought into force and hardly any experience gained on its working. The Law Commission had favoured the deferment of the question as to whether the banks in India should have protection on the lines of the U.K. Cheques Act, pending knowledge on the experience in the U.K. on the working of the Cheques Act provisions. But banks in India asked for similar provisions soon after the Law Commission's Report. Before the Banking Laws Committee, the IBA and the banks individually have made a strong plea for provisions analogous to the provisions of the U.K. Cheques Act, based on the developmental role the bankers have to play and the consequential additional risks they are to assume.

### *Cheques Act experience in the U.K.*

9.9 Before we go into the specific provisions to be considered with reference to the protection of paying and collecting bankers, it is appropriate to refer here briefly to the experience gained in the U.K. on the working of the Cheques Act. We have had the benefit of the opinion of experts like Mr. Maurice Megrah, editor of *Paget*. Mr. Megrah has advised:

“The U.K. Cheques Act of 1957 was designed to avoid the necessity for the indorsement of cheques and *has succeeded in its purpose*. If the use of cheques in India is comparable with their use in the United Kingdom, I would think that a similar legislation in India would be useful.”

The rate of increase in chequeable deposits in our country for over a decade, the increase in the number and volume of cheque transactions in the recent past and their increase that could naturally be expected as a result of implementation of the special measures this Committee is recommending for spreading cheque habit would, in the Committee's view, make the use of cheques in our country comparable to their use in the U.K.

### *Principles of the Cheques Act adopted in other countries*

9.10 Not only that the provisions of the Cheques Act have been found to be considerably beneficial in the U.K., but the value of the principles underlying this legislation has also been recognised in other Commonwealth countries. In this regard, New Zealand has adopted an identical position with reference to law and practice as prevailing in the U.K. In Australia, the Australian Bills of Exchange Committee (1964) recommended, after an expert study of the position, statutory

provisions for Australia based on the Cheques Act provisions. This has led to the enactment of sections 88B to 88E of the Bills of Exchange Act, 1909-1971 of the Commonwealth of Australia.

#### *U.S.A. and Geneva Conventions countries*

9.11 Though in the U.S.A. there are no such special provisions in the negotiable instruments law to safeguard the collecting and paying bankers, Byles has said that by special contract or local legislation, the bankers could protect their position.<sup>1</sup> Under the Geneva Conventions, which have been adopted by the majority of the nations of the world, the drawee who pays an endorsable cheque is bound only to verify the regularity of the series of endorsements but not to go into the validity of the endorsements; this confers a protection to banks even when they pay instruments with *forged endorsements*, so long as the endorsements are regular on their face.

#### *Need for full scale review*

9.12 The general need for special provisions to banks in their handling of negotiable instruments, particularly cheques, is obvious. The need for such provisions has been recognised in our country even when the NIA was enacted, and the scope and content of the protection have been gradually amplified by several piecemeal and ad hoc legislative measures, namely, by the Negotiable Instruments (Amendment) Acts of the years 1922, 1930, 1934 and 1947. But the increase in the volume of business, the need for expedition and the necessity to effect economy in banking business have necessitated a full scale review of the adequacy of the extent of protection available to banks.

9.13 Nevertheless, in certain areas, specially in the banks handling of items allied to cheques, we find that the banks in India are placed at considerable disadvantage *vis-a-vis* their counterparts in the U.K. Moreover, the review by the Mocatta Committee prior to the enactment of the Cheques Act in the U.K. and the consideration of this question by the Australian Bills of Exchange Committee have shown the need for extending the scope of the protection available to banks. But, before we proceed further, we have to consider persons who can qualify as "bankers" and claim the benefits of the special privileges given to bankers under the negotiable instruments law.

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<sup>1</sup>"Byles on Bills of Exchange", Sweet & Maxwell, 23rd edn. (1972), p. 254.

*"Banker"—Definition*

9.14 Banker may be the "drawee", or the agent of the "payee", or "indorsee" for collection of the instrument, and where he has paid value therefor, he may also claim as a "holder for value". Under the law relating to negotiable instruments, the banker has already certain privileges and we are recommending the extension of the scope of the privileges. The bankers have a special role to aid actively in the fulfilment of the country's socio-economic objectives. Thus, the role and importance of banker are considerably enhanced. In view of this, there should not be any ambiguity or doubt as to whether or not a person qualifies as a "banker". The present definition in the NIA, as has been pointed out often, begs the question. Hence, it is necessary to define the expression "banker" in more positive terms.

9.15 Lord Denning, M.R., in *United Dominions Trust Ltd. v. Kirkwood*,<sup>1</sup> while pointing out that bankers are "an exclusive circle to which entry is limited", regretted that the British Parliament has not defined the expression "banker". There is no satisfactory definition of "banker" in the NIA, though the amendment in 1955 made specific mention of the Post Office Savings Banks.

*Appropriateness of the B.R. Act definition*

9.16 In 1948, the Constituent Assembly (Legislative) approved the definitions of "banking" and "banking company" while enacting the Banking Companies Act, 1949 (now renamed as the Banking Regulation Act, 1949) on the following lines:

"'banking' means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise".

"'banking company' means any company which transacts the business of banking in India:

*Explanation:* Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause".

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<sup>1</sup>(1966) 1 All E.R. 968.



Under the NIA, a person acting as a "banker" is a "banker", whether or not he is a "company". The Law Commission had suggested that "banking" be defined in the Act on the lines on which it has been defined in the Banking Regulation Act.

9.17 The adequacy of the definition of "banking" as set out in the Banking Regulation Act has recently been reviewed by the Banking Commission. The Banking Commission analysed the scope of the definition and indicated that *it covers acceptance of both chequeable and non-chequeable deposits*. That Commission drew attention to section 49A of the Banking Regulation Act, which precludes the acceptance of chequeable deposits by any person, whether a company or not, if such person is not specifically notified in this behalf by the Central Government on the recommendation of the Reserve Bank of India. While the Banking Commission suggested defining "banking" as the acceptance of deposits from the members of the public, they also suggested a scheme of banking regulation which would *inter alia*, confine the acceptance of chequeable deposits to companies or other corporate bodies which are licensed by the Reserve Bank. They also recommended that the expression "bank", "banker" or "banking" should be allowed to be used only by a person authorised to accept chequeable deposits.

9.18 Having regard to the economic and legal significance of acceptance of deposits from the public and the aim as regards protection of depositors, it is natural that "banking" for the purpose of banking regulation should be defined in the manner recommended by the Banking Commission. However, though for the scheme of "banking regulation" even those accepting non-chequeable deposits may be regarded as doing "banking" (as the definition of "banking" in the Banking Regulation Act would also indicate), it is only those authorised to accept chequeable deposits who should be eligible to claim the special privileges and who may be able to fulfil the special role assigned to a "banker" under the negotiable instruments law. This is so as many of the special privileges conferred on a "banker" under the NIA, or which are now proposed, would be inappropriate with reference to a person not authorised to accept deposits withdrawable by "cheque". We also consider that the special privileges that are being recommended for the "banker" should be confined to those companies or corporate bodies which are subject to the discipline of the banking regulation.

9.19 Hence, WE RECOMMEND that "banker" should be defined in the negotiable instruments law as a "company" or other corporate body which is authorised to accept deposits withdrawable by cheque.

*Protection should cover items allied to cheques*

9.20 Sections 60 and 80 of the BEA read with the Bills of Exchange Amendment Act, 1932 of the U.K. protect the paying banker as regards bills, drafts and cheques paid by him in good faith as per the apparent tenor of the instrument. Section 19 of the Stamp Act, 1853 of the U.K. extended the protection to the bankers paying any instrument analogous to cheque, that is, "any draft or order drawn upon a banker for a sum of money payable to order on demand". The protection under this section has been extended by section 11 of the Court of Chancery (Funds) Act, 1872, to any document authorising payment of money issued by the Pay-master-General in pursuance of that Act. In the U.K., a collecting banker was earlier protected with reference to instruments akin to cheques by section 17 of the Revenue Act, 1883, and this protection is now available under section 4 of the Cheques Act, 1957.

9.21 Thus, the protection the paying and collecting bankers have with reference to bills and cheques in the U.K. has been extended to their handling of cheques with receipt forms, dividend warrants, postal orders and other types of demand orders drawn on a banker for a sum of money.

9.22 In India, while sections 85 and 85A of the NIA aim to safeguard the paying banker acting in good faith in the ordinary course of his business with reference to cheques and drafts, and sections 131 and 131A similarly protect the collecting banker with reference to *crossed* cheques and drafts, there is no provision in our country which extends such protection to bankers paying and collecting instruments analogous to cheques, on the lines of the protection available to bankers in the U.K. for the last several decades.

9.23 Essentially, such absence of protection is responsible for the reluctance of bankers in India to allow cheques with receipt forms being used even by customers who may have a genuine and valid need for this facility, like the Life Insurance Corporation, by special arrangements with the banks concerned. We consider it necessary that the scope of the bankers' protection in India should also extend to their payment and collection of instruments analogous to cheques, like cheques with receipt forms.

9.24 Hence, WE RECOMMEND that the protection available to paying and collecting bankers with reference to cheques and drafts

should also extend to their payment and collection of instruments for a sum of money payable to order on demand, which are drawn on them, or are collected by them, as the case may be.

*Is there adequate protection to banks in India?*

9.25 While considering whether the extent of the protection now available in India to paying and collecting bankers is adequate or not, we would first like to refer to the study conducted in the U.K. earlier on this subject and the legislative reform carried out in that country based on that. Then we would like to refer to the banking practice that developed in the U.K. thereafter, the subsequent acceptance of the principles underlying the Cheques Act in other countries and how substantially the resulting position of the law as modified by the banking practice in the U.K. has been accepted in all the countries concerned. This result, as may be seen, is quite consistent with the rationale we have set out earlier for judging the bankers' claim for some special protection. We have benefited by the results of the study carried out in this regard in the U.K. and Australia, and in our recommendations we have tried to cover certain areas which are found, on expert examination, as not adequately covered by the U.K. legislation. The results of the special survey regarding cheques and bills conducted by the National Institute of Bank Management in collaboration with, and for, the Banking Laws Committee amply support our recommendations.

*Study by the Mocatta Committee in the U.K.*

9.26 In the U.K., a Committee was set up under the chairmanship of Mr. A. A. Mocatta, Q. C. (now Mocatta, J.) to "consider (a) whether, and if so in what circumstances and to what extent, it is desirable to reduce the need for the endorsement of order cheques and similar instruments received for collection by a bank, (b) what, if any, amendment of the Bills of Exchange Act, 1882, or other statutory provision should be made for this purpose". In other words, the Committee was not constituted to consider primarily the adequacy of bankers' protection, but to facilitate business efficiency. In the words of Reeday, the aim of the Committee was "to see whether it was possible to cut down the laborious task of indorsing many millions of order cheques each year, involving the subsequent labours of both collecting and paying banks in checking these indorsements and getting irregular ones confirmed,

and how this could be effected in relation to the framework of the Act of 1882".<sup>1</sup>

*Negotiated cheque—an exception*

9.27 That Committee reviewed "the developments which have produced the undoubtedly widespread belief that the endorsement of most order cheques serves no useful purpose and is therefore a waste of effort". As traced by the Mocatta Committee, the popularity of order cheques in the U.K. was due to certain historical developments and "with the great growth in the use of cheques for the transfer of money in numerous transactions, the proportion of payments made by the negotiation of cheques by endorsement has become very small. The drawing of a new cheque for each payment is convenient and there is usually little reason for the recipient of a cheque to negotiate it to a third party by endorsement except where he has no bank account of his own."

9.28 Mr. R. Graham Page<sup>2</sup> estimated that 97 per cent. of all cheques drawn in the U.K. are not negotiated but are credited to the account of the payee or are cashed at the counter, and the Committee of London Clearing Bankers agreed that the figure is at least 97 per cent. The survey regarding cheques and bills has shown that in India recourse to negotiation is much less than the estimated percentages for the U.K.<sup>3</sup> As the Mocatta Committee indicated, "now that the vast majority of cheques are never negotiated but are paid into the payee's account it is not surprising that questions should be raised about the legal need and practical justification for the endorsement of these cheques". Thus, the negotiated cheque is a rarity and the requirements of law meant to deal with such rarities should not press too heavily on the banks' time and labour in their handling of over 97 per cent of the total volume of cheques handled by the banking system and thus impair their speed and efficiency.

9.29 In the U.K., the Mocatta Committee attempted also to assess the burden in time, effort and money attributable to the system of endorsement. They examined the question with reference to the

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<sup>1</sup>Reeday, T. G., "The Law Relating to Banking", Butterworths, 2nd edn. (1972), p. 393.

<sup>2</sup>A Member of the House of Commons of the U. K. who introduced a Private Member's Bill designed to reduce the need for endorsement on order cheques.

<sup>3</sup>Please see paragraphs 39 to 50 of Appendix VI.

burden on the payee to claim payment on the instrument and again with reference to the burden on the paying and collecting bankers.

*Endorsement on order cheques—unnecessary burden on payees.*

9.30 With reference to the burden on the payee, especially in regard to cheques received by firms or corporate organisations, considerable labour is now spent to ensure that the cheque is made out exactly in the correct name. For overcoming the problem in the U.K., such persons are forced to make use of endorsement rubber stamps which list the correct names of the concerns and all likely variations thereof. Even so, every incoming cheque has to be examined to ensure that it is drawn in one of the names covered by the endorsement stamps. In our country, it does not appear that such endorsement rubber stamps are frequently used by big firms; in other words, the labour of verification is only felt much more in India. It has been found that for small businesses than in large ones a greater portion of the time of senior persons is spent on endorsements of cheques.

*Burden on the collecting banker*

9.31 The burden on the collecting banker is also considerable. If the customer is the payee, the bank has to examine "the back of the cheque to be sure that the customer's endorsement is present, and that it is regular. ....If the customer is not the payee.....the bank must ensure that the payee's endorsement is 'regular'. ....In addition to this, the collecting bank will have to consider generally and quite apart from the matter of endorsement the question of the customer's entitlement to the cheque.....". The collecting bank's examination is not only with reference to "its own need for protection, but also to its anticipation of the paying bank's examination, so that time shall not be wasted in the return by paying banks of irregularly endorsed cheques".

*Burden on paying bank*

9.32 Even the paying banker is not spared from a considerable amount of work which is necessitated by the need to verify the endorsements on order cheques, whether such cheques come through clearing or are presented across the counter. "The paying bank also must make sure that the cheque is 'regularly' endorsed so that, when it pays, it properly discharges the cheque.....".

*Views of bodies concerned with banking industry*

9.33 Considerable number of other independent bodies in the U.K. concerned with the banking industry have also expressed themselves in favour of provisions which would eliminate endorsements on order cheques. Before the Mocatta Committee, the Central Council of Bank Staff Associations and the National Union of Bank Employees expressed strong views about the pointlessness and troublesome nature of the work of examining endorsements and the inconvenience caused to customers by the frequent need to return cheques for "regularisation" of endorsements. One of these organisations stressed the sense of futility felt by bank staffs in carrying out the considerable amount of daily work on the examination of endorsements *and the vexation caused by the system to bank customers*. This organisation believed that the saving to all concerned from the elimination of the need for endorsement of cheques paid into payees' bank accounts would be "considerable". Before our Committee, not only the IBA but also almost all the banks and many of the individual respondents and bankers have expressed themselves strongly in favour of provisions which would avoid the necessity of endorsements on order cheques.

9.34 The fact that other Commonwealth countries like New Zealand and Australia have also favoured these measures goes to show the general nature of the problem and the need to adopt suitable measures which have been tested in other countries and found to be effective.

*Endorsement on order cheques—unnecessary*

9.35 We concur with the general impression of the Mocatta Committee that the endorsement of a cheque paid into the payee's own bank account causes a not inconsiderable amount of work to recipients of cheques, that it imposes an appreciable burden on the banks, that this effort was being expended in relation to the provisions of a statute framed to meet conditions very different from today's, and that there is justification for the belief that the work is often unnecessary. In most cases, even what purports to be an "endorsement" is not really one, that is, one meant for negotiation. A purported endorsement is required just so that the paying bank may hope to rely on this for the purpose of protection under sections 85 and 85A of the NIA. Where the payee has signed on the reverse of the instrument, it is not "endorsement" and hardly affords any protection.<sup>1</sup>

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<sup>1</sup>Please see paragraphs 9.52 to 9.54 *infra*.

9.36 In view of the spread in the branches of commercial banks for over a decade past, the considerable increase in the number and volume of cheques handled by banks and the further increase we can reasonably expect consequent on the special measures we are recommending we can conclude that the time and labour which the public as payees and the collecting and paying banks would have to spend in scrutinising endorsements on order cheques (endorsements on bearer cheques now merit no notice by banks) would be very considerable<sup>1</sup> and that in view of the futility of the exercise, there is a clear case for dispensing with this and effecting consequential economy in time and labour. The question is how this is to be brought about.

*Alternatives considered by Mocatta Committee*

9.37 The Mocatta Committee considered several alternatives, viz., the introduction of a new non-negotiable instrument, the popularisation of the use of bearer cheques crossed "not negotiable" or "account payee only", and the increased use of the traders' credit system, and found that none of them was adequate to solve the problem but could afford only a partial solution. They considered also the American practice of collecting banks guaranteeing paying banks and themselves covering the position by individual agreements with their constituents and felt that such multi-partite indemnity would involve many complications and should, therefore, be avoided. That Committee also felt that if a change was to be made, it would be desirable to think of a more far-reaching one.

*Method recommended by Mocatta Committee*

9.38 The method recommended by the Mocatta Committee was not to do away with the necessity of endorsement for the purpose of negotiation, but to eliminate, as far as possible, the necessity of the paying and collecting bankers being obliged to scrutinise the presence or the regularity of endorsements. This method has the merit of not only freeing the paying bankers from work in connection with endorsements, but also of bringing substantial saving of work both to the collecting banks and to the public. The Mocatta Committee also recommended that if the collecting banker has given value for the cheque or has a lien thereon, he shall, as against the drawer and the payee, have all the rights of a holder for value or a holder in due

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<sup>1</sup>Please see paragraphs 51 to 53 and 60 of Appendix VI.

course, as the case may be, notwithstanding the absence or irregularity of endorsements in such cases. There were also a number of consequential recommendations made by that Committee.

*U.K. Cheques Act extended wider protection*

9.39 But the legislation in the U.K., pursuant to the recommendations of the Mocatta Committee, went beyond the scope of that Committee's recommendations in certain respects. Firstly, the encashment of cheques across the counter was also covered by the legislation, though not intended by the Committee. Secondly, the legislation covered not merely cheques drawn in favour of the collecting bank's customer but also third party cheques endorsed in his favour or deposited by him in his account. Under the scheme proposed by the Mocatta Committee, the collecting banker was saved from the liability to ensure the regularity of the endorsements only when the cheque was drawn in favour of the customer, and with reference to negotiated cheques he was not absolved. The reason why the collecting banks were saved by legislation from scrutinising endorsements on cheques drawn in favour of third persons but deposited into the customer's account was probably to cover cheques on which the payee's name differed slightly from that of the customer. As recommended by the Committee, both crossed and uncrossed cheques are covered by the legislation which thus removed a long-standing anomaly. The legislation covered not only cheques but also allied instruments. The differences between the Mocatta Committee's recommendations and the U.K. Cheques Act merit special mention as they help our understanding of the banking practice that developed in the U.K. after the Cheques Act.

*Method to preserve value of paid cheques as receipts*

9.40 It was pointed out before the Mocatta Committee that if the need for endorsement was done away with, the value of paid cheques as convenient evidence of receipt would be diminished. But to meet this point, the legislation provides that a cheque which appears to have been paid by the bank on which it is drawn is *prima facie* evidence of the receipt of the money by the payee.<sup>1</sup>

*Cheque with receipt form*

9.41 Again, before the Mocatta Committee, the British Insurance Association and certain others pointed out that with reference to their

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<sup>1</sup>Please see also *Westminster Bank Ltd. v. Zang*, (1965) 1 All E.R. 1023.



business, the use of a receipt form with the cheque was necessary and that it should not be dispensed with. The Committee of the London Clearing Bankers, after full consideration, agreed to help, and banks in the U.K. now provide by special arrangement with established customers for their drawing cheques with receipt forms, the instruments being distinguished by the capital letter "R" required to be placed on such instruments. But the Cheques Act, read with section 19 of the Stamp Act, 1853, continues, as pointed out earlier, the protection to bankers in their handling of cheques with receipt forms attached.

*Banking practice initiated by London Clearing Banks*

9.42 But the London Clearing Banks, notwithstanding the legislation, have, by administrative arrangement, taken the responsibility to scrutinise endorsements in the following cases even though the legislation would absolve them of such responsibility:<sup>1</sup>

- (i) The paying banker considers the regularity of endorsements when a cheque or other allied instrument is presented across the counter.
- (ii) The collecting banker scrutinises the endorsements when the cheque deposited is not drawn in favour of his customer.

9.43 This voluntary curtailment by the Clearing Banks of the scope of the protection afforded by legislation in the U.K. has come in for the comment that "in so far as the banks are voluntarily cutting down the very widespread protection of the Act this may ultimately redound to their disadvantage, for as these practice rules appear to have become the standard for the ordinary course of banking business any deviation from them could be perilous in that the bank concerned might be held to have thereby forfeited its statutory protection".<sup>2</sup> As pointed out by Professor Ellinger, if the banker pays in the U.K. an irregularly endorsed cheque in circumstances where this contravenes the provisions of the Clearing Bankers' circular, he becomes liable not by reason of the missing endorsement, but because of the disregard of standing banking practice.<sup>3</sup>

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<sup>1</sup>Circular of the Committee of London Clearing Bankers, dated 23rd September 1957.

<sup>2</sup>Reeday, T. G., "The Law Relating to Banking", Butterworths, 2nd edn. (1972), p. 394.

<sup>3</sup>"Collection and Payment of Cheques—The Current Law and the Need for a Reform", University of Western Australia Law Review, December 1969.

*Position in New Zealand*

9.44 In New Zealand, the Cheques Act, 1960, has amended the Bills of Exchange Act, 1908 of that country and has introduced provisions practically identical with the provisions of the Cheques Act, 1957 of the U.K. But the banks have voluntarily restrained themselves with regard to the scope of the protection on the lines adopted by the British banks and this has been done by a circular dated November 17, 1960 issued on the lines similar to those issued by the Committee of the London Clearing Bankers on September 23, 1957.

*Position in Australia*

9.45 The need for eliminating endorsements on cheques and thereby effecting economy and speed in banking transactions came in for special consideration before the Australian Bills of Exchange Committee. This has led to the enactment of sections 88B to 88E of the Bills of Exchange Act, 1909-1971 of the Commonwealth of Australia.

*Australian model reconciles the law and banking practice in the U.K.*

9.46 The Australian model has taken note of the practice in the U.K. and New Zealand and has extended the protection substantially to the extent to which banks in the U. K. have claimed such protection under the provisions of the Cheques Act.

9.47 Under the Australian Act, the paying banker's protection is confined to cheques or drafts paid to another banker, or deemed to be so paid. The protection as regards cheques and drafts is available to a collecting banker only when the name of the payee in the instrument is the same as the name of the customer, or is so similar to the name of the customer that it is reasonable, in the circumstances, for the banker to assume that the customer is the person intended by the drawer to be the payee. The provision extending the collecting banker's protection to cover instruments drawn in favour of his customer and also those where the name is expressed slightly differently gives full effect to the aim of the Mocatta Committee regarding collecting banker's protection, while at the same time not throwing the gates wide open as has been done under the U.K. Cheques Act whereby a stolen order cheque may be collected by a thief through his account before he absconds.

*Forged endorsements*

9.48 Again, certain improvements have also been effected by the Australian model over the provisions of the U.K. Cheques Act. The U.K. Act covers only instruments irregularly endorsed or bearing no

endorsement. Paget has remarked that though section 60 of the BEA specifically refers to forged endorsements, the position under section 1 of the Cheques Act is still to be learnt and it may not cover forged endorsements.<sup>1</sup> But the Australian Act, by including endorsements made without authority, has specifically brought within the scope of the protection cases of forged endorsements as well. The extension of the protection to cover also cases of forged endorsements would place the paying bankers on par with the paying bankers in countries which have adopted the Geneva Conventions on Cheques.

*What we recommend*

9.49 The need for adequate safeguards to paying and collecting bankers has already been stressed by us. Provisions modelled on the lines of the Cheques Act of the U.K. are necessary for our country not merely for the protection of bankers but mainly because they are conducive to business expedition and economy. However, profiting by the experience gained on the working of the Cheques Act and the developments in this regard elsewhere, we would not like to extend the scope of the protection to cover cases of payment of cheques and allied instruments across the counter, or to cases of a banker collecting cheques not drawn in the name of his customer or in a name which so resembles the customer's name as to lead the banker to believe that the instruments are drawn in favour of the customer (here the Australian provision is appropriate). It is also necessary to consolidate the protective provisions both for paying and collecting bankers. As has been indicated in Australia, we would like to cover also cases of endorsements without authority within the protective canopy. Such provisions should be applied irrespective of the fact whether the instrument is crossed or uncrossed and should extend to cheques and other allied instruments. On the lines of the U.K. Cheques Act, the crossing provisions should apply also to instruments allied to cheques. The payment of a cheque or other allied instrument when collected by a banker to the credit of the named payee should be a *prima facie* evidence of the receipt of such amount by him. WE RECOMMEND statutory provisions to be made accordingly.

*Identification of payees/endorsees on order cheques presented across the counter*

9.50 There is one more question with reference to order cheques presented across the counter. In such cases, whether or not the banker

<sup>1</sup>"Paget's Law of Banking", Butterworths, 8th edn. (1972), p. 337.

should insist on the identification of the presentor has been a matter of controversy. The Banking Commission recommended that it is necessary to dispense with the formality of identification in respect of instruments for small amounts, except in cases where there are reasonable grounds to suspect that the presentor is not entitled to receive the payment.<sup>1</sup> They considered this necessary to inculcate the cheque habit among the public and in order to popularise drafts as a mode of remittance. We have to see whether under the NIA in such cases banks would be protected if they make payment without insisting on identification, and if they do not get any protection, whether the statute requires any change. We have also tried to ascertain the practice in this regard now followed by banks in India.

*Origin of the practice of getting payee's purported endorsement*

9.51 The necessity or otherwise of the need for identification is linked with the question of discharge a "banker" gets under section 85(1) of the NIA when he pays a cheque in due course on the strength of payee's endorsement or purported endorsement. The Mocatta Committee explained how the practice developed of paying bankers obtaining on the reverse of the cheque what purports to be a payee's endorsement:

"For a very long time, however, it has been the invariable practice of the banks to insist on such endorsements. We asked a number of witnesses for their opinion on the legal basis of this practice and the explanation generally favoured, which we accept, is as follows.

In earlier practice, it was a common procedure for the payee or endorsee of a cheque to present it to the paying banker for payment over the counter; in such cases the identity of the payee or endorsee would seldom be known to the banker. If the banker paid a person who was not in fact the payee named, he would have acted without authority and would not be entitled to debit his customer's account with the amount paid. If, however, the instrument bore the payee's endorsement, the banker would be in a position to claim that he had paid the amount to bearer, as under the law of negotiability he was entitled to do, and had thereby put himself into the position of a holder for value, so that he was entitled to debit his customer's account. This argument would not

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<sup>1</sup>Report of the Banking Commission, Government of India (1972), paragraph 11.38.

hold good if the endorsement had been forged, and section 19 of the 1853 Stamp Act, which applied to any draft or order drawn upon a banker for a sum payable to order on demand, and is still in force, was designed to meet that difficulty. That section was reproduced in a slightly modified form in relation to cheques only as section 60<sup>1</sup> of the Bills of Exchange Act, 1882.

After the passing into law of these two statutory provisions, paying banks were naturally reluctant to dispense with the requirement of an endorsement purporting to be made by the payee since (a) the protection afforded by both sections related to such endorsements and (b) section 60 of the Bills of Exchange Act, 1882, required payment 'in the ordinary course of business' which, by virtue of the practice of requiring such an endorsement, might not be held applicable when payment was made without such an endorsement."

This led the Mocatta Committee to observe that though in more than one way the practice of requiring the payee's endorsement on an order cheque became firmly established and part of the ordinary course of banking business, they did not think that it could be dispensed with, except by legislative authority, without endangering the statutory protection available to bankers.

*BEA and NIA provisions are in pari materia*

9.52 Section 85(1) of the NIA discharges the drawee when he makes payment in due course on a cheque payable to order *purporting to be endorsed* by or on behalf of the payee. As Paget has pointed out—

"The common practice of paying bankers, both prior to and since the passing of this Statute,<sup>2</sup> to refuse payment unless the ostensible payee signs on the back of the cheque seems in any event without justification. It is understood that at least one object of demanding such signature was to get the protection of s. 60<sup>3</sup> should the person presenting the cheque not be the real payee, but it would appear that such object was not attained thereby. The reasons

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<sup>1</sup>This materially corresponds to sections 85 and 85A of the NIA.

<sup>2</sup>The Statute here referred to is the BEA, but with equal force it could be considered with reference to the NIA.

<sup>3</sup>Section 60 of the BEA.

for this conclusion were as follows. In *Keene v. Beard*,<sup>1</sup> Byles, J., said:

‘One of the best receipts is the placing on the back of the instrument the name of the party who has received payment of it. Such an entry of the name on the instrument is not an indorsement.’

In *Gerald McDonald & Co. v. Nash & Co.*,<sup>2</sup> Lord Haldane, L.C., quotes this, and adds:

‘Section 8(5) is accordingly only declaratory of old law, which has been the law throughout, whatever may have been the cautious practice of bankers and others in asking for what resembles a responsible indorsement for reasons of convenience.’

The Bills of Exchange Act, s. 2, defines indorsement thus:

‘Indorsement means an indorsement completed by delivery.’<sup>3</sup>

To constitute indorsement there must be not only delivery, but the operation must be done *animo indorsandi*, with intention to transfer the property in the instrument by the indorsement.<sup>4</sup> There can be no such intention and no real delivery when the cheque has got home and is merely being presented for payment and discharge. ....Strictly, therefore, it would seem that the only case covered by s. 60 is that where the forged signature has been appended for purposes of negotiation.’<sup>5</sup>

9.53 Prof. Ellinger has referred to the decision of the High Court of Australia in *Smith v. Commercial Banking Co.* to show that section 60 of the BEA (Australian provision is similar) which corresponds to section 85 of the NIA, does not cover cases where paying banker pays merely against the discharge of the holder.

‘In *Smith v. Commercial Banking Co.*, the appellant, who was about to sail from England to Sydney, obtained a draft payable

<sup>1</sup>(1860), 8 C.B.N.S., at p. 382.

<sup>2</sup>(1924) A.C. 625 at p. 634.

<sup>3</sup>Cf. *Arnold v. Cheque Bank* (1876), 1 C.P.D. at p. 584.

<sup>4</sup>*Lloyd v. Howard*, (1850) 15 Q.B. 995 at p. 1000, per Erle, J.: per Wightman, J.: “..... a delivery of a bill for a special purpose not performed is not an indorsement.”

<sup>5</sup>“*Paget’s Law of Banking*”, Butterworths, 8th edn. (1972), pp. 228-229.

to his own order on the respondents, a firm of bankers. The draft was issued in two parts. The appellant retained the first part (or exchange) and sent the second to himself c/o the G.P.O., Sydney. The second copy was stolen by a thief who presented it for payment to the respondents. He was asked to sign his name on the back of the bill and, after comparing his signature with a specimen signature of the appellant, the draft was paid to the thief. The High Court of Australia gave judgment for the appellant, the payee. It was held that the respondents, the paying bankers, could not rely on section 60 as the signature of the thief was not an indorsement. O'Connor, J. said:

The reason of the protection conferred by the section is the obligation of the banker to pay on indorsements which come to him in the ordinary course of business under circumstances in which it is in most cases impossible to test their genuineness. Where payment is made to the holder, as holder, and not as indorsee, where he is not bound to indorse before obtaining payment, and he is asked to put his name on the back merely as a receipt, or as test of identity, the reason for the protection is at an end. In such a case the bank pays because it is satisfied as to the identity of the payee, and not because it is satisfied as to the genuineness of the indorsement."<sup>1</sup>

9.54 Section 85(1) of the NIA when read with section 15 which defines "indorsement" as signature "for the purpose of negotiation" is in this regard *in pari materia* with section 60 of the BEA. Both section 60 of the BEA and section 85(1) of the NIA refer to orders "*purporting to be indorsed*"; hence, the position in this regard under our Act cannot be considered as different. In the result, the purported signature on the reverse of the cheque by or on behalf of the payee cannot be relied on by the drawee as the purported endorsement and hence the drawee may not be discharged merely by payment of such instrument in due course. Hence, strictly speaking, the drawee banker may be discharged when he pays an order cheque across the counter *only* when the payment is made to the correct person.

9.55 About the practice the banks are following on the question of identification of payees on order cheques, we have received the views

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<sup>1</sup>"Collection and Payment of Cheques—The Current Law and the Need for a Reform", University of Western Australia Law Review, December 1969.

of quite a number of bankers and banks. Generally, they have indicated the need for identification under the present provisions, and have also urged that banks should be enabled not to insist on identification of the payees when they make payment on order cheques across the counter in their ordinary course of business. For the reasons stated by the Banking Commission, it is desirable that banks are relieved, by statute, of the obligation to require identification of the payees on order cheques for payments made in their ordinary course of business. But, this would not prevent banks from insisting on identification where they consider that the facts warrant it.

9.56 Having regard to the above, WE RECOMMEND that the position may be made clear by amending section 85(1) of the NIA to read as under :

“Where a cheque payable to order purports to be indorsed and/or discharged by or on behalf of the payee or indorsee, the drawee is discharged by payment in due course.”

*Protection to bank collecting an altered item*

9.57 Section 89 of the NIA protects a banker paying an altered instrument according to the apparent tenor thereof at the time of payment and otherwise in due course. But, there is no corresponding provision in the NIA affording similar protection to a banker collecting an item according to the apparent tenor thereof at the time of receipt for collection. In the Chapter on “Negotiable Instruments—Formal Requisites”, we have suggested certain changes to section 89 of the NIA. Therein we have suggested that the protection to persons handling an altered negotiable instrument should extend not only to parties who have signed the instrument but also to those who have acted thereon subsequent to such alteration. This change may cover also a collecting banker who receives for collection an altered instrument without any reason to suspect that the instrument has been altered. Nevertheless, we consider that the position merits an express statutory clarification.

9.58 The Law Commission had suggested that a banker collecting a cheque crossed “account payee” to the credit of a person other than the payee should be protected if the “account payee” crossing had been obliterated and was not apparent. It is true that alteration of an “account payee” crossing, when it is not apparent, affords an instance of the necessity for protection to the collecting banker. But the protection to the collecting banker should extend to the same



extent as is now available to the paying banker under section 89 of the NIA and thus cover not only alteration of "account payee" crossing but other alterations in the instrument which are not apparent, so long as the collecting banker acts in good faith and in the ordinary course of business. This would also take care of any obliteration, which is not apparent, of the "not negotiable" crossing in an instrument.

9.59 WE RECOMMEND that a collecting banker should be protected when in good faith and in the ordinary course of business he collects payment of an instrument (whether crossed or uncrossed) according to the apparent tenor of the instrument at the time of receipt thereof for collection.

#### *Bankers and restrictive endorsements*

9.60 Now there are no special provisions in the NIA or the BEA safeguarding banks with reference to restrictively endorsed instruments collected or paid by them. Under the BEA (probably this is also the position under the NIA), there is no necessity for this since a restrictively endorsed instrument is not negotiable. But, on the lines of the provisions found in the UCC, we have earlier recommended that unless the endorsement specifically restricts, a restrictive endorsee should have the right to negotiate the instrument, and that parties taking the instrument from him for value may qualify as holders in due course. Hence, it is necessary to safeguard the position of banks which may collect or pay instruments restrictively endorsed, without any reason to suspect that thereby they are acting contrary to the restrictions imposed by the endorsement.

9.61 Under the UCC, an intermediary bank, or a paying bank, which is not the collecting bank, is neither given notice nor otherwise affected by the restrictive endorsement of any person who is not either the bank's immediate transferor or the person who presented the instrument for payment. The UCC comment clarifies that this provision permits an intermediary bank or a paying bank, which is not a collecting bank, to disregard any restrictive endorsement except that of the bank's immediate transferor, since banks ordinarily handle instruments, especially cheques, in bulk and have a no practicable opportunity to consider the effect of restrictive endorsements. WE RECOMMEND that banks in our country should be similarly protected with reference to restrictively endorsed cheques handled by them.

*Special provisions regarding minors*

9.62 The paying banker is not in a very happy position today with reference to cheques drawn by minors. The law in India is that a minor's contract is void.<sup>1</sup> In the U.K., a minor's contract may be void or voidable according to circumstances.<sup>2</sup> Thus, the position in India and that in the U.K. are not identical. However, a view has been put forth that since section 26 of the NIA provides that a minor may draw, endorse, deliver and negotiate instruments so as to bind all parties except himself, he may be presumed as competent to give discharge to the banker who pays against a cheque drawn by him on his account. As the Law Commission had pointed out, the NIA provision appears to be contradictory to the principle laid down in section 11 of the Contract Act. It is not quite clear whether a banker is discharged when payment is made to a person who is a minor to the knowledge of the banker and whether a minor can under such circumstances give a valid discharge. Though probably a banker may be protected by the tenor of the language of section 26 of the NIA, there is every merit in clarifying the position statutorily.

*Position in the U.S.A.*

9.63 Section 603 of the Pennsylvania Banking Code of 1965 (similar provisions are found in the other States of the U.S.A.) specifically deals with a banker's transactions with a minor. We consider that the adoption of such provisions in India would eliminate most of the difficulties the banks are now facing with reference to minors' accounts.

9.64 Hence, WE RECOMMEND the following provisions which are on the lines of section 603 of the Pennsylvania Banking Code :

*"Minors' Deposits and Safe-Deposit Agreements*

(a) *Receipt of deposits.*—A banker may receive deposits by or in the name of:

(i) a minor,

(ii) a minor jointly with one or more adults or other minors, with the same effect as a joint deposit, or

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<sup>1</sup>Mohori Bibee v. Dhurmodas Ghose, (1903) 30 Cal. (P.C.) 539.

<sup>2</sup>Bhashyam & Adiga, "The Negotiable Instruments Act, 1881", Madras Law Journal, 13th edn. (1974), p. 208.

- (iii) a minor as trustee, or a minor and one or more adults or other minors as trustees, with the same effect as a deposit in trust.
- (b) *Safe-deposit agreements.*—A banker may rent a safe deposit box or other receptacle for safe-deposit of property to, and receive property for safe-deposit from, a minor.
- (c) *Dealings with minor.*—A banker may deal with a minor with respect to a deposit account or safe-deposit agreement covered by subsection (a) or (b) of this section *without the consent of a parent or guardian* and with the same effect as though the minor were an adult. A parent or guardian shall not have any right in the capacity to interfere with any such transactions. Any action of the minor with respect to such deposit account or safe-deposit agreement shall be binding on the minor with the same effect as though an adult. This section shall not affect the law governing transactions with minors in cases outside the scope of this section.”

9.65 Though the above provisions may fall strictly outside the purview of the negotiable instruments law, we recommend such provisions since the Committee is also to consider the law relating to bank deposits and collections and other commercial laws affecting banking. We consider that the proper place for the above provisions would be to introduce the same by an appropriate amendment in the Banking Regulation Act, and WE RECOMMEND accordingly.

## CHAPTER 10

### SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

We set out in this chapter the conclusions and recommendations of the Committee which have to be considered along with the reasons given in the relevant paragraphs of the earlier chapters.

#### REVISION OF THE NEGOTIABLE INSTRUMENTS LAW— GENERAL APPROACH

1. The law relating to negotiable instruments is not really part of the law of any one nation but applies to the commercial world in general, transcending national barriers. The Negotiable Instruments Act, 1881, of our country requires changes in several respects to suit the banking and commercial practices of modern days. In order to further the development of international intercourse in industry, trade and commerce, it is desirable that the provisions of our negotiable instruments law are drawn up to be in step with international conventions and models of other advanced countries. Taking into consideration the fact that the U.K. has already joined the European Common Market and that serious attempts are being made to reconcile the economic and commercial laws of the European Continent and the U.K., the divergence based on the Common Law system and the Civil Law jurisprudence is proving to be gradually of lesser importance. Though by and large our laws have been modelled on the lines of those of the U.K. and the other Common Law countries and naturally our main reliance even today is on the provisions that are found to be in force in the Common Law countries, wherever we find that for cogent reasons it would be desirable for us in certain respects to adopt provisions found in the Geneva Conventions or in the other Continental laws, we need not be inhibited from adopting such provisions. Ultimately, the question is what would be suitable for the commercial and economic development of our country.

(2.5, 2.9, 2.30 and 2.34)

2. The Law Merchant is not a closed book and the categories of negotiable instruments are also neither fixed nor stereotyped. The features of negotiable instruments in general are sufficiently well-known

and they require no express statutory incorporation. Hence, it is not necessary to have a general statutory definition of the basic requisites of a negotiable instrument, and the method adopted by the NIA would serve the purposes of the statute. As and when it is considered necessary for the legislation to cover negotiable instruments other than the specified categories covered by the statute, the definition need concern itself only with the particular criteria to be fulfilled by instruments to come within such category.

(2.39)

3. Negotiable certificates of deposit have proved in other countries as a potentially volatile source for deposit mobilisation by commercial banks, and this is attributed to their sensitivity to interest rates, attractive yields and marketability, which the traditional time deposits lack. The desirability of banks in India introducing negotiable certificates of deposit merits careful consideration by the Reserve Bank of India and the Government having regard to the needs of our country's banking and economic development.

(2.41 to 2.43 and 2.48)

4. It is not necessary to introduce any special provision in the statute to provide for the issue of negotiable certificates of deposit by banks, as they will qualify as time promissory notes.

(2.48)

5. When it is considered desirable for banks to issue negotiable certificates of deposit, Government may, by notification, exempt such certificates of deposit from liability to be stamped as time promissory notes.

(2.48)

#### NEGOTIABLE INSTRUMENTS—FORMAL REQUISITES

6. While it is necessary that in view of their special character and incidents negotiable instruments should conform to certain essential formal requisites, in considering such requisites we have to allow for suitable adaptations and give greater importance to the mercantile necessities of modern times, for the healthy development of commerce and trade.

(3.2)

7. An instrument containing a promise or order to pay should not be regarded as conditional when—

- (a) it states its consideration, whether performed or promised or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or “as per” such transaction ; or
- (b) it refers to or states that it arises out of a separate agreement;  
or
- (c) it states that it is drawn under a letter of credit ; or
- (d) it states that it is secured, whether by mortgage, reservation of title or otherwise ; or
- (e) it indicates a particular account to be debited or any other fund or source from which reimbursement is expected ; or
- (f) it is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit ; or
- (g) it is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

However, the promise or order should not be regarded as unconditional if the instrument states that it is *subject to or governed* by any other agreement; or if it states that is to be paid *only* out of a particular fund or source.

(3.6 to 3.8)

8 The recognition of a documentary bill, *under the Act*, would be consistent with the mercantile theory. Having regard to the aim of the *new Bill Market Scheme* which the Reserve Bank of India has promoted and the objectives of credit policy, it may not be desirable to do away with bilti hundis. The objectives of credit policy would be better served if we could expressly validate a bill of exchange with the condition that payment thereon is to be made only against transfer and/or delivery of the documents referred to in the bill. Hence, the second paragraph of section 5 of the NIA should be further amplified to provide that with reference to a bill of exchange, *other than a cheque*, the mere fact that payment on the bill is made subject to the transfer and delivery of the documents of title to goods attached thereto does not make the instrument *per se* conditional.

(3.11, 3.14, 3.15 and 3.20)

9. The amount payable on a negotiable instrument should be considered as *sum certain* even though it is to be paid—

- (a) with stated interest or by stated instalments ; or
- (b) with stated different rates of interest before and after default or a specified date; or
- (c) with a stated discount or addition if paid before or after the date fixed for payment ; or
- (d) with exchange or less exchange, whether at a fixed rate or at the current rate.

(3.22 to 3.24)

10. An instrument should be considered as drawn or made payable at a *definite time* when by its terms it is payable—

- (a) on or before a stated date or at a fixed period after a stated date ; or
- (b) at a fixed period after sight ; or
- (c) at a definite time subject to any acceleration.

(3.26 and 3.29)

11. "*Signature*" should be defined as "the writing or otherwise affixing a person's name or a mark to represent his name, by himself or by his authority with the intention of authenticating a document as being that of or as binding on the person whose name or mark is so written or affixed".

(3.31)

12. Whether, in any instance, the *facsimile* would qualify as a "mark" validly affixed with the requisite intention and thus be regarded as proper signature, could be left to facts of the particular case. But banks would be in order to ask for a proper indemnity before agreeing to act on facsimile signatures as a matter of course.

(3.33)

13. The third paragraph of section 26 of the NIA may be substituted to provide that :

"An instrument shall be deemed to have been made, accepted, drawn or indorsed on behalf of a corporate body if drawn, accepted, made, or indorsed in the name of, or on behalf or on

account of, a corporate body by any person acting under its authority, express or implied.”

(3.36)

14. For the healthy development of commerce and trade it is necessary to discountenance instruments made or drawn without a date, though the fact that the instrument is ante-dated or post-dated should not *per se* affect its validity. Hence, an *undated* instrument should be made invalid, but the validity of an instrument should not be affected merely for the reason that it is *ante-dated* or *post-dated*.

(3.37 and 3.42)

15. Where an instrument is ante-dated or post-dated, the time when it is payable should be determined by the stated date if the instrument is payable on demand or at a fixed period after date, and where the instrument or any signature thereon is dated, the date may be presumed to be correct.

(3.43)

16. Section 20 of the NIA may be modified to provide that before a *prima facie* authority to make or complete the instrument is presumed in favour of a person, the delivery of the inchoate instrument to that person should be in order that it may be converted into a negotiable instrument and that he should fill up the instrument within a reasonable time and strictly in accordance with the authority given.

(3.45 and 3.48)

17. The scope of section 20 of the NIA need not be confined only to delivery of signed papers which are stamped with duty as per the stamp law.

(3.50)

18. There should be an express provision that as against a holder in due course, the defence that when the instrument was signed it was inchoate and there was no “delivery” should not be allowed to be set up.

(3.54)

19. Section 18 of the NIA may be amplified to provide also that where the words are ambiguous or uncertain, reference may be made to the figures to fix the amount.

(3.55)



20. The practice of banks in India to return a cheque where there is a discrepancy in the amount expressed in figures and the amount expressed in words may be discontinued in order to reduce the return of cheques for needless causes. (3.56)

21. The law should provide that handwritten terms control typewritten and printed terms, and typewritten control printed. (3.58)

22. An instrument should be regarded as payable to bearer when by its terms it is payable to "cash" or "order of cash" or any other indication which does not purport to designate a specific payee. (3.64)

23. Unless the instrument indicates that a signature is made in some other capacity, it should be regarded as an "indorsement". (3.65)

24. Section 17 of the NIA should be clarified that a bill of exchange drawn on the drawer is effective as a promissory note. (3.69, 8.26 and 8.29)

25. "Material alteration" with reference to an instrument means any alteration which changes the contract of any party thereto in any respect, including any such change in—

- (a) the number or relations of the parties; or
- (b) an incomplete instrument, by completing it otherwise than as authorised; or
- (c) the writing as signed, by adding to it or by removing any part of it; or
- (d) the date, the sum payable, the time of payment, or the place of payment; or
- (e) the addition of a place of payment where the instrument has been accepted generally, without the acceptor's assent; or
- (f) the addition of the name of a new maker to a joint and several note, without the consent of the original makers; or

- (g) an alteration in the name of the payee of an order cheque; or
- (h) an unauthorised description in the payee's name; or
- (i) the alteration of an inland bill to a foreign bill; or
- (j) alteration of a foreign bill by adding either on the face of the bill or to the endorsements, the rate of exchange according to which the bill is to be paid; or
- (k) the addition of the words requiring payment of interest at a specified rate, where originally the instrument has been drawn for the payment of "lawful interest".

(3.73)

26. The effect of a material alteration without the assent of all the parties liable on the instrument should be to avoid the instrument except as against the party who has himself made, authorised or assented to the alteration, and his subsequent endorsers. But the alteration should not have such effect where the alteration was made by a stranger without the consent of or any negligence or fraud on the part of the holder, or where the alteration was made in order to carry out the common intention of the original parties.

(3.77)

27. The person who has substantially contributed to the alteration of a negotiable instrument should not be allowed to take advantage of his negligence and escape his liability on the instrument. As between an innocent third party and the negligent party, it is equitable if the latter is made to bear the loss. Hence, any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorised signature should be precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payer who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payer's business.

(3.79 and 3.82)

28. Section 89 of the NIA may be substituted by a provision to the effect that in cases of material alterations of the text of a bill of exchange, promissory note or a cheque, parties, who have signed or acted thereon subsequent to such alterations when such alterations are not apparent, are bound according to the altered text; and parties, who

have signed or acted thereon before such alterations, are bound according to the terms of the original text.

(3.87 and 9.57)

29. Section 82(a) of the NIA may be substituted to provide that the holder of an instrument may even without consideration discharge any party—

(a) in any manner apparent on the face of the instrument or the endorsement, as by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature;

(b) by surrender of the instrument to the party to be discharged.

(3.91)

30. It is equitable and just to all the parties and would afford banks a reasonable amount of protection if a *forged signature* is treated as an "*unauthorised signature*" capable of being ratified without affecting liabilities which may arise under the criminal law. For this purpose, "*unauthorised signature*" may be defined as a signature which is made without actual, implied or apparent authority and as including a forgery. It should be further provided that any unauthorised signature is wholly inoperative as against the person whose name is signed unless he ratifies or is precluded from denying it, and that any unauthorised signature may be ratified for the purpose of the negotiable instruments law and such ratification does not *per se* affect any rights of the person ratifying, against the actual signer or liabilities arising under the criminal law.

(3.100)

31. An unauthorised signature, which would include a forgery, shall operate as a signature of the unauthorised signer, in favour of any person who in good faith pays the instrument or takes it for value.

(3.102)

32. Abolition of the stamp duty as regards usance bills and notes would certainly be a measure that would encourage and promote speedier settlement of short-term commercial claims by means of usance bills. This would also help the development of genuine trade and commercial bills and the growth of bill market, and would facilitate the provision of credit against such bills. Hence, Government may

consider, in consultation with the Reserve Bank of India, the feasibility of total remission of stamp duty payable on usance bills and notes.

(3.106)

33. In case such total remission of stamp duty is not now feasible, on the analogy of foreign bills received in India which require to be stamped in this country, Government may provide for the other bills and notes also to be stamped with special adhesive labels.

(3.110)

#### NEGOTIABLE INSTRUMENTS—PARTIES THERETO

34. For the sake of commercial convenience, the law should be amended to permit an instrument being drawn with *alternative drawees*, and the holder of such an instrument, upon the first dishonour thereof by any of the named alternative drawees, should be entitled to have his recourse against the drawer and endorsers.

(4.10 and 5.58)

35. "*Bearer*" should be defined as a person in possession of an instrument which is payable to bearer or endorsed in blank.

(4.13)

36. The position of the *purchaser of a banker's draft* may be clarified by bringing him within the framework of the negotiable instruments law. The position of the purchaser of a banker's draft is approximately the same as that of the payee and the Law Merchant has also recognised him as owner of the instrument. Where the purchaser takes the banker's draft in his own name, there is no difficulty. Where he takes it in the name of a third person, he cannot transfer the same by endorsement but can transfer the same by delivery only to the named payee. Since the instrument is not drawn in his favour, the paying bank may not be aware of his title to the instrument, and his claims would be mainly against the issuing bank. Subject to such limitations, which may be clarified separately, the purchaser of a banker's draft not made out in his own name may nevertheless be recognised as the holder thereof. This could be done by defining "holder" as including a person to whom the instrument has been issued, whether or not it is made out in his own favour. The holder of an instrument which is drawn or made out in favour of a third party can negotiate the same by mere delivery thereof to the named payee only

and it should be provided that such holder cannot directly enforce payment on the instrument from the drawee.

(4.17 and 4.32)

37. "*Holder*" may be defined as a person in possession of an instrument which is either drawn or endorsed to him or to his order or to bearer or in blank, and as including also the purchaser to whom the instrument is issued but not including a beneficial owner.

(4.20)

38. "*Issue*" of an instrument may be defined as the first delivery of an instrument to a holder or a purchaser.

(4.22 and 4.23)

39. It is necessary that the circumstances when a person could claim to be a *holder in due course* and the defences that may or may not be raised against him are indicated with as much precision as possible. Hence, in section 9 of the NIA, the expression "becomes overdue" shall be substituted for the words "became payable". The section should also be modified to make clear the position that a person can claim as a holder in due course only when he takes the instrument for consideration, whether the instrument is payable to bearer or order. An Explanation may also be added to this definition to draw reference to the provisions which indicate when a defect may be said to exist in the title of a person to an instrument.

(4.24 to 4.27)

40. "*Restrictive endorsement*" may be defined as an endorsement which either—

- (a) purports to prohibit further transfer of the instrument; or
- (b) includes the words "for collection", "for deposit", "pay any bank", or like terms signifying a purpose of deposit or collection; or
- (c) otherwise states that it is for the benefit or use of the endorser or of another person.

A *restrictive endorsee* should be defined as a person taking the instrument under a restrictive endorsement.

(4.29 to 4.31)

41. The old Common Law rule as regards *conditional endorsement* operates harshly and hence, the law should provide that where an instrument purports to be endorsed conditionally, the condition may be disregarded by the payer and that the payment to the endorsee is valid whether the condition has been fulfilled or not.

(4.30 and 4.31)

42. "*Accommodation party*" may be defined as a person who has signed the instrument as drawer, acceptor or endorser, without receiving value therefor and for the purpose of lending his name to some other person.

(4.33)

43. Where in an instrument payable to order the payee or endorsee is wrongly named, or his name is misspelt, he may endorse the instrument as therein described, adding, if he thinks fit, his proper signature; but signature in both names or both designations (as the case may be) may be required by a person paying or giving value for the instrument.

(4.37)

44. The introduction of the concepts of "fictitious payee" and "non-existing payee" in the negotiable instruments law has come in for considerable criticism and has been the cause of confusion. Judgments dealing with the question exhibit refinements, if not inconsistencies, which render it almost impossible to formulate the general effect of the provision. Hence, to deal with instruments drawn in favour of *payees who are either imaginery or unintended*, the law should provide that—

- (1) An endorsement by any person in the name of a named payee is effective if
  - (a) an imposter through the use of the post office or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or
  - (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

(c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this provision shall affect the criminal or civil liability of the person so endorsing.

(4.42 to 4.44)

45. Section 121 of the NIA may be substituted by a provision on the following lines :

“By making, drawing or accepting, the party admits as against all subsequent parties including the drawee, *the existence of the payee and his then capacity to indorse*, and such party is also precluded from denying as against all subsequent parties including the drawee, the payee’s capacity to indorse on the ground of any defect which existed on the date of such making, drawing or accepting.”

(4.49)

46. Until the contrary is proved, the endorsements appearing on an instrument shall be deemed to have been made in the order in which they appear.

(4.50)

47. An endorsement which shows that it is not in the chain of title shall be deemed to be notice of its accommodation character.

(4.51)

48. Since it is important that a mercantile instrument should not be an embarrassing document, any restriction on the right to negotiate cannot be presumed. Hence, a restrictive endorsee’s right to further transfer or negotiate the instrument should not be affected unless the endorsement though restrictive in any respect also specifically precludes negotiation.

(4.53)

49. The law should provide that the first holder of an instrument claiming under a restrictive endorsement, if otherwise qualified, will be a “holder in due course” provided he acts consistent with such endorsement, and that a subsequent holder will also be, if otherwise qualified, a holder in due course if he has no notice of the fact that the previous holders have not acted consistent with the endorsement.

(4.54, 9.60 and 9.61)

50. The transferee for value without endorsement of an instrument shall have all the rights which the transferor had in instrument and in addition the right to have the endorsement of the transferor or his legal representative, as the case may be. But the right to ask for an endorsement should not apply to the case of a purchaser obtaining an instrument in the name of another, which he may transfer to such person by mere delivery.

(4.55)

51. The warranties that a transferor is deemed to make in favour of his transferee, and to subsequent holders who take the instrument for value and in good faith, should be clearly specified so as to cover both kinds of transfers, namely, by endorsement and delivery, and by mere delivery.

(4.56)

52. Any person who obtains payment or acceptance, or any prior transferor, should be regarded as warranting to a person who in good faith pays or accepts, that—

- (a) he has a good title to the instrument or is authorised to obtain payment or acceptance on behalf of one who has a good title; and
- (b) he has no knowledge that the signature of the maker or drawer is unauthorised, except that this warranty is not to be regarded as given by a holder in due course acting in good faith
  - (i) to a maker with respect to the maker's own signature; or
  - (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
  - (iii) to an acceptor of a bill if the holder in due course took the bill after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorised; and
- (c) the instrument has not been materially altered, except that this warranty is not to be regarded as given by a holder in due course acting in good faith—
  - (i) to the maker of a note; or
  - (ii) to the drawer of a bill whether or not the drawer is also the drawee; or



- (iii) to the acceptor of a bill with respect to an alteration made prior to the acceptance if the holder in due course took the bill after the acceptance, even though the acceptance provided "payable as originally drawn" or in equivalent terms; or
- (iv) to the acceptor of a bill with respect to an alteration made after the acceptance.

However, the party who accepts or pays should not be regarded as admitting the genuineness of the endorsement and he may recover from the person presenting the instrument when the endorsement turns out to be a forgery.

(4.57)

53. A transferor by endorsement and delivery should be regarded as warranting in favour of his transferee *and* to any subsequent holder who takes the instrument in good faith and for value that—

- (a) he has a good title to the instrument or is authorised to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
- (b) all signatures are genuine or authorised; and
- (c) the instrument has not been materially altered; and
- (d) no defence of any party is good against him; and
- (e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

However, such transferor may limit his obligation as regards the validity or the defence of any party against him by transferring the instrument "without recourse".

The *transferor by delivery* should be regarded as giving the afore-said warranties only in favour of his immediate transferee.

(4.58 and 4.59)

54. The scope of section 43 of the NIA should be confined only to a transferee of an instrument who takes it by endorsement and delivery.

(4.60)

55. The scope of section 45A of the NIA should be widened to cover bills, cheques and notes.

(4.61)

56. The person claiming a duplicate as owner of a lost instrument is not strictly a "holder" since he is not in possession of the paper and he does not have the holder's, *prima facie*, right to recover. He must establish the terms of the instrument and his ownership and must account for its absence. Hence, the law should provide that the amount and terms of security to be offered when a person claims a duplicate shall be determined by agreement between the parties and failing such agreement, they shall be determined by the court.

(4.62 and 4.63)

57. The purchaser of an instrument should be regarded as having notice of a claim or defence if

- (a) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or
- (b) the purchaser has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.

The purchaser should also be regarded as having notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.

(4.65)

58. In the following circumstances, the purchaser of an instrument should not be considered as having notice of any claim on or defect in the instrument :

- (a) that the instrument is ante-dated or post-dated;
- (b) that it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defence or claim has arisen from the terms thereof;

- (c) that any party has signed for accommodation;
- (d) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion;
- (e) that any person negotiating the instrument is or was a fiduciary;
- (f) that there has been default in payment of interest on the instrument or in payment of any other instrument, unless it is one of the same series.

(4.66)

59. The purchaser of an instrument should be regarded as having notice that an instrument is overdue if he has reason to know—

- (a) that any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series; or
- (b) that acceleration of the instrument has been made; or
- (c) that he is taking a demand instrument after demand has been made or more than a reasonable length of time after it is issued.

(4.68)

60. A cheque which has been in circulation for over three months from the date it bears should be presumed to be overdue.

(4.71 and 7.67 to 7.73)

61. The law should provide that, to be effective, a notice of any defence or claim which would affect the title to, or the amount payable on, the instrument, must be received by a person at such time and in such manner as to give him a reasonable opportunity to act on it.

(4.73)

62. The holder in due course should be regarded as taking the instrument free from all claims to it on the part of any person and all defences of any party to the instrument with whom the holder has not dealt, except—

- (a) infancy, to the extent that it is a defence to a simple contract; and

- (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
- (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
- (d) discharge in insolvency proceedings; and
- (e) any other discharge of which the holder has notice when he takes the instrument.

(4.75)

63. The law should provide that as against a holder in due course a defence based on non-delivery, conditional delivery or delivery for a special purpose shall not be set up.

(4.76)

64. As against a holder in due course and without notice of the accommodation, oral proof of the accommodation should not be admissible to give the accommodation party the benefit of discharge dependent on his character as such, and in other cases, the accommodation character may be shown by oral proof.

(4.77)

65. An endorsement which purports to transfer to the endorsee only a part of the amount payable shall operate only as a partial assignment and should not be effective as a negotiation thereof.

(4.80)

66. Business convenience requires that the terms of a contract of a person guaranteeing the payment of an instrument or the fulfilment of an obligation arising thereon of any party to the instrument are expressly stated and scope of any ambiguity thereon should be avoided. Hence, the law should provide that—

- (a) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.
- (b) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not

paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

- (c) Words of guaranty, which do not state otherwise, guarantee payment.
- (d) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.
- (e) When words of guaranty are used presentment, notice of dishonour and protest are not necessary to charge the user of such words.

(4.81)

67. Instead of having provisions in our law on the lines found in the Geneva Conventions regarding the system of "Aval", the law should provide that where a person signs an instrument otherwise than as a maker, drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course.

(4.82)

68. Where an instrument is drawn or negotiated by a minor, the drawing or negotiation, as the case may be, shall entitle the holder to receive payment of the instrument and to enforce it against any party thereto other than the minor.

(4.84)

69. When a negotiable instrument contract is entered into on behalf of a corporate body by a person acting without authority, such a contract may nevertheless be valid in order to bind other parties thereto.

(4.85)

#### NEGOTIABLE INSTRUMENTS—THEIR HONOUR AND DISHONOUR

70. The procedure for honouring an instrument should be clear leaving no scope for ambiguity and should be consistent with business convenience. If the instrument is dishonoured, the secondary parties who

may become thereby liable have to be promptly apprised of the dishonour in order that they may take proper steps to protect their interests. The procedure for recovery of the amount due on the instrument from the parties liable thereon, in the event of dishonour, should contribute to the expeditious settlement of the claim.

(5.1)

71. Unless otherwise agreed, where an instrument is taken for an underlying obligation, the obligation should be regarded as suspended *pro tanto* until the instrument is due or if it is payable on demand, until its presentment. If the instrument is dishonoured, action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument should also be regarded as discharging him on the obligation.

(5.2)

72. The provisions of the negotiable instruments law relating to payment of interest should be specifically provided as subject to any law for the time being in force for the relief of debtors, which authorises the courts to scale down the interest and give relief to the debtors. It should, however, be provided that as against a holder in due course, no claim or defence based on any relief available under any statute for the relief of debtors will be allowed to be set up.

(5.5 and 5.7)

73. The rate of interest specified in the Act should apply both to a case where the instrument is silent as to payment of interest and to a case where the instrument is silent only as to the rate for such payment. But, with reference to instruments payable on demand, this provision should be made applicable only to instruments other than cheques. With reference to cheques, the provision should apply only from the date of dishonour.

(5.11)

74. The rate specified in the Act is the minimum applicable when the parties have not cared to provide for payment of interest at a specified rate. Hence, it is not necessary to consider any upward revision of the rate at which interest should be payable under the Act, if the instrument is silent as to interest/rate.

(5.12)

75. With reference to a usance bill or a note, the rate of interest specified under the Act should apply, when the instrument is silent, for determining the interest payable either for the period of usance or for the period commencing from the date of default, or both, as the case may be.

(5.14)

76. While the rate specified in section 80 of the NIA works as the minimum rate of interest recoverable, the rate specified in section 34 of the Civil Procedure Code operates as a ceiling rate at which interest is recoverable. Hence, the appropriateness or otherwise of the rate specified in section 34 has to be considered with reference to market conditions. This provision also works adversely against banks, since the funds which would have gone to several better purposes are not only stagnated, but by committing default the concerned parties may continue to avail themselves of the benefit of the funds at a rate much lower than the rate prevailing in the market from the date of decree to the date of realisation, a period which is usually extended to a very considerable length of time by unscrupulous parties by adopting a variety of dilatory tactics. Hence, with reference to claims on negotiable instruments—there may be similar justification for suits based on other money claims as well—the rate at which the decretal amount is recoverable from the date of the decree should be the rate specified in the instrument so long as it is not unreasonable or unconscionable. What is “unreasonable” or “unconscionable” would vary with the facts and may also vary having regard to the nature of the lending institution and this may be left to be decided by the court. In other words, the rule should be that the decree should provide for interest, from the date of suit to the date of realisation, on the principal amount at the rate specified in the instrument or the minimum rate specified in section 80 of the NIA when the instrument is silent as to the rate, as the case may be, unless the court reduces the rate of interest specified in the document on the ground that it is unreasonable or unconscionable.

(5.16 to 5.18)

77. When a note is payable in instalments, on the default in the payment of any instalment thereof, the balance amount due under the instrument shall also become payable unless the instrument states otherwise.

(5.21)

78. The provision in the negotiable instruments law relating to days of grace should be abolished, except with reference to a bill drawn, or a note made, before the date of coming into force of the provision for abolition. On and from that date, a bill or a note shall become due and payable on the last day of the time of payment as fixed by the bill or note, or, if that is a non-business day, on the succeeding business day.

(5.23 to 5.26)

79. Section 25 of the NIA should be modified to adopt the *succeeding business day rule*. Having regard to the fact that the pressure of work is quite considerable now on Saturdays, which are half-working days for banking institutions in India, presentment should also be excused on Saturdays. Hence, when the maturity date of an instrument falls on Saturday, Sunday, or a public holiday, the instrument shall become due on the succeeding full business day.

(5.27 to 5.30)

80. Section 25 of the NIA should be amended to provide that the State Governments shall *also* be entitled to declare "public holidays" for their territory.

(5.32)

81. The practice followed in our country with reference to presentment, especially by banks, and the requirements of the NIA, are not entirely consistent nor are both in conformity with the procedure suggested by the Uniform Rules for the Collection of Commercial Paper.

(5.34)

82. "*Presentment*" may be defined as a demand for acceptance or payment made upon the maker, acceptor, drawee or other party liable on the instrument by or on behalf of the holder.

(5.37)

83. The party to whom presentment is made may, without dishonour, have the right to require—

- (a) exhibition of the instrument; and
- (b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and



- (c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and
- (d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.

Failure to comply with any such requirements should invalidate the presentment, but the person presenting should have a reasonable time in which to comply and the time for acceptance or payment should run from the time of compliance.

(5.38)

84. Unless otherwise instructed, a collecting bank should be allowed to present an instrument not payable by, through or at a bank, by sending to the party to accept or pay a written notice that the bank holds the instrument for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due. The drawee or other party liable should have 48 hours (exclusive of public holidays) from the close of business of the day on which such notice is received from the bank, for asking the bank to comply with any such requirements. The bank should comply with any such requirements within 48 hours (exclusive of public holidays) from the close of business of the day on which the bank receives notice of such requirements. When presentment is made by notice, if neither acceptance/payment nor request for compliance with any such requirements is received within the specified time, the presenting bank may treat the instrument as dishonoured and charge any secondary party by sending him notice of the facts.

(5.39 and 5.40)

85. Having regard to the special position occupied by banks and banking convenience and the need for expeditious settlement where a bank has to meet the claim, in the case of a bill to be accepted or a bill or note payable at a bank, it should be required to be presented at such bank.

(5.41)

86. It is not necessary that the validity of presentment for acceptance or payment by post should depend on proof of any such usage. Hence, presentment should be allowed to be made—

- (a) by a registered letter, in which event the time of presentment is determined by the time of receipt of the letter; or

- (b) through a clearing house; or
- (c) at the place of acceptance or payment specified in the instrument or if there be none, at the place of business or residence of the party to accept or pay. If neither the party to accept or pay nor any one authorised to act for him is, present or accessible at such place, presentment shall be excused.

(5.42 and 5.43)

87. In order to fix the acceptor with liability, a bill should be required to be presented for acceptance before it is presented for payment.

(5.45)

88. Presentment for acceptance should be necessary to charge the drawer and endorsers of a bill where the bill so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its maturity depends upon such presentment, and the holder may at his option present for acceptance any other bill payable at a specified date.

(5.49)

89. A cheque must be presented for payment before the drawer and endorsers thereof could be made liable thereon.

(5.50)

90. Presentment for payment is not necessary to charge the maker of a note or the acceptor of a bill.

(5.51)

91. Presentment, whether for acceptance or for payment, should not be necessary, or may be excused, in circumstances where non-presentment is not likely to prejudice or otherwise affect the parties whose liability is dependent on such presentment. Again, in conditions where presentment would be an empty formality and is not likely to result in the instrument being accepted or honoured, as the case may be, presentment is not necessary.

(5.52)

92. Where the instrument is not accepted, or payment is refused, and the ground for rejection is not related to any defect in presentment,

then the want of proper presentment should not be allowed to be set up as a defence.

(5.53)

93. Presentment for acceptance should be excused in the following circumstances :

- (a) if the maker, acceptor or drawee intentionally prevents the presentment;
- (b) as against any party to be charged therewith, if he has engaged in writing to pay without such presentment;
- (c) as against any party if, after maturity, with knowledge that the instrument has not been presented for acceptance, he makes a part payment on account of the amount due on the instrument, or promises to pay the amount due thereon in whole or in part, or otherwise waives his right to take advantage of any default in presentment;
- (d) as against the drawer, if he cannot suffer damage from such non-presentment; and
- (e) as regards an endorser, where the instrument was made, drawn or accepted for the accommodation of that endorser and he has no reason to expect that the instrument would be paid even if presented for acceptance.

(5.54)

94. Negotiable instruments are drawn with a view to have them honoured on their maturity. Where the person to pay is dead or bankrupt, the chances of *immediate* payment either are not there or are remote. However, though the holder should have the choice to make presentment, he should not be required to make presentment for payment when the drawee or maker is dead or bankrupt. The provision excusing presentment when the maker or the drawee/acceptor is dead or insolvent should not apply in the case of documentary bills.

(5.56 and 5.57)

95. In order to reduce disputes and eliminate scope for controversy, notice of dishonour should be required to be given in writing, signed by or on behalf of the holder.

(5.59)

96. The holder of a bankrupt's acceptance should be allowed to exercise his right of recourse against the drawer and endorsers without waiting till the bill falls due for presentment for payment.

(5.60)

97. It is necessary to specify the categories of personnel who could be approached when the services of a notary public cannot conveniently be availed of. Hence, the following categories of persons may be empowered to make a protest or other notarial function with reference to

- (a) Members of Parliament or of any State Legislature; negotiable instruments :
- (b) the classes of officers of the Central or of any State Government who would have qualified as gazetted officers;
- (c) sub-divisional magistrates or officers;
- (d) tahsildars, naib or deputy tahsildars authorised to exercise magisterial powers;
- (e) block development officers;
- (f) post-masters;
- (g) panchayat inspectors.

(5.62)

98. It is necessary to permit a notary or other authorised person to make presentment by registered letter with acknowledgment due, without reference to any agreement or usage regarding the same.

(5.63)

99. So long as the notary or other authorised person takes the responsibility, it is not necessary to go beyond except where want of *bona fides* is attributed to him. Hence, ordinarily, there should be no objection for a notary or other authorised person being allowed to certify a protest "upon information satisfactory to such person".

(5.64)

100. All the courts in the country having original civil jurisdiction should be permitted to decide claims arising on negotiable instruments by applying the summary procedure provided for in Order 37 of the Civil Procedure Code.

(5.66)

101. The adequacy and effectiveness of the present provisions providing for summary procedure in Order 37 of the Civil Procedure Code should be gone into by the Government in consultation with High Courts and to the extent possible its provisions should be modified to ensure that the summary procedure is really effective to arrive at a decision to dispose of the case in the least possible time.

(5.67)

### CONFLICT OF LAWS

102. The conflict of laws rules are really a part of the national system of administration of justice. Having regard to our expanding export and import trade and the diversification thereof, it is necessary that the conflict of laws rules in our Act accord to bankers, merchants and traders a parity in the treatment their counterparts receive in other countries. An arbitral statutory rule is preferable instead of leaving the holders of the instruments to conjecture about the proper law applicable. What businessmen need is a rule of law which can be stated to parties in advance of action and upon which they can act with ease and certainty.

(6.1 and 6.3)

103. The "*proper law*" doctrine is not consistent with the general principle of the negotiable instruments law that terms and conditions not *ex-facie* apparent in the instrument should not be allowed to be set up, especially against a holder in due course.

(6.4)

104. It is not in public interest to allow the parties unfettered choice to select their own law for determining rights and liabilities with reference to negotiable instruments. Nor is it correct to allow the parties the right to alter any rules stated in the Act by contracting otherwise. However, where the Act is silent and with reference to foreign instruments, the parties may be permitted to choose a law that has a reasonable connection to the transaction and this could only be either the *lex loci contractus* or the *lex loci solutions*, provided the choice is expressly stated in the instrument.

(6.10)

105. Having regard to the complexity of their work and the speed with which they are required to function, it is just that banks and their branches should be saved from the botheration of ascertaining

the procedural requirements under the foreign law with reference to matters covered by bank collection process. Hence, the law should provide that the liability of a bank for action or non-action with respect to any instrument handled by it for purposes of presentment, payment or collection should be governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or a separate office of a bank, its liability should be governed by the law of the place where the branch or separate office is located.

(6.12 and 6.14)

106. The conflict of laws rules should indicate, unless unavoidable, both as regards matters of form and validity and with reference to matters of liability, that the same system of law is applicable; application of different systems to determine form and validity and to determine liability will not work well, will cause avoidable hardship to the parties and is likely to breed litigation as to whether a question is one of form and validity, or of liability, since matters of form and validity generally determine the liability.

(6.15)

107. For determining the validity of an instrument with reference to requisites in form, it is only the law of the place of contracting that has to be applied.

(6.20)

108. Subject to the exceptions that are indicated later on, both for determining the essential requisites as to form and for determining the liability of parties, the conflict of laws rule should provide for applying the law of the place of contracting.

(6.22)

109. The liability of an endorser of an instrument should also be governed by the same conflict of laws rules that determine the liability of the drawer of a bill.

(6.24)

110. There is no valid reason why the rights under an instrument executed outside India should be affected in India for its failure to comply with the stamp law requirements of the country of origin. Hence, the law should provide that where an instrument is issued outside our country, it shall not be regarded as invalid in India merely

by reason of the fact that it is not stamped in accordance with the law of the place of issue.

(6.27)

111. The validity of supervening contracts made in India with reference to an instrument issued outside India but made payable in India should not be affected by reason of the instrument not conforming in any respect to the requirements of form of the place of issue.

(6.29)

112. Where an inland instrument is endorsed in a foreign country, the legal effect of such endorsement as regards the payer should be according to the law of India.

(6.30)

113. The general rule as to capacity should be one of *lex loci contractus*. Nevertheless, when a person lacks capacity according to the law of the place of contract, he should be bound if, according to the law of his domicile, he is not lacking in capacity.

(6.36)

114. The law of the place where the instrument is payable shall govern—

- (i) the duties of the holder with respect to presentment for acceptance or payment;
- (ii) the date of maturity;
- (iii) what constitutes dishonour by non-acceptance or non-payment; and
- (iv) the necessity for and sufficiency of protest or notice of dishonour.

(6.39)

115. Consistent with the provisions to be made to decide the form and validity of an instrument and the liability of parties, no separate provision is necessary to determine questions relating to payment and satisfaction.

(6.41)

116. Where an instrument is drawn outside the country but is payable in India and the sum payable is not expressed in the Indian currency, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(6.42)

### CHEQUES

117. The extent to which the cheque system is popular is an indication of the coverage of the financial transactions of a country by the banking system. While in the advanced countries practically all the transactions are paid by cheques or other allied media through the banking system, cash transactions form a predominant part of the Indian economy. Though in recent years there has been an increase in our country in the volume of transactions through cheques, it has been the result only of rising deposits and not due to larger turnover of deposits, which should have come about if the cheque habit on an average had gone up. Actually, the velocity of circulation of deposits has shown a marginal decline over the period 1965-66 to 1972-73.

(7.2 and 7.3)

118. Banks have to be assisted in the task of mobilising deposits and diversifying investments for a massive spread of the banking habit in the rural and urban areas by an extensive use of the cheque system.

(7.4)

119. The spreading of cheque habit is vital for the garnering of domestic resources by the banking system of the country. The spread of the banking habit, resulting from the greater resort to cheques in settling transactions, will pave the way for the integration of the monetary system and will make the monetary policy more effective. Since it is generally felt that the preference for cash transactions is mainly due to the existence of tax-evaded income, the spreading of cheque habit is highly conducive to public interest. Having regard to the general feeling regarding the extent of the malaise of tax-evaded income and its adverse impact on the general economy of the country, there is an imperative necessity for adopting in our country adequate measures for the spread of cheque habit.

(7.6)



120. The cheque habit became native to the English people and hardly was there any need for any special measures to promote the cheque habit. The reverse was the position in the Continent, and special measures had to be taken there which ensured their readier acceptability and freer circulation. Partly this is also true with reference to the position in the U.S.A. We are now faced with an analogous situation.

(7.7)

121. Over the course of years, the banking practice in India has developed on certain lines and when this is viewed in the light of the provisions of the NIA, on some of the aspects relating to cheques, there is necessity for statutory clarification.

(7.8)

122. It would considerably promote ready acceptability of the cheque if the issue of a cheque can be considered as operating as an assignment of the available funds with the banker, in favour of the holder. There is sufficient justification for applying the principle of assignment of the available funds with reference to cheques, without extending the principle to bills in general. On practical considerations, such a distinction may be necessary having regard to our policy objectives. There is also theoretical justification.

(7.13 and 7.14)

123. Where a drawee-banker has in his hands funds available for the payment of a cheque which has not become stale, the cheque should operate as an assignment of the sum for which it is drawn, or of the sum available to meet the cheque, as the case may be, in favour of the holder, from the time when the cheque is presented to the drawee-banker. The drawee-banker may ask for a receipt on the cheque, and an additional receipt, when he makes a partial payment on the cheque.

*Explanation:* For the purpose of this provision, the cheque shall be deemed to be presented to the drawee-banker only after the banker has had a reasonable time to ascertain the extent and availability of funds to meet the cheque.

(7.26)

124. Since the countermand of each cheque must be specially handled it throws a substantial burden on the holder and the drawee, whether the drawer's order is observed or not. By countermanding, the drawer is able to shift the burden to the payee in an action on the underlying obligation, which he would not be able to do had he paid in cash. In the majority of the countries of the world, there are severe restrictions on the drawer's right to countermand.

(7.27 and 7.28)

125. As between the drawer and the drawee, the drawee should be protected if he acts on the instructions of the drawer. But the drawer's liability to the holder for damages for his wrongful action should be clearly provided for. (7.33)

126. (i) The duty and authority of a banker to pay a cheque should be terminated by countermand of payment thereof by the drawer;

(ii) notwithstanding the above, the drawer should not be entitled to countermand payment unless he can show—

- (a) that the cheque has been lost or stolen; or
- (b) that the holder thereof has become insolvent;

(iii) without prejudice to any penal liability he may become subject to, if the drawer is shown to have countermanded payment in other circumstances, he shall be liable to the holder of the cheque for damages;

(iv) where a countermanded cheque is presented to the banker for payment, the banker shall—

- (a) advise the presenter about the countermand, and the drawer about such presentment;
- (b) set apart any available funds towards the cheque; but if within a period of three months from the date of such presentment the presenter or holder does not serve the bank with notice in evidence of his having taken legal proceedings to establish his title to the set-apart funds, the banker shall re-credit the account of the drawer with the amount so set apart; and where the presenter or holder takes suitable legal proceedings within such time, the banker shall abide by the direction of the court regarding the title to the amount so set apart.

(7.34)

127. Cheques are meant for immediate payment and the practice of issuing post-dated cheques is neither a healthy one nor is it in public interest. Generally post-dating of a cheque is a device to avoid stamp duty payable on a usance instrument. It is also not in the interests of public policy to countenance post-dated cheques.

(7.35 and 7.38)

128. A cheque should be payable at sight and on the day of presentment though it is post-dated. (7.42)

129. The death of a customer should not terminate the duty and authority of the banker to pay the customer's cheques until the expiry of a period of ten days from the date of the banker's knowledge of the death of the customer; however, within such period, any person claiming an interest in the account may, by notice in writing, ask the banker not to pay the customer's cheques, or not to pay a particular cheque of the customer. Any such notice shall have the same effect as an order issued to a banker by a customer countermanding payment of a cheque. In such a case, or when a cheque drawn by the customer is presented for payment after ten days from the date on which the banker has knowledge of the death of the customer, the provisions stated *supra* when there is a countermand of a cheque by the customer shall apply. (7.49)

130. As in the case of the death of a customer, other cases of adjudication of incompetence (*e.g.*, lunacy) of a customer, other than an adjudication of insolvency, should be similarly dealt with. (7.50)

131. Where a customer is adjudicated as an insolvent under the insolvency law, public policy requires that the interests of the general body of creditors should not be affected. Hence, the banker's authority to pay the cheque should not survive after the drawer is adjudged an insolvent, and the holder will have to prove his claim before the assignee. But any payment by the banker until he has notice of such adjudication and has reasonable opportunity to act thereon shall nevertheless be valid. (7.51)

132. The negotiable instruments law of all systems envisages certification of cheques by banks, though judicial recognition thereof in this regard in the U.K. and in India is now confined to the practice amongst clearing bankers. Since it usually involves undertaking some commitment or obligation to third parties, the reluctance of bankers to certify cheques, except in certain circumstances, is understandable. But while it may not be made obligatory for banks to certify, it is necessary to clarify statutorily the legal effect of certification in India. (7.61)

133. (1) Certification of a cheque shall be regarded as acceptance. Where a holder procures certification, the drawer and all other prior endorsers shall be discharged.

(2) Unless otherwise agreed, a banker shall have no obligation to certify a cheque.

(3) A banker may certify a cheque before returning it for lack of proper endorsement. If he does so, the drawer shall be discharged. (7.66)

134. There is no justification in law for the practice followed by banks, whereby they refuse to honour a cheque presented after a period of six months from the date it bears, without obtaining the confirmation of the drawer. Statutory protection has to be given to this practice. Hence, the statute should provide that a banker may refuse to honour a cheque presented six months after the date it bears though he may nevertheless charge his customer's account for payment made in good faith thereafter. (7.72 and 7.73)

135. Cheques crossed "account payee" should be made not negotiable. (7.74—Please see also paragraph 9.58)

136. A cheque crossed "not negotiable" should cease to be negotiable. (7.75)

137. It is necessary to take care of the special requirements of institutions like the Life Insurance Corporation, and public agencies like Government Departments, for their issuing *cheques with receipt forms*. Such arrangement, between bankers and such special types of customers, as envisaged by the Mocatta Committee in the U.K., may become necessary in our country as well. The law has to be made clear to extend to bankers the protection they have with reference to cheques also with reference to their handling of cheques with receipt forms. (7.78 and 9.41)

138. Practically in all the countries of the world, the dishonour of a cheque for insufficiency of funds available to the credit of the drawer may give rise to penal consequences. Differences exist only with regard to attendant circumstances to be established before the penal consequences are brought home to the drawer. (7.80)

139. Section 415 of the Penal Code is hopelessly inadequate to curb the evil resulting from the issue of bad cheques. The practical difficulties in proving a crime of cheating when a worthless cheque is passed on are formidable. There are also the following lacunae with reference to the coverage of the provision relating to cheating:

- (a) When a person gives a bad cheque in repayment of an earlier debt, he may not be considered as thereby inducing another to deliver to him, or consent for his retention of, any property.

When goods are delivered in anticipation of payment, say, for a period of one month, and a cheque is accepted in the month end, if the cheque bounces for lack of funds, "cheating" may not be established as the supplier of the goods was not induced to deliver the goods by the issue of the bad cheque.

- (b) Again, when a bad cheque is given in payment of wages or other services rendered, there is neither delivery nor retention of property, and this may not amount to "cheating".
- (c) Now, before dishonesty could be established, there has to be a wrongful loss or wrongful gain, and such loss or gain can arise only when an unlawful means has been adopted. When a person gives a cheque, it is very difficult to consider that he is employing any unlawful means, unless the facts are so extreme as to warrant a conclusion that he could have had no reasonable belief that he was passing a negotiable instrument of any real value.
- (d) There are no statutory inferences which are found in the provisions of other countries as to when a *prima facie* fraudulent or dishonest intention could be presumed.
- (e) There are also no provisions which would penalise a reckless issue of a cheque without reasonable cause to believe that the drawer had adequate funds in his account.
- (f) We do not also have adequate provisions giving any grace period within which a person whose cheque bounces can pay and thereby not only save his credit but also save the economic consequences flowing as a result of circulation of bad cheques.

Having regard to the position in other countries, the adverse effect on the economy when bad cheques are not severely dealt with and the damage to the cheque transfer system this causes, it is necessary to rectify the above lacunae. (7.97 and 7.98)

140. Sufficient safeguards could be taken and innocent persons' interests amply protected if the measures for the spreading of cheque habit including those with reference to the issue of bad cheques are brought into force after a specific period, say, six months, from the date on which the provisions are enacted. Within this period of six months, the central bank of the country and other banks can adequately publicise the measures taken to popularise the cheque habit and the date from which such measures would come into force. (7.100)

141. It is necessary for the penal law to deal with the crime of *obtaining pecuniary advantage by deception or dishonest means*. Such an offence should not be confined to deal with only causes of bouncing of cheques, but should be a general one applicable to cover also other similar instances. (7.105 and 7.106)

142. (1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction be liable to imprisonment for a term not exceeding five years;

*Explanations :*

- (i) Where any debt or charge for which a person makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred, he shall be deemed to have obtained a pecuniary advantage.
- (ii) As against the maker or drawer, the making, drawing, uttering or delivering by such maker or drawer of a cheque, bill or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in his possession or control, shall be *prima facie* evidence of knowledge of insufficient funds or credit with such drawee and of intent to obtain pecuniary advantage by deception:  
  
*Provided*, however, where such maker or drawer pays the holder of the instrument the amount due thereon within *five days* of his receiving notice in writing that such instrument has not been paid, no such knowledge or intent shall be presumed.
- (iii) For the purposes of this provision, "deception" should mean any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or of any other person.
- (iv) For the purposes of this provision, a person should be considered to act dishonestly by causing wrongful gain or wrongful loss whether such gain or loss of money or other property is temporary or permanent, and for this purpose—
  - (a) "gain" shall include a gain by keeping what one has, as well as a gain by getting what one has not; and
  - (b) "loss" shall include a loss by not getting what one might get, as well as a loss by parting with what one has.

(2) Where the person who has obtained the pecuniary advantage is a corporate body, any deception practised by, or with the consent or connivance of, any director, manager, secretary or other similar officer of the corporate body, or of a member acting in the course of his management of a corporate body, or of any person who was purporting to act in any such capacity, such person as also the corporate body shall be liable for the offence. (7.107)

143. A provision on the above lines should be introduced in the Penal Code by inserting it after section 415. (7.108)

144. In order that the holder of a cheque is not put to heavy expenses and considerable loss of time and as it is a serious economic crime, the obtaining of a pecuniary advantage by issuing a cheque with inadequate funds at credit should be made a cognisable offence, though it may be allowed to be compounded by the holder. (7.109)

145. Any unjustified countermand by the drawer should also be visited with penal consequences in the same way as the issuance of a cheque without funds or credit available to meet the cheque. Mere civil liability for damages (assuming damages could be proved) will not be a sufficient deterrent to guard against improper use by the drawer of his right to countermand. (7.111)

146. The drawer of a cheque, who countermands payment thereon when he has no reasonable cause to believe that the cheque is either lost or stolen or that the holder of the instrument has either committed an act of insolvency or been adjudged an insolvent, shall be liable to imprisonment for a term not exceeding five years.

*Explanations :*

- (i) The burden of establishing that the drawer had reasonable grounds for believing that he was justified in countermanding the cheque on any one of the above grounds shall be on the drawer in any action against him instituted by the holder.
- (ii) Where the person who has countermanded payment is a corporate body, any unjustified countermand made by, or with the consent or connivance of, any director, manager, secretary or other similar officer of the corporate body, or of a member acting in the course of his management of a corporate body,

or any person who was purporting to act in any such capacity, such person as also the corporate body shall be liable for the offence. (7.111)

147. A provision on the above lines should be introduced in the Penal Code by inserting it after the provision dealing with the offence relating to obtaining pecuniary advantage by deception. (7.112)

148. A bureau to disseminate information on unpaid cheques, on the lines of the Central Card Index of Cheques maintained by the Bank of France, is beneficial for its preventive, repressive and curative roles. In its preventive role, the banker is helped in his assessment of a person whether or not he is creditworthy and it furnishes valuable information about the antecedents of a customer. In its repressive role, it clarifies and facilitates the process of law in dealing with those responsible for issue of bad cheques. In its curative role, thanks to the effect of intimidation and of education, a registration in the Card Index cannot fail to exert a healthy influence on certain drawers who may be more negligent than dishonest. (7.123)

149. The measures for curbing the issue of cheques without sufficient funds should be supplemented by a system which provides for the management by the central bank of the country, namely, the Reserve Bank of India, of a bureau for collecting and disseminating information on unpaid cheques, somewhat on the lines of the Central Card Index of Cheques maintained by the Bank of France. It is necessary to give legislative sanction for the furnishing of information by the bureau to banks and to investigating and judicial authorities. Such a bureau would be a very effective adjunct to the Credit Information Bureau now being operated by the Reserve Bank of India pursuant to the provisions contained in Chapter III-A of the Reserve Bank of India Act, 1934. The legislation in this regard may find place as a separate chapter of that Act. (7.125)

150. Persons opening chequeable accounts should be required to disclose their income-tax code number to the banks concerned, which the banks may furnish to the bureau for identifying the drawers when their cheques bounce for inadequacy of funds. (7.126)

151. Section 40(A)(3) of the Income-tax Act requires that in order that an expenditure exceeding Rs. 2,500 may qualify as an allowable item in computing the tax liability, the payment thereof has to be effected by means of a crossed cheque or a crossed draft. Whether



payments by indigenous negotiable instruments (hundis) should also be treated on par with payments effected by crossed cheques or crossed drafts, is a question to be considered while dealing with the codification of the practices and usages relating to indigenous negotiable instruments. Subject to this reservation, the principle underlying section 40(A)(3) of the Income-tax Act is salutary and merits inclusion in the package of proposals for promotion of cheque habit. (7.127)

152. The statute should provide for the compulsory maintenance of chequeable accounts with banks by merchants and traders. (7.128)

153. All payments of wages and salaries above Rs. 1,000/- should be compulsorily required to be made either by a credit to the bank accounts of the employees or by means of crossed cheques or crossed drafts. (7.131)

154. A period of six months to one year from the date of the legislation to implement the provisions suggested in the chapter on "Cheques" may be allowed before the relative provisions are brought into force. This would ensure that honest and innocent persons are not affected by the measures. (7.132)

155. It is necessary to acquaint bankers, merchants and traders and the public at large with the measures for the spreading of the cheque habit in the larger interests of the country's economy. Banks may be required to print in the inner cover of the cheque books important details of the measures introduced with reference to cheques. The public should be made aware of these measures by the Reserve Bank of India by the issue of special pamphlets, bulletins and press releases prepared for this purpose. The Reserve Bank should also arrange for appropriate training programmes to impart special instructions to officers and other employees of banks to acquaint them with the new measures. (7.133)

### BANKER'S DRAFTS

156. There are some general problems regarding "*banker's drafts*", which cover both inter-bank and inter-branch instruments payable on demand. As regards the second category of banker's drafts (inter-branch instruments payable on demand, *i.e.*, "*drafts*" as defined in section 85A of the NIA), there is need for statutory clarification as regards their legal status and their incidences on the rights and liabilities of those who handle them. (8.1)

157. It is not correct to regard a negotiable instrument as a form of receipt given for the transmission of money in the case of a purchase of a banker's draft. The fact that the object of the purchase is to remit the money should not affect this question. It is a recognised purpose throughout the world to use a negotiable instrument as medium for the transmission of funds. Thereby the issue of the instrument is not considered as creating a contract for the carriage of money. It is also not correct to regard the purchase of a draft as in no way different from a mail or a telegraphic transfer where there is no question of the issue of any instrument. Hence, there is no justification to sustain the distinction so far maintained by judicial decisions in India between the purchase of a banker's draft for the purpose of transmission, and purchase of a banker's draft ordinarily. The holder of the draft cannot claim the rights of a holder of a bill and the additional right to get the amount of the draft in preference to the general body of creditors. (8.11 and 8.12)

158. When a banker's draft (that is, an order to pay money, drawn either by one bank on another, or one office of a bank upon another office of the same bank, for a sum of money payable to order on demand) is purchased, no usage or practice inconsistent with the terms of the instrument shall be allowed to be set up. (8.13)

159. Since "holder" by definition would include also the purchaser of the instrument, banks may not have much difficulty in recognising the claim of the purchaser either for issue of a duplicate of the banker's draft, or for effecting payment to him of the amount covered by the instrument, when they are satisfied about the claim, after obtaining suitable indemnity. (8.15)

160. If the holder of a banker's draft, which is lost, is able to establish adequately his capacity as such, his claim for a duplicate thereof should not be denied merely for the reason that the purchaser refused to co-operate with such holder in approaching the bank for obtaining a duplicate. (8.18)

161. When the purchaser asks for cancellation of a banker's draft, the bank has to be satisfied about non-delivery of the instrument to the named payee. In the absence of any suspicious circumstances, the production of the instrument itself would be the best evidence of non-delivery. But the bank would not be justified to cancel the banker's draft or countermand payment thereof after it has been delivered to the named payee. (8.19)

162. There is no valid reason for the difference in the law and the practice in India regarding the status of "drafts". Whether the inter-branch instrument issued by a bank is treated as a cheque or a note, it is clear that all the provisions applicable to cheques or notes cannot be extended to such an instrument. Since no third person is involved and both the drawer and the drawee are the same, the obligation is on the bank to pay the draft, and the liability of the maker of a note and that of the drawer of the draft are not in any way different. The draft is on all fours in its legal effect with a promissory note payable on demand at a specified place. Since it is a question of basic liability and not merely a matter as to where the instrument is payable, the fact that for certain procedural requirements as to the performance of the obligation, branches of the same bank are considered as distinct, would not affect this question. What the banker really needs with reference to drafts is the application of certain special provisions which do not now extend to notes, to facilitate the issue and handling of such instruments by him.

(8.23 and 8.26)

163. The special provisions that have to be extended with reference to "*draft*", when understood as a note, are :

- (i) provisions relating to crossing;
- (ii) the extension of the provisions granting protection to the paying and collecting bankers in handling drafts—the crossing and protection provisions are now found in sections 85A and 131A of the NIA, and this position will have to be continued;
- (iii) the exemption from stamp duty to ensure that drafts are not made liable to duty as demand promissory notes.

Hence, the law should provide as under :

- (i) "draft", *i.e.*, an order to pay money, drawn by one office of a bank upon another office of the same bank, for a sum of money payable to order on demand, shall be regarded as a note;
- (ii) the provisions relating to crossing and the provisions relating to banker's protection shall extend to drafts;
- (iii) notwithstanding anything contained in the stamp law for the time being in force, drafts shall not be liable for any stamp duty. (8.28 and 8.29)

**BANKERS' PROTECTION**

164. As banks undertake and play a more positive and active role in the fulfilment of the country's socio-economic objectives and venture out of their conventional and narrow confines, it is but natural that the range of protection to them requires to be broadened in content and coverage to facilitate banks to effectively perform the special tasks assigned to them. Again, the surveys conducted and studies made have also brought out the gap in the applicable protective provisions of our law and the need for extending the scope of such provisions with reference to instruments analogous to cheques.

(9.1 and 9.2)

165. While the paying banker knows the state of, and takes the responsibility for the authenticity of the signature of, the drawer, and the collecting banker similarly may know the holder for whose account he collects, the former cannot be presumed to have any special knowledge about the payee or other holders of the instrument and the latter about the drawer and the previous holders of the instrument. The banker collecting in good faith an instrument to the credit of an ostensible payee or endorsee should not be saddled with responsibility if his constituent's title is subsequently found to be defective or wanting. Responsibility when it attaches can only relate to areas in which in his respective roles the banker has means, access and duty to undertake such responsibility. The standard of care required of bankers should at any given point of time be decided with reference to established banking practices.

(9.3 and 9.4)

166. The extent of growth in the number of offices of commercial banks and the increase in the number and value of cheques handled by banks for more than a decade past give sufficient indication about the magnitude of the problem and of the consequent need for clear statutory provisions to facilitate utmost expedition in the handling of cheques by banks. It is a reasonable assumption that in the years to come the rate of increase will not only be maintained but will go up. The rate of increase in chequeable deposits in our country for over a decade, the increase in the number and volume of cheque transactions in the recent past and their increase that could naturally be expected as a result of implementation of the special measures for spreading cheque habit would make the use of cheques in our country comparable to their use in the U.K.

(9.7 and 9.9)

167. Though for the scheme of "banking regulation" even those accepting non-chequeable deposits may be regarded as doing "banking" (as the definition of "banking" in the Banking Regulation Act would also indicate), it is only those authorised to accept chequeable deposits who should be eligible to claim the special privileges and who may be able to fulfil the special role assigned to a "banker" under the negotiable instruments law. This is so as many of the special privileges conferred on a "banker" under the NIA, or which are now proposed, would be inappropriate with reference to a person not authorised to accept deposits withdrawable by "cheque". Moreover, the special privileges which may be accorded to the "banker" should be confined to those companies or corporate bodies which are subject to the discipline of the banking regulation. (9.18)

168. "*Banker*" should be defined in the negotiable instruments law as a "company" or other corporate body which is authorised to accept deposits withdrawable by cheque. (9.19)

169. There is no provision in our country which extends protection to bankers paying and collecting instruments analogous to cheques, on the lines of the protection available to bankers in the U.K. for the last several decades. Essentially, such absence of protection is responsible for the reluctance of bankers in India to allow cheques with receipt forms being used even by customers who may have a genuine and valid need for this facility, like the Life Insurance Corporation, by special arrangements with the banks concerned. It is necessary that the scope of the bankers' protection in India should also extend to their payment and collection of instruments analogous to cheques, like cheques with receipt forms. (9.22 and 9.23)

170. The protection available to paying and collecting bankers with reference to cheques and drafts should also extend to their payment and collection of instruments for a sum of money payable to order on demand, which are drawn on them, or are collected by them, as the case may be. (9.24)

171. The negotiated cheque is a rarity and the requirements of law meant to deal with such rarities should not press too heavily on the banks' time and labour in their handling of the total volume of cheques and thus impair their speed and efficiency. (9.28)

172. The burden on the payee of verifying that the cheque is made out exactly in the correct name is felt much more in India

where endorsement rubber stamps by the payees are not in common use. (9.30)

173. The pointlessness and troublesome nature of the work of examining endorsements and the inconvenience caused to customers by the frequent need to return cheques for "regularisation" of endorsements develop a sense of futility amongst bank staff and cause vexation to bank customers. (9.33)

174. In most cases, even what purports to be an "endorsement" is not really one, that is, one meant for negotiation. A purported endorsement is required just so that the paying bank may hope to rely on this for the purpose of protection under the NIA. Where the payee has signed on the reverse of the instrument, it is not "endorsement" and hardly affords any protection. (9.35, 9.52 and 9.54)

175. In view of the spread in the branches of commercial banks for over a decade past, the considerable increase in the number and volume of cheques handled by banks and the further increase that may be expected consequent on the special measures for spreading the cheque habit, the time and labour which the public as payees and the collecting and paying banks would have to spend in scrutinising endorsements on order cheques (endorsements on bearer cheques now merit no notice by banks) would be very considerable and in view of the futility of the exercise, there is a clear case for dispensing with this and effecting consequential economy in time and labour. (9.36)

176. Provisions modelled on the lines of the Cheques Act of the U.K. are necessary for our country not merely for the protection of bankers but mainly because they are conducive to business expedition and economy. However, profiting by the experience gained on the working on the Cheques Act and the developments in this regard elsewhere, it is not necessary to extend the scope of the protection to cover cases of payment of cheques and allied instruments across the counter, or to cases of a banker collecting cheques not drawn in the name of his customer or in a name which so resembles the customer's name as to lead the banker to believe that the instruments are drawn in favour of the customer (here the Australian provision is appropriate). But it is necessary to consolidate the protective provisions both for paying and collecting bankers. As has been done in Australia, cases of endorsements without authority should also be brought within the protective canopy. Such provisions should be applied irrespective of the fact whether the instrument is crossed or uncrossed

and should extend to cheques and other allied instruments. On the lines of the U.K. Cheques Act, the crossing provisions should apply also to instruments allied to cheques. The payment of a cheque or other allied instrument when collected by a banker to the credit of the named payee should be a *prima facie* evidence of the receipt of such amount by him. (9.49)

177. The purported *signature* on the reverse of the cheque by or on behalf of the payee cannot be relied on by the drawee as the purported *endorsement* and hence the drawee may not be discharged merely by payment of such instrument in due course. Hence, strictly speaking, the drawee banker may be discharged when he pays an order cheque across the counter *only* when the payment is made to the correct person. (9.54)

178. In order to inculcate the cheque habit among the public and in order to popularise draft as a mode of remittance, banks should be relieved, by statute, of the obligation to require identification of the payees on order cheques for payments made in their ordinary course of business. But this should not prevent banks from insisting on identification where they consider that the facts warrant it. (9.55)

179. Section 85(1) of the NIA should be amended as :

“Where a cheque payable to order purports to be indorsed and/or *discharged* by or on behalf of the payee or indorsee, the drawee is discharged by payment in due course”. (9.56)

180. There is no provision in the NIA affording protection to a banker collecting an altered item according to the apparent tenor thereof at the time of its receipt for collection, on the lines of section 89 of the NIA which protects a banker when he pays in due course an altered instrument according to the apparent tenor thereof. The collecting banker should be protected when in good faith and in the ordinary course of business he receives payment of an instrument (whether crossed or uncrossed) according to the apparent tenor of the instrument at the time of receipt thereof for collection.

(9.57 and 9.59)

181. It is necessary to safeguard the position of banks which may collect or pay instruments *restrictively endorsed*, without any reason to suspect that thereby they are acting contrary to the restrictions imposed by the endorsement. Banks ordinarily handle instruments,

especially cheques, in bulk and have no practicable opportunity to consider the effect of restrictive endorsements. Hence, neither the collecting bank (including an intermediary bank acting on behalf of the first collecting bank) nor the paying bank should be considered as having notice nor otherwise affected by the restrictive endorsement of any person who is not either the bank's immediate transferor or the person who presented the instrument for payment. (9.60 and 9.61)

182. It is not clear whether a banker is discharged when payment is made to a person who is a minor to the knowledge of the banker and whether a minor can under such circumstances give a valid discharge. Though probably a banker may be protected by the tenor of the language of section 26 of the NIA, there is every merit in clarifying the position with reference to minors' deposit accounts and safe deposit agreements with banks. (9.62)

183. To deal with minors' accounts, the Banking Regulation Act, 1949, may be amended to introduce the following provisions :

*Minors' Deposits and Safe-Deposit Agreements*

(a) *Receipt of Deposits*—A banker may receive deposits by or in the name of :

(i) a minor,

(ii) a minor jointly with one or more adults or other minors, with the same effect as a joint deposit, or

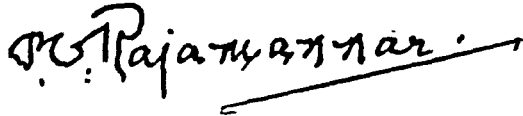
(iii) a minor as trustee, or a minor and one or more adults or other minors as trustees, with the same effect as a deposit in trust.

(b) *Safe-deposit agreements*—A banker may rent a safe deposit box or other receptacle for safe deposit of property to, and receive property for safe-deposit from, a minor.

(c) *Dealings with minor*—A banker may deal with a minor with respect to a deposit account or safe-deposit agreement covered by sub-section (a) or (b) of this section *without the consent of a parent or guardian* and with the same effect as though the minor were an adult. A parent or guardian shall not have any right in such capacity to interfere with any such transactions. Any



action of the minor with respect to such deposit account or safe-deposit agreement shall be binding on the minor with the same effect as though an adult. This section shall not affect the law governing transactions with minors in cases outside the scope of this section. (9.64 and 9.65)



P. V. RAJAMANNAR,  
*Chairman and Sole Member.*



R. KRISHNAN,  
*Secretary.*

MADRAS,

7th February, 1975.

APPENDIX I  
BANKING LAWS COMMITTEE

(Government of India)

Review of legislation affecting Banking

**\*QUESTIONNAIRE ON THE REVISION OF THE NEGOTIABLE  
INSTRUMENTS LAW**

**@PART 7—NEGOTIABLE INSTRUMENTS FOR PAYMENT OF MONEY  
NOT IN THE NATURE OF CHEQUES, BILLS OR NOTES**

**Group 1—General**

- 7.1.1 A major suggestion is to bring within the scope of the Negotiable Instruments Act the following types of negotiable documents under which money is payable :

Debentures ; bonds issued by companies ; bearer bonds ; bearer scrips ; bearer debentures ; treasury bills ; postal orders ; share certificates ; insurance certificates/policies ; deposit receipts ; pay warrants, etc.

Do you think it feasible and/or desirable?

- 7.1.2 If you do not favour bringing such negotiable instruments under the Negotiable Instruments Act, do you regard a separate legislation dealing with such types of instruments necessary or desirable?
- 7.1.3 Bonds, certificates of stock and other types of investment securities are now dealt with under separate but common legislative provisions in the U.S.A., which are "likened rather to a negotiable instruments law dealing with securities." Do you consider such legislation necessary or desirable in India?

[Vide Article 8 of the UCC]

**Group 2—Trend to increase the types of negotiable instruments**

- 7.2.1 The NIA defines a negotiable instrument as a note, bill or a cheque payable to order or to bearer (Section 13). However, in U.S.A., any writing—
- (a) signed by the maker or drawer ; and

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\*The questionnaire was originally issued by the Banking Commission's Study Group which reviewed legislation affecting banking.

@Parts 5, 6 and 11 to 21 of the questionnaire relate to the other branches of laws under review by the Banking Laws Committee.

- (b) containing an unconditional promise or order to pay a sum certain in money, and no other kind of promise or order; and
- (c) payable on demand or at a definite time; and
- (d) payable to order or bearer

is held as a negotiable instrument. Do you consider it desirable to have in India a provision as in U.S.A.?

### **Group 3—Certificate of deposit**

- 7.3.1 In U.S.A., the “negotiable certificate of deposit” issued by a bank is specifically stated as a negotiable instrument and is governed by the Negotiable Instruments Law. Do you consider it necessary or desirable to specifically provide for such recognition in India of certificate of deposits, if any, issued by banks?

## **PART 8—NEGOTIABLE INSTRUMENTS—CONFLICT OF LAWS**

### **Group 1—Parties’ power to choose applicable law**

- 8.1.1 Under the American law, when a transaction relating to a negotiable instrument bears a reasonable relation to more than one State or nation, the parties may agree that the law of either shall govern their rights and duties. Would you favour such liberty being given to the parties to such an instrument in India?

[Vide Section 1-105 of the UCC]

### **Group 2—Special provision for banks**

- 8.2.1 In U.S.A., the liability of a bank, or the branch of a bank, for action or non-action with reference to any instrument handled by it for purposes of presentment, payment or collection, is governed by the law of the place where the bank or the branch of a bank, as the case may be, is located. Do you consider a provision on these lines necessary or desirable in India?

[Vide Section 4-102 of the UCC]

### **Group 3—Formal validity of the contract**

- 8.3.1 A negotiable instrument involves a composite contract consisting not only of the original contract between the parties to the instrument but also of the “supervening contracts” made by the acceptor or indorser. Each of these contracts may be entered into at different places and it has been suggested that the validity of each must be determined according to the law of the place where such contract was made. Do you agree? Or, would you suggest any other rule?

### **Group 4—Capacity of parties**

- 8.4.1 For determining the capacity of parties to a contract, in relation to a negotiable instrument, the choice is between the law of domicile and the law of the place where the contract is made. Generally, the

law of the place where the contract takes place is considered as the more appropriate. However, as per the Geneva Conventions, the capacity of a person is determined by his national law with this qualification, namely, if the person lacks capacity as per his national law, he will nevertheless be bound if his signature had been given in any territory in which, according to the law in force there, he would have the requisite capacity. Which law, according to you, should determine the capacity of parties?

- 8.4.2 If the rule is to apply the law of the place where the contract takes place, the following exceptions have been suggested, namely :
- (a) that the absence or inadequacy of stamp and effect thereof, as per the requirements of the foreign law, need not affect the admissibility or enforceability of the instrument in India, if it satisfies the requirements of the Indian Stamp Law; and
  - (b) that the validity of any acceptance or indorsement made in India should not be affected by reason that the instrument made, drawn, accepted or indorsed out of India but in accordance with the law of India, is invalid according to the foreign law (Section 136 of the NIA).

Please give your views regarding each of the exceptions.

#### **Group 5—Liability of parties**

- 8.5.1 The liability of a maker or drawer of a foreign instrument is determined by the law of the place where the instrument is made, while the liability of an acceptor or indorser is determined by the law of the place where the instrument is made payable (Section 134 of the NIA). It has been suggested that even the liability of the maker or drawer should also be determined by the law of the place where the instrument is payable. Are you in favour of this suggestion?
- 8.5.2 The provisions relating to dishonour, notice of dishonour, the due date, the duties of holder with respect to presentment, acceptance or payment, it has been suggested, must be governed by the law of the place where the money is payable. Do you agree?
- 8.5.3 All questions relating to payment and satisfaction including interest, it has been suggested, should be governed by the law of the place where the instrument is payable. Do you agree?

### **PART 9—NEGOTIABLE INSTRUMENTS—GENERAL**

#### **Group 1—Drawee**

- 9.1.1 In U.S.A., unlike in U.K., the order to pay under the negotiable instrument may be addressed to one or more persons in the alternative. This recognises the practice of corporations issuing dividend warrants and of other drawers who for commercial convenience name a number of drawees, usually in different parts of the country. Do you consider

such a provision necessary or desirable? If so, would you also like to provide that in such cases the holder should not be required to make more than one presentment of the instrument?

[Vide Section 3-102(b) of the UCC and Section 6(2) of the "Bills of Exchange Act of U.K." (BEA).]

### **Group 2—Banker**

- 9.2.1 The definition of "banking" under the Banking Regulation Act, 1949, covers also acceptance of deposits which are withdrawable otherwise than by cheque, draft or order. Do you consider this definition appropriate in the context of defining a "banker" for the purpose of the NIA?
- 9.2.2 Under Section 49A of the Banking Regulation Act, 1949, only a banking company, the Reserve Bank of India, the State Bank of India or any other notified banking institution, firm or person can accept deposits of money from the public withdrawable by cheque. In view of this, would you like to provide in the NIA that a banker is one who is eligible to accept deposits withdrawable by cheque under Section 49A of the Banking Regulation Act, 1949? If not, how would you like a "banker" to be defined for the purpose of the NIA?

### **Group 3—Payee**

- 9.3.1 In U.S.A., by drawing, making or accepting, the party is deemed to admit, as against all subsequent parties including the drawee, the existence of the payee and his then capacity to indorse. Do you consider such a provision necessary or desirable in India?
- [Vide Section 3-413(3) of the UCC]
- 9.3.2 Considerable difference of opinion and difficulty arise when dealing with an instrument drawn in favour of a "fictitious or non-existent person." Hence, the UCC (Section 3-405) has eliminated the reference to "fictitious or non-existent person". In like circumstances, the UCC provides that an indorsement by any person in the name of the named payee is effective. Do you consider that a provision on those lines is necessary or desirable in India?
- 9.3.3 It is said that the insistence on the identification of the payee of an order cheque affects the spread of the cheque habit. Do you consider identification for payment of order cheques presented across the counter necessary? What is the practice followed in your bank in this behalf? Do you consider it necessary or desirable for banks to adopt a uniform practice? If so, what practice you would suggest?
- 9.3.4 Do you consider that any provision of the NIA makes such identification necessary? If so, do you consider any modification in this regard necessary or desirable?

**Group 4—Accommodation party**

- 9.4.1 Are you in favour of allowing the accommodation character of a party to an instrument to be proved by oral evidence? If so, would you also like to provide that, as against a holder in due course without notice of the accommodation, such evidence shall not be admissible?  
[Vide Section 3-415(3) of the UCC]
- 9.4.2 Would you regard an indorsement which is apparently not in the chain of title as notice of its accommodation character?  
[Vide Section 3-415(4) of the UCC]

**Group 5—Bearer**

- 9.5.1 It has been suggested that “bearer” should mean a person who by negotiation comes into possession of an instrument payable to bearer. However, the corresponding provision in U.K. and U.S.A. does not refer to the person in possession having obtained the instrument as a result of negotiation. Do you consider it necessary or desirable to insist on the condition that the instrument comes into his possession as a result of negotiation?  
[Vide Section 2 of the BEA and Section 1-201(5) of the UCC]

**Group 6—Holder**

- 9.6.1 It has been suggested that the definition of “holder” should expressly exclude a beneficial owner claiming through a benamidar. Do you consider this necessary or desirable?
- 9.6.2 The law in India enables a holder to ask for a duplicate of a bill, if he claims that it is lost, after furnishing an indemnity. It has been suggested that the scope of this provision should be widened to cover all negotiable instruments. Do you agree?
- 9.6.3 Difficulties are experienced in determining when a negotiable instrument can be held to have been lost before it is overdue. Is it possible to lay down any general criteria on the satisfaction of which it could be assumed that the instrument has been lost? If so, please indicate them.
- 9.6.4 Difficulties are also experienced in deciding the extent of indemnity to be obtained when a duplicate of an instrument is asked for. Is it possible to lay down any standard that could be applied in such cases? If so, please indicate. Should the indemnity cover also the right to ask for adequate collateral or other security?
- 9.6.5 It has been suggested that a transferee for value without indorsement of an instrument should have all the rights which the transferor had in it and in addition, the right to have the indorsement of the transferor or his representative. Do you consider this desirable?  
[Vide Section 31(4) of the BEA]

**Group 7—Holder in due course**

- 9.7.1 Do you consider that a person, to be a holder in due course, should have taken the instrument for consideration, whether the instrument is payable to bearer or order? Please give your views with reasons therefor.
- 9.7.2 The UCC (Section 3-305) provides that, as against a holder in due course, the following defences could be urged :
- (a) infancy, to the extent that it is a defence to a simple contract; and as renders the obligation of the party a nullity; and
  - (b) such other incapacity, or duress, or illegality of the instrument,
  - (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
  - (d) discharge in insolvency proceedings; and
  - (e) any other discharge of which the holder has notice when he takes the instrument.

Do you agree that such defences should be available as against a holder in due course in India? If so, do you consider an express provision on the aforesaid lines desirable?

**Group 8—Transferor by delivery**

- 9.8.1 It has been suggested that a transferor by delivery should not be liable on the instrument except that he gives certain warranties to his immediate transferee for consideration. Do you agree? If so, would you like to confine the scope of Section 43 of the NIA only to transfer of instruments by indorsement and delivery?

**Group 9—Minors**

- 9.9.1 Do you consider the legal position relating to deposit of monies by minors in banks and withdrawals by them satisfactory? If not, what improvements you would like to suggest to the present position?
- 9.9.2 A suggestion has been made that minors who have attained a certain age of understanding may be legally permitted to give a valid discharge for monies withdrawn by them from bank accounts. Do you consider that such a provision is necessary or desirable?

**Group 10—Negotiable instruments and drafts**

- 9.10.1 In *Haji Sheikh Hasanoo v. S. Natesa Mudaliar & Co.* (A.I.R. 1959 Bom. 267), the Bombay High Court has held that a draft drawn by one branch of a bank on another is not a negotiable instrument under the NIA. Do you consider this decision satisfactory? If not, do you favour an amendment of the law; in which case, on what lines?

- 9.10.2 Would you like to apply all the general provisions of the NIA to such drafts, or would you like to apply to them only the provisions relating to cheques?

**Group 11—Sum certain**

- 9.11.1 The UCC (Section 3-106) specifically provides that the amount payable under an instrument is "sum certain" even though it is to be paid—

- (a) with stated interest or by stated instalments; or
- (b) with stated different rates of interest before and after default or a specified date; or
- (c) with a stated discount or addition if paid before or after the date fixed for payment; or
- (d) with exchange or less exchange, whether at a fixed rate or at the current rate; or
- (e) with costs of collection or an attorney's fee or both upon default.

Do you agree that under the aforesaid circumstances the sum payable could be regarded as certain? If so, would you like this to be specifically clarified?

**Group 12—Unconditional order**

- 9.12.1 Under the UCC (Section 3-105), a promise or order otherwise unconditional is not made conditional by the fact that the instrument—

- (a) is subject to implied or constructive conditions; or
- (b) states its consideration, whether performed or promised or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or "as per" such transaction; or
- (c) refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to pre-payment or acceleration; or
- (d) states that it is drawn under a letter of credit; or
- (e) states that it is secured, whether by mortgage, reservation of title or otherwise; or
- (f) indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or
- (g) is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or
- (h) is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.



However, a promise or order does not become unconditional if the instrument—

- (a) states that it is subject to or governed by any other agreement; or
- (b) states that it is to be paid only out of a particular fund or source except as stated above.

Do you agree that promise or order could be regarded as unconditional in all or in only some of the aforesaid circumstances? If in only some, please state them. Would you like a specific provision providing for such circumstances?

### Group 13—Definite time

- 9.13.1 Would you regard the time for payment of an instrument as definite if by its terms it is payable—
- (a) on or before a stated date or at a fixed period after a stated date; or
  - (b) at a fixed period after sight; or
  - (c) at a definite time subject to any acceleration; or
  - (d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event?

If so, do you favour a provision clarifying this?

[Vide Section 3-109(1) of the UCC]

### Group 14—Inchoate instruments

- 9.14.1 Would you like to expressly provide that the completion by the holder, of an incomplete instrument, as per authority given to him, should be “within a reasonable time and strictly in accordance with the authority given”? If so, would you like to provide that any failure to comply with this requirement shall not be set up as against a holder in due course?
- 9.14.2 It has been observed that the practice of delivering a blank paper containing a signature (which may be on a stamp paper) with a view that it may be filled in as a negotiable instrument for an adequate amount had utility only when communications were slow and difficult, that the practice has become obsolete, affords obvious opportunity for fraud, and should not be encouraged. Hence, it has been suggested that the provision that the delivery of such blank paper operates as *prima facie* authority to fill it up could be omitted. Do you agree?

[Vide Section 20 of the NIA]

- 9.14.3 If an incomplete instrument is stolen before its issue, and afterwards it is filled up and negotiated to an innocent party, he cannot be a "holder in due course" under the Law Merchant, though, in India, this point is not free from doubt. This rule has been criticised and dispensed with in the U.S.A. Are you in favour of its retention or deletion?

**Group 15—Ambiguous instruments**

- 9.15.1 It has been suggested that where words are ambiguous or uncertain, reference should be made to the figures to fix the amount. Do you favour a provision to that effect?

[Vide Section 3-118(c) of the UCC]

- 9.15.2 When a person draws a bill on himself, the holder has now the choice to treat it as either a bill or note. But, under the UCC [Section 3-118(a)], it is effective as a note. Which do you prefer?
- 9.15.3 Under the UCC [Section 3-118(b)], handwritten terms control typewritten and printed terms, and typewritten control printed. Do you consider a provision to that effect desirable in India?

**Group 16—Issue**

- 9.16.1 The BEA (Section 2) defines "issue" as "the first delivery of an instrument complete in form to the person who takes it as a holder". It is felt that this is not consistent with the provisions relating to incomplete instruments and not sufficient to cover the case of a remitter. Do you agree? If so, can "issue" be defined as the first delivery of an instrument to a holder or a remitter?

[Vide Section 3-102(1)(a) of the UCC]

**Group 17—Completion of an instrument by delivery**

- 9.17.1 Do you agree that as against a holder in due course, a defence based on "non-delivery", "conditional delivery" and "delivery for special purpose" shall not be allowed to be set up?

**Group 18—Instrument payable to bearer**

- 9.18.1 Do you regard an instrument as payable to bearer when by its terms it is payable to "cash" or the order of "cash" or any other indication which does not purport to designate a specific payee? Would you favour a specific provision clarifying the position in this behalf?

[Vide Section 3-111 of the UCC]

**Group 19—Instrument payable to order**

- 9.19.1 Under the UCC (Section 3-110), an instrument made payable both to order and to bearer is one payable to order unless the "bearer" word is handwritten or typewritten. Do you consider such a provision necessary or desirable?

**Group 20—Date, ante-dating and post-dating**

9.20.1 A provision that ante-dating or post-dating of an instrument will not make it invalid unless it is done for an illegal or fraudulent purpose, has been suggested. Do you favour such a provision or you would suggest any modification thereof?

9.20.2 The UCC (Section 3-114) specifically provides that—

- (1) the negotiability of an instrument is not affected by the fact that it is undated, ante-dated or post-dated; or
- (2) where an instrument is ante-dated or post-dated, the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date; or
- (3) where the instrument or any signature thereon is dated the date is presumed to be correct.

Do you agree with the principles underlying these provisions? If so, do you consider a provision on those lines necessary or desirable in India?

**Group 21—When an instrument is overdue**

9.21.1 It has been suggested that on demand an instrument shall be deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. In this connection could you please indicate what period you would regard as reasonable length of time for cheques, bills and notes payable on demand? Are you in favour of statutorily clarifying the position?

9.21.2 A cheque drawn and payable in U.S.A., is regarded as overdue 30 days after its issue while the banker is obliged to pay a cheque which is presented to him not more than six months after its date and has an option to pay or not to pay thereafter. Please give your views as regards the reasonableness of these periods. Do you favour a specific provision providing when a cheque could be regarded as having become overdue and the period up to which a banker is obliged to honour cheques drawn on him?

[Vide Sections 3-304(3)(c) and  
4-404 of the UCC]

**Group 22—Defective title**

9.22.1 Would you like to provide when the purchaser of a negotiable instrument could be regarded as having notice of a claim or defence or of the fact that an instrument is overdue?

9.22.2 Under the following circumstances, the UCC [Section 3-304(1) and (2)] provides that the purchaser of an instrument has notice of a claim or defence—

- (a) when the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or
- (b) when he has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged; and has notice of a claim—
  - when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt, or in any transaction for his own benefit or otherwise in breach of duty.

Do you agree that in the aforesaid circumstances, knowledge of a claim or defence can be imputed to the purchaser? If so, do you favour a specific provision to that effect?

9.22.3 A person is held to have notice that an instrument is overdue, under the UCC [Section 3-304(3)], when he has reason to know—

- (a) that any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series; or
- (b) that acceleration of the instrument has been made; or
- (c) that he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue.

Do you agree that in the aforesaid circumstances the purchaser could be regarded as having notice of the fact that an instrument has become overdue? If so, do you favour such a provision?

9.22.4 The UCC [Section 3-304(4)] does not regard knowledge of the following facts as *per se* giving the purchaser notice of a defence or claim:

- (a) that the instrument is ante-dated or post-dated;
- (b) that it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defence or claim has arisen from the terms thereof;
- (c) that any party has signed for accommodation;
- (d) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion;
- (e) that any person negotiating the instrument is or was a fiduciary;
- (f) that there has been default in payment of interest on the instrument or in payment of any other instrument, unless it is one of the same series.

Do you agree that knowledge of the above facts shall not be regarded as giving the purchaser notice of a defence or claim? Do you favour a similar provision in India?

- 9.22.5 Would you like to provide that to be effective a notice must be received by a person at such time and in such manner as to give him a reasonable opportunity to act on it?

[Vide Section 3-304(6) of the UCC]

### Group 23—Material alteration

- 9.23.1 What kinds of alterations of an instrument you would regard as material, and what not?

- 9.23.2 Would you regard alterations in relation to an instrument, namely, any alteration of the date, of the sum payable, of the time or the place of payment, of the name of the payee or drawee, of the place of drawing, of the nature of the instrument, of the crossing and the addition of a place of payment without the acceptor's assent, as material alterations or not? Please give your views with regard to each, with reasons.

- 9.23.3 The UCC [Section 3-407(1)] defines material alteration as—  
any alteration of an instrument which changes the contract of any party thereto in any respect, including any such change in
- (a) the number or relations of the parties; or
  - (b) an incomplete instrument, by completing it otherwise than as authorized; or
  - (c) the writing as signed, by adding to it or by removing any part of it.

Do you consider this definition satisfactory and adequate?

- 9.23.4 A material alteration renders the instrument void as against anyone who is a party thereto at the time of such alteration if he does not assent to the alteration. To this, an alteration by a stranger made without the assent of, or any negligence or fraud on the part of, the holder has been suggested as an exception. Do you agree?

- 9.23.5 Under the UCC [Section 3-407(2)] there is a distinction as regards alterations which are both fraudulent and material and those which are not, only the former discharging any party. This distinction is not found in the U.K./Indian provisions. Are you in favour of this distinction or not?

- 9.23.6 Under the UCC [Section 3-407(3)] and the Geneva Conventions (Articles 69 and 77 of Convention No. 3313 regarding bills and notes and Article 51 of Convention No. 3316 regarding cheques), a holder in due course may hold the party liable only according to the original

tenor of the altered instrument. Proviso to Section 64(1) of the BEA is similar in regard to bills. But Section 89 of the NIA enables a holder in due course to charge the person liable according to the apparent tenor of the instrument. Do you consider that the obliged party should be held liable to the holder in due course according to the original tenor or the apparent tenor of the altered instrument?

- 9.23.7 The BEA [proviso to Section 79(2)], the UCC [Section 4-401(2)(a)] and the NIA (Section 89) protect the payment of an altered instrument in good faith by a banker. While the BEA gives such protection only in relation to cheques, the UCC and the NIA extend this to payments in relation to any altered instrument. While under the BEA and the NIA the banker can charge the customer according to the apparent tenor of the altered instrument, the UCC enables him only to charge the customer according to its original tenor. Please indicate—
- (a) whether the protection to a banker paying an altered instrument in good faith should be confined to cheques, or extended to other instruments also? and
  - (b) whether the banker can charge the customer according to the original tenor or the apparent tenor of the instrument?
- 9.23.8 Do you expect a banker to detect also alterations invisible to the naked eye by the use of particular machines? Is it possible to evolve uniform standards to be observed by banks in this behalf? If so, please give your comments thereon.

#### **Group 24—Cancellation of an instrument**

- 9.24.1 Under the BEA [Section 63(1) and (2)] and the UCC [Section 3-605(1)-(a)], an intentional cancellation by a holder or his representative, of a bill, or the signature of any party liable thereon, which is apparent, discharges the bill or the party whose signature is cancelled, as the case may be. The Indian Act refers only to an intentional cancellation of the signature of a party liable on the instrument, but it does not specify that the cancellation should be apparent. Do you think it desirable to provide that a cancellation of the signature of a person liable, or of the instrument itself, should be apparent before such person or the instrument could be held as discharged? In addition in the case of a cancellation of the instrument, would you like to provide, on the lines of the UCC provision [Section 3-605(2)] that it will not, without its surrender, affect the title thereto?

#### **Group 25—Negligence contributing to alteration**

- 9.25.1 It has been judicially held that a drawer of a cheque rendering it easy for a forger to make alterations is bound to bear the loss, and not the bank. While there is no statutory provision in this behalf either in U.K. or in India, the UCC has a provision [Section 3-406] that any person who by his negligence substantially contributes to a material alteration of an instrument or the making of an unauthorised signature is precluded from asserting the alteration or lack of

authority against a holder in due course or against the drawee or other payer who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payer's business. Do you consider that such a provision is necessary or desirable in India?

### **Group 26—Signature**

- 9.26.1 Do you consider it desirable to define "signature"? If so, could it be defined as "the writing or otherwise affixing a person's name or a mark to represent his name, by himself or by his authority, with the intention of authenticating a document as being that of or as binding on the person whose name or mark is so written or affixed"? Would you also like to include in the above definition "the facsimile of the name so affixed in print, by perforation or in some other form"?
- 9.26.2 Under Section 47 of the Companies Act, 1956, a bill, hundi or note has to be signed on behalf of the company by any person acting under its authority express or implied in the name of, or on behalf of, or on account of, the company. Similar provisions are found in Section 147 of that Act. As these provisions apply only to companies registered under the Companies Act, do you favour a provision on these lines in the NIA so that they may apply to all corporate bodies?
- 9.26.3 Under the law in India and U.K., while an unauthorised signature could be ratified, a forged one cannot be. This principle has now been altered in U.S.A. on the ground that a forged signature could at least be adopted without in any way affecting the liability under the criminal law [Section 3-404(2)] and [1-201(43) of the UCC]. Do you favour such change? If so, would you like to provide that the retention of benefits received in the transaction with knowledge of the unauthorised or forged signature amounts to implied ratification of the unauthorised signature or forgery, as the case may be?
- 9.26.4 Under the UCC (3-404) an unauthorised signature operates as the signature of the unauthorised signer against a person who in good faith takes it for value. Do you consider such a provision necessary or desirable in India?
- 9.26.5 It is suggested that person signing an instrument otherwise than as a drawer, maker or acceptor shall be presumed to be an indorser unless there is express indication in the instrument to the contrary. Do you consider such a provision desirable?
- 9.26.6 Under the Geneva Conventions (Articles 30, 31, 32 and 77 of Convention No. 3313), payment of a bill or a note may be guaranteed by the signature of a third person and expressed by words such as "good as aval". The system of "aval" is not recognised in India. Do you consider it desirable to provide for its recognition?

- 9.26.7 The UCC (Section 3-416) specifically provides that a person can be guarantor under an instrument, and that the guarantee may be expressed by words such as "payment guaranteed" or "collection guaranteed" or by general words of guarantee. Do you consider a provision on these lines necessary or desirable in India?

**Group 27—Indorsements**

- 9.27.1 It has been suggested that when the payee or indorsee is wrongly named or misnamed in an order instrument, he may specifically be enabled to indorse the bill in the same manner or by his proper signature. Do you consider such a provision desirable? If so, would you also like to provide that a person paying or giving value for the instrument may require the signature of the person in both the names?

[Vide Section 3-203 of the UCC]

- 9.27.2 The general rule is that negotiation of an instrument is not effective unless it is for the entire amount or for the amount remaining as unpaid residue. Would you like to provide in such cases, on the lines of the UCC (Section 3-202), that a partial indorsement "operates only as a partial assignment"?

- 9.27.3 Under the NIA (Section 50) a restrictive indorsee is not empowered to further transfer or negotiate the instrument unless specifically authorised, nor he could be a holder in due course. Under the UCC [Section 3-205 and 3-206], a restrictive indorsement as such does not prevent further transfer or negotiation, and a restrictive indorsee may also be a holder in due course provided he has acted consistently with such indorsement. Please indicate whether you consider it necessary or desirable—

- (a) to allow a restrictive indorsee to further transfer or negotiate the instrument; and
- (b) to enable a restrictive indorsee to be a holder in due course subject to his acting consistently with such indorsement.

- 9.27.4 If you favour the UCC provisions regarding the rights of a restrictive indorsee, would you like to bring conditional indorsements also within the scope of those provisions as in the UCC?

- 9.27.5 Do you favour a presumption that the indorsers of an instrument are liable to one another in the order in which their signatures appear on the instrument?

[Vide Section 3-414(2) of the UCC]

**Group 28—Date of maturity**

- 9.28.1 If a person contracts to pay an amount due under an instrument on demand, he could as well have fixed a time limit to suit his convenience. In this view, the provision for days of grace is considered



as unnecessary. This is also not allowed under the Geneva Conventions and the UCC. Are you in favour of abolishing the rule as to days of grace or its retention? Please give your views with reasons.

- 9.28.2 When the date of maturity falls on a public holiday, under the present rule the instrument is payable on the "next preceding business day". It has been suggested that to avoid difficulties, the "succeeding business day" rule should be applied. Under the UCC [Section 3-503(3)] it is the "next following day which is a full business day for both parties" and it thus excludes half-holidays like Saturday. Which rule you consider should properly be applied in India and why?

#### **Group 29—Presentment**

- 9.29.1 A drawee of a bill is not liable on it unless he assents or accepts. But to charge the drawer and indorser, presentment for acceptance is considered obligatory under the BEA [Section 39(1) and (2)] and the UCC [Section 3-501(1)(a)] provisions only when—

- (a) the bill is payable after sight;
- (b) there is an express stipulation to this effect; and
- (c) the bill is drawn payable elsewhere than at the residence/place of business of the drawee.

But under the NIA, this is necessary only when the bill is payable after sight. Please indicate the circumstances when you would consider presentment for acceptance necessary or desirable to charge the drawer and indorser.

- 9.29.2 Do you consider presentment for payment necessary in the case of a cheque to charge the drawer and indorser?
- 9.29.3 Whether presentment for payment is necessary or not to charge the maker and the acceptor is not free from ambiguity. This is not necessary under the BEA or the UCC or the Geneva Conventions. Do you consider presentment for payment necessary to charge the maker or acceptor?
- 9.29.4 Presentment for payment is necessary under the BEA [Section 87(1)] to charge the maker of a note payable at a specified place. This is not necessary in India if such note is payable on demand (exception to Section 64 of the NIA). But presentment for payment is not necessary to charge the maker of any note, under the UCC or the Geneva Conventions. Do you favour the present position or would you like to dispense with presentment for payment as necessary to charge the maker of any note?
- 9.29.5 Under the UCC [Section 3-511(3)(b)], presentment for acceptance or payment is entirely excused when the acceptance or payment is refused but not for want of proper presentment. Do you agree with this provision?

- 9.29.6 Under the BEA [Section 45(3) and (7)], presentment for payment is not excused when the person liable is dead or bankrupt. But the UCC [Section 3-511(3)(a)] entirely excuses presentment in such cases except in the case of documentary draft, on the ground that where immediate payment or acceptance is impossible, or is so unlikely, the holder cannot reasonably be expected to make presentment and instead can have his immediate recourse upon the drawer or indorser. Which provision do you prefer?
- 9.29.7 Please indicate whether in all or any of the following circumstances presentment for acceptance could be excused
- (a) if the maker, acceptor or drawee intentionally prevents the presentment;
  - (b) as against any party to be charged therewith, if he has engaged in writing to pay without such presentment;
  - (c) as against any party if, after maturity, with knowledge that the instrument has not been presented for acceptance, he makes a part payment on account of the amount due on the instrument or promises to pay the amount due thereon in whole or in part or otherwise waives his right to take advantage of any default in presentment;
  - (d) as against the drawer, if he cannot suffer damage from want of such presentment; and
  - (e) as regards an indorser, where the instrument was made, drawn or accepted for the accommodation of that indorser and he has no reason to expect that the instrument would be paid even if presented for acceptance.
- 9.29.8 Under the BEA [Sections 41(1)(b) and 45(6)] where there are two or more drawees, unless they are partners or one man has authority to act for all, presentment for acceptance or payment should be made to all of them. The UCC [Section 3-504(3)(a)] provides that presentment in such cases need not be to all, and may be made to any one of them on the reason that the holder is entitled to expect that any one of the named parties would pay or accept and that he should not be required to go to the trouble and expense of making separate presentment to a number of them. Which provision do you prefer and why?
- 9.29.9 It has been felt that when an instrument is payable in instalments and default is made in the payment of one of them, the point whether it is necessary to present the instrument for payment as regards the subsequent instalments, in the absence of an acceleration clause, is not clear. Would you like to clarify the position? If so, how?
- 9.29.10 While presenting an instrument for acceptance, do you consider it necessary in all cases to exhibit the original instrument? Will it not be adequate if this is done only if specifically required by the party to accept?

- 9.29.11 While presenting an instrument for payment, do you consider it necessary to send the original, or an attested copy thereof? Or, do you regard that presentment for payment could be made by a mere demand as under the UCC (Section 3-504)?
- 9.29.12 Under the UCC (Section 3-505), the party to whom the presentment is made may, without dishonour, require—
- (a) exhibition of the instrument; and
  - (b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and
  - (c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and
  - (d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.

Are you in favour of a provision on these lines?

- 9.29.13 What is the practice you follow when you have to make presentment for acceptance and for payment? Do you regard the practice as fully consistent with the requirements of law? If not, in what respects, and what remedy you suggest?
- 9.29.14 It is said that there is a practice among banks to make presentment by giving only an intimation to the person liable to pay. Is this practice justifiable under the present law? Are you in favour of making any special provision giving legal recognition to this practice? If so, do you favour a provision on the lines of Section 4-210 of the UCC whereby a collecting bank is permitted to present an instrument (not payable by, through, or on a bank) by sending to the party to accept or pay, a written notice that the bank holds the instrument for acceptance or payment?
- 9.29.15 Do you agree that in the case of a bill accepted or a note made payable at a bank, presentment should only be by production of the instrument?

[Vide Section 3-504 (4) of the UCC]

- 9.29.16 At present while presentment for acceptance could only be on a business day, presentment for payment can be on a day which is not a business day provided it is not a public holiday. In U.K., any presentment could be made only on a business day [Sections 41(1)(a) and 45(3) of the BEA]. Under the UCC [Section 3-503 (3) and (4)], the presentment has to be "on a day which is a full business day for both parties, and if at a bank, during its banking day". In the light of this, please indicate whether you favour the continuance of the existing position or desire any change. If you want a change, on what lines?

- 9.29.17 It has been suggested that the party who is to make the presentment for payment could adopt any means convenient to him including the use of postal communication. Do you agree? If so, would you like to provide similarly also as regards presentment for acceptance?

[Vide Section 3-504(2)(a) of the UCC]

- 9.29.18 If presentment by post could be allowed, do you consider it necessary to stipulate that it should be by registered post?

**Group 30—Interest**

- 9.30.1 Do you favour the rate of interest payable on negotiable instrument being varied by the provisions of the local State enactments?

**Group 31—Notice of dishonour**

- 9.31.1 A notice of dishonour can be given in India, U.K. and U.S.A. orally or in writing. It has been suggested that in order to impart more certainty to this important act, the notice should be required to be given in writing. Do you favour this change? If notice has to be given in writing, should it also be required to be signed, or need not be as under the BEA?

**Group 32—Noting and protest**

- 9.32.1 Under the BEA (Section 94), in the absence of a Notary, a protest could be effected by "any householder or substantial resident of the place attesting the dishonour of a bill in the presence of two witnesses". As the services of the Notary may not be available at all places, please indicate the persons who could be authorised in India to note and/or protest.
- 9.32.2 Do you favour the Notary being permitted to make presentment ordinarily through post?
- 9.32.3 Under the UCC (Section 3-509), a person authorised to protest is allowed to do so "upon information satisfactory to such person". It has been stated that this provision is not intended to affect any personal liability of the officer for making a false certificate but to leave it to his responsibility for determining whether he has satisfactory information. It has also been stated that the requirement that the person making protest must certify as of his own knowledge, has been more honoured in the breach than in the observance, and in practice, protest is made upon hearsay which the officer regards as reliable. Please give your comments on this and indicate how this can be avoided.
- 9.32.4 Under the Geneva Conventions, the holder of a bankrupt's acceptance is allowed to exercise his right of recourse. But under the BEA [Section 51(5)] and the NIA (Section 100) the holder is required to wait till the bill falls due before he can sue any party, and the

protest for better security does not excuse a subsequent protest for non-payment, if the bill is not met at maturity. Do you consider it desirable to modify the Indian law on the lines of the provisions of the Geneva Conventions in this regard?

## PART 10—CHEQUES.

### Group 1—General

- \*10.1.1 The Committee on Finance for the Private Sector (the Shroff Committee) has suggested for consideration the question of making the issue of a cheque on a bank without sufficient funds a criminal offence. Do you consider that such a provision is necessary or desirable? If you do, are you in favour of a proviso to such a provision on the following lines?
- “Provided the maker or drawer of such a cheque has not paid the holder thereof the amount due thereon within a specified number of days after receiving notice that the cheque has not been paid”.
- \*10.1.2 Would you favour a statutory provision, as in several States of the U.S.A., to the effect that a refusal of payment by the drawee because of insufficient funds shall be *prima facie* evidence of an intention to cheat?
- \*10.1.3 Do you favour that a provision on the aforesaid lines should cover also other classes of negotiable instruments?
- 10.1.4 Do you consider it necessary or desirable to provide for certification of cheques on the lines of the provisions applicable in this behalf in U.S.A.?
- 10.1.5 Do you consider that it is necessary or desirable to promote issue of cheques with receipt forms attached thereto? If you hold such a view, do you consider that any amendment of the law is necessary for such promotion? If so, please give your suggestions.

### Group 2—Cheques Act, 1957 of U.K.

- 10.2.1 The Cheques Act of U.K., which came into force on the 17th October 1957, seems to be working satisfactorily. Please state your views on the desirability or otherwise of a law in India on the lines of the Cheques Act.
- 10.2.2 The provisions of the Cheques Act extend also to documents which may not be negotiable instruments provided they are intended to enable a person to obtain payment of a sum. If you consider that provisions on the lines of this enactment are necessary or desirable

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\*Vide Section 22-1410 of the District of Columbia Code, 1967.

in India, would you like to cover also non-negotiable instruments for the payment of money?

- 10.2.3 Under the provisions of the Cheques Act, a paying banker, when he acts in good faith and in the ordinary course of business, is not concerned with, nor does he incur any liability merely by reason of, the absence of, or irregularity in, indorsements. Do you consider provisions on these lines necessary or desirable in India?
- 10.2.4 Under the Cheques Act, an unindorsed cheque paid by the banker on whom it is drawn is held as evidence of the receipt by the payee of the amount payable on the cheque. Do you consider such a provision desirable in India?
- 10.2.5 If you view that it is not desirable to have in India provisions on the lines of the Cheques Act, do you consider that at least in the case of not-negotiated cheques, the paying banker may not concern himself with the absence of or irregularity in the indorsement of the payee?
- 10.2.6 Under the Cheques Act, a banker collecting a cheque payable to order delivered to him by the holder for collection without indorsement has such rights as he would have had if the holder had indorsed it in blank. Do you consider such a provision necessary or desirable in India?
- 10.2.7 Under the Cheques Act, the collecting banker is not held as having acted negligently merely by his failure to concern himself with the absence of or irregularity in indorsements. Do you favour such a provision in India?
- 10.2.8 Under the Cheques Act, where a banker in good faith and without negligence receives payment for a customer or credits a customer's account with the amount of the instrument and receives payment for himself and it is found that the customer has no title or has defective title, the collecting banker does not thereby incur any liability to the true owner of the instrument. Section 131 of the NIA, which protects a collecting banker acting in good faith and without negligence, covers only cases of defective title and is also limited to crossed cheques handed over for collection. Do you consider it necessary to extend the scope of the protection to the collecting banker on the lines of the Cheques Act provision?
- 10.2.9 A collecting banker is protected only in respect of collection of amounts of crossed cheques. Do you favour an extension of the scope of this protection to include also uncrossed cheques?

### Group 3—Crossing

- 10.3.1 Would you like to provide that cheques crossed "account payee" should be made not negotiable by law? In that case, do you favour a provision for the protection of a banker who pays or collects in good

faith the cheque in which the "account payee" crossing has been obliterated or altered when such obliteration or alteration is not apparent?

- 10.3.2 If you do not favour cheques crossed "account payee" to be made not negotiable, do you consider it necessary or desirable to extend the protection to the collecting banker also to collection by him of negotiated cheques crossed "account payee"?
- 10.3.3 Do you favour that cheques crossed "not negotiable" should be placed on the same footing as cheques crossed "account payee"? Or, would you favour the continuance of the existing position under which the person can become a holder but not a holder in due course of a cheque crossed "not negotiable"?
- 10.3.4 Under the Cheques Act, the provisions relating to crossing of cheques are made to have effect in relation to instruments other than cheques, to which the provisions of the Cheques Act apply, though thereby such instruments are not made negotiable instruments. Do you consider a provision on these lines necessary or desirable?

## APPENDIX II

### LIST OF INSTITUTIONS AND INDIVIDUALS TO WHOM QUESTIONNAIRE IN ENGLISH/HINDI WAS SENT

1. Concerned Departments of the Government of India
2. Departments of State Governments and Union Territories
3. Law Commission of India
4. Registrars of Companies
5. Registrars of Co-operative Societies
6. All Scheduled and non-Scheduled Commercial Banks
7. All State Co-operative Banks
8. Selected Urban and District Central Co-operative Banks
9. Industrial Development Bank of India, Industrial Finance Corporation, Industrial Reconstruction Corporation of India Ltd., Industrial Credit and Investment Corporation of India Ltd., State Financial Corporations, Life Insurance Corporation of India and such other financial corporations
10. Indian Banks' Association
11. Foreign Exchange Dealers' Association
12. All India State Co-operative Banks' Federation
13. All India Institute of Chartered Accountants and their regional associations
14. Bar Council of India
15. Bar Association of India
16. Supreme Court Bar Association
17. State Bar Councils
18. Bar Associations of High Courts
19. All District Bar Associations
20. Federation of Indian Chambers of Commerce and Industry
21. Indian Merchants' Chamber
22. Chambers of Commerce in various States and Union Territories
23. Stock Exchanges
24. Merchants' Associations in various States and Union Territories



25. **Manufacturers' Associations and other producers' associations in various States and the Union Territory of Delhi**
26. **Educational and Training Institutions**
27. **University Law Departments**
28. **Foreign Central Banks and Foreign Exports**
29. **Senior and Middle Level Executives of Reserve Bank of India and its associate Institutions, and of other commercial banks**
30. **Specified Individuals including those who have requested for copies of the Terms of Reference/Questionnaire**

### APPENDIX III

#### PERSONS WHO ANSWERED THE QUESTIONNAIRE (INCLUDING THE HINDI VERSION) OR SUBMITTED MEMORANDA RE. REVISION OF THE NEGOTIABLE INSTRUMENTS LAW

1. Allahabad Bank
2. Bank of Baroda
3. Bank of India
4. Canara Bank
5. Union Bank of India
6. National and Grindlays Bank Ltd.
7. Jammu and Kashmir Bank Ltd.
8. Karnataka Bank Ltd.
9. New Bank of India Ltd.
10. Punjab & Sind Bank Ltd.
11. Trader's Bank Ltd., New Delhi
12. Vijaya Bank Ltd., Bangalore
13. Himachal Pradesh State Co-operative Bank Ltd.
14. Indian Banks' Association, Bombay
15. All India State Co-operative Banks' Federation Ltd., Bombay
16. U.P. Financial Corporation, Kanpur
17. Indian Law Institute, through Shri D. C. Pande, Associate Research Professor
18. Faculty Members, Co-operative Bankers Training College, Poona
19. Merchants' Chamber of Commerce, Calcutta
20. Registrar of Co-operative Societies, Himachal Pradesh, Simla
21. Registrar of Co-operative Societies, Orissa, Bhubaneswar
22. The Chief Secretary, Government of Orissa, Bhubaneswar
23. Shri Aleem M. A., State Bank of Mysore, Bangalore
24. Shri Antony C. P., State Bank of Mysore, Malleswaram
25. Shri Banerjee P. G., State Bank of India, Calcutta
26. Shri Bhat K. G., Manager, Syndicate Bank, Visakhapatnam

27. Shri Gandhi C. T., Dena Bank, Calcutta
28. Shri Gaurishankaran, Indian Bank, Madras
29. Shri Gujarati N. G., Agent, Central Bank of India, Poona
30. Shri Gupta T. R., United Commercial Bank, Ferozapore
31. Shri Hussain K. M., State Bank of Mysore, Bangalore
32. Shri Inasu, M. L., Chairman, Purbanchal Bank Ltd., Gauhati
33. Shri Joshi G. S., State Bank of Mysore, Malavalli
34. Shri Kaka P. N., Central Bank of India, Poona
35. Shri Kakkar S. N., Allahabad Bank, Fatehpur
36. Shri Kanchan D. T., Syndicate Bank, Guntur
37. Shri Karuppanchetty M. R., Joint Chief Officer, Department of Banking Operations and Development, Reserve Bank of India, Calcutta
38. Shri Mahadev S. M., State Bank of Mysore, Bangalore
39. Shri Mathur P. S., Agent, State Bank of Bikaner and Jaipur, Bharatpur
40. Shri Mediratta D. R., Bikaner
41. Shri Mehta K. C., Bank of Baroda, Ahmedabad
42. Shri Mohinder Lal, Advocate, Mandi, Himachal Pradesh
43. Shri Murthy K. S., State Bank of Mysore, Bangalore
44. Shri Murthy P. N., State Bank of Mysore, Bangalore
45. Shri Murthy T. N., State Bank of India, Avaniigadda
46. Shri Nair P. B., Syndicate Bank, Lakshadweep
47. Shri Nanjappa B. R., Manager, State Bank of Mysore, Mandya
48. Shri Narayan Murthy, State Bank of Mysore, Bangalore
49. Shri Nayak V. V., Syndicate Bank, Mysore
50. Shri Noronha E. G., Deputy Chief Officer, Department of Banking Operations and Development, Reserve Bank of India, Ahmedabad
51. Shri Parikh P. C., Shroff, Mehmedabad
52. Shri Patra B. C., State Bank of India, Calcutta
53. Shri Ramakrishnan V., Instructor, Staff College, Indian Overseas Bank, Madras
54. Shri Ramanan K. V., State Bank of Mysore, Bangalore
55. Shri Ramaseshan V., Lecturer, Madras University, Madras

56. Dr. Rao B. R., Syndicate Bank, Manipal
57. Shri Rao L. V., State Bank of Bikaner and Jaipur, Jaipur
58. Shri Rao P. M., Syndicate Bank, Manipal
59. Shri Sengupta C. R., Manager, Industrial Development Bank of India, Bombay
60. Shri Shah B. G., Bodeli
61. Shri Shetty B. B., Syndicate Bank, Manipal
62. Shri Shah P. D., Broach
63. Shri Shah R. A., Cambay
64. Shri Shingde B. S., Syndicate Bank, Poona
65. Shri Srinivasan N., Manager, Reserve Bank of India, Calcutta
66. Shri Srivastava D. P., State Bank of India, Jamshedpur
67. Shri Subramanian A., Staff Training Centre, State Bank of Hyderabad, Aurangabad
68. Shri Suryanarayanan P. S., State Bank of Hyderabad, Hyderabad
69. Shri Vaz W. J. F., Chief Officer, Industrial Finance Department, Reserve Bank of India, Bombay
70. Shri Venkatachari S., Principal, Staff College, Indian Overseas Bank, Madras

#### FOREIGN EXPERTS

71. Mr. Carl W. Funk, Philadelphia (USA)
72. Mr. Maurice Megrah, London

## APPENDIX IV

### REPLIES OF MR. CARL W. FUNK\* TO THE QUESTIONNAIRE RELATING TO NEGOTIABLE INSTRUMENTS LAW

#### PART 7—NEGOTIABLE INSTRUMENTS FOR PAYMENT OF MONEY NOT IN THE NATURE OF CHEQUES, BILLS OR NOTES

##### Group 1—General

- 7.1.1 I do not think it desirable to bring debentures, corporate bonds, share certificates, insurance certificates and similar writings within the scope of the Negotiable Instruments Act. The inclusion of bonds, debentures and other monetary obligations within the Uniform Negotiable Instruments Law (NIL), which was adopted by all of the states of the United States, created many problems, the solutions of which were unsatisfactory. I consider it far better to treat obligations of this kind, together with share certificates, as "investment securities", as is done by Article 8 of the Uniform Commercial Code (UCC), and apply to them different rules from those applicable to commercial paper such as promissory notes, cheques, drafts, bills of exchange and certificates of deposit which, in the Uniform Commercial Code, are covered by Article 3.
- 7.1.2 Either separate legislation or separate divisions of a single statute such as the UCC should be used to deal with investment securities on the one hand and commercial paper on the other.
- 7.1.3 I believe that legislation similar to Article 8 of the UCC would be desirable in India.

##### Group 2—Trend to increase the types of negotiable instruments

- 7.2.1 I believe that a provision concerning negotiable instruments similar to the provisions of the Uniform Commercial Code (and the earlier Uniform Negotiable Instruments Law) as adopted in the U.S.A. would be desirable for India.

##### Group 3—Certificate of deposit

- 7.3.1 I am not familiar with the extent to which certificates of deposit are issued by banks in India. Their inclusion within Article 3 of the UCC has worked well in the United States.

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\*Former Member of the Pennsylvania Banking Law Commission, Counsel to the Permanent Editorial Board of the American Law Institute, and the Conference of Commissioners on Uniform State Laws; and an Author on Uniform Commercial Code.

## PART 8—NEGOTIABLE INSTRUMENTS—CONFLICT OF LAWS

**Group 1—Parties' power to choose applicable law**

- 8.1.1 I favor a provision similar to Section 1-105 of the UCC permitting parties to a transaction which bears a reasonable relation to more than one state or nation, to agree that the law of one particular state or nation shall govern their rights under negotiable instruments used in the transaction.

**Group 2—Special provision for banks**

- 8.2.1 I regard it as desirable for the liability of a bank, or the branch of a bank, for action or nonaction with reference to presentment, payment or collection to be governed by the law of the place where the bank or the branch is located. Although the law on this subject is now uniform within the United States (except in Louisiana), and therefore a bank is familiar not only with the law of its own state but with that of all but one of the other American jurisdictions, it cannot be expected to know the law regarding presentment, etc. of a foreign country such as Finland or Thailand, and should not be liable if it fails to take some step concerning presentment which the law of such a foreign country requires, but which is not necessary under American law. Therefore, I think that a similar provision would be desirable in India.

**Group 3—Formal validity of the contract**

- 8.3.1 The American Law Institute is about to publish its Restatement Second on Conflict of Laws, which will deal with this question. However, I have not yet had an opportunity to study the final draft of this work and I prefer to defer my answer to the question until later.

**Group 4—Capacity of parties**

- 8.4.1 } The American Law Institute is about to publish its Restatement Second  
8.4.2 } on Conflict of Laws, which will deal with these questions. However,  
I have not yet had an opportunity to study the final draft of this work  
and I prefer to defer my answers to the questions until later.

**Group 5—Liability of parties**

- 8.5.1 } The American Law Institute is about to publish its Restatement  
8.5.2 } Second on Conflict of Laws, which will deal with these questions.  
8.5.3 } However, I have not yet had an opportunity to study the final draft  
of this work and I prefer to defer my answers to the questions until  
later.

## PART 9—NEGOTIABLE INSTRUMENTS — GENERAL

**Group 1—Drawee**

- 9.1.1 I consider it desirable to provide that an order to pay under a negotiable instrument may be addressed to one or more persons in the alternative, and that one presentment of such an instrument is all that is required.

**Group 2—Banker**

- 9.2.1 I believe the definition of banker should include a person who accepts deposits whether they are withdrawable by check, draft or order, or in any other manner.
- 9.2.2 I refrain from answering this question because of unfamiliarity with the Banking Regulation Act.

**Group 3—Payee**

- 9.3.1 I consider desirable a provision like UCC Section 3-413(3) that a drawer admits as against all subsequent parties, including the drawee, the existence of the payee and his then capacity to endorse.
- 9.3.2 UCC Section 3-405 has proved itself to be preferable to the "fictitious or non-existence person" doctrine of the Uniform Negotiable Instruments Law and therefore I would regard such a provision as desirable in India.\*
- 9.3.3 This question is to be answered only by banks.
- 9.3.4 I refrain from answering this question because of lack of knowledge of the Negotiable Instrument Act of India.

**Group 4—Accommodation party**

- 9.4.1 I favor allowing the accommodation character of a party to an instrument to be proved by oral evidence unless the instrument is held by a holder in due course, in which case such evidence should not be admitted.

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\*Subsequently Mr. Carl W. Funk has written as under to the Secretary of the Committee:

"I do not believe that any of the proposed substitutes for section 3-405 is as good as the section itself. None of them expressly covers the case of an instrument drawn to the order of an impostor, and several of them treat an instrument payable to a fictitious payee as bearer paper, which itself is an undesirable fiction. Certainly such an instrument requires some writing of some name on the back before it can be transferred. I believe the draftsman of the Code Section considered all the possible alternatives, including all of the amendments to the NIL that had been adopted, and that what they produced is the best statement of the rule. I am not aware of any criticisms of it during the last twenty years".

- 9.4.2 I would regard an indorsement which is apparently not in the chain of title as notice of its accommodation character.

**Group 5—Bearer**

- 9.5.1 I do not consider it necessary or desirable to insist that a bearer instrument come into a person's possession as a result of negotiation. For example, I believe that a person who finds a lost instrument payable to bearer or endorsed in blank should be regarded as a "bearer", even though he may be liable to the true owner of the instrument if he succeeds in obtaining payment of it. Nevertheless, he should be able to collect it from the maker or drawee unless the latter has a defense such as failure of consideration, fraud, duress, etc.

**Group 6—Holder**

- 9.6.1 I refrain from answering this question because of lack of knowledge of the nature of a benamidar.
- 9.6.2 I agree that a holder should be asked for a duplicate of any negotiable instrument if he claims that it is lost and furnishes appropriate indemnity.
- 9.6.3 I doubt if it is possible to lay down any general criteria as to when an instrument is deemed to have been lost.
- 9.6.4 I also doubt whether it is possible to lay down any standard which can be applied in deciding the extent of indemnity that must be furnished when a duplicate of an instrument is asked for. The usual practice with which I am familiar is to require indemnity in double the amount of the instrument, but this may not be satisfactory in all cases.
- 9.6.5 I agree that it is desirable that a transferee for value without indorsement of an instrument should have all the rights which the transferor had and, in addition, the right to have the indorsement of the transferor or his representative.

**Group 7—Holder in due course**

- 9.7.1 I consider that a person, to be a holder in due course, should have taken the instrument for a consideration, whether the instrument is payable to bearer or order. If a person has given no consideration or value for the instrument, for example where he has received it as a gift, there is no justification for giving him a special status which confers immunity against valid defenses or claims of ownership of other parties to the instrument.
- 9.7.2 I agree that the defenses specified in UCC Section 3-305 should be available against a holder in due course in India, and that an express provision along the lines of the UCC is desirable.



**Group 8—Transferor by delivery**

- 9.8.1 I agree that a transferor by delivery should not be liable on the instrument except for warranties he gives to his immediate transferee and to any person who in good faith pays for or accepts the instrument. In this respect I would follow UCC Section 3-417 which appears to go further than Section 43 of the NIA, since the latter does not seem to impose any liability to the payor or acceptor of the instrument upon someone who transfers it without indorsement

**Group 9—Minors**

- 9.9.1 I am not familiar with the provisions of Indian law relating to the deposit of minors in banks and withdrawals by them, so that I do not know whether it is satisfactory. Section 603 of the Pennsylvania Banking Code of 1965 deals with this subject and I believe is substantially similar to statutory provisions in other states of the U.S.A. A copy of these provisions is attached to this part.
- 9.9.2 I consider that minors who have attained the certain age of understanding may be permitted to give a valid discharge for moneys withdrawn by them from bank accounts and I consider such a provision is necessary. However, I know of no statute which specifies a definite age when a minor attains the power to do this. In my experience, savings deposits have been accepted by savings institutions and commercial banks from minors from the time they enter school, and I am not aware of any difficulties that have resulted. The acceptance of a deposit from a minor is a matter which, in this country, can be left to the discretion of the bank officer or employee who is requested to open the **minor's account**.

**Group 10—Negotiable instruments and drafts**

- 9.10.1 If the question had been presented to a court in the U.S.A. the decision would have differed from that of the Bombay High Court. The American court would have held that a draft drawn by one branch of a bank on another was a negotiable instrument. See UCC Section 4-106 and its Comment for a discussion of the status of branches or separate offices of banks in the U.S.A. If, under the law of the state in question, each branch is treated as a separate bank, then the instrument would be regarded as a draft. If, however, this is not the case, then I believe the instrument would be treated as a promissory note of the issuing bank. See UCC Section 3-118(a). I would therefore favor an amendment of the law which would make such a draft a negotiable instrument.
- 9.10.2 I would apply all of the general provisions of the NIA to such drafts.

**Group 11—Sum certain**

- 9.11.1 I agree that sums payable as provided in UCC Section 3-106 should be regarded as sums certain, and that this should be specifically clarified.

**Group 12—Unconditional order**

- 9.12.1 I agree that a promise or order should be regarded as unconditional under all of the circumstances set forth in UCC Section 3-105.

**Group 13—Definite time**

- 9.13.1 I would regard the time of payment of an instrument as definite if it is payable as set forth in UCC Section 3-109.

**Group 14—Inchoate instruments**

- 9.14.1 I would like to provide expressly that the completion by the holder of an incomplete instrument, pursuant to authority given to him, should be strictly in accordance with the authority given, but I would not require that this be done within a reasonable time. In addition, I would like to provide that a departure from the authority given would not be set up against a holder in due course.
- 9.14.2 I do not believe that delivery of a blank paper containing a signature should operate as authority to fill it up or transform it into a negotiable instrument. I have heard of more than one case where a person has been asked for his specimen signature or his autograph and the terms of a promissory note were later written over his signature. In my judgment, he should not be held liable in this situation even to a holder in due course. I prefer the provisions of UCC Section 9-115(1) which apply only to a paper whose contents at the time of signing show that it is intended to become an instrument.
- 9.14.3 I favor the deletion of the present rule of the Law Merchant, and urge the adoption of the rule of UCC Section 3-115.

**Group 15—Ambiguous instruments**

- 9.15.1 I favor a provision similar to UCC Section 3-118(c) that where words are ambiguous or uncertain, reference may be made to the figures to fix the amount of an instrument.
- 9.15.2 I prefer the provision of UCC Section 3-118(a) that when a person draws a bill on himself, the instrument is effective as a note. I see no reason to give the holder an election, although this was done by common law and under the NIL.
- 9.15.3 I consider the provision of UCC Section 3-118(b) that handwritten terms control typewritten and printed terms, and typewritten terms control printed terms, to be desirable in India.

**Group 16—Issue**

- 9.16.1 I prefer the rule of UCC Section 3-102(1)(a) that issue is the first delivery of an instrument to a holder or remitter over the provisions of Section 2 of the BEA.

**Group 17—Completion of an instrument by delivery**

- 9.17.1 I agree that as against a holder in due course a defense based on “non-delivery”, “conditional delivery” and “delivery for special purpose” should not be allowed to be set up.

**Group 18—Instrument payable to bearer**

- 9.18.1 I would favor a specific provision similar to UCC Section 3-111(c) that an instrument is payable to bearer when by its terms it is payable to “cash” or the order of “cash,” or any other indication which does not purport to designate a specified payee.

**Group 19—Instrument payable to order**

- 9.19.1 I consider desirable a provision similar to UCC Section 3-110 that an instrument made payable both to the order of a named person and to bearer is payable to order unless the word “bearer” is handwritten or type-written. However, I am not sure that this is sufficient, because it does not cover the case of an instrument reading “pay to the order of bearer”. This case actually arose in my practice many years ago and my recollection is that it gave us great concern under the NIL. I think such an instrument should be treated as a bearer instrument, as UCC Section 3-111(a) provides.

**Group 20—Date, ante-dating and post-dating**

- 9.20.1 I would favor a provision that ante-dating or post-dating an instrument will not make it invalid unless it is done for an illegal or fraudulent purpose.
- 9.20.2 I agree with the principles underlying the provisions of UCC Section 3-114.

**Group 21—When an instrument is overdue**

- 9.21.1 I believe that an uncertified check should be deemed to be overdue thirty-one days after its date and that this should be clarified by statute, but that no definite rule can be laid down for other types of instruments. See UCC Section 3-503(2).
- 9.21.2 I favor the provisions of UCC Sections 3-304(3)(c) and 4-404 with respect to overdue cheques and the period up to which a banker is obliged to honour cheques drawn on him; and I consider both time limits reasonable.

**Group 22—Defective title**

- 9.22.1 I would like to provide when the purchaser of a negotiable instrument can be regarded as having notice of a claim or defense or of the fact that an instrument is overdue.
- 9.22.2 I agree that under the circumstances specified in UCC Section 3-304(1) and (2) knowledge of a claim or defense can be attributed to the purchaser of an instrument.

- 9.22.3 I agree that under the circumstances set forth in UCC Section 3-304(3) the purchaser of an instrument should be regarded as having notice of the fact that an instrument has become overdue ; and I favor such a provision.
- 9.22.4 I agree that knowledge of the facts specified in UCC Section 3-304(4) should not be regarded as giving the purchaser of an instrument notice of a defense or claim, and I favor a similar provision in India.
- 9.22.5 I would like to provide, as does UCC Section 3-304(6) that to be effective a notice must be received by a person in such time and in such manner as to give him reasonable opportunity to act upon it.

### Group 23—Material alteration

- 9.23.1 I regard the kinds of alterations of an instrument specified in Section 3-407(a), (b) and (c) as material. It is possible that some other alterations would also be material, but at the moment I cannot think of an example, nor can I provide a list of all alterations that I can definitely say are not material.
- 9.23.2 See foregoing answer.
- 9.23.3 See foregoing answer.
- 9.23.4 I agree that an alteration of an instrument by a stranger, made without the assent of, or any negligence or fraud on the part of, the holder of the instrument should not render the instrument void against anyone who is a party thereto at the time of such alteration. I believe this is sometimes called a "spoliation" rather than an "alteration" and that the courts adopted this distinction in order to escape from the very harsh rule of the Law Merchant on alteration.
- 9.23.5 I favor the distinction made by UCC Section 3-407(2) between a fraudulent and nonfraudulent material alteration and a provision that only the former discharges a party to the instrument. This represented a change made in the U.S.A. law by the UCC, as any material alteration, even though not fraudulent, operated as a discharge under the NIL.
- 9.23.6 I do not consider that the obligated party should be held liable in due course of an altered instrument according to its apparent tenor. I favor the rule of the UCC, the NIL, the BEA, and the Geneva Conventions rather than the rule of Section 89 of the NIA.
- 9.23.7 (a) I do not think that the protection to a banker paying an altered instrument in good faith should be confined to cheques. It should be extended to other instruments also.
- (b) However, I believe the banker should be permitted to charge the customer only according to the original tenor of the instrument, rather than its apparent tenor.
- 9.23.8 I am not familiar with any machines that will enable a banker to detect alterations invisible to the naked eye, although such machines

may be in existence. I feel sure that it would not be feasible to submit the millions of cheques moving each day through the banking system in the U.S.A. to such machines. I question seriously whether it is possible to evolve uniform standards to be observed by banks in this situation.

**Group 24—Cancellation of an instrument**

- 9.24.1 I think it desirable to provide that a cancellation of the signature of a person liable on an instrument or of the instrument itself should be apparent before such person or the instrument can be held to be discharged. I would like to provide, along the lines of UCC Section 3-605(2) that a cancellation of the instrument will not, without its surrender, affect the title thereto.

**Group 25—Negligence contributing to alteration**

- 9.25.1 I consider that a provision similar to UCC Section 3-406 is highly desirable in India. There was no comparable provision in the NIL, and courts tended to hold under that statute that only negligence in the physical preparation of the instrument, such as the leaving of blank spaces, precluded its enforcement by the drawer, irrespective of how careless he might be in his handling of the instrument once it was prepared. This resulted in a number of decisions which seem to me to be quite unjust and I think that UCC Section 3-406 constituted a great improvement in the law of negotiable instruments.

**Group 26—Signature**

- 9.26.1 I believe that the definition of "signature," which should include a facsimile, set forth in this question is an appropriate one.
- 9.26.2 I would favor a provision along the lines of the NIA concerning signatures being made applicable to all corporate bodies. However, under the law of agency in the U.S.A., an agent can bind his principal if he has apparent authority, even where he does not possess either express or implied authority. For example, if a principal (P) tells someone (T) that another individual (A) has authority to execute a promissory note on P's behalf, but also tells A that he must not execute the note without further instructions (which are never given), A has no express or implied authority to bind P, but he does have apparent authority to do so and P will be liable to T on a note signed by A on P's behalf. (A will in turn be liable to P for violating P's instructions.)
- 9.26.3 I favor the change made in the U.S.A. by UCC Section 3-404(2) and 1-201(43) which permits a forged signature to be ratified. I would like to provide that the retention of benefits received in the transaction with knowledge of an unauthorized or forged signature amounts to ratification.
- 9.26.4 I consider desirable a provision similar to UCC Section 3-404 that an unauthorized signature operates as the signature of the unauthorized signer against a person who in good faith takes it for value.

- 9.26.5 I consider desirable a provision that a person signing an instrument otherwise than as a drawer, maker or acceptor shall be presumed to be an indorser unless there is an express indication in the instrument to the contrary. See UCC Section 3-415.
- 9.26.6 I do not believe it is desirable to provide for the recognition of the system of "aval" in India. I have had some experience with this system in transactions conducted in Mexico, but I question whether it is necessary to add it to the law of a country which has not employed it in the past. Furthermore, I prefer to retain terms expressed in a language which is commonly used, as English is in India, rather than to import additional foreign words.
- 9.26.7 I consider a provision along the lines of UCC Section 3-416 desirable, providing that a person can guarantee an instrument by using the terms "payment guaranteed" or "collection guaranteed" or by general words of guarantee. It seems to me this provision would make the use of the "aval" system unnecessary.

#### **Group 27—Indorsements**

- 9.27.1 I consider desirable a provision similar to UCC 3-203 that when the payee or indorsee of an instrument is wrongly named or misnamed, he may indorse the instrument in the same manner by his proper signature, or both. I would also like to provide that a person paying or giving value for the instrument may require the signature in both names.
- 9.27.2 I would like to provide that an indorsement for less than the entire amount or for the unpaid residue of an instrument would operate only as a partial assignment, along the lines of UCC Section 3-202.
- 9.27.3 I consider it desirable (a) to allow a restrictive indorsee to further transfer or negotiate the instrument as provided in UCC Section 3-206(1); and (b) to enable a restrictive indorsee to be a holder in due course if he acts consistently with a restrictive indorsement and otherwise satisfies the requirements of holder in due course status, as provided in UCC Sections 3-206(3) and 3-302.
- 9.27.4 I would like to treat a conditional indorsement as a restrictive indorsement, as does UCC Section 3-205(a).
- 9.27.5 I favor a presumption that indorsers of an instrument are liable to one another in the order in which their signatures appear on the instrument, as provided by UCC Section 3-414(2).

#### **Group 28—Date of maturity**

- 9.28.1 I favor the abolition of days of grace, which I believe were necessary at one time, but which are no longer essential under modern conditions.
- 9.28.2 I favor the rule of UCC Section 3-503(3) providing that when the date of maturity falls on a day which is not a full business day for

both parties, the instrument is payable on the next following business day; but I express no opinion as to whether this rule would be applied in India.

#### **Group 29—Presentment**

- 9.29.1. I consider presentment for acceptance desirable to charge the drawer and indorser under the circumstances specified in UCC Section 3-501(1)(a), that is, when the draft so provides, or is payable elsewhere than the residence or place of business of the drawee or its date of payment depends upon such presentment. I see no necessity for presentment for acceptance where a bill is payable at sight.
- 9.29.2 I consider presentment for payment necessary in the case of a cheque to charge the indorser. However, in the case of a drawer, although presentment should be made, failure to make presentment should discharge the drawer only under the circumstances set forth in UCC Section 3-502(1)(b), particularly where the cheque would have been paid if it had been presented promptly, but was dishonored while funds were on deposit to pay it and the drawee became insolvent thereafter.
- 9.29.3 I do not consider presentment for payment necessary to charge the maker or acceptor except under the circumstances referred to in the answer to the preceding question.
- 9.29.4 I would like to dispense with the necessity of presentment for payment in order to charge the maker of a note except under the circumstances referred to above, where the note is payable at a bank which becomes insolvent after the note should have been presented.
- 9.29.5 I agree with the provisions of UCC Section 3-511(3)(b) that presentment or acceptance for payment is entirely excused when the acceptance or payment is refused but not for want of proper presentment.
- 9.29.6 I prefer the provisions of UCC Section 3-511(3)(a) that presentment is excused when the person liable to pay is dead or bankrupt.
- 9.29.7 I believe the presentment for acceptance should be excused under all of the circumstances set forth in this question.
- 9.29.8 I prefer the provisions of UCC Section 3-504(3)(a) providing that presentment need be made to only one of several drawees. This is important in any large country, particularly in the case of cheques drawn by corporations in payment of interest or dividends, and drawn upon banks in different parts of the country, such as New York, Chicago and San Francisco, where the drawer maintains bank accounts. It permits the payee of the cheque to obtain its payment more rapidly than if a single drawee had been named; and it would be a great burden on the payee to be forced to present the cheque to another bank if it should be dishonored by the first one. Probably the rule of the BEA was satisfactory in a country as small as England many years ago, but even there, I believe the UCC rule would now be preferable.

- 9.29.9 The practice in the U.S.A. of including an acceleration clause in an instalment note has become so widespread that I would favor a statutory rule accelerating the maturity of such a note upon the default in the payment of any instalment, even though the note itself did not contain an acceleration clause. I would favor putting on the parties to the instrument the burden of providing for a different rule if they wish to do so, or else issuing a series of notes each payable on a different date.
- 9.29.10 I believe that it should be necessary in all cases, when presenting an instrument for acceptance, to exhibit the original instrument since I believe the acceptance should be written upon the instrument itself. Cf. UCC Section 3-410(1).
- 9.29.11 I do not consider it necessary when presenting an instrument for payment to send either the original or an attested copy to the payor. I believe that presentment for payment can be made by a mere demand as provided by UCC Section 3-504.
- 9.29.12 I favor a provision along the lines of UCC Section 3-505 permitting the party to whom presentment is made to require exhibition of the instrument, identification, etc.
- 9.29.13 Rarely, if ever, have I myself presented an instrument for acceptance or for payment. Presentment is usually made by a representative of a bank. I have no reason to think that the practice of banks in the U.S.A. is not fully consistent with the requirements of law, and I have had no experience with cases where I have learned that presentment has been inadequate.
- 9.29.14 I favor a provision along the lines of UCC Section 4-210 whereby a collecting bank can present an instrument by notice to the party to pay.
- 9.29.15 I agree with the provision of UCC Section 3-504(4) that in the case of a bill accepted or a note payable at a bank, the instrument must be presented at such bank. I believe, also, that the instrument should be produced at the time of presentment.
- 9.29.16 I would favor a change along the lines of UCC Section 3-503(3) that presentment must be made on a day which is a full business day for both parties, and if at a bank, during its banking day.
- 9.29.17 I believe that the provisions of the UCC on presentment, including presentment by mail, are desirable. However, I do not go so far as to say that the party making the presentment may adopt any means convenient to him, as a method which he finds convenient might be undesirable from the point of view of the payor.
- 9.29.18 I do not consider it necessary that presentment by mail be made by registered post, although the use of registered post or something similar may be necessary in order to obtain proof that presentment has actually occurred. In the U.S.A. we have both registered post and certified post. The sender can obtain a receipt of the addressee if



he uses certified post, but his letter is otherwise handled by the post office as first class mail. Registered post in the U.S.A. includes many safeguarding operations to insure that the letter is not lost while in the postal system. It is much more expensive and slower and is used primarily for the transmission of valuable securities and other documents.

**Group 30—Interest**

- 9.30.1 In the U.S.A. the rate of interest payable on negotiable instruments does vary from state to state and this is probably desirable because economic conditions are so different in various parts of the country that a rate of interest which is satisfactory in one area, such as the Northeast, might be wholly inadequate in a less developed portion of the country where the risks are higher, such as Alaska.

**Group 31—Notice of dishonor**

- 9.31.1 I would not favor a change to require all notices of dishonor to be in writing, and I do not think that a written notice need be signed. I believe the provisions of UCC Section 3-508 are satisfactory.

**Group 32—Noting and protest**

- 9.32.1 I am not sufficiently familiar with conditions in India to suggest the persons who should be authorised to note for protest or to protest instruments where a notary is not available.
- 9.32.2 I would favor a notary being permitted to make presentment through the post.
- 9.32.3 I favor the provisions of UCC Section 3-509 that a person authorized to protest may do so upon information satisfactory to him. I believe it will be impractical under conditions in the U.S.A., and probably also under conditions in most developed countries, to impose a requirement that the person protesting must act upon his own personal knowledge.
- 9.32.4 I would favor retention of the provision of the BEA and the NIA requiring a holder to wait until a bill falls due before he can sue any party to an acceptance, even though the acceptor has become bankrupt.

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(Cf. reply to question 9.9.1)

**S 603. MINORS' DEPOSITS AND SAFE-DEPOSIT AGREEMENTS**

(a) Receipt of deposits—An institution may receive deposits by or in the name of:

- (i) a minor,
- (ii) a minor jointly with one or more adults or other minors, with the same effect as a joint deposit under section 604, or

- (iii) a minor as trustee, or a minor and one or more adults or other minors as trustees, with the same effect as a deposit in trust under section 605.

(b) **Safe-deposit agreements**—An institution may rent a safe-deposit box or other receptacle for safe-deposit of property to, and receive property for safe-deposit from, a married minor and spouse, whether adult or minor, jointly.

(c) **Dealings with minor**—An institution may deal with a minor with respect to a deposit account or safe-deposit agreement covered by sub-sections (a) or (b) of this section without the consent of a parent or guardian and with the same effect as though the minor were an adult. A parent or guardian shall not have any right in that capacity to interfere with any such transaction. Any action of the minor with respect to such deposit account or safe-deposit agreement shall be binding on the minor with the same effect as though an adult. This section 603 shall not affect the law governing transactions with minors in cases outside the scope of this section.

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#### *Prior Law*

Section 902 of the prior Code and Minors' Deposits Act of 1953 restated with changes and additions noted in comment.

#### *Comment*

This section amplifies the provisions of section 902 of the prior Code and of the Act of 1953, 7 P.S. 819-902a, affecting minors' deposits.

The authority to receive deposits from or for minors under sub-section (a) is made clearly applicable to joint accounts whether with an adult or another minor, and to tentative trusts whether in the name of the minor individually or jointly with one or more adults or other minors. The authority given is a permissive one; it does not require an institution to accept minors' deposits if it insists upon the joinder of a parent or guardian.

Authority to rent safe-deposit boxes to minors or to receive property for safe-deposit from minors is covered only in the case of a minor who is married whether the spouse is a minor or of full age. The section does not prohibit other safe-deposit arrangements involving minors but the institution's protection against potential liability as a result of dealing with a minor will have to be found outside this Act. The distinction is made here to facilitate the availability of safe-deposit facilities for young married couples who might have particular need for them. It is not intended to imply any change in the law otherwise applicable to safe-deposit arrangements with minors except in this one instance.

Sub-section (c) contains the substance of former section 902 and of the Act of 1953 as to the effect of transactions with a minor within the scope of subsections (a) and (b). It permits but does not require the institution to deal with the minor rather than a parent or guardian and gives binding effect to such transactions. Since this section affects only relationships as between an institution, on the one hand, and minors or their parents or guardians, or

both, on the other hand, it has no effect on the relationships between the minors and their parents or guardians between themselves only. As provided in the last sentence of subsection (c), it likewise has no effect on transactions outside the scope of this section, such as the safe-deposit arrangements mentioned in the preceding paragraph of this comment.

## PART 10—CHEQUES

### Group 1—General

- 10.1.1 I consider desirable a provision making the issue of a cheque on a bank without sufficient funds a criminal offense if the drawer does not pay the holder the amount of the cheque within ten days after receiving notice that the cheque has been dishonored by the drawee bank. I consider such a time period necessary in order to allow a person who has inadvertently issued such a cheque to make it good without being subjected to criminal liability. I have seen a number of cases where cheques in excess of the drawer's balance have been issued because of his own book-keeping errors, or because, in the case of joint chequeing accounts of husband and wife, one spouse has failed to enter on the cheque book stubs a cheque which has been drawn, and I do not think it desirable to make such actions criminal. On the other hand, the failure of the drawer to make the cheque good within a reasonable period of time, creates a presumption that the cheque was issued with intent to defraud.
- 10.1.2 As stated above, I would favor a statutory provision that the refusal by the drawee of payment of a cheque because of insufficient funds shall be *prima facie* evidence of an intention to cheat.
- 10.1.3 I would not favor a provision along the aforesaid line with respect to notes or classes of negotiable instruments other than cheques.
- 10.1.4 I consider it desirable to provide for the certification of cheques along the lines of the provisions applicable in the U. S. A. The certification of a cheque is treated here as an acceptance of the instrument. Cf. UCC Section 3-411(1).
- 10.1.5 I do not think it necessary to promote by legislation the issue of cheques with receipt forms attached. I believe this can be left to the practice of the financial and trading community.

### Group 2—Cheque Act, 1957 of U. K.

- 10.2.1 I refrain from answering this question because my experience under the Cheque Act is limited to the maintenance of a small personal account in a London bank. This has worked satisfactorily so far as I am concerned, but my transactions are infrequent and very simple.
- 10.2.2 Subject to the qualifications stated in 10.2.1, I believe that an act comparable to the Cheque Act should also cover non-negotiable instruments for the payment of money.

- 10.2.3 I do not consider it desirable to relieve a payee banker, even though he acts in good faith and in the ordinary course of business, from liability by reason of the absence of or irregularity in indorsements. I recognize that in the vast majority of cases in the U. S. A., indorsements are not examined by payor banks, but nevertheless I think they should be responsible to their customer if a cheque is paid on a forged indorsement or if it is paid without indorsement and this causes damage to the drawer. The payor bank should then be able to hold the collecting bank liable to it.
- 10.2.4 I would not consider desirable a provision that an unindorsed cheque paid by the banker on whom it is drawn is evidence of the receipt by the payee of the amount payable on the cheque. I think it appropriate to provide that, as does UCC 4-205, that a depository bank which credits the amount of a cheque to the account of a payee may supply the indorsement of its own customer.
- 10.2.5 I refrain from answering this question because I do not understand the use of non-negotiated cheques in India.
- 10.2.6 As stated above, I do consider that a banker collecting a cheque payable to order, delivered to him by the holder for collection without indorsements, has such rights as he would have had if the holder had indorsed it in blank, provided the holder is also the payee. However, if the holder is a different person than the payee, this rule should not apply.
- 10.2.7 I would not favor a provision that the collecting banker is not negligent merely because of his failure to concern himself with the absence or irregularity in indorsements. I believe that the first banker to whom a cheque is delivered for collection should have the responsibility of seeing that the cheque is duly indorsed by the payee, and should bear the ultimate responsibility if it fails to do this.
- 10.2.8 I do not consider it necessary to extend the scope of the protection given by the Cheques Act provision to the collecting banker. I think he should be responsible if it is found that his customer has no title or a defective title.
- 10.2.9 I refrain from answering this question because of lack of sufficient experience with crossed cheques, which are not used in the U.S.A.

### Group 3—Crossing

- 10.3.1 I refrain from answering these questions because of unfamiliarity  
to with the practice of crossing cheques, which is not followed in the  
10.3.4 U.S.A. I believe, however, that substantially the same result can be obtained by the payee by indorsing the cheque "For deposit", pursuant to UCC Sections 3-206 and 4-201(2).

## APPENDIX V

### REPLIES OF MR. MAURICE MEGRAH\*, Q. C. TO THE QUESTIONNAIRE RELATING TO NEGOTIABLE INSTRUMENTS LAW

#### PART 7—NEGOTIABLE INSTRUMENTS FOR PAYMENT OF MONEY NOT IN THE NATURE OF CHEQUES, BILLS OR NOTES

##### Group 1—General

7.1.1 I do not consider it desirable to bring within the Negotiable Instruments Act the documents mentioned in the question, which vary considerably. It may be that some of them, by reason of their form, already fall within the Statute, but to bring them all in, whether appropriate or not, would be to complicate an otherwise straightforward Statute and I think it would be better for the Courts to deal with such documents as they come before them. I do not think that special legislation is desirable; it would restrict the freedom of action of the issuers of the documents and, perhaps, inhibit them in deciding what form the documents should take.

7.1.3 If the proposed legislation is for the purpose of unification, I would think not; if necessary for the protection of the public, that may well be desirable.

##### Group 2—Trend to increase the types of negotiable instruments

7.2.1 The U. S. A. conception is no different in substance from the Indian or the English; it is slightly different from both in definition. I see no reason to change the Indian definition sections which, combined, are adequate; any amendments should take the whole statute into account and not merely particular sections.

##### Group 3—Certificates of deposit

7.3.1 I would not specifically provide for such certificates of deposit. They may already fall within the definition section of the Negotiable Instruments Act; if not they should be dealt with individually on their merits.

#### PART 8—NEGOTIABLE INSTRUMENTS—CONFLICT OF LAWS

##### Group 1—Parties' power to choose applicable law

8.1.1 There is ordinarily no objection to the parties to any contract stating which law shall apply to the contract. But negotiable instruments represent a number of contracts, those of the drawer, acceptor, and indorser (question No. 8.3.1). I have never seen a bill

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\*Editor of "Paget's Law of Banking", "Byles on Bills of Exchange", Gutteridge's "The Law of Bankers' Commercial Credits" and the "Legal Decisions Affecting Banking" published by the Institute of Bankers, London.

which attempts to subject all parties to the same law, but if they are willing to be bound there is no objection so long as the provision does not make the instrument conditional. A promissory note is different and such a provision would not raise the same difficulties.

**Group 2—Special provision for banks**

- 8.2.1 I assume that the law is the same in all the states of India (Negotiable Instruments Act, 1881, s. 1) and, if this is the case, there is no point in providing as is suggested in the question. It is because the laws in the United States vary that such provision there is required.

**Group 3—Formal validity of the contract**

- 8.3.1 This is generally true, but it is only where there is the question of conflict that it is significant. If India has the same law in all its States, the point arises only where the instrument is a foreign bill, *i.e.*, where one of the contracts embodied in it is performed in another country.

**Group 4—Capacity of parties**

- 8.4.1 This question is not yet decided in the United Kingdom. On the whole I think that the law of the place of contract should be applied, because I see no great advantage in changing over to the Geneva Convention rule.
- 8.4.2 Foreign stamp laws should have no effect on the efficacy of bills in India; no defendant in India should be able to avoid liability by reason merely that the bill is not properly stamped abroad.

With regard to (b), s. 136 of the N. I. A. speaks of "any *subsequent* acceptance or indorsement" within India. Bhashyam's Negotiable Instruments Act, 9th ed., p. 565 speaks of the "liability between persons who subsequently become parties to it [the bill] in India". I am not sure that these are the same; nor do I see that the question of capacity enters into the matter. I find the section (136) difficult to construe.

**Group 5—Liability of parties**

- 8.5.1 I see no reason why the liability of a drawer or maker should be determined by the law of the place where payment is to be made, nor any reason why an indorser should be regarded in the same category for the purpose as the acceptor. It is, however, hard to show a preference for the one or the other, because under any rule one of the parties is likely to be dissatisfied. It is more important that the rule or law should be clear and in line with those of as many other countries as possible.
- 8.5.2 Yes, I would agree; I see no reason to make any change from the existing law as to dishonour, presentment, acceptance or payment.

- 8.5.3 Questions relating to payment and interest must, I think, be governed by the law of the place of payment, for a judgment can only be executed in the currency of the place in which the money is payable. The answers to all the questions in this Part show clearly, I think, the wisdom of reaching uniformity, where possible, between the countries of the world.

## PART 9—NEGOTIABLE INSTRUMENTS—GENERAL

### Group 1—Drawee

- 9.1.1 I do not know what United States experience is nor do I know the reason for the rule. The reason why in the U. K. alternate drawees is not permissible may, perhaps, be found in the definition of a bill of exchange (s. 3), which would seem not to include alternate drawees. I cannot consider such a provision necessary; it may be desirable, though it would raise questions of liability as between drawees, between different drawees and the drawer and possibly of the liability of drawees to the holders. With regard to the second question, if one drawee refuses to pay, the bill is dishonoured and the holder should have an immediate right of action; the question is whether he would lose it if he chooses to present to another drawee. I do not know how the U. C. C. (s. 3-116) would deal with the matter, but I suspect that if presentment to one payee in the alternative fails, the bill should be dealt with at once as dishonoured.

### Group 2—Banker

- 9.2.1 I would define 'banker' as one who carries on the business of banking as indicated in my answers to question 1 of Group 1, Part I. The N. I. A. offers considerable protection to paying and collecting bankers; it is, therefore, desirable that this protection should be limited to bankers dealing with cheques as a large part of their business and the limitation may well be made to apply to those who undertake the business of banking as defined in question 1 of Part I, group 1.
- 9.2.2 I do not know how a banking company is defined in the Banking Regulation Act, 1949 but I would define it as a company carrying on the business of banking, once that has been defined. I imagine that it has been found desirable to restrict the right to obtain deposits from the public, but the acceptance of deposits is only one of the factors making up the business of banking.

### Group 3—Payee

- 9.3.1 As the acceptance is the drawee's engagement, the wording of s. 3-413 of the U. C. C. is not felicitously worded; apart from the important fact that the section operates in favour of "all subsequent parties", it is in substance the same as ss. 54 and 55 of the Bills of Exchange Act, 1882, the benefit of which is largely for the benefit

of the holder in due course. I would think that the Indian Act, s. 121 should not follow the U. C. C. but rather the B/E Act, with which it is more consistent.

- 9.3.2 I agree that the introduction of a "fictitious or non-existing" payee gives rise to confusion, but fortunately the point does not often arise. But I do not like the U. C. C. solution which (s. 3-405) is conditional. If I understand it aright an indorsement may be valid (effective) even though it is unauthorised (which includes forgery); it follows that a valid title may be obtained through a forged indorsement, which would seem to contradict s. 3-404.

The matter is largely one of evidence and I incline to think that it is better left as it is.

- 9.3.4 Section 85(1) of the N. I. A. provides that "Where a cheque payable to order purports to be indorsed by or on behalf of the payee the drawee is discharged by payment in due course".

If, therefore, payment is made pursuant to s. 10 there would appear to be no need for identification when the indorsement "purports to be that of the payee."

#### **Group 4—Accommodation party**

- 9.4.1 I do not think it necessary so to provide. As against a holder in due course, the question ought never to be allowed to arise and I would have thought that this was made clear by s. 36 of the N. I. A.

In this connection see s. 28(2) of the B/E Act. Perhaps I have misunderstood the question!

- 9.4.2 I see no reason for regarding the presence of an indorsement not forming part of a chain as evidence that it is an accommodation indorsement. An accommodation party in English law has not received value; the backer of a bill may have done so.

#### **Group 5—Bearer**

- 9.5.1 I would think not. A person who issues a negotiable instrument to bearer takes the risk of the instrument's finding itself in the hands of someone without a title. If it can be established that he has no title he cannot succeed in an action; otherwise he is entitled to be paid. To make it a condition that the holder takes the instrument by negotiation is merely placing on him the burden of proving his title. This is a negation of the quality of a negotiable instrument which is transferable by delivery.

#### **Group 6—Holder**

- 9.6.1 I prefer the definition of 'holder' in s. 2 of the B/E Act to that in section 8 of the N. I. A. which, if I understand it properly, brings in the 'benamidar' doctrine. I agree with Bhashyam that the latter definition is not a happy one. Without understanding



the significance of the doctrine in Indian law I can only say that changing the words from "entitled in his own name" to the end in section 8 to "possession of a bill or note payable to bearer *per se* or by indorsement in blank" ought to avoid a number of difficulties.

- 9.6.2 I would not, as I have said, for the reasons given in answer to question 7.1.1 assimilate to bills, notes and cheques such negotiable instruments as are not within the N. I. A.
- 9.6.3 This is a matter of evidence and I do not see how oral evidence can be displaced by rules. The evidence is probably easier to find where the instrument has a due date than when it is payable on demand. But if the drawer is given an adequate indemnity for the issue of a duplicate or in relation to the bringing of an action on the lost bill, nothing serious is likely to arise. The answer probably lies in the adequacy of the indemnity.
- 9.6.4. It is difficult to lay down any definition. I regard the indemnity as embodying, if necessary, tangible security. The important thing is that the drawer should be adequately protected, for the lost instrument is, after all, a negotiable instrument.
- 9.6.5 I see no reason why a transferee for value without indorsement should not have all the rights of his transferor, as well as the right to the indorsement of the transferor. If, for any reason, he does not take *bona fide*, he cannot become a holder in due course and has no better title than his transferor had. Perhaps the question intends to ask why a transferee should take an instrument which has not been indorsed by the transferor but, so long as he takes under the conditions laid down in section 29 of the B/E Act, he obtains an indefeasible title. I think that no difficulty arises from the provision.

#### **Group 7—Holder in due course**

- 9.7.1. I think it important that for a person to assert the indefeasible title which a holder in due course obtains it is essential that he should have given value. An indefeasible title should be obtainable only under strict conditions such as are laid down in section 29 of the B/E Act, which is stronger than section 9 of the N. I. A. In English law, at any rate, there is still doubt as to the precise rights of a holder for value, especially one who has not actually given value. If the giving of value was not essential the same rights would be obtained by transferees not in the same category of entitlement; confusion would inevitably follow and the certainty of an indefeasible right of action would disappear. It seems to me not to matter whether the instrument is payable to bearer or to order.
- 9.7.2 I do not think that any amendment of Statute is necessary. The defences referred to must be available, but it is better that they should be raised by the incapacitated person in any action against

him rather than embodied in statute. The defences are not applicable merely to actions on bills of exchange, but generally. In any event a holder in due course has always a right of action against all parties to the bill other than an incapacitated party.

**Group 8—Transferor by delivery**

- 9.8.1 A transferor by delivery is not, in the United Kingdom, liable on the instrument he transfers, but only for the warranties set out in the Statute. I would not have thought that it was necessary to enact Section 43 of the N. I. A. which relates primarily to transfer without consideration, whereas section 31(4) of the B/E Act relates to transfer for consideration. I incline to think that only the latter is essential, for want of consideration is always a defence.

**Group 9—Minors**

- 9.9.1 and 2 An infant who understands what he is doing can give a discharge for moneys he withdraws from a bank. The question is not necessarily one of age, but of understanding. It is a matter which is probably best left to the banks and not governed by legislation, which might raise difficulties for infants without any compensatory protection.

**Group 10—Negotiable instruments and drafts**

- 9.10.1 I have not read the judgment in *Hasanoo v. Mudaliar* and therefore I do not know how it relates if at all, to section 85A, N. I. A. The instrument, a banker's draft, is not strictly a bill of exchange, but it may nevertheless be a negotiable instrument. In English law, by section 5(2) of the B/E Act, the holder may treat the instrument either as a bill or as a promissory note. I think that this is useful. Moreover a banker's draft is brought within the Bills of Exchange Act, 1882 by the Cheques Act, 1957. It is, I consider, important that such an instrument should be within the B/E Act.
- 9.10.2 By reason of the licence granted to the holder in section 5(2) of the English statute, I think that to limit such instruments to the provisions relating to cheques only is, perhaps, too restrictive.

**Group 11—Sum certain**

- 9.11.1 The U. C. C. goes a good deal further than either the Indian or the English Statutes; the cases provided for are based on U. S. practice and are not likely to arise elsewhere. However, if they do occur, then there is a case for making statutory provision in order to avoid the instrument's being regarded as conditional.

**Group 12—Unconditional order**

- 9.12.1 If the promise or order is "subject to implied or constructive conditions" it would seem bound to be conditional, but I have no idea what the U. C. C. contemplates. I would exclude (a) in any

event; and (h) also which is not altogether clear and might well be regarded as conditional. (b) to (g) inclusive are no different from the law in the United Kingdom or, in all likelihood, in India.

If either (a) or (b) is conditional, as both appear to be, the instrument cannot be an unconditional order; but I think I am not sure of the meaning of the second part of the question.

#### **Group 13—Definite time**

##### **9.13.1 A bill which is payable**

(a) on a stated date;

(b) at a fixed period after a stated date;

(c) at a fixed period after sight;

is payable at a fixed future time.

A bill which is payable on or before a stated date or at a definite date subject to acceleration or at a definite time subject to extension at the option of the maker or acceptor is not payable at a definite future time; nor if the time is extended for any reason or in any manner whatever. I think that section 5 of the N. I. A. might be clearer.

#### **Group 14—Inchoate instruments**

9.14.1 I incline to think that where a person takes subject to the conditions laid down in section 29 of the B/E Act, his title should *not* be affected by the fact that the instrument, drawn inchoate, has been completed not in accordance with any authority given or within a reasonable time. This is contrary to English law.

9.14.2 I think that the practice of drawing inchoate instruments is to be discouraged but it might nevertheless be as well to leave the provision in the N. I. A. which copes with such an instrument for the occasion when it arises.

9.14.3 I am in favour of giving the person who takes under the conditions applicable to a holder in due course the right to sue on the instrument; he should not be defeated on the ground that the bill was originally inchoate and was filled up not in accordance with the directions of the drawer. Section 9 of the N. I. A. might, perhaps, be amended to bring it nearer to Section 29, B/E Act. Bhashyam says that Indian law is stricter, requiring that a holder in due course should have exercised due diligence, but I would have thought that the requirements of Section 29 were adequate.

#### **Group 15—Ambiguous instruments**

9.15.1 I incline to think that the suggestion is undesirable. For obvious reasons, words should control figures, but I would not accept the reverse in the case of ambiguity in words. If I were a banker I should prefer the position to be made clear.

a cheque is intended for relative quick payment of a debt and a promissory note offer as a continuing security. A demand bill is in a different category and I think it impossible to say in general when it should be considered overdue.

- 9.21.2 I think it impossible to be dogmatic. As I say in question 9.21.1, everything depends upon the circumstances. The matter is better left to the parties. In the United Kingdom a cheque is considered stale after 3 or 6 months, but the banker's liability remains until the debt is statute barred.

**Group 22—Defective title**

- 9.22.1 No, I think not; caveat emptor.
- 9.22.2 This must surely be the law in India today. I see no reason in providing statutorily for the points raised. The circumstances in (a) would certainly put a transferee on enquiry and might prevent his becoming a holder in due course. As to (b) a person taking as a holder in due course would be affected only *vis-a-vis* the voidable party. Knowledge of a breach of trust would prevent a transferee from being a *bona fide* transferee, but he would have recourse to his immediate transferor.
- 9.22.3, 4 and 5 I am not in favour of legislation. I think it better to leave it to the Courts to decide in the light of the particular circumstances.

**Group 23—Material alteration**

- 9.23.1, 2 and 3 As to material alteration, I think that Section 64(1) with proviso and (2) of the B/E Act, 1882, provide the best solution; but see the answer to question 9.23.6. Of the alterations mentioned in 9.23.2 the only one I am doubtful of is the alteration of the "nature of the instrument". What does this mean?
- 9.23.4 I see no reason why an alteration by a stranger should make any difference to the rule. It is dangerous to make exceptions and the suggestion raises a number of questions which neither the parties nor the transferee might know anything about.
- 9.23.5 I am not in favour of the distinction. I see the reason for it, but the transferee should be aware of the risk if the alteration is apparent and if it is not either he or the drawer would have to suffer.
- 9.23.6 I agree that the position is unfortunate from the standpoint of a *bona fide* transferee for value where an alteration is not apparent, but there is ordinarily no reason why the risk should be carried by the drawer unless by drawing he has facilitated the alteration and, therefore, contributed to the loss. There may, however, be circumstances in which the drawer should be held responsible as in the case of a cheque, but I would leave it to the Courts to decide. This is an exception to the rule as laid down in the proviso to Section 64(1) of the B/E Act. I think it would be a

9.15.2 Section 3-118(a) of the U. C. C. speaks of a "draft drawn on the drawer" as being effective as a note, which is what it really is. But the N. I. A., Section 131A treats a banker's draft (Section 85A) as if it were a cheque and a promissory note is not a cheque. I am inclined to leave the position as it is in Indian law (N. I. A., Section 17).

9.15.3 Section 3-118(b) of the U. C. C. gives effect to the likelihood that a mistake is less likely to be made in writing than in typewriting or print and less in typewriting than in print. I hardly think that legislation to this effect is necessary; it would tie the Courts too rigidly.

**Group 16—Issue**

9.16.1 I see no inconsistency between Section 2, 'Issue' and Section 20. Until an instrument is completed as provided by Section 20, it is not issued and is ineffective as against anyone who became a party prior to completion. As soon as someone becomes the holder after completion, the instrument is 'issued', it having been delivered earlier. Delivery is mere transfer of possession.

In English law, 'remitter' is not a term of art and it seems to me therefore, that Section 3-102(1)(a) of the U. C. C. needs further definition.

**Group 17—Completion of an instrument by delivery**

9.17.1 I agree that there should be no defence against a holder in due course.

**Group 18—Instrument payable to bearer**

9.18.1 An instrument payable to 'cash' is not payable to bearer, but I see no objection to making it so. The risk would be the drawer's.

**Group 19—Instrument payable to order**

9.19.1 An instrument payable to bearer or order is necessarily payable to bearer. I see no reason for legislating to this effect.

**Group 20—Date, ante-dating and post-dating**

9.20.1 Ante-dating or post-dating does not invalidate either in Indian or English law. To introduce questions of fraud or illegality would be to deprive a transferee, otherwise a holder in due course, of his indefeasible title. I do not favour the suggested provision.

9.20.2 This is, in effect, section 13 of the B/E Act, 1882. I think that it might well be embodied in Indian legislation.

**Group 21—When an instrument is overdue**

9.21.1. I am *not* in favour of providing by Statute for the 'reasonable time' before a bill on demand becomes overdue. It all depends upon the circumstances but it is necessary to bear in mind that

mistake to attempt to legislate for this, except perhaps by amending the proviso to leave it open to a Judge to find against a drawer, where the loss is clearly due to his negligence.

- 9.23.7 I incline to think that the protection to be found in section 79(2) of the Bills of Exchange Act, 1882 should *not* be extended to cover other instruments which have been altered, for the reason that a banker must pay a cheque presented to him if he has funds, but is under no duty to pay bills other than cheques. If he is asked to do so, he can make his own terms—in other words he can demand that the risk can be taken by the acceptor.

As regards (b), please see my answer to question.

- 9.23.8 I see no reason why a banker should be held responsible for alterations which cannot be detected by the naked eye. It is the drawer's instrument and the responsibility should be his also.

**Group 24—Cancellation of an instrument**

- 9.24.1 I think that the cancellation should be apparent, for a transferee is entitled to look to all parties to the instrument unless it is clear that he is not entitled to look to certain parties by reason of their signatures having been cancelled. Only the holder can cancel a bill so as to discharge it; if he does so he should be prepared to surrender it to the party primarily liable on it.

**Group 25—Negligence contributing to alteration**

- 9.25.1 The responsibility to facilitating alteration leading to loss should rest upon the drawer of the instrument, for its form and effect are clearly his to decide. In the United Kingdom this responsibility is limited and could well be widened. The difficulty is to decide how far it would be wise to go; any legislation should, therefore, be general and it should be left to the Courts to decide in particular cases.

**Group 26—Signature**

- 9.26.1 I hardly think it wise to define 'signature'. If a person cannot write he must make his mark. It is not a question of how the signature is made but of whether or not it is authentic. The position is different where, for instance, a company signature is produced mechanically on a cheque, for in such a case the drawee banker is protected by a mandate. But I should hesitate to permit such signature on bills other than cheques, for a transferee would not know whether or not he had the right of recourse to all the parties whose signatures were mechanically reproduced.
- 9.26.2 I do not know the Indian Companies Act, 1956, but would it not be preferable to amend this Act rather than the N. I. A.? This would necessitate amending the definition of 'company', which might be undesirable.

- 9.26.3 I would prefer to leave things as they are, in India and the United Kingdom. Ratification of a forgery need not affect liability under the criminal law, but it might affect rights on negotiable instruments. I do not see the advantage of the suggested change.
- 9.26.4 While I think that the title of a holder in due course should be absolute, I would not think that it should be obtainable through a forged or unauthorised signature. The holder may always have recourse to his transferor and the risk is his (the holder's) if he takes from a transferor who turns out to be unsatisfactory. On the other hand, it might be argued that it is the drawer who issues the negotiable instrument and who should be responsible for whatever happens to it. It is largely a matter of choice.
- 9.26.5 I think that section 56 of the Bills of Exchange Act, 1882 is quite satisfactory, except that I would prefer that a payee should be a holder in due course—if he takes under the conditions of section 29 except as to negotiation. It is only a technicality that a payee cannot in the United Kingdom claim to be a holder in due course.
- 9.26.6 I think that the position of an aval (unknown in English law) is quite well met by section 56 of the Bills of Exchange Act, 1882. India might well choose the one or the other.
- 9.26.7 If India has anything similar to the Statute of Frauds of the United Kingdom, it would be better to leave the point to be covered by a provision similar to section 56 of the B/E Act.

#### **Group 27—Indorsements**

- 9.27.1 A misnamed payee or indorsee should indorse in the same way, adding his own signature if he wish. This is important because a transferee cannot be a holder in due course unless the bill is regular on the face of it, which includes the indorsements. I see no reason, however, why a transferee should not require the true signature of his transferor, if this has been wrongly spelt in a special indorsement.
- 9.27.2 I think that partial indorsements are undesirable and can rarely be useful. A holder suing all parties to the bill would have to claim the whole amount against some and a less amount against others. This is confusing and, I would think, unnecessary.
- 9.27.3 Under section 35(1) of the B/E Act restrictive indorsements appear to be of two kinds, though they are not actually said to be so. There would seem to be no good reason why 'Pay D only' should prevent D from being a holder in due course, but the same cannot be said of 'Pay D for the account of X', for D may not have given value, or of 'Pay D or order for collection', for here D cannot have given value. 'Pay D only' clearly prevents further negotiation and any transfer would be subject to the equities. On the whole I prefer to leave the section as it is.

- 9.27.4 I would bring neither U. C. C. provisions into the negotiable instruments law.
- 9.27.5 Yes, I think that the order of indorsements should be presumed to be the proper order until the contrary is shown by external evidence.

#### Group 28—Date of maturity

- 9.28.1 Days of grace are an anachronism and I think it desirable that there should be uniformity. In any revision of the Indian statute, therefore, it might be useful if days of grace were eliminated.
- 9.28.2 Similarly with holidays and non-business days, there should preferably be uniformity, but I would not prefer one rule to another.

#### Group 29—Presentment

- 9.29.1 I would agree with the BEA and the UCC. The case of (a) in the question is obvious, as is (b) and in the case of (c) the acceptor must know where he has to arrange to pay, if he accepts.
- 9.29.2 Presentment for payment, is necessary to charge the drawer and indorsers; otherwise there would be no finality and drawer and indorsers would not know the position.
- 9.29.3 If the acceptance is a general acceptance it is not necessary that the bill be presented to the acceptor for payment on the due date in order to bind him.
- 9.29.4 If the maker of a note wishes it presented at a specified place for payment, he is entitled to say so on the note and, accordingly, I think that the rule is correct.
- 9.29.5 I would agree with section 3-511(3)(b), for the reason given in the note on paragraph (3)(b), page 342 of the U. C. C. This is in effect the position under section 43(2) of the B/E Act.
- 9.29.6 It seems to me that presentment is necessary to give the representative of the bankrupt or deceased person the chance of paying the bill. The position resulting from the bankruptcy or death should not be taken for granted.
- 9.29.7 I would think it bad to make any exceptions. It is no hardship for the holder to present for acceptance and there is no need for special provision. In regard to (a) the (presumed) attempt on the part of the holder to present and his prevention may amount to presentment and dishonour.
- 9.29.8 It would seem to be presumed that to address a bill to more than one drawee means that it must be presented to them both (or all). It must be rare for a bill to be so addressed and I would prefer that this should not be permitted rather than that the drawer's implied instruction should be disobeyed.



- 9.29.9 The provision in section 9(1)(c) of the B/E Act is clear and satisfactory. By implication, if such a provision is not included, each instalment must be considered separately and dealt with separately.
- 9.29.10 If I were a drawee I would insist on accepting the original bill. I am not sure that I understand the meaning of this question.
- 9.29.11 Again, I would insist on the original being returned to me. In the B/E Act section 52(4) applies.
- 9.29.12 I would agree with (a) and (c); I think that the acceptor is not entitled to ask for evidence of the title or right of the presenter unless he has reason to doubt it; as regards (d) he is entitled to have the instrument delivered up to him on payment.
- 9.29.13 In the United Kingdom, at any rate, the rules relating to presentment are strict and I would say that, generally, they are strictly followed. The only licence is that offered by the Statute.
- 9.29.14 To give an intimation that the bank holds a bill due for payment is not a presentment, though the bank may in advance of the due date notify the acceptor that it holds the bill. I do not favour any special provision authorising the practice, if it exists which, in the United Kingdom, it does not.
- 9.29.15 Yes. I would agree that in all cases the bill itself should be presented.
- 9.29.16 I would think it unnecessary to make any change in the law in the United Kingdom as to business days. In spite of the explanation given in the U. C. C., I do not see the reason for the enactment in section 3-503(3).
- 9.29.17 Presentment means what it says and the method is legally immaterial, but any other method than 'personal' presentment raises considerable uncertainty, which is clearly undesirable.
- 9.29.18 Registered post would enable the sender-presenter to prove presentment only up to a point; it might also prove the receipt of the bill by the drawee or acceptor. Any enactment would have to cover the return of the bill on acceptance also; but I would not change the existing provisions.

#### **Group 30—Interest**

- 9.30.1 I do not understand this question or how such variation would operate.

#### **Group 31—Notice of dishonour**

- 9.31.1 I see no necessity for any change. The giving of notice of dishonour is a matter of evidence, which is obviously clearer if given in writing, but if an oral notice can be proved I see no reason for excluding it. It is probably essential to a written notice that it be signed, but again I see no need to insist on it.

**Group 32—Noting and protest**

- 9.32.1 I think that the attesting of the presentment and dishonour of a bill must be in the hands of responsible people and this must depend in some measure on the education and sense of social responsibility of the population. I would suggest that any professional person should be suitable.
- 9.32.2 I think that presentment by a notary should be personal, not through the post. He has to swear to the presentment and he cannot do so unless it is personal.
- 9.32.3 I would restrict noting to persons of professional qualification only and only then if the services of a notary public are not available. The weakness of any alternative is shown by the question itself.
- 9.32.4 I would not recommend a change in favour of the Geneva Convention rule; it might enable the holder of a bill on which a bankrupt is liable to obtain priority over other creditors of the bankrupt.

**PART 10—CHEQUES****Group 1—General**

- 10.1.1 This is a social question and I do not know enough of conditions in India to be able to judge.
- 10.1.2 This again is a social question; the suggestion transfers the burden of proof to the drawer, but it might be difficult for him to meet it, even if he were innocent. On the whole, I dislike the suggestion.
- 10.1.4 I consider certification of cheques neither necessary nor actually desirable, but there is probably little harm in the suggestion.
- 10.1.5 The use of cheques with receipts affixed has long existed in the United Kingdom and on the whole has been found wanting, with the result that they are much less common than they used to be. If they are to be used, however, it might be as well to enact that any instruction that the receipt must be completed is to be regarded as an instruction to the payee, not the drawee banker, so as to avoid the necessity for the banker to take his customer's indemnity.

**Group 2—Cheques Act, 1957 of U. K.**

- 10.2.1 The U. K. Cheques Act of 1957 was designed to avoid the necessity for the indorsement of cheques and has succeeded in its purpose. If the use of cheques in India is comparable with their use in the United Kingdom I would think that similar legislation in India would be useful.
- 10.2.2 The United Kingdom covers non-negotiable as well as negotiable instruments and I see no reason why they should not be included.

- 10.2.3 A similar provision would be desirable.
- 10.2.4 A similar provision would be useful.
- 10.2.5 In the absence of legislation such as the U. K. Cheques Act, the paying banker should probably concern himself with indorsement. This again, however, is a question with a social significance; it has always been my view that merely to ignore indorsements would do little harm.
- 10.2.6 A similar provision would be desirable.
- 10.2.7 A similar provision would be desirable.
- 10.2.8 I see no reason why the protection to the collecting banker should be limited to cheques to which the customer has a defective titled.
- 10.2.9 I would favour the inclusion of uncrossed cheques within the protection to the collecting banker; to differentiate between crossed and uncrossed cheques is artificial and unnecessary.

### Group 3—Crossing

- 10.3.1 The words 'a/c payee' on a cheque are an anomaly. They do not prevent negotiation in the strict sense of the term, but they may prevent the transfer of a cheque in practice. In English law they are considered addressed to the collecting banker and require him, if the customer is not the payee, to enquire as to the customer's title and to obtain a satisfactory answer as a condition of the banker's being entitled to plead the statutory protection. I believe, but I am not sure, that the law is the same in India. If a cheque so 'crossed' were held to be not negotiable, the statute would contain two expressions having the same effect. At present 'not negotiable' means something different from 'a/c payee'. The drawer can achieve the same effect as at present by drawing in favour of a named person 'only'. I would deprecate bringing the so-called crossing into the law of negotiable instruments to any greater extent.
- 10.3.2 As I say above, I would make no change.
- 10.3.3 See my answer to 10.3.1. I prefer continuance of the present position.
- 10.3.4 If India were to enact a 'Cheques Act' I think it might be based on the English Act, which has proved itself in practice.

# APPENDIX VI

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**SURVEY re. CHEQUES AND BILLS**

by

**THE NATIONAL INSTITUTE OF  
BANK MANAGEMENT**

in collaboration with

**THE BANKING LAWS COMMITTEE**

( GOVERNMENT OF INDIA )

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# SURVEY REPORT

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# **SURVEY re. CHEQUES AND BILLS**

by

**THE NATIONAL INSTITUTE OF BANK MANAGEMENT**

in collaboration with :

**THE BANKING LAWS COMMITTEE**

(GOVERNMENT OF INDIA)

## **SURVEY REPORT**

When the Banking Laws Committee (BLC) was reviewing the law relating to negotiable instruments, the BLC felt the need to have an authentic picture of the actual state of affairs in regard to such instruments, particularly cheques and bills (clean and documentary) and their negotiation. The National Institute of Bank Management (NIBM) agreed to collaborate with the BLC in conducting, amongst banks, a sample survey which would yield the necessary statistical and allied information.

### *Sample design*

2. In deciding the size and frame of the sample, we have to make due allowance for the heterogeneity in branches of banks based on their location and other environmental conditions which may influence the nature and the type of business transacted by them.

### *Unit of investigation*

3. The unit of investigation for this survey was naturally a bank-branch which is the principal operating unit for banking activities and a source of almost all banking transactions.

### *Heterogeneity in branches of banks*

4. Nearly 17,000 branches of commercial banks reveal their heterogeneity. Branches of bigger banks are likely to be catering to a class of customers substantially different from that served by smaller banks. Difference in the rural customers of banks from their urban counterparts is too obvious to need any comment. One cannot be

equally confident in respect of regional variations but it was considered safer to assume so at the stage of designing the survey. On the other hand, variations are likely to occur in the extent of utilisation of different types of services among various localities in a town.

#### *Factors causing heterogeneity*

5. In short, heterogeneity in the present context can occur amongst the 17,000 bank branches in respect of the following aspects :

- (i) Size of the concerned bank—measurable, say, in terms of total resources of the bank;
- (ii) Demographic environment around the bank centre—measurable, say, in terms of the population;
- (iii) Geographic location of the bank centres in India—to be determined with reference to the different States of the Indian Union;
- (iv) Type of customers of a bank-branch, for branches located in big cities—to be determined by the type of locality in which the branch is located, say, whether in a predominantly business locality or partly business and partly residential locality or exclusively residential locality.

#### *Stratification of branches*

6. Accordingly, the nearly 17,000 bank branches were stratified into several strata. Technically, this amounted to a four-way stratification, initially according to the size of the bank, then according to demographic environment, geographic location and finally according to the type of customers.

#### *Factors determining size of sample*

7. Size of a sample is in practice determined by the following factors :

- (i) The extent of heterogeneity of the population, having regard to the objectives of the investigation; more specifically, the extent of heterogeneity within each stratum if the population is stratified. (The purpose of stratification is to classify the units of investigation according to the stratification variable. The resultant effect is a re-arrangement of the units into a

number of homogeneous groups, the group averages being significantly different from each other);

(ii) The precision required in the final result—more the precision expected, larger the sample size;

(iii) The cost and time budget for the investigation.

8. The objective of the investigation was to obtain an authentic picture of the actual state of affairs in regard to negotiable instruments. On this count, the four-way stratification of about 17,000 bank-branches would produce homogeneous strata with little variation among units belonging to a stratum. This is because the application of laws relating to negotiable instruments is hardly a matter of branch-to-branch variation or subject to branch agent's discretion. A sample of a small size taken well from the four-way stratified group of branches should, therefore, satisfy all the necessary criteria of a representative sample.

#### *Selection of banks*

9. In relation to the size of the bank, the following banks were selected to represent banks of different sizes :

TABLE 1  
*Banks included in the Survey*

Name of the bank	Head-quarters*	Total Resources (Dec. 1973) (Rs. in crores)
1. State Bank of India . . . . .	Bombay . . . . .	2,687
2. Bank of India . . . . .	Bombay . . . . .	880
3. Punjab National Bank . . . . .	New Delhi . . . . .	757
4. United Commercial Bank . . . . .	Calcutta . . . . .	511
5. Canara Bank . . . . .	Bangalore . . . . .	469
6. Union Bank of India . . . . .	Bombay . . . . .	373
7. Indian Bank . . . . .	Madras . . . . .	232
8. New Bank of India Ltd. . . . .	New Delhi . . . . .	93
9. Bank of Madura Ltd. . . . .	Madurai . . . . .	30

\*This column indicates the place of location of the Central Office of the bank which may not necessarily indicate the location of the bank's Registered Office.

*Selection of centres based on RBI classification*

10. Next characteristic was the demographic environment classified according to the Reserve Bank definition into metropolitan, urban, semi-urban and rural centres. Due to concentration of banking transactions in the big cities, the sample contained all the 8 metropolitan towns and 10 per cent of the urban towns. Approximately equal number of semi-urban and rural centres was selected in order to balance the sample in view of the number of such branches to the universe comprising nearly 17,000 branches.

11. The third characteristic, viz., the geographic location, was introduced in the sample at this stage. Selection of the urban, semi-urban and rural centres has been made in such a way that all corners of the country get represented. Selection of branches of various banks in the metropolitan towns has been the fourth characteristic and this part of the sample includes branches located in different localities of these big towns. The emerging sample is exhibited in Table 2 below:

TABLE 2  
*Branches included in the Sample*

Centre	State	Name of the Bank
<b>1. METROPOLITAN</b>		
1. New Delhi . . . .	Union Territory	State Bank of India
2. Calcutta-Howrah . . . .	West Bengal	State Bank of India
3. Bombay-Andheri . . . .	Maharashtra	Bank of India
4. Hyderabad . . . .	Andhra Pradesh	Bank of India
5. Madras-Mylapore . . . .	Tamil Nadu	Punjab National Bank
6. Ahmedabad . . . .	Gujarat	Canara Bank
7. Kanpur . . . .	Uttar Pradesh	Union Bank of India
8. Bangalore . . . .	Karnataka	Indian Bank
<b>2. URBAN</b>		
1. Cuttack . . . .	Orissa	State Bank of India
2. Gwalior . . . .	Madhya Pradesh	Bank of India

Centre	State	Name of the Bank
3. Patna . . . . .	Bihar	Bank of India
4. Ludhiana . . . . .	Punjab	Punjab National Bank
5. Baroda . . . . .	Gujarat	Punjab National Bank
6. Srinagar . . . . .	Jammu & Kashmir	United Commercial Bank
7. Agra-Cantonment . . . . .	Uttar Pradesh	Canara Bank
8. Belgaum-Shahapur . . . . .	Karnataka	Canara Bank
9. Poona . . . . .	Maharashtra	Union Bank of India
10. Ernakulam . . . . .	Kerala	Union Bank of India
11. Guntur . . . . .	Andhra Pradesh	Indian Bank
12. Jaipur . . . . .	Rajasthan	New Bank of India Ltd.
13. Madurai . . . . .	Tamil Nadu	Bank of Madura Ltd.
<b>3. SEMI —URBAN</b>		
1. Sonapat . . . . .	Haryana	State Bank of India
2. Satara . . . . .	Maharashtra	State Bank of India
3. Farrukhabad . . . . .	Uttar Pradesh	Bank of India
4. Simla . . . . .	Himachal Pradesh	Punjab National Bank
5. Balasore . . . . .	Orissa	United Commercial Bank
6. Chaibasa . . . . .	Bihar	Canara Bank
7. Dhoraji . . . . .	Gujarat	Union Bank of India
8. Rameswaram . . . . .	Tamil Nadu	Indian Bank
9. Moga . . . . .	Punjab	New Bank of India Ltd.
10. Tenkasi . . . . .	Tamil Nadu	Bank of Madura Ltd.
<b>4. RURAL</b>		
1. Farakka . . . . .	West Bengal	State Bank of India
2. Boinchee . . . . .	West Bengal	State Bank of India
3. Niphad . . . . .	Maharashtra	State Bank of India
4. Amlai (Shahdo) . . . . .	Madhya Pradesh	State Bank of India

Centre	State	Name of the Bank
5. Masaurhi . . . .	Bihar	Bank of India
6. Ghasipura . . . .	Orissa	Bank of India
7. Shamsabad . . . .	Uttar Pradesh	Punjab National Bank
8. Bhogpur . . . .	Punjab	United Commercial Bank.
9. Londa . . . .	Karnataka	Canara Bank
10. Shrikrishnapuram . . . .	Kerala	Canara Bank
11. Vadasery . . . .	Tamil Nadu	Union Bank of India
12. Kothakotta . . . .	Andhra Pradesh	Indian Bank
13. Rahon . . . .	Punjab	New Bank of India Ltd.
14. Rayavaram . . . .	Tamil Nadu	Bank of Madura Ltd.

*Active participation of the selected banks in the conduct of the survey*

12. Each of the selected banks nominated an officer as its representative for discussions with the BLC and the NIBM with regard to the conduct of the survey. This personal association of the officers of the selected banks with the conduct and progress of the survey has facilitated the expeditious completion of the survey and the obtaining of the relevant information. Two meetings were held between the representatives of the selected banks and the officers of the BLC and the NIBM, when the tentative schedules, which had already been drawn up, were discussed.

*Visits to city branches*

13. The discussions with the representatives of the selected banks revealed that it would be advantageous if some offices in Bombay of the selected banks were to be visited by the officers of the BLC and the NIBM along with the concerned bank's representative in order to get an insight into the book-keeping of the respective banks and the nature and types of instruments handled by them.

14. Accordingly, the officers of the BLC and the NIBM, accompanied by the banks' representatives, visited the branches of the selected banks in Bombay and spent considerable time acquainting themselves with the procedures followed and the records kept by the banks.

Annexure I gives the names of the branches and the dates on which they were visited.

*Observational and impressionistic data also collected*

15. These visits have also helped in the obtaining of observational and impressionistic data based on the nature of the instruments examined at the branches and of the prevailing practices regarding the manner in which they were drawn and the methods adopted for their collection or negotiation. The main features of the information so gathered, and with reference to some of which remedial action may be needed, are set out below.

*Perfunctory manner of drawing inland bills*

16. With reference to inland bills, the visits enabled the officers of the BLC and the NIBM to get themselves directly acquainted with the several problems connected with the procedural and other requirements. When the bills which had come to the banks for collection or negotiation were examined, astounding variations were noticed as regards the several differences in the forms in which bills were drawn by the mercantile community. Many such bills were, strictly speaking, no bills at all as the amounts of some of them were uncertain or the orders to pay were conditional or they contained extraneous matters. The banks and their customers, however, dealt with such bills as if they were regular bills, without giving thought to the difficulties they might encounter in the event of any necessity for enforcing their claims thereagainst. It was found that the essential distinction between references in the bill to the fact that the bill is in payment for the sale or purchase of goods covered by the document and to the fact that payment of the bill is to be made subject to a valid transfer and delivery of the document was not clearly recognised by many merchants and traders.

*Bilti hundis*

17. During the examination of the several types of inland documentary negotiable instruments with the banks, a number of bilti hundis (indigenous negotiable instruments with documents) were also noticed. Such hundis were pending for collection or payment with the branches of the banks on the dates of the visits.

*Shahjog and other types of hundis*

18. The visits to the branches also revealed that quite a number of indigenous negotiable instruments (hundis), in various types, were coming into the banking system for the purpose of collection. Of the several types of hundis noticed, the Shahjog hundis were greater in number. Dekhadnar hundis and Namjog hundis were also noticed.

*Stamp requirements regarding bills*

19. As regards the payment of stamp duty on bills, there does not appear to be much awareness as to the proper method for payment of duty of the requisite value. The stamps in some cases were found to have been affixed on the reverse of the bills, although sufficient spaces were available on the obverse. In some other cases, the bills were typed with a carbon duplicate and the stamp requirements were sought to be complied with by affixing the stamps, some to the original and some to the carbon duplicates, the total of such labels making up the full stamp duty required for bills. In many cases, two or more "hundi papers" were placed one beneath the other and were stapled or pasted together to make up the full stamp duty, and the recitals of the instruments were written on the first sheet and on the rest there was only a statement that it was a continuation sheet of the bill written on the first "hundi paper" sheet.

*Finalisation of the schedules*

20. As a result of the observations made during such visits of the practices of banks in keeping their books and records, the schedules for the collection of data from the several branches coming within the sample design were further amended and finalised at a meeting of the officers of the BLC and the NIBM.

21. A set of the basic forms comprising the schedules, in which the banks were required to furnish their returns containing the relevant data, is annexed (Annexures II to VII). This consists of four basic forms. In each basic form, certain variations were adopted so that the information obtained could be full and adequate in coverage.

*Data on cheques and other demand instruments paid by banks (Basic Form D)*

22. A random selection was made of the dates to be specified in each month for the furnishing of information regarding demand instruments paid by the banks. The selection was so done to ensure that



the coverage would spread to all the calendar months of 1973. The following dates were selected :

1. 12-1-1973	5. 9-5-1973	9. 10-9-1973
2. 20-2-1973	6. 5-6-1973	10. 30-10-1973
3. 22-3-1973	7. 23-7-1973	11. 14-11-1973
4. 3-4-1973	8. 2-8-1973	12. 26-12-1973.

*Data collected also with reference to different instruments analogous to cheques*

23. The particulars called for covered all negotiable and other instruments payable on demand paid by a branch on the specified dates, either in cash or through clearing or by transfer. Data were required to be given separately also with reference to different instruments analogous to cheques employed to transfer funds held in the accounts of all classes of customers. Such particulars were required to be furnished separately with reference to payments made from current and allied accounts and from savings bank accounts.

*Full information called for as regards cheques endorsed and negotiated*

24. The total instruments paid to the debit of either savings bank or current and allied accounts were classified into bearer and order instruments and with reference to order instruments, the form devised aimed at obtaining full information as to the extent to which the instruments were endorsed and the trends in this regard in the metropolitan, urban, semi-urban and rural areas. While for the purposes of the return the expression "endorsement" was described in a wide sense to cover also payee's acquittance for payment on the instrument, the form, by distinguishing between "payee's endorsement" and the "further endorsements" on an instrument, made it possible to arrive at the figures as to the extent to which cheques and allied instruments were negotiated.

*Endorsements in scripts other than English or by mark*

25. Opportunity was also taken to obtain information as to the extent to which "endorsements" were made in scripts other than English or by thumb impressions or marks.

*Information on endorsements of depository and intermediary banks*

26. One of the main objectives of the survey was to bring out the data that would show the time and labour banks have to spend in observing the requirements as to the regularity of endorsements on cheques and analogous instruments. For this purpose, information was separately obtained regarding the number of endorsements of depository or intermediary banks.

*Data on instruments returned unpaid (Basic Form II)*

27. Here data were required to be furnished as to the number and amount, classified reason-wise, of instruments dishonoured or returned unpaid in the current and allied accounts, and in the savings bank accounts, for the two half-years of 1973 by the representative branches for the four stratified areas, viz., metropolitan, urban, semi-urban and rural.

28. This form required particulars of instruments returned unpaid for want of funds available in the accounts and the number of accounts involved, of instruments returned unpaid for absence of, or irregularity in, (a) endorsements of depository or intermediary banks or (b) other endorsements, and of instruments returned unpaid for any disqualification of the drawer, e.g., death, insolvency, lunacy or unsoundness of mind. Information was also required separately as regards countermanding of instruments by the drawers.

29. As regards particulars of bills dishonoured, they were classified into usance and demand bills, and clean and documentary bills, and further with reference to usance bills, dishonour by non-acceptance and dishonour by non-payment were required to be shown separately.

*Data on bills (Basic Form III)*

30. This form was designed to elicit information on the periods for which usance bills are usually drawn and with reference to documentary bills, it sought to classify the bills based on the different types of documents which have gained currency and popularity with the trade and which are annexed to bills. A break-up of the number and amount of the bills supported by such documents was required, so that a quantitative assessment may also be feasible.

31. Information was separately required to be furnished with reference to inward and outward inland bills purchased and discounted

by the branches covered by the survey. This excluded Multani hundis. Particulars were also similarly obtained with reference to bills that had come to the branches exclusively for collection (both inward and outward).

32. Based on a similar classification, information was required separately with reference to foreign bills.

33. A further classification was also made in order to ascertain the extent to which the bills drawn were under letters of credit.

*Data on "Multani hundis" (Basic Form IV)*

34. This form was designed to obtain data with reference to what are called "Multani hundis", and the form attempted a classification of such hundis similar to the classification attempted for bills.

*Method adopted to collect the data*

35. The schedules were sent to the selected branches, and the representatives of banks and their head offices were requested to ensure the accuracy and filling up of the schedules in time.

36. All the banks fully co-operated and sent their returns. However, the returns from two branches of the United Commercial Bank, viz., Srinagar and Balasore, could not be received in time for inclusion. Nevertheless, the collection of data from the sample selected can be considered as practically complete in coverage, and the analysis of the data collected can be considered as giving a fairly representative picture of the trends and practices with reference to cheques, bills and allied instruments for the metropolitan, urban, semi-urban and rural areas of the country. When properly projected, the resultant picture can also be considered as giving a fair indication of the trends and practices of the country as a whole.

*"Bearer" & "Order" and "Negotiated" & "Non-negotiated" instruments*

37. The data collected were analysed to give the proportion of bearer to order instruments, and again the data were further analysed to arrive at the proportion of negotiated instruments to the rest, i.e., non-negotiated items including bearer instruments.

38. Table 3 gives the percentages of bearer and order instruments to the total, classified area-wise, and calculated separately with reference to savings bank accounts and current and allied accounts, and also gives the all-India averages.

TABLE 3  
*Percentages of bearer and order instruments*

Area	Bearer instruments		Order instruments	
	Savings bank accounts	Current and allied accounts	Savings bank accounts	Current and allied accounts
Metropolitan . . . . .	82.9	21.9	17.1	78.1
Urban . . . . .	92.0	25.3	8.0	74.7
Semi-urban . . . . .	98.2	33.7	1.8	66.3
Rural . . . . .	98.1	81.7	1.9	18.3
ALL-INDIA . . . . .	91.6	26.2	8.4	73.8

39. With reference to both business accounts (current and allied accounts) and savings bank accounts, an increasing trend is noticed as regards resort to bearer instruments as we go from metropolitan to urban, semi-urban and rural areas. Correspondingly, there is a decreasing trend with reference to order instruments. Ordinarily, this indicates that recourse to negotiation is less and less in the urban, semi-urban and rural areas.

*Proportion of negotiated cheques and other instruments to the non-negotiated*

40. One of the objectives of the survey was to ascertain the extent to which cheques and allied instruments are really negotiated in practice. In this context, it was negotiation by means of endorsement and delivery that was relevant and not negotiation by mere delivery alone. Hence, in ascertaining the proportion of negotiated items to the non-negotiated, bearer instruments and order instruments without payees' endorsements and with payees' endorsements alone were treated as non-negotiated, and order instruments bearing payees' endorsements and one or more other endorsements were treated as negotiated items. On this basis, the percentages of negotiated cheques and allied instruments were arrived at to the total of such instruments.

41. The proportion was first seen with reference to cheques alone excluding cheques/drafts issued by banks either on themselves or on other banks and excluding also cheques issued by government departments and local authorities. Table 4 gives the result.

TABLE 4

*Percentages of negotiated and non-negotiated cheques (excluding bank and Government cheques)*

Area	Bearer cheques and cheques without or only with payees' endorsements			Cheques with payees' endorsements and one or more other endorsements		
	Savings bank accounts	Current and allied accounts	All accounts	Savings bank accounts	Current and allied accounts	All accounts
Metropolitan .	99.90	99.65	99.70	0.10	0.35	0.30
Urban .	99.70	98.80	99.16	0.30	1.20	0.84
Semi-urban .	100.00	99.70	99.80	..	0.30	0.20
Rural .	100.00	98.09	99.56	..	1.61	0.44
ALL-INDIA .	99.90	99.36	99.59	0.10	0.64	0.41

42. The data were next analysed to arrive separately at the proportion of negotiated cheques to the rest including cheques/drafts issued by banks either on themselves or on other banks but excluding cheques issued by government departments and local authorities. The results are given in Table 5.

TABLE 5

*Percentages of negotiated and non-negotiated cheques (including bank cheques but excluding Government cheques)*

Area	Bearer cheques and cheques without or only with payees' endorsements			Cheques with payees' endorsements and one or more other endorsements		
	Savings bank accounts	Current and allied accounts	All accounts	Savings bank accounts	Current and allied accounts	All accounts
Metropolitan .	99.90	99.38	99.46	0.10	0.62	0.54
Urban .	99.70	95.20	96.18	0.30	4.80	3.82
Semi-urban .	100.00	97.29	98.09	..	2.71	1.91
Rural .	100.00	98.00	99.50	..	2.00	0.50
ALL-INDIA .	99.90	98.00	98.50	0.10	2.00	1.50

43. The data were further analysed to arrive separately at the proportion of negotiated cheques after including cheques/drafts issued by banks and also cheques issued by government departments and local authorities. The results are given in Table 6.

TABLE 6

*Percentages of negotiated and non-negotiated cheques (including bank and Government cheques)*

Area	Bearer cheques and cheques without or only with payees' endorsements			Cheques with payees' endorsements and one or more other endorsements		
	Savings bank accounts	Current and allied accounts	All accounts	Savings bank accounts	Current and allied accounts	All accounts
Metropolitan . .	99.90	96.15	96.66	0.10	3.85	3.34
Urban . . . . .	99.70	96.00	96.70	0.30	4.00	3.30
Semi-urban . . .	100.00	97.87	98.39	..	2.13	1.61
Rural . . . . .	100.00	98.00	99.50	..	2.00	0.50
ALL-INDIA . . .	99.90	96.40	97.20	01.0	3.60	2.80

44. From Tables 4 to 6 it is seen that cheques negotiated by endorsements form a very small proportion to the total cheques drawn. Amongst cheques issued by the public (this would exclude cheques/drafts issued by banks, government and local authorities) negotiation by recourse to endorsement is negligible. The all-India average is 0.10% in savings bank accounts, 0.64% in current and allied accounts, and for all accounts it is only 0.41%.

45. When we take into consideration also bank cheques/drafts (excluding government cheques), the all-India average is only 0.10% in savings bank accounts. Though it is somewhat higher in current and allied accounts, even then it is only 2.00%. The all-India average for all accounts is only 1.50%.

46. When we add also the cheques issued by government and local authorities (table 6), we find that the all-India percentages of negotiated cheques come to 0.10 in savings bank accounts, 3.60 in

current and allied accounts and 2.80 for all accounts considered together. But not much significance can be attached to this somewhat higher percentage arrived at with reference to the position in current accounts found after adding government cheques also. This is because except in one metropolitan branch of one of the selected banks, "nil" figures have been furnished by all other branches of all banks regarding endorsements that would evidence negotiation of government cheques.

47. The data collected with reference to demand instruments paid by banks were also analysed to arrive at the proportion of negotiated *instruments* to the total of all *instruments* paid by banks including dividend warrants and other items which serve as media for transfer or payments from one account to another and which may be considered as playing more or less the same role as cheques. The results are set out in Table 7.

TABLE 7  
*Percentages of negotiated instruments to the total instruments (bearer and order)*

Area	Bearer instruments and instruments without or only with payees' endorsements			Instruments with payees' endorsements and one or more other endorsements		
	Savings bank accounts	Current and allied accounts	All accounts	Savings bank accounts	Current and allied accounts	All accounts
Metropolitan . . .	99.93	96.40	97.00	0.07	3.60	3.00
Urban . . . . .	99.80	96.20	97.04	0.20	3.80	2.96
Semi-urban . . . .	100.00	98.00	98.60	..	2.00	1.40
Rural . . . . .	100.00	97.90	99.50	..	2.10	0.50
ALL-INDIA . . . .	99.94	96.60	97.50	0.06	3.40	2.50

48. Even when the proportion of negotiated instruments is seen to the total instruments paid by banks we find that negotiated items form only a very small percentage. The all-India percentage with reference to savings bank accounts is only 0.06, with reference to current and allied accounts it is 3.4 and for all accounts it is only 2.5.

49. Table 8 gives the percentages of negotiated items to the total of the *order* instruments paid by banks when cheques and other allied instruments are considered together.

TABLE 8

*Percentages of negotiated items to the total of the order instruments*

Area	Instruments without or only with payees' endorsements			Instruments with payees' endorsements and one or more other endorsements		
	Savings bank accounts	Current and allied accounts	All accounts	Savings bank accounts	Current and allied accounts	All accounts
Metropolitan . . .	99.60	95.40	95.60	0.40	4.60	4.40
Urban . . . . .	97.90	94.80	95.00	2.10	5.20	5.00
Semi-urban . . . .	100.00	97.00	97.00	..	3.00	3.00
Rural . . . . .	100.00	88.50	91.30	..	11.50	8.70
ALL-INDIA . . . .	99.20	95.30	95.50	0.80	4.70	4.50

50. The all-India average of the percentage of negotiated instruments to the total of order instruments comes only to around 4.5. The percentages are nearabout the same in metropolitan, urban and semi-urban areas. The rural areas have shown a slightly larger percentage of negotiated items amongst the order instruments, but this has to be considered with the position that in the rural areas resort to order cheques is only around 2%. Though the position is similar in semi-urban areas as well, a slightly larger recourse to negotiation found with reference to order cheques in rural areas alone may be due to the fact that in rural areas banking habit is not as yet widespread and hence instruments are often required to be endorsed by the payees to the other persons for being collected through such other persons' accounts and have, therefore, to be negotiated.

*Endorsements by intermediary and depository banks*

51. Table 9 gives the break-up of the information together with the all-India average about instruments endorsed by intermediary and depository banks.



TABLE 9

*Endorsements by depository and intermediary banks*

Area	Percentage of instruments with depository and intermediary banks' endorsements to the total instruments paid		
	Savings bank accounts	Current and allied accounts	All accounts
Metropolitan . . . . .	1.2	25.9	21.6
Urban . . . . .	2.3	21.5	16.9
Semi-urban . . . . .	22.8	25.1	25.9
Rural . . . . .	6.4	11.0	7.5
ALL-INDIA . . . . .	6.7	24.1	19.4

52. The all-India average of instruments endorsed by intermediary and depository banks (the collecting bank and any other bank acting for the collecting bank in the process of collection) came to 19.4% of all the instruments paid. Having regard to the volume of instruments to be handled, it is obvious that this is a high percentage and entails considerable time, labour and expense to banks in making and scrutinising such endorsements.

53. When the above results are considered with the further fact that of the cheques and allied instruments returned unpaid, 17.027% of such items have been returned for the absence of, or irregularity in, the endorsements of depository and intermediary banks, it is clear that the burden on the banking system consequent on the need for and the necessity to scrutinise such endorsements is really considerable.

*Endorsements in character other than English*

54. There were practically no endorsements in characters other than English on the cheques and allied instruments paid by banks for the period covered by the survey.

*Dishonour of cheques and allied instruments*

55. The following table gives the cause-wise break-up of the instruments returned unpaid to the total instruments returned unpaid during the whole of the calendar year 1973. This table gives the percentages for the whole country for savings bank accounts, and for current and allied accounts separately and for all accounts taken together.

TABLE 10

*Percentages of cheques returned unpaid to the total instruments so returned during the year 1973*

Particulars	Current and allied accounts	Savings bank accounts	All accounts
1. Instruments returned unpaid for want of available funds . . . . .	52.947	52.116	52.811
2. Instruments returned unpaid for absence of or irregularity in :			
(a) endorsements of depository and intermediary banks . . . . .	16.955	17.396	17.027
(b) other endorsements . . . . .	8.136	4.773	7.583
3. Instruments returned unpaid for any personal disqualification . . . . .	0.202	0.934	0.323
4. Instruments, payment of which was stopped by the drawer . . . . .	1.950	1.993	1.957
5. Instruments returned unpaid for any other reason . . . . .	19.806	22.785	20.296

56. Table 11 gives such cause-wise break-up separately for metropolitan, urban, semi-urban and rural areas of the country.

TABLE 11

*Percentages of cheques returned unpaid to the total instruments so returned during the year 1973—Area-wise break-up*

Particulars	Metropolitan		Urban		Semi-urban		Rural	
	(a)	(b)	(a)	(b)	(a)	(b)	(a)	(b)
1.	43.242	37.338	69.031	71.457	57.566	69.897	82.926	58.400
2.A.	22.212	28.704	7.680	2.874	16.355	7.653	3.135	3.200
B.	9.369	5.162	7.093	4.478	3.348	3.571	4.529	3.200
3.	0.178	0.044	0.308	2.406	..	..	..	0.800
4.	1.927	1.869	1.390	2.005	4.249	2.551	3.135	3.200
5.	23.070	26.880	14.495	16.778	18.480	16.326	6.271	31.200

- NOTES: 1.—Instruments returned unpaid for want of available funds.  
 2.A.—Instruments returned unpaid for absence of or irregularity in endorsements of depository and intermediary banks.  
 B.— —do— other endorsements.  
 3.—Instruments returned unpaid for any personal disqualification.  
 4.—Instruments, payment of which was stopped by the drawer.  
 5.—Instruments returned unpaid for any other reason.  
 (a)—Current and allied accounts. (b) Savings bank accounts.

#### *Quantitative analysis of reasons for dishonour of cheques*

57. Though the data collected about the cause-wise break-up of the instruments returned unpaid were in a form that included also instruments allied to cheques, the information obtained can reasonably be taken as giving a quantitative analysis of the reasons for the return of cheques unpaid.

#### *Dishonour for insufficiency of funds—major cause*

58. It is noted that the dishonour of cheques for want of available funds in the accounts of the drawers is the major reason for the dishonour of cheques. It is also found that this is so both with reference to current and allied accounts as also savings bank accounts.

59. But the number of cheques dishonoured for insufficiency of funds generally is higher as we go from metropolitan to urban, semi-urban and rural areas. In rural areas in business accounts 82.9% of the instruments returned unpaid have been so returned for insufficiency of funds in the accounts.

*Endorsements of depository and intermediary banks*

60. The next major reason for the return of the instruments is the absence of, or irregularity in, endorsements. An analysis was made to determine, amongst cheques and allied instruments dishonoured for absence of or irregularity in endorsements, the extent to which this is attributed to such defect regarding endorsements of depository and intermediary banks and regarding endorsements by others. We find that more cheques and allied instruments are being returned for such defects in the requirements as to endorsements of depository and intermediary banks than for any such defect with reference to other endorsements.

*Countermanding of payments*

61. Roughly 2% of the cheques returned unpaid are so returned on account of their having been countermanded by the drawers.

62. It is found that the practice of countermanding is seen to be comparatively more prevalent in semi-urban and rural areas than in metropolitan and urban areas.

*Dishonour on account of personal disqualification*

63. Of the cheques dishonoured, in current and allied accounts in urban centres 2.4%, and in savings bank accounts for the whole country 0.934%, are found to be dishonoured for the personal disqualification of the drawers, such as death, insolvency or lunacy, though the all-India average for such dishonour for all accounts is only 0.323%. Since this disqualification relates only to accounts of individuals, it may be inferred that the percentage of cheques so returned on the total individual accounts alone will be higher.

*Defective drawal of the instruments*

64. The residual column, i.e., the percentage of instruments returned unpaid for "any other reason", also shows a high percentage. The "other reasons" were specified. But they comprise mainly defects

or irregularities noticed with reference to the drawal of the instruments entailing their consequential dishonour.

*Other reasons given for dishonour*

65. Some of the "other reasons" given for the dishonour of the instruments may be specifically mentioned as they are not found in the printed returning memorandum used by banks and the validity or propriety of such reasons as causes for dishonour of the instruments may be in doubt. Some such reasons are listed below :

- (i) Does not participate in clearing.
- (ii) Ten days' notice required.
- (iii) Station stamp required.
- (iv) Strike in Bank of .....
- (v) Intimation of new cheque book issued required.

*Analysis of data on bills*

66. The data on inland bills and foreign bills were collected separately.

*Data on inland bills*

67. The following tables give the proportion of inland bills which are clean and documentary and which may be payable on demand or depending on the usance, and their number and amount, to the total of such bills which are either purchased/discounted by banks or are received by them for collection. Annexures VIII and IX give the area-wise break-up also.

TABLE 12

*Particulars of inland bills purchased/discounted*

Particulars	Demand		Usance		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Clean bills . . . . .	57.5	53.2	2.7	3.4	60.2	56.6
Documentary bills . . . . .	30.2	32.7	9.6	10.7	39.8	43.4
	87.7	85.9	12.3	14.1	100.0	100.00

TABLE 13

*Particulars of inland bills handled by banks for collection*

Particulars	Demand		Usance		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Clean bills . . . . .	36.9	44.9	1.5	2.7	38.4	47.6
Documentary bills . . . . .	53.7	47.7	7.9	4.7	61.6	52.4
	90.6	92.6	9.4	7.4	100.0	100.0

68. Of the inland bills purchased/discounted, there are more clean bills than documentary bills. But of the inland bills received for collection, we find that there are more documentary bills than clean bills. Again, usance bills are much less in number than demand bills.

69. In fact, the percentage of usance bills to the total volume of such bills ranges from 1.5 to 9.6 when considered with reference to numbers and from 2.7 to 10.7 when considered with reference to amounts. Again, the percentage of documentary usance bills ranges from 7.9 to 9.6.

70. The data on the documentary bills were further analysed to bring out the percentages of inland documentary bills drawn under letters of credit. Tables 14 and 15 give the relevant percentages as regards documentary bills purchased/discounted and documentary bills coming for collection. Annexures X and XI give also their area-wise break-up.

TABLE 14

*Particulars of inland documentary bills purchased/discounted*

Particulars	Demand		Usance		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Under letters of credit . . . . .	10.6	12.3	0.5	1.7	11.1	14.0
Without letters of credit . . . . .	65.3	63.0	23.6	23.0	88.9	86.0
	75.9	75.3	24.1	24.7	100.0	100.0

TABLE 15

*Particulars of inland documentary bills handled by banks for collection*

Particulars	Demand		Usance		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Under letters of credit	8.0	5.2	0.5	0.5	8.5	5.7
Without letters of credit	79.1	85.7	12.4	8.6	91.5	94.3
	87.1	90.9	12.9	9.1	100.0	100.0

71. Only 8 to 10.6% in terms of number and 5.2 to 12.3% in terms of amount are the percentages of inland demand bills which are drawn under letters of credit.

72. As regards inland usance bills, bills drawn under letters of credit are considerably less. They are only 0.5% of the total number of bills and they range from 0.5 to 1.7% when considered in terms of the amount.

73. The data on the inland documentary bills were further analysed to ascertain the extent to which the different types of documents were utilised to support the bills, and these were considered separately with reference to bills drawn under letters of credit and those drawn without them. Tables 16 and 17 set out this information. The area-wise break-up of the data collected is given in Annexures XII and XIII.

TABLE 16  
*Inland documentary bills purchased/discounted*

Particulars of documentary bills	Under letters of credit		Without letters of credit		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
1. With railway receipts	3.9	5.9	20.7	45.9	24.6	51.8
2. With roadway bills/lorry receipts	5.6	7.9	65.3	35.4	70.9	43.3
3. With pucca delivery orders	..	..	0.1	..*	0.1	..*
4. With post parcel receipts	..*	..*	0.1	0.1	0.1	0.1
5. With warehouse receipts	..	..	..	..	..	..
6. With shares or government securities	..	..	0.8	0.4	0.8	0.4
7. With air consignment notes	..	..	..*	..*	..*	..*
8. With other documents	1.5	0.1	2.0	4.3	3.5	4.4
	11.0	13.9	89.0	86.1	100.0	100.0

\*Negligible.

TABLE 17  
*Inland documentary bills handled by banks for collection*

Particulars of documentary bills	Under letters of credit		Without letters of credit		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
1. With railway receipts	3.4	2.3	18.4	42.9	21.8	45.2
2. With roadway bills/lorry receipts	4.9	3.4	68.0	49.8	72.9	53.2
3. With pucca delivery orders	..	..	0.2	0.5	0.2	0.5
4. With post parcel receipts	0.2	..*	0.6	0.4	0.8	0.4
5. With warehouse receipts	..	..	..	..	..	..
6. With shares or government securities	..	..	0.1	0.1	0.1	0.1
7. With air consignment notes	..	..	..*	..*	..*	..*
8. With other documents	..	..	4.2	0.6	4.2	0.6
	8.5	5.7	91.5	94.3	100.0	100.0

\*Negligible.



*Lorry receipts v. railway receipts*

74. It is significant to note that roadway bills/lorry receipts figure as the main documents supporting a documentary bill, in terms of the number of inland documentary bills. The roadway bills or the lorry receipts account for more than 70% of the total number of inland documentary bills drawn, indicative of the fact that carriage of goods by roadways is now widespread and the roadway bills/lorry receipts constitute the major part of the documents of title to goods. In terms of amount, the railway receipts exceed lorry receipts when bills purchased/discounted by banks are considered. But with reference to bills received for collection, the lorry receipts exceed railway receipts.

*Warehouse receipts*

75. The fact that in the data collected there is no bill supported by warehouse receipts as documents suggests that warehouse receipts are not popular as supporting documents to documentary bills. Though the proportionately small size of the sample taken may not permit a definite conclusion to be drawn, it may be mentioned that during the visits to the branches referred to earlier, the officers of the BLC and the NIBM did not come across instances of warehouse receipts supporting documentary bills.

*Pucca delivery orders*

76. The small percentage of documents under pucca delivery orders will have to be considered together with the fact that PDOs are mainly issued to finance jute trade and they are current only in the Calcutta region.

*Air consignment notes*

77. The absence of bills supported by air consignment notes reveals that air consignment notes are not generally used as valuable documents to support the bills.

*Foreign bills*

78. Tables 18 and 19 give the percentages of demand and usance bills with reference to foreign bills purchased and discounted by banks and foreign bills coming to them for collection. They also give the break-up of the figures into clean and documentary bills. The area-wise break-up is given in Annexures XIV and XV.

TABLE 16  
*Inland documentary bills purchased/discounted*

Particulars of documentary bills	Under letters of credit		Without letters of credit		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
1. With railway receipts	3.9	5.9	20.7	45.9	24.6	51.8
2. With roadway bills/lorry receipts	5.6	7.9	65.3	35.4	70.9	43.3
3. With pucca delivery orders	..	..	0.1	..*	0.1	..*
4. With post parcel receipts	..*	..*	0.1	0.1	0.1	0.1
5. With warehouse receipts	..	..	..	..	..	..
6. With shares or government securities	..	..	0.8	0.4	0.8	0.4
7. With air consignment notes	..	..	..*	..*	..*	..*
8. With other documents	1.5	0.1	2.0	4.3	3.5	4.4
	11.0	13.9	89.0	86.1	100.0	100.0

\*Negligible.

TABLE 17  
*Inland documentary bills handled by banks for collection*

Particulars of documentary bills	Under letters of credit		Without letters of credit		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
1. With railway receipts	3.4	2.3	18.4	42.9	21.8	45.2
2. With roadway bills/lorry receipts	4.9	3.4	68.0	49.8	72.9	53.2
3. With pucca delivery orders	..	..*	0.2	0.5	0.2	0.5
4. With post parcel receipts	0.2	..*	0.6	0.4	0.8	0.4
5. With warehouse receipts	..	..	..	..	..	..
6. With shares or government securities	..	..	0.1	0.1	0.1	0.1
7. With air consignment notes	..	..	..*	..*	..*	..*
8. With other documents	..	..	4.2	0.6	4.2	0.6
	8.5	5.7	91.5	94.3	100.0	100.0

\*Negligible.

*Lorry receipts v. railway receipts*

74. It is significant to note that roadway bills/lorry receipts figure as the main documents supporting a documentary bill, in terms of the number of inland documentary bills. The roadway bills or the lorry receipts account for more than 70% of the total number of inland documentary bills drawn, indicative of the fact that carriage of goods by roadways is now widespread and the roadway bills/lorry receipts constitute the major part of the documents of title to goods. In terms of amount, the railway receipts exceed lorry receipts when bills purchased/discounted by banks are considered. But with reference to bills received for collection, the lorry receipts exceed railway receipts.

*Warehouse receipts*

75. The fact that in the data collected there is no bill supported by warehouse receipts as documents suggests that warehouse receipts are not popular as supporting documents to documentary bills. Though the proportionately small size of the sample taken may not permit a definite conclusion to be drawn, it may be mentioned that during the visits to the branches referred to earlier, the officers of the BLC and the NIBM did not come across instances of warehouse receipts supporting documentary bills.

*Pucca delivery orders*

76. The small percentage of documents under pucca delivery orders will have to be considered together with the fact that PDOs are mainly issued to finance jute trade and they are current only in the Calcutta region.

*Air consignment notes*

77. The absence of bills supported by air consignment notes reveals that air consignment notes are not generally used as valuable documents to support the bills.

*Foreign bills*

78. Tables 18 and 19 give the percentages of demand and usance bills with reference to foreign bills purchased and discounted by banks and foreign bills coming to them for collection. They also give the break-up of the figures into clean and documentary bills. The area-wise break-up is given in Annexures XIV and XV.

TABLE 18

*Particulars of foreign bills purchased/discounted*

Particulars	Demand		Usance		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Clean bills . . .	15.6	0.6	0.3	0.1	15.9	0.7
Documentary bills . . .	81.1	95.2	3.0	4.1	84.1	99.3
	96.7	95.8	3.3	4.2	100.0	100.0

TABLE 19

*Particulars of foreign bills handled by banks for collection*

Particulars	Demand		Usance		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Clean bills . . .	22.3	2.8	..	..	22.3	2.8
Documentary bills . . .	70.9	90.6	6.8	6.6	77.7	97.2
	93.2	93.4	6.8	6.6	100.0	100.0

79. Unlike inland bills, documentary bills form a substantial proportion to the total of foreign bills. Usance bills are comparatively less in vogue. In the case of inland bills purchased and discounted by banks, there are more clean demand bills than documentary demand bills; but with reference to foreign bills, the documentary demand bills are significantly more than clean demand bills.

80. Compared to the percentage of usance bills amongst inland bills, usance foreign bills form a negligible fraction of the total foreign bills, particularly clean usance bills.

81. Tables 20 and 21 give the break-up of the figures as regards foreign bills drawn under letters of credit and those drawn without letters of credit. They also give the proportion of demand and usance bills in each of the said categories. The area-wise particulars may be seen in Annexures XVI and XVII.

TABLE 20

*Foreign documentary bills purchased/discounted*

Particulars	Demand		Usance		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Under letters of credit . . .	21.1	90.5	1.7	2.0	22.8	92.5
Without letters of credit . . .	75.3	4.9	1.9	2.6	77.2	7.5
	96.4	95.4	3.6	4.6	100.0	100.0

TABLE 21

*Foreign documentary bills for collection*

Particulars	Demand		Usance		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Under letters of credit . . .	20.2	83.4	0.5	0.3	20.7	83.7
Without letters of credit . . .	71.1	9.8	8.2	6.5	79.3	16.3
	91.3	93.2	8.7	6.8	100.0	100.0

82. Though the foreign demand bills drawn under letters of credit constitute a small percentage of the total, they account for 90.5% of the total amount of foreign demand documentary bills purchased or discounted by banks and for 83.4% of such bills collected by banks.

83. Of the foreign usance documentary bills, more bills are drawn without letters of credit than under such credit. The percentage of foreign usance documentary bills to the total of foreign documentary bills is also very small.

*Document-wise classification of foreign documentary bills*

84. Tables 22 and 23 give the document-wise break-up of the foreign documentary bills and they also indicate the extent to which they are, or are not, drawn under letters of credit. The area-wise and all-India particulars may be seen in Annexures XVIII and XIX.

TABLE 22

*Particulars of foreign documentary bills purchased/discounted*

Particulars of documentary bills	Under letters of credit		Without letters of credit		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
1. Bills of lading/mates' receipts . . . . .	20.9	92.0	3.6	5.9	24.5	97.9
2. Air consignment notes . . . . .	1.9	0.8	5.6	1.0	7.5	1.8
3. Post parcel receipts . . . . .	..*	..*	1.5	0.2	1.5	0.2
4. Warehouse receipts . . . . .	..	..	..	..	..	..
5. Shares/Government securities . . . . .	..	..	..	..	..	..
6. Other documents . . . . .	..	..	66.5	0.1	66.5	0.1
	22.8	92.8	77.2	7.2	100.0	100.0

\*Negligible.

TABLE 23

*Particulars of foreign documentary bills handled by banks for collection*

Particulars of documentary bills	Under letters of credit		Without letters of credit		Total	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
1. Bills of lading/mates' receipts . . . . .	15.2	81.7	56.0	7.5	71.2	89.2
2. Air consignment notes . . . . .	1.9	0.9	12.7	4.7	14.6	5.6
3. Post parcel receipts . . . . .	2.8	0.4	8.6	3.7	11.4	4.1
4. Warehouse receipts . . . . .	..	..	..	..	..	..
5. Shares/Government securities . . . . .	..	..	..	..	..	..
6. Other documents . . . . .	0.8	0.7	2.0	0.4	2.8	1.1
	20.7	83.7	79.3	16.3	100.0	100.0

85. The bills of lading/mates' receipts account for in terms of amount, 81.7% to 92% of the total volume of foreign documentary bills drawn under letters of credit. However, in terms of number, they account for only 15.2% to 20.9% of the total of foreign documentary bills drawn under letters of credit.

86. Of the foreign documentary bills received by banks for collection, 56% are attached with bills of lading and are not drawn under letters of credit. The corresponding figure with reference to foreign documentary bills purchased/discounted comes to 3.6%. This indicates that of foreign documentary bills accompanied by bills of lading, it is only a small percentage that receives bank credit if they are not supported by letters of credit.

87. There is a high percentage of foreign documentary bills which are not drawn under letters of credit and which are accompanied by "other documents" among foreign documentary bills purchased/discounted by banks. However, in terms of amount, this accounts for only 0.1% of the total amounts for which foreign documentary bills have been purchased/discounted by banks. Evidently, this indicates some stray transactions. This result is mainly due to a return filed by one bank with reference to one of its branches. Since we could not verify the facts further, no definite conclusions are possible consequent on such high percentage in terms of number of foreign documentary bills purchased/discounted by banks which are accompanied by "other documents".

#### *Data on bills returned unpaid*

88. The data on bills returned unpaid have been collected from the point of view of the collecting banker and in this context no distinction has been made between inland bills and foreign bills.

89. The data have been analysed to indicate the percentage of bills dishonoured by non-acceptance and non-payment with reference to usance bills, and percentage of bills dishonoured by non-payment with reference to demand bills. The bills have been further classified as clean and documentary. The result is set out in Table 24. The area-wise break-up is given in Annexure XX.

TABLE 24

*Particulars of bills returned unpaid*  
(Percentages are to the total bills returned unpaid)

Particulars	Usance bills dishonoured by non-acceptance		Usance bills dishonoured by non-payment		Demand bills dishonoured by non-payment		Total	
	% of bills returned	% of amount	% of bills returned	% of amount	% of bills returned	% of amount	% of bills returned	% of amount
Clean .	0.14	0.38	8.93	11.40	17.49	19.00	26.56	30.78
Documentary .	0.14	0.14	19.36	22.70	53.94	46.38	73.44	69.22
	0.28	0.52	28.29	34.10	71.43	65.38	100.00	100.0

90. Both as regards documentary bills and clean bills, it is only a negligible percentage of bills which are dishonoured by non-acceptance. In other words, the problem of dishonour of bills essentially arises only at the time of payment and not much difficulty is felt in obtaining the acceptance of drawees.

91. Amongst documentary bills dishonoured by non-payment, 53.94% are demand bills, while it is only 19.36% which are usance bills, in terms of number. When considered in terms of amount also, the relative position is the same.

92. Of the demand bills dishonoured by non-payment, there are more documentary bills dishonoured than clean bills. This is the position when we compare both in terms of the number of the bills and their amount.

93. Amongst usance bills dishonoured by non-payment, more documentary bills have been dishonoured than clean bills. It may be due to the fact that as regards documentary bills, reliance is placed in the main on the value of the documents and the dishonour is generally due to the documents not fully complying with the requirements of the credit term as regards quantity and specifications.



*Multani hundis*

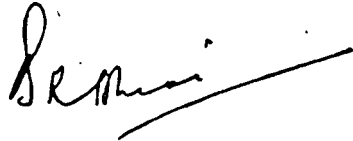
94. The information collected with reference to Multani hundis is almost nil. It is only at one branch of a bank the survey has received data of the Multani hundis. The information collected is not adequate to form any reliable conclusion. The absence of information from the branches of the selected banks as regards Multani hundis may be attributed to the fact that as a policy measure banks are not now in favour of giving accommodation against Multani hundis. In this sense, the "nil" returns may help to indicate that the accommodation by banks against Multani hundis is practically negligible.

*Acknowledgements*

95. The NIBM and the BLC would like to thank the Governor and the Deputy Governor (Dr. R. K. Hazari) of the Reserve Bank of India who evinced keen interest in the conduct of the survey and helped the completion of the survey in several ways. The NIBM and the BLC would also like to thank the Chairmen of the selected banks for their spontaneous response and help in the expeditious completion of the survey. They would also like to thank the representatives of the selected banks (Annexure XXI) and the officers and staff associated with the filling up of the schedules and attending to other work.



Sd./-  
(R. KRISHNAN)  
Secretary,  
BANKING LAWS COMMITTEE  
(Government of India)



Sd./-  
(S. R. BHISE)  
for THE NATIONAL  
INSTITUTE OF BANK  
MANAGEMENT

BOMBAY,  
31st January, 1975.

## ANNEXURE I

### Names of Branches in Bombay of the selected Banks visited by the Officials of the BLC and NIBM in connection with the Survey

Dates of visits	Name of the bank	Names of branches visited
2nd April 1974	Union Bank of India	(i) Princess Street; (ii) Mandvi.
18th April 1974	Canara Bank	(i) Tamarind Lane; (ii) Kaka Market.
22nd April 1974	Indian Bank	Mandvi.
	Bank of India	Mandvi.
23rd April 1974	Punjab National Bank	P.N.B. House.
	Bank of Madura Ltd.	Fort.
25th April 1974	State Bank of India	Bombay Main Office.
30th April 1974	United Commercial Bank	Fort.
	New Bank of India Ltd.	Fort.

**ANNEXURE II**  
**NATIONAL INSTITUTE OF BANK MANAGEMENT SURVEY**  
for  
**BANKING LAWS COMMITTEE**

(GOVERNMENT OF INDIA)

**FORM-I**

**Cheques and Allied Instruments (Payable on Demand) paid by a Branch**

Particulars	Cheques other than Bank Cheques		Bank Drafts and Bank Cheques		Dividend warrants (including warrants issued by Unit Trust of India)	Travelers' cheques	Instruments with receipt forms attached	T.T. and M.T. receipts	Withdrawals or withdrawal by letter	Instruments other than those mentioned in Col. (2) to (10)	Total
	Drawn by Government & local authorities	Drawn by others	Drawn by a branch upon another branch or upon itself	Drawn by one bank upon another bank							
1	2	3	4	5	6	7	8	9	10	11	12

**A. NUMBER OF INSTRUMENTS PAID :**

**(a) Payable to bearer**

- (i) In cash . . . . .
- (ii) Through clearing . . . . .
- (iii) By transfer . . . . .

**TOTAL . . . . .**

(b) Payable to order  
 (i) In cash . . . . .  
 (ii) Through clearing. . . . .  
 (iii) By transfer . . . . .  
 TOTAL . . . . .

TOTAL OF A [Items (a) and (b) above] .

**B. NUMBER OF INSTRUMENTS PAYABLE TO ORDER :**

1. Without payee's indorsement . . .  
 2. With payee's indorsement . . .  
 3. With payee's plus one or more other indorsements (in all two or more indorsements) . . . . .

**C. NUMBER OF INDORSEMENTS OF DEPOSITORY OR INTERMEDIARY BANKS :**

(a) With one indorsement . . . . .  
 (b) With more than one indorsement . . . . .  
 TOTAL OF C [Items (a) and (b) above] .

---

**NOTE.**—The following aspects were also required to be indicated with regard to indorsements :

- (i) indorsements in English character;
- (ii) indorsements in characters other than English; and
- (iii) indorsements by mark.

**ANNEXURE III**  
**NATIONAL INSTITUTE OF BANK MANAGEMENT**  
**SURVEY**  
for  
**BANKING LAWS COMMITTEE**  
(GOVERNMENT OF INDIA)

**FORM-JIA**

**Particulars of Instruments (Specified in Columns 2 to 11  
of Form I) Returned Unpaid**

Particulars	1-1-1973 to 30-6-1973		1-7-1973 to 31-12-1973	
	Number	Amount	Number	Amount
1. (a) Instruments returned unpaid for want of available funds* .				
(b) Number of accounts involved (Vide item 1(a) (above) .			XX	XX
2. Instruments returned unpaid for absence of or irregularity in—				
(a) indorsements of depository and intermediary banks** .				
(b) other indorsements@ .				
3. (a) Instruments returned unpaid with the answer "drawer reported dead" .				
(b) Instruments returned unpaid with the answer "drawer reported insolvent" .				
(c) Instruments returned unpaid owing to any other disqualification of the drawer@@ .				

\*That is to say, instruments returned mainly with the following answers :

- (i) Refer to drawer
- (ii) Effects not cleared
- (iii) Effects drawn against returned unpaid
- (iv) Exceeds arrangement
- (v) Full cover not received
- (vi) Not arranged for.

@That is to say, instruments returned mainly with the following answer :  
Indorsement/s require/s bank's guarantee or confirmation.

That is to say, instruments returned mainly with the following reasons :

- (i) Indorsement/s incomplete/required.
- (ii) Indorsement/s irregular/illegible.

Particulars	1-1-1973 to 30-6-1973		1-7-1973 to 31-12-197	
	Number	Amount	Number	Amount
4. Instruments of which payment was stopped by the drawers . . . . .				
5. Instruments returned unpaid for any other reason (please specify such reason in each case) . . . . .				
6. TOTAL . . . . .				

@@That is to say, returned mainly owing to

(i) Drawer becoming a lunatic or of unsound mind, etc.

#### ANNEXURE IV

### NATIONAL INSTITUTE OF BANK MANAGEMENT SURVEY for BANKING LAWS COMMITTEE (GOVERNMENT OF INDIA)

#### FORM-IIB

#### Particulars of Bills of Exchange (Other than the Instruments Specified in Columns 2 to 11 of Form I) Returned Dishonoured

Particulars	1-1-1973 to 30-6-1973		1-7-1973 to 31-12-1973	
	Number	Amount	Number	Amount
1. Usance Bills Dishonoured by Non-Acceptance :				
Clean Bills . . . . .				
Documentary Bills . . . . .				
2. Usance Bills Dishonoured by Non-Payment:				
Clean Bills . . . . .				
Documentary Bills . . . . .				
3. Demand Bills Dishonoured by Non-Payment :				
Clean Bills . . . . .				
Documentary Bills . . . . .				

**ANNEXURE V**  
**NATIONAL INSTITUTE OF BANK MANAGEMENT SURVEY**  
for  
**BANKING LAWS COMMITTEE**  
(GOVERNMENT OF INDIA)  
**FROM III-A**  
**Inland Bills Purchased and Bills Discounted**  
**(other than Multani Hundis)\***

Particulars	DEMAND BILLS				USANCE BILLS							
	Returned dis-honoured				Not exceeding 90 days				Exceeding 90 days but not exceeding 180 days			
	Returned dis-honoured		Returned dis-honoured		Returned dis-honoured		Returned dis-honoured		Returned dis-honoured		Returned dis-honoured	
	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.
1	2	3	4	5	6	7	8	9	10	11	12	13

**CLEAN BILLS**

**DOCUMENTARY BILLS :**

1. With railway receipts :

(a) Under L/C . . . . .

(b) Without L/C . . . . .

2. With roadway bills/lorry receipts :

(a) Under L/C . . . . .

(b) Without L/C . . . . .

3. With pucca delivery orders :

(a) Under L/C . . . . .

(b) Without L/C . . . . .

- 4. With post parcel receipts :
  - (a) Under L/C . . . . .
  - (b) Without L/C . . . . .
- 5. With warehouse receipts :
  - (a) Under L/C . . . . .
  - (b) Without L/C . . . . .
- 6. With shares or Government/other securities :
  - (a) Under L/C . . . . .
  - (b) Without L/C . . . . .
- 7. With air consignment notes :
  - (a) Under L/C . . . . .
  - (b) Without L/C . . . . .
- 8. Other documents (please specify in each case) :
  - (a) Under L/C . . . . .
  - (b) Without L/C . . . . .

---

\*A similar form was utilised to obtain information relating to inland bills received by banks for collection.



**ANNEXURE V—Contd.**

Particulars	USANCE BILLS											
	Exceeding 180 days but not exceeding 270 days				Exceeding 270 days				Total usance bills		Total usance bills returned dishonoured	
			Returned dishonoured				Returned dishonoured					
	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.
1	14	15	16	17	18	19	20	21	22	23	24	25

**CLEAN BILLS**

**DOCUMENTARY BILLS :**

1. With railway receipts :

- (a) Under L/C . . . .
- (b) Without L/C . . . .

2. With roadway bills/lorry receipts :

- (a) Under L/C . . . .
- (b) Without L/C . . . .

3. With pucca delivery orders :

- (a) Under L/C . . . .
- (b) Without L/C . . . .

4. With post parcel receipts :

- (a) Under L/C . . . .
- (b) Without L/C . . . .



**ANNEXURE VI**  
**NATIONAL INSTITUTE OF BANK MANAGEMENT SURVEY**  
for  
**BANKING LAWS COMMITTEE**  
**(GOVERNMENT OF INDIA)**

**FORM III-B**

**Foreign Bills Purchased and Bills Discounted\***

Particulars	DEMAND BILLS				USANCE BILLS							
	Returned dis- honoured				Not exceeding 90 days				Exceeding 90 days but not exceeding 180 days			
	Returned dis- honoured		Returned dis- honoured		Returned dis- honoured		Returned dis- honoured		Returned dis- honoured		Returned dis- honoured	
	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.
1	2	3	4	5	6	7	8	9	10	11	12	13

**CLEAN BILLS**

**OCUMENTARY BILLS :**

**1. With bills of lading/mates' receipts :**

(a) Under L/C . . . . .

(b) Without L/C . . . . .

**2. With air consignment notes:**

(a) Under L/C . . . . .

(b) Without L/C . . . . .

**3. With post parcel receipts :**

(a) Under L/C . . . . .

(b) Without L/C . . . . .

4. With warehouse receipts:

(a) Under L/C . . . .

(b) Without L/C . . . .

5. With shares or Government/other securities:

(a) Under L/C . . . .

(b) Without L/C . . . .

6. Other documents (to be specified):

(a) Under L/C . . . .

(b) Without L/C . . . .

---

\*A similar form was utilized to obtain information relating to foreign bills received by banks for collection.

**ANNEXURE VI—Contd.**

Particulars	USANCE BILLS											
	Exceeding 180 days but not exceeding 270 days				Exceeding 270 days				Total usance bills		Total usance bills returned dishonoured	
			Returned dishonoured				Returned dishonoured				Returned dishonoured	
	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.
1	14	15	16	17	18	19	20	21	22	23	24	25

**CLEAN BILLS**

**DOCUMENTARY BILLS :**

1. With bills of lading/mates' receipts :

(a) Under L/C . . . . .

(b) Without L/C . . . . .

2. With air consignment notes :

(a) Under L/C . . . . .

(b) Without L/C . . . . .

3. With post parcel receipts :

(a) Under L/C . . . . .

(b) Without L/C . . . . .

4. With warehouse receipts :

(a) Under L/C . . . . .

(b) Without L/C . . . . .

**5. With shares or Government/other securities :**

(a) Under L/C . . . . .

(b) Without L/C . . . . .

**6. Other documents (to be specified) :**

(a) Under L/C . . . . .

(b) Without L/C . . . . .

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## ANNEXURE VII

NATIONAL INSTITUTE OF BANK MANAGEMENT  
SURVEY

for

## BANKING LAWS COMMITTEE

(GOVERNMENT OF INDIA)

FORM-IV

## MULTANI HUNDIS

Particulars	MULTANI HUNDIS*						Total (Col. 3 to Col. 7)
	CLEAN	DOCUMENTARY					
	With R.Rs.	With Road- way Bills/ L.Rs.	With Pucca Deli- very Orders	With Ware- house receipts	Other docu- ments (Please specify in each case)		
1	2	3	4	5	6	7	8

## 1. Demand Hundis

## 2. Usance Hundis .

- (a) Not exceed-  
ing 90 days
- (b) Exceeding 90  
days but not  
exceeding 180  
days
- (c) Exceeding 180  
days but not  
exceeding 270  
days
- (d) Exceeding 270  
days.

\*"Multani hundis" mean instruments where drawee and drawer are the same and payee is an indigenous banker as commonly understood.

## ANNEXURE VIII

## Area-wise and All-India particulars of Inland bills Purchased/Discounted—Clean and Documentary

Area	DEMAND				USANCE			
	Clean		Documentary		Clean		Documentary	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Metropolitan	61.8	60.7	25.5	28.6	3.0	3.8	9.7	6.9
Urban	28.6	22.0	64.1	54.9	0.9	0.4	6.4	22.7
Semi-urban	69.7	43.6	30.0	55.3	..	..	0.3	1.1
Rural	47.5	11.4	24.0	33.1	3.3	6.2	25.2	49.3
ALL-INDIA	57.5	53.2	30.2	32.7	2.7	3.4	9.6	10.7

## ANNEXURE IX

## Area-wise and All-India particulars of Inland bills for Collection—Clean and Documentary

Area	DEMAND				USANCE			
	Clean		Documentary		Clean		Documentary	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Metropolitan	27.9	20.1	54.7	63.8	3.3	6.4	14.1	9.7
Urban	43.0	26.7	51.1	57.6	0.6	5.3	5.3	10.4
Semi-urban	40.6	24.2	58.9	75.1	0.05	..*	0.45	0.7
Rural	38.5	33.9	56.2	63.7	0.8	0.5	4.5	1.9
ALL-INDIA	36.9	44.9	53.7	47.7	1.5	2.7	7.9	4.7

\*Negligible.



## ANNEXURE X

**Area-wise and All-India particulars of Inland Documentary  
Bills Purchased/Discounted—Under, Without,  
Letters of Credit**

Area	DEMAND				USANCE			
	Under L/C		Without L/C		Under L/C		Without L/C	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Metropolitan	..	..	72.4	80.6	..	..	27.6	19.4
Urban	47.5	50.7	43.4	20.0	2.2	7.2	6.9	22.1
Semi-urban	0.6	3.2	98.5	94.8	..	..	0.9	2.0
Rural	9.6	3.9	39.1	36.2	..	..	51.3	59.9
ALL-INDIA	10.6	12.3	65.3	63.0	0.5	1.7	23.6	23.0

## ANNEXURE XI

**Area-wise and All-India particulars of Inland Documentary  
Bills for Collection—Under, Without, Letters of Credit**

Area	DEMAND				USANCE			
	Under L/C		Without L/C		Under L/C		Without L/C	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Metropoli- tan	0.1	1.4	79.4	85.4	..	..	20.5	13.2
Urban	20.4	21.3	70.1	63.4	1.1	2.3	8.4	13.0
Semi-urban	..	..	99.2	99.1	..	..	0.8	0.9
Rural	..	..	92.7	98.0	..	..	7.3	2.0
ALL-INDIA	8.0	5.2	79.1	85.7	0.5	0.5	12.4	8.6

## ANNEXURE XII

### Area-wise and All-India particulars of Inland Documentary Bills Purchased/Discounted

Area	Railway receipts		Roadway bills/ lorry receipts		Pucca deli- very orders		Post parcel receipts		Shares or Government securities		Air consign- ment notes		Other documents	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
<b>WITHOUT LETTERS OF CREDIT</b>														
Metropolitan . . .	17.3	49.0	79.4	44.1	..*	..*	0.1	0.2	0.9	0.3	..	..	2.3	6.4
Urban . . . . .	19.7	19.0	28.3	22.3	0.1	0.2	..	..	0.3	0.7	0.3	..*	1.9	..*
Semi-urban . . .	46.6	76.1	52.8	20.7	..	..	..	..	..	..	..	..	..	..
Rural . . . . .	85.0	89.5	4.9	6.4	..	..	..	..	0.5	0.1	..	..	..	..
<b>ALL-INDIA . . .</b>	<b>20.7</b>	<b>45.9</b>	<b>65.3</b>	<b>35.4</b>	<b>0.1</b>	<b>..*</b>	<b>0.1</b>	<b>0.1</b>	<b>0.8</b>	<b>0.4</b>	<b>..*</b>	<b>..*</b>	<b>2.0</b>	<b>4.3</b>
<b>UNDER LETTERS OF CREDIT</b>														
Metropolitan . . .	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Urban . . . . .	16.6	23.9	26.6	33.6	..	..	0.1	..*	..	..	..	..	6.4	0.3
Semi-urban . . .	0.6	3.2	..	..	..	..	..	..	..	..	..	..	..	..
Rural . . . . .	7.6	3.1	..	..	..	..	..	..	..	..	..	..	2.0	0.9
<b>ALL-INDIA . . .</b>	<b>3.9</b>	<b>5.9</b>	<b>5.6</b>	<b>7.9</b>	<b>..</b>	<b>..</b>	<b>..*</b>	<b>..*</b>	<b>..</b>	<b>..</b>	<b>..</b>	<b>..</b>	<b>1.5</b>	<b>0.1</b>

\*Negligible.

## ANNEXURE XIII

### Area-wise and All-India particulars of Inland Documentary Bills for Collection

Area	Railway receipts		Roadway bills/ lorry receipts		Pucca deli- very orders		Post parcel receipts		Shares or Government securities		Air consign- ment notes		Other documents	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
<b>WITHOUT LETTERS OF CREDIT</b>														
Metropol itan . . .	13.8	24.3	85.5	73.6	..	..	0.5	0.7	0.1	..*	..*	..*	..	..
Urban . . .	17.2	19.7	49.6	52.6	0.3	1.2	0.6	0.2	0.1	0.3	..*	..*	10.7	2.4
Semi-urban . . .	20.1	46.1	79.0	52.3	0.1	..*	0.8	1.5	..*	0.1	..	..	..	..
Rural . . .	54.6	75.9	42.4	23.5	2.2	0.6	0.7	..*	0.1	..*	..	..	..	..
ALL-INDIA . . .	18.4	42.9	68.0	49.8	0.2	0.5	0.6	0.4	0.1	0.1	..*	..*	4.2	0.6
<b>UNDER LETTERS OF CREDIT</b>														
Metropol itan . . .	0.1	1.1	..*	0.3	..	..	..	..	..	..	..	..	..	..
Urban . . .	8.5	8.6	12.4	14.9	..	..	0.6	0.1	..	..	..	..	..	..
Semi-urban . . .	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Rural . . .	..	..	..	..	..	..	..	..	..	..	..	..	..	..
ALL-INDIA . . .	3.4	2.3	4.9	3.4	..	..	0.2	..*	..	..	..	..	..	..

\*Negligible.

## ANNEXURE XIV

## Area-wise and All-India particulars of Foreign Bills Purchased/Discounted—Clean and Documentary

Area	DEMAND				USANCE			
	Clean		Documentary		Clean		Documentary	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Metropolitan	21.5	0.4	69.3	76.4	0.2	..*	9.0	23.2
Urban	11.9	2.9	87.4	93.2	..	..	0.7	3.9
Semi-urban	60.3	95.0	36.2	4.6	..	..	3.5	0.4
Rural	..	..	..	..	100.0	100.0	..	..
ALL-INDIA	15.6	0.6	81.1	95.2	0.3	0.1	3.0	4.1

\*Negligible.

## ANNEXURE XV

## Area-wise and All-India particulars of Foreign Bills for Collection—Clean and Documentary

Area	DEMAND				USANCE			
	Clean		Documentary		Clean		Documentary	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Metropolitan	30.5	3.3	60.0	87.9	..	..	9.5	8.8
Urban	9.9	1.6	84.4	92.6	..	..	5.7	5.8
Semi-urban	93.2	87.1	6.8	12.9	..	..	..	..
Rural	100.0	100.0	..	..	..	..	..	..
ALL-INDIA	22.3	2.8	70.9	90.6	..	..	6.8	6.6

## ANNEXURE XVI

**Area-wise and All-India particulars of Foreign Documentary Bills Purchased/Discounted—Under, Without, Letters of Credit**

Area	DEMAND				USANCE			
	Under L/C		Without L/C		Under L/C		Without L/C	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Metropolitan	64.0	58.4	24.5	18.4	5.5	8.4	6.0	14.8
Urban	5.0	83.8	94.1	12.2	0.3	3.0	0.6	1.0
Semi-urban	85.3	99.1	7.35	0.5	7.35	0.4	..	..
Rural	..	..	..	..	..	..	..	..
ALL-INDIA	21.1	90.5	75.3	4.9	1.7	2.0	1.9	2.6

## ANNEXURE XVII

**Area-wise and All-India particulars of Foreign Documentary Bills for Collection—Under, Without, Letters of Credit**

Area	DEMAND				USANCE			
	Under L/C		Without L/C		Under L/C		Without L/C	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
Metropolitan	34.6	71.6	51.8	19.2	1.4	0.9	12.2	8.3
Urban	13.0	87.8	80.7	6.3	0.1	..*	6.2	5.9
Semi-urban	..	..	100.0	100.0	..	..	..	..
Rural	..	..	..	..	..	..	..	..
ALL-INDIA	20.2	83.4	71.1	9.8	0.5	0.3	8.2	6.5

\*Negligible.

ANNEXURE XVIII

Area-wise and All-India particulars of Foreign Documentary Bills Purchased/Discounted

Area	Bills of lading/ mates' receipts		Air Consignment notes		Post parcel receipts		Shares or Go- vernment securities		Other documents	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
1	2	3	4	5	6	7	8	9	10	11
<b>WITHOUT LETTERS OF CREDIT</b>										
Metropolitan . . . .	6.6	25.7	21.8	7.3	2.1	0.2	..	..	..	..
Urban . . . . .	2.5	10.7	0.2	0.3	1.3	1.2	..	..	90.7	0.9
Semi-urban . . . .	7.4	0.5	..	..	..	..	..	..	..	..
Rural . . . . .	..	..	..	..	..	..	..	..	..	..
ALL-INDIA . . . . .	5.6	5.9	5.6	1.0	1.5	0.2	..	..	66.5	0.1
<b>UNDER LETTERS OF CREDIT</b>										
Metropolitan . . . .	62.3	61.0	7.1	5.8	0.1	..*	..	..	..	..
Urban . . . . .	5.2	86.7	0.1	0.2	..*	..*	..	..	..	..
Semi-urban . . . .	92.6	99.6	..	..	..	..	..	..	..	..
Rural . . . . .	..	..	..	..	..	..	..	..	..	..
ALL-INDIA . . . . .	20.9	92.0	1.9	0.8	..*	..*	..	..	..	..

\*Negligible.

**ANNEXURE XIX**

**Area-wise and All-India particulars of Foreign Documentary Bills for Collection**

Area	Bills of lading/ mates' receipts		Air consignment notes		Post parcel receipts		Shares or Go- vernment securities		Other documents	
	%of bills	%of amount	%of bills	%of amount	%of bills	%of amount	%of bills	%of amount	%of bills	%of amount
1	2	3	4	5	6	7	8	9	10	11
<b>WITHOUT CREDIT</b>										
Metropolitan	18.9	13.7	32.6	13.1	12.5	0.7	..	..	..	..
Urban	74.4	5.1	2.8	1.6	6.6	4.9	..	..	3.1	0.6
Semi-urban	100.0	100.0	..	..	..	..	..	..	..	..
Rural	..	..	..	..	..	..	..	..	..	..
ALL-INDIA	56.0	7.5	12.7	4.7	8.6	3.7	..	..	2.0	0.4
<b>UNDER LETTERS OF CREDIT</b>										
Metropolitan	28.1	68.8	3.2	1.1	2.2	0.2	..	..	2.5	2.4
Urban	8.7	86.6	1.3	0.8	3.1	0.4	..	..	..	..
Semi-urban	..	..	..	..	..	..	..	..	..	..
Rural	..	..	..	..	..	..	..	..	..	..
ALL-INDIA	15.2	81.7	1.9	0.9	2.8	0.4	..	..	0.8	0.7

**ANNEXURE XX**

**Area-wise and All-India particulars of Bills Returned Unpaid**

Area	CLEAN						DOCUMENTARY					
	Usance bills dishonoured by non-acceptance		Usance bills dishonoured by non-payment		Demand bills dishonoured by non-payment		Usance bills dishonoured by non-acceptance		Usance bills dishonoured by non-payment		Demand bills dishonoured by non-payment	
	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount	% of bills	% of amount
1	2	3	4	5	6	7	8	9	10	11	12	13
Metropolitan .	0.05	0.04	13.02	16.90	19.25	18.73	..	..	23.02	24.22	44.66	40.11
Urban .	0.40	1.19	2.67	3.08	14.14	13.77	0.31	0.38	16.27	24.73	66.21	56.85
Semi-urban .	..	..	..	..	17.33	48.12	0.55	0.48	5.11	5.28	77.01	46.12
Rural .	..	..	..	..	28.08	24.61	0.62	0.10	2.47	2.91	68.83	72.38
ALL-INDIA .	0.14	0.38	8.93	11.40	17.49	19.00	0.14	0.14	19.36	22.70	53.94	46.38



## ANNEXURE XXI

**Names of the Selected Banks' Representatives who assisted  
in the Survey**

Names of banks	Names of the representatives
1. State Bank of India . . . . .	Shri R. V. Panchapakesan
2. Bank of India . . . . .	1. Shri A. C. Desai 2. Shri M. Krishnan
3. Punjab National Bank . . . . .	Shri K. S. Shekhar
4. United Commercial Bank . . . . .	1. Shri S. D. Parekar* 2. Shri A. K. Ugrankar
5. Canara Bank . . . . .	Shri D. P. Pai
6. Union Bank of India . . . . .	Shri P. N. Shenoy
7. Indian Bank . . . . .	1. Shri K. S. Kasiraman 2. Shri Y. Radhakrishna Shenoy
8. New Bank of India Ltd. . . . .	1. Shri Kalia Parkash* 2. Shri K. Poornam 3. Shri N. Kalyana Sundaram
9. Bank of Madura Ltd. . . . .	1. Shri S. Pethaperumal* 2. Shri M. Odayappan

\*These representatives did not attend the meetings held by the BLC and NIBM.

APPENDIX VII  
SHRI R. KRISHNAN  
*SECRETARY*  
**BANKING LAWS COMMITTEE**

(GOVERNMENT OF INDIA)  
(Dy. Legal Adviser, R.B.I.)

**Other Officials of the Special Cell assisting the Banking  
Laws Committee**

---

Shri R. Hariharan . . . . .	Banking Officer
„ L. H. Kulkarni . . . . .	—do—
„ S. B. Fos . . . . .	—do—
„ Ch. Sreerama Murthy* . . . . .	Legal Officer
„ V. N. Nagaraja Rao* . . . . .	Assistant Accounts Officer
„ D. R. Sardesai . . . . .	Rural Credit Officer
„ Ch. L. Mohana Rao . . . . .	Sub-Accounts Officer
„ T. L. Ramaswamy* . . . . .	Staff Officer
„ S. V. Gorakshakar* . . . . .	—do—
Smt. N. B. Gupte* . . . . .	—do—
Shri O. S. Khanna . . . . .	—do—
„ A. F. Pereira . . . . .	—do—
„ A. R. Dalvi . . . . .	—do—
„ A. Mohiddin* . . . . .	—do—
„ V. Vembu . . . . .	Personal Assistant-

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These persons have been earlier associated with the work of the Committee.

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iv	Detailed Chapter Contents— Chapter 2—Column 1 . . . . .	6	14-2.19	2.14—2.19
iv	Detailed Chapter Contents — Chapter 2—Column 2 . . . . .	15	instrument	instruments
vi	Detailed Chapter Con- tents— Chapter 4— Column 1 . . . . .	4	3.5—4.10	4.5—4.10
vi	Detailed Chapter Contents - Chapter 4—Column 2 . . . . .	13	knowleage	knowledge
vii	Detailed Chapter Contents — Chapter 4—Column 2 . . . . .	10	ana	and
viii	Detailed Chapter Contents—Chapter 5 —Column 2 . . . . .	10	interests	interest
viii	Detailed Chapter Contents— Chapter 5 —Column 2 . . . . .	13	Cod	Code
ix	Detailed Chapter Contents—Chapter 5— Column 2 . . . . .	21	Persentment	Presentment
x	Detailed Chapter Contents— Chapter 5 —Column 1 . . . . .	6	5.66—6.67	5.66—5.67
x	Detailed Chapter Contents — Chapter 6—Column 2 . . . . .	6	“requisites inform”	“requisites in form”
x	Detailed Chapter Con- tents— Chapter 6— Column 2 . . . . .	12	vallaity	validity
xii	Detailed Chapter Con- tents— Chapter 7— Column 2 . . . . .	8	Inaian	Indian
xii	Detailed Chapter Con- tents— Chapter 7— Column 2 . . . . .	20	countires	countries
xiv	Detailed Chapter Con- tents—Chapter 7— Column 2 . . . . .	10	liwit	limit

(1)	(2)	(3)	(4)	(5)
xiv	Detailed Chapter Contents— Chapter 8— Column 2 . . . . .	9	bankers's	banker's
xiv	Detailed Chapter Contents— Chapter 8— Column 2 . . . . .	13	84—A	84
xvi	Detailed Chapter Contents - Chapter 9— Column 2 . . . . .	7	payees-endorsees	payees/endorsees
xvi	Appendices—III	1	Questionnaire	Questionnaire
5	1.14	4	bills cheques	bills, cheques
6	1.18	11	Ltd.,	Ltd.,
12	2.10	7	to have at first,	to have, at first,
22	2.38	5	shu	shut
29	3.10	4 and 5	negotiable instruments that go to	negotiable instruments as instruments that go to
30	3.11	3	essentiality	essentially
32	3.16	1	the visits.	the visits,
34	3.23	3	and	or
35	3.25	4	on	in
36	3.28	6	tha	that
36	3.28	8	mentioned.	mentioned,
37	F.N. 3	1	23rd end.	23rd edn.
41	3.45	11	holder	holder
42	3.46	3 and 4	converted	converted
46	3.62	1	certain	certain
48	3.71	11	instrument	instrument
50	3.75	3	Hongkong	Hongkong
51	3.80	7	'setting it afloat upon a sea of strangers'	'setting it afloat upon a sea of strangers'
52	3.81	2	contributed	contributed
69	F.N.	1	Bhashyam & Adiga.	Bhashyam & Adiga,
72	4.34	2	acquisition	acquisition
81	4.57	32	Disposition	position
89	Heading to para 4.76	..	non-delivery etc.	non-delivery, etc.
97	5.5	9	measure.	measure,
98	F.N.	1	F.G.2.	F.C.2.
103	5.21	12	is, payable	is payable
105	5.25	3	provide for,	provide, for
105	5.27	3	day	day
108	5.38	3	instrument :	instrument;
110	5.41	10	pavable	payable

(1)	(2)	(3)	(4)	(5)
111	5.47	5	aslo	also
115	5.59	10	igned	signed
120	6.3	5	certain.*	certainty.*
121	F.N. 3	1	Bhashyam & Adiga.	Bhashyam & Adiga,
122	F.N. 3	1	“ ‘Autonomy, in Choice of Law’ ”,	“ ‘Autonomy’ in Choice of Law’ ”,
123	F.N. 2	4	lournal,	Journal,
124	6.12	3	liability of bank	liability of a bank
129	F.N.	1	Chalmers on Bills of Exchange’ ”,	“Chalmers on Bills of Exchange’ ”,
129	F.N.	2	“The Negotiable Instruments Act, 1881”	“The Negotiable Ins- truments Act, 1881” ,
129	F.N.	2	Madra	Madras
130	6.32	2	contract Act	Contract Act
134	7.1	8	traders	traders’ -
141	F.N. 4	2	p	p.
142	F.N. 1	1	Checks’ ”.	Checks’ ”,
142	7.21	7	be given to him*	be given to him.”*
157	7.64	9	amounts	amount
161	7.76	10	holder.	holder,
164	7.86	13	months to 15 years imprisonment. *	months’ to 15 years’ imprisonment. *
165	7.92	7	three months to two years imprisonment,	three months’ to two years’ imprisonment,
188	8.24	3	not	nor
189	Heading of para 8.27	..	84A	84
191	9.2	2	ountry	country
191	9.2	3	ana	and
201	9.31	3	present,	present
203	9.36	4	recommending	recommending,
212	9.57	7	Formal Requisites’ ”,	Formal Requisites’ ”,
213	9.61	9	have a no	have no
218	7	22	that is to be paid	that it is to be paid
218	8	1	Ac,	Act;
220	19	3	lo	to
222	(k)	3	“lawful interest.	“lawful interest”.
238	91	2	bc	be
240	97	4	with reference to	with reference to ne- gotiable instruments;

(1)	(2)	(3)	(4)	(5)
240	97	5 and 6	(a) Members of Parliament or of any State Legislature; negotiable instruments;	(a) Members of Parliament or of any State Legislature;
241	104	8	solutions,	solutionis,
245	124	1 and 2	handled	handled,
246	126	19 and 20	re-credit	re-credit
248	134	5	Hence.	Hence,
251	146(i)	3	hall	shall
261	183	2	agreement	agreement
264	7.3.1	4	certificate	certificates
265	8.5.1	2	made.	made,
265	8.5.3	3	Dou	Do
268	9.7.2	3 and 4	(a) infancy, to the extent that it is a defence to a simple contract; and as renders the obligation of the party a nullity; and	(a) infancy, to the extent that it is a defence to a simple contract; and
268	9.7.2	5	(b) such other incapacity, or duress, or illegality of the instrument,	(b) such other incapacity, or duress, or illegality of the instrument, as renders the obligation of the party a nullity; and
269	9.11.1	11	circumstances	circumstances
270	9.14.1	1	holder,	holder,
270	9.14.2	5	become	become
272	9.21.1	1	on demand an instrument	an on demand instrument
276	9.26.3	5	[Section 3-404(2)] and [1-201(43) of the UCC]	[Sections 3-404(2) and 1-201(43) of the UCC].
277	9.28.1	1	amount	amount
279	9.29.8	5	any one	any one,
279	9.29.9	4	clause.	clause.
280	9.29.11	...	9.29.11	9.29.11
286	28	1	Exports	Experts
287	17	1	Research	Research
296	9.21.2	3	honour	honor
308	9.1.1	11	choses	chose
311	9.9.1 and 2	5	any	any

(1)	(2)	(3)	(4)	(5)
315	9.26.1	7	signature	signatures
320	10.2.8	2	titled.	title.
324	17	6	non-negotiated	non-negotiated
324	21	5	dawn	drawn
325	XII	1 and 2	purchased discounted	purchased/discounted
329	Table 1, F.N.	2	bank	bank,
331	Table 2 Column 3	4	Commercial	Commercial
331	Table 2 Column 1	32	Amlai (Shahdo)	Amlai (Shahdol)
339	Table 4	4	1.61	1.91
339	Table 5	..	All account	All accounts
340	Table 6	..	All accounts	All accounts
340	Table 6	5	01.0	0.10
341	Table 7	..	All accounts,	All accounts
343	Table 9	3	Semi-urban	Semi-urban
345	Table 11	3	B.	2B.
350	Table 16	17	other	other
359	Annexure I—Column 3	4	(ii) Kakaa Market.	(ii) Kakad Market.
360	Annexure II—Column 8	..	Instrument with receipt forms attached	Instruments with receipt forms attached
361	Annexure II—A.(b)	..	(b) Payable to ordet	(b) Payable to order
362	Annexure III—Heading	..	(GOVEERMENT OF INDIA)	(GOVERNMENT OF INDIA)
362	Annexure III—Item 1(b)	..	(Vide item (1) (a) (above)	(Vide item 1(a) (above)
362	Annexure III—F.N.	..	@ That is to say, instruments returned mainly with the following answer :	** That is to say, instruments returned mainly with the following answer :
362	Annexure III—F.N.	..	That is to say, instruments returned mainly with the following reasons :	@ That is to say, instruments returned mainly with the following reasons :
363	Annexure III—Heading Column 3	..	1-7-1973 to 31-12-197	1-7-1973 to 31-12-1973
			Number Amount	Number Amount
364	Annexure V—Heading	..	FROM III-A	FORM III-A
364	Annexure V—Columns 10 to 13—Heading	..	dayss	days
368	Annexure VI—Column 1	2	OCUMENTARY BILLS :	DOCUMENTARY BILLS :
368	Annexure VI—Columns 7 and 8—Heading	..	Returned dishonourad	Returned dishonoured

(1)	(2)	(3)	(4)	(5)
375	Annexure XII—Column 1	8 and 9	UNR LETTERS OF CREDIT	UNDER LETTERS OF CREDIT
376	Annexure XIII—F.N.	..	*Negligible.	*Negligible.
381	Annexure XX—Columns 4 and 5—Heading	..	aishonoured	dishonoured
383	Appendix VII	11	Legal	Legal
383	Appendix VII	20	A.R. Daivi	A.R. Dalvi
383	Appendix VII	F.N.	These	*These
385	Table of Cases	8	7.54	7.54 ;
386	Table of Cases	13	Ghanashyamdas.	Ghanashyamdas v.
387	Table of Cases	33	Bom	Bom.
387	Table of Cases	34	Mukharjee	Mukherjee
388	Table of Cases	6	Narainy.	Narain v.
388	Table of Cases	23	Serrel	Serrell
391	Index to the Chapters	38	5.19.	5.19,
392	Index to the Chapters	11	5.28.	5.28,
392	Index to the Chapters	23	4.43	4.43,
394	Index to the Chapters	18	N.7.36	F.N.7.36
395	Index to the Chapters	40	Flourentines	Flourentines
398	Index to the Chapters	1	Indian Stamp Act 1899	Indian Stamp Act, 1899
398	Index to the Chapters	12	nstitute of Bankers, London	Institute of Bankers, London
403	Index to the Chapters	1	of	on
404	Index to the Chapters	18	9.61,	9.61
405	Index to the Chapters	24	5.30,	5.39,
405	Index to the Chapters	27	5.31	4.31,
406	Index to the Chapters	12	9.8	9.8,
406	Index to the Chapters	16	9.43 9.46	9.43, 9.46,
406	Index to the Chapters	20	4.82	7.82
406	Index to the Chapters	30	nited	United
406	Index to the Chapters	48	Wstern	Western
407	Index to the Chapters	3	Wneeler	Wheeler