

10-1-1983

# Drafts, Promissory Notes and Checks: A Comparison of Civilian, Quasi-Civilian and Non- Civilian Suggestions

Daniel E. Murray

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

---

## Recommended Citation

Daniel E. Murray, *Drafts, Promissory Notes and Checks: A Comparison of Civilian, Quasi-Civilian and Non-Civilian Suggestions*, 15 U. Miami Inter-Am. L. Rev. 211 (1983)

Available at: <http://repository.law.miami.edu/umialr/vol15/iss2/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# DRAFTS, PROMISSORY NOTES AND CHECKS: A COMPARISON OF CIVILIAN, QUASI-CIVILIAN AND NON-CIVILIAN SUGGESTIONS

DANIEL E. MURRAY\*

I.	INTRODUCTION	213
II.	COMPARATIVE ANALYSIS	216
A.	<i>The Omission of the Magic Words "To The Order Of"</i>	216
B.	<i>Ambiguous Words and Numbers</i>	219
C.	<i>Agency</i>	221
D.	<i>Burden of Proof - Holder in Due Course Status</i>	224
E.	<i>How Does One Count the Elapsing of Time?</i>	228
F.	<i>The Holder in Due Course and the Time for Presentment of a Demand Draft or Promissory Note</i>	230
G.	<i>Prohibition of Further Indorsements</i>	232
H.	<i>Conditional Indorsements</i>	233
I.	<i>Conditional and Qualified Acceptances</i>	234
J.	<i>Alterations</i>	236
K.	<i>Alterations: Prior and Subsequent Parties</i>	239
L.	<i>Forgery of the Drawer's Signature</i>	241
M.	<i>Forgery of the Payee's Signature</i>	244
N.	<i>Crossed Checks and Checks Payable in Account</i>	252
	1. <b>CROSSED CHECKS</b>	252

---

\* Professor of Law, University of Miami. This article was made possible by a grant from the School of Law, University of Miami.

	2. CHECKS PAYABLE IN ACCOUNT	253
O.	<i>Underlying Validity of a Draft or Check in Spite of Forged Signatures</i>	255
P.	<i>The Shelter Principle</i>	256
Q.	<i>Rights of the Transferee Without Indorsement</i>	258
R.	<i>Accommodated Parties: Who is the Party Being Accommodated?</i>	259
S.	<i>Accommodated Parties and the Invalidity of the Principal Obligation</i>	261
T.	<i>Guaranty of Payment of a Check</i>	263
U.	<i>Time of Presentment for Payment of Checks</i>	264
V.	<i>Installment and Interest Bearing Instruments</i>	267
W.	<i>The Drawer Who Draws Without Recourse</i>	270
X.	<i>Bearer Instruments and Special Indorsements</i>	271
Y.	<i>Restrictive Indorsements for Collection</i>	274
Z.	<i>Optional Presentment for Acceptance of Drafts</i>	278
AA.	<i>Certified Checks</i>	280
BB.	<i>Post-Dated Checks</i>	283
CC.	<i>Stop Orders</i>	285
DD.	<i>Partial Payments</i>	286
EE.	<i>Drawer's Death, Incapacity or Bankruptcy</i>	288
FF.	<i>Statute of Limitations and Prescriptions</i>	290
GG.	<i>Late Presentment of Checks and Insolvency of the Drawee</i>	293
HH.	<i>Rights of the Holder Against Prior Parties in Cases of Late Presentment or Notice of Dishonor</i>	294
II.	<i>Waivers of Protest - Dangers for the Unwary</i>	295
JJ.	<i>Unjust Enrichment Actions After the Statute of Limitations Has Run</i>	297

1983]	COMPARISON OF SUGGESTIONS	213
	<i>KK. Miscellaneous Concepts</i>	298
	1. JOINT AND ALTERNATE PAYEES	298
	2. LIABILITY OF TRANSFERORS WHO DO NOT INDORSE	299
	3. TIME ALLOWED FOR ACCEPTANCE	300
	4. DOCUMENTARY DRAFTS	301
	5. "GRACE PERIOD" FOR PRESENTMENT FOR PAYMENT	301
	6. "ACCELERATION" OF MATURITY OF A DRAFT BECAUSE OF DEATH OR BANKRUPTCY OF A PARTY	302
	7. THE PAYOR BANK: WHAT PROCEDURES WHEN A FORGED CHECK IS PRESENTED	304
	8. THE ILLITERATE PAYEE AND BANK PAYMENT	304
	9. INDORSEMENTS TO PLEDGEEES	305
III.	CONCLUSION	306

## I. INTRODUCTION

The antiquity of article 3 of the Uniform Commercial Code (UCC) has been delightfully delineated in the phrase that it is "old wine in new bottles."<sup>1</sup> The term seems fitting since the wording of the article was closely "cribbed" from the Negotiable Instruments Law (NIL) which, in turn, was cribbed from the English Bills of Exchange Act enacted in 1882.<sup>2</sup> Essentially, the negotiable instruments law of the United States became a closed system after the adoption of the NIL. The American draftsmen of the UCC paid little attention to the content of the 1930 Geneva Bills of Exchange Convention<sup>3</sup> and the 1931 Geneva Check Convention,<sup>4</sup> and their

---

1. F. LEARY, JR., *COMMERCIAL PAPER, UNIFORM COMMERCIAL CODE HANDBOOK* 87 (1964).

2. Bills of Exchange Act, 1882, 45 & 46 Vict., ch. 61.

3. Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7, 1930, 143 L.N.T.S. 259 (1933-34), *reprinted in* Register of Texts of Convention and Other Instruments concerning International Trade Law, 1 U.N. GAOR, 154-80 (1971) [hereinafter cited as Geneva Draft Convention].

4. Convention Providing a Uniform Law for Cheques, March 19, 1931, 143 L.N.T.S. 357 (1933-34), *reprinted in* Register of Texts of Conventions and Other Instruments Concerning International Trade Law, 1 U.N. GAOR 154-80 (1971) [hereinafter cited as Geneva Cheque

subsequent adoptions, in whole or in part, in Europe and Latin America. The "old wine" became domesticated wine which has not improved with age.

Some fifty years after the Geneva Conventions, new conventions governing drafts, promissory notes and checks have been proposed under the auspices of the United Nations.<sup>5</sup> These UN proposed conventions are a blending of Anglo-American and civil law (civilian) concepts with undue emphasis (in the opinion of the author) upon UCC concepts. This "undue emphasis" may have been induced by hopes that the United States might adopt these conventions. The author suggests that this "undue emphasis" may have the opposite effect of turning away many of the civilian oriented countries.

Regardless of the slant and over-all quality of these UN proposed conventions, many of the proposed concepts (a large portion of which can be tracked back to the Geneva Conventions) are worth examining and comparing with the UCC. It is the objective of this work to make comparisons of selected portions of the UCC with the British Bills of Exchange Act, the UN Draft Convention and UN Check Convention, the two Geneva Conventions<sup>6</sup> and the commercial codes and laws of Argentina,<sup>7</sup> Mexico,<sup>8</sup> Venezuela,<sup>9</sup> El Salvador,<sup>10</sup> Colombia,<sup>11</sup> Guatemala<sup>12</sup> and Ecuador.<sup>13</sup>

Convention].

5. Commentary on Draft Convention on International Bills of Exchange and International Promissory Notes, 15 U.N. GAOR commission on International Trade Law, U.N. Doc. A/CN.9/213 (1982) [hereinafter cited as U.N. Draft Convention]; Commentary on Draft Convention on International Cheques, 15 U.N. GAOR Commission on International Trade Law, U.N. Doc. A/CN.9/214 (1982) [hereinafter cited as U.N. Check Convention].

6. In the discussion that follows, the author will use the terms Geneva Draft Convention, the English Bills of Exchange Act, etc., rather than their common abbreviations, in order to facilitate the reader's comprehension and to avoid confusing the author who is overwhelmed with abbreviations and acronyms.

7. CÓDIGO DE COMERCIO DE ARGENTINA (F.A. Legon 9th ed. 1981). Bills of exchange are governed by a separate decree having its own numbering system which appear as Title 10 and 11 in the CÓDIGO. Checks are likewise governed by a separate decree which also has its own numbering system. This decree appears as Title 13 in the CÓDIGO. Any references hereafter will refer to the bill of exchange or check numbers.

8. Mexico includes bills of exchange and checks under a LEY GENERAL DE TÍTULOS Y OPERACIONES DE CRÉDITO (1981) [hereinafter cited as LEY GENERAL] with a separate numbering system from the Code of Commerce. The text of this Law is taken from CODIGO DE COMERCIO Y LEYES COMPLEMENTARIOS, (Colección Porrúa, 9th ed. 1983).

9. The Venezuelan law governing bills of exchange and checks is an integral part of the Commercial Code. The text is taken from CÓDIGO DE COMERCIO VENEZOLANO (A. Hernández-Bretón 1982).

10. The El Salvadorian law governing bills of exchange and checks is an integral part of the Commercial Code. The text has been taken from CÓDIGO DE COMERCIO DE LA REPÚBLICA

There are some striking differences and similarities between the Anglo-American and the civilian treatment of negotiable instruments. The striking differences are in the approaches to forgery of the drawer's signature, forgery of the payee's signature, certified checks, stop payment of checks, concepts of unjust enrichment, the effect of the drawer's death or incompetency, conditional endorsements, guaranty of instruments, crossed checks, checks payable in account, the omission of the magic words "to the order of" and a few other concepts which will be discussed in the article. This article will also show some striking similarities between the two systems. After all, there are limited alternatives in deciding a legal question, regardless of the differing legal systems, languages, ethnic and social backgrounds and historical periods.

The author chose the above listed Latin American countries because it is thought that they represent a fair cross-section of South and Central America. Colombia, having at one time adopted the negotiable instruments law of the United States, shows the residual effects of this foreign infiltration in its commercial code.<sup>14</sup> The comparison of the laws of the various Latin American countries may help dispel the mistake which is commonly made in the United States in thinking that the Latin American countries can be lumped together as one homogeneous mass. In fact, these various countries have diverse ideas, different ways of stating concepts and differing legal vocabularies. There is an exciting diversity in Latin American laws.

---

DE EL SALVADOR (Ahora 1974).

11. The Colombian law governing bills of exchange and checks is an integral part of the Commercial Code. It contains a continuous numbering of the articles. The text has been taken from *CÓDIGO DE COMERCIO* (Jorge Ortega Torres 1982).

12. The text of the Commercial Code (*CÓDIGO DE COMERCIO*) may be found in *CONSTITUCIÓN Y CÓDIGOS DE LA REPÚBLICA DE GUATEMALA* (H.A. Cruz Quintana, 4th ed. 1975).

13. In Ecuador, bills of exchange are an integral part of the Commercial Code, whereas checks are governed by a separate *CODIFICACIÓN DE LA LEY DE CHEQUES* (1972) [hereinafter cited as *LEY DE CHEQUES*]. The bills of exchange articles in the Commercial Code have been taken from 3 *Leyes Tributarias* 2-44-2-56 (1982); the Law of Checks is found in 4 *Leyes Tributarias* 4-41-4-15 (1982).

14. The Negotiable Instruments Law (NIL) of the United States was adopted in Colombia by *LEY* 46 (1923), and it seemed to vanish as a separate chapter when the official revision of the Commercial Code was promulgated in *DEC. No. 410 and 837* (1971).

## II. COMPARATIVE ANALYSIS

### A. *The Omission of the Magic Words "To The Order Of"*

From law school days, it seems almost in the very order of things that for any instrument to be negotiable it must contain the magic words "to the order of" or "to bearer."<sup>15</sup> After so many generations of law school students have had this notion driven into their heads, could it be possible to have negotiable instruments simply payable to a named payee without the magic words? Could a statute simply say that certain kinds of instruments are negotiable by legislative fiat? As seen in section 8-105(1) of the UCC, it is possible: "Certificated securities governed by this article are negotiable instruments." So long as the security is issued in bearer or registered form, is a share or other interest in property, is of a type commonly traded on a security exchange or market and is divisible into a series or class, it is negotiable.<sup>16</sup> In short, all stocks and bonds are now negotiable, even without the magic words, if they are brought and sold on exchanges.

If stocks and bonds no longer need magic words of negotiability, why not dispense with these words on promissory notes, checks and drafts? Much of the rest of the world dispensed with the magic words years ago. For example, England, the American source of the magic words, has eliminated their necessity by providing that:

A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable [emphasis added].<sup>17</sup>

Surely, if the English eliminated the necessity for the magic words over a hundred years ago, it would seem that we, in the United States, might do the same (particularly in light of the practice in the rest of the world). The Geneva Draft Convention requires that the bill of exchange state "[t]he name of the person to whom or to whose order payment is to be made."<sup>18</sup> This language is repeated in the provisions governing promissory notes.<sup>19</sup>

---

15. U.C.C. § 3-104(1)(d), 3-110 (1977).

16. U.C.C. § 8-102(1)(a).

17. Bills of Exchange Act, § 8(4).

18. Geneva Draft Convention, art. 1(6).

19. *Id.*, art. 75(5).

The Geneva Check Convention is even more flexible:

A cheque may be made payable:

To a specified person with or without the express clause "to order", or

To a specified person, with the words "not to order" or equivalent words, or

To bearer.

A cheque made payable to a specified person with the words "or to bearer", or any equivalent words, is deemed to be a cheque to bearer.

A cheque which does not specify the payee is deemed to be a cheque to bearer.<sup>20</sup>

The Geneva Check Convention then states that "a cheque made payable to a specified person, with or without the express clause 'to order,' may be transferred by means of an indorsement."<sup>21</sup> If the words "not to order" are used in the check, it can be transferred as an ordinary assignment.<sup>22</sup> The Geneva Draft Convention has a similar provision.<sup>23</sup>

The UN Draft Convention states that a draft must be payable "to the payee or his order." A promissory note must contain the same language.<sup>24</sup> The commentaries to these articles point out that the UN Draft Convention does not permit drafts or promissory notes to be drawn payable to bearer; however, the payee or special indorsee may convert them into bearer instruments by indorsing the instruments in blank.<sup>25</sup>

The draftsmen of the UN Check Convention diverge from the draftsmen of the Draft Convention by providing that the international check may be made payable "to the payee or to his order or to bearer."<sup>26</sup> The draftsmen fail to articulate why they have authorized a "bearer check." The commentary is limited to the magic words "order of:"

The words "or to his order" have been added after the words "to the payee" because of the well-established practice in certain common law countries to draw cheques "to the order of" a

---

20. Geneva Cheque Convention, art. 5.

21. *Id.*, art. 14.

22. *Id.*

23. Geneva Draft Convention, art. 11.

24. U.N. Draft Convention, arts. 1(2)(b),(3)(b).

25. U.N. Draft Convention, art. 1 commentary at 8.

26. U.N. Check Convention, art. 1(2)(b).



payee. However, the omission of the words "or to his order" does not prevent the cheque from being a negotiable instrument under this Convention. Therefore, an international cheque may be drawn "pay to X," "pay to the order of X," "pay to X or to his order," or "pay to bearer."<sup>27</sup>

This theme is continued in a commentary to another article of the Check Convention:

Under article 1(2) of this Convention a cheque need not be made payable to "the order" of the payee. Therefore, a mere omission of the words "to order" does not prevent further transfer, and where a cheque lacking that expression is transferred by the payee in accordance with article 14 the transferee is a holder and may in turn further transfer the cheque.<sup>28</sup>

El Salvador agrees with the UN Draft Convention that the draft must be made payable to a payee and any draft written to bearer is without effect,<sup>29</sup> and the same rule prevails as to promissory notes.<sup>30</sup> Checks drawn in El Salvador must contain the "name of the person in whose favor it is issued or indication that it is to be to bearer."<sup>31</sup> The El Salvadorian Commercial Code continues:

The check may be issued in:

- I. A name of a determined person, which may be to the same drawer or of a third party, and in both cases it shall be understood that it is to order.
- II. In favor of a determined person, with the clause "not to the order", "not negotiable" or other equivalent. If the beneficiary was the same drawee, the check without exception shall not be negotiable.
- III. To bearer.<sup>32</sup>

Under this El Salvadorian approach, the order language is not entirely erased or disregarded. So long as the phrase "to order" is understood, lip service is being used to perpetuate its use.

In Argentina, the bill of exchange must contain "[t]he name of he to whom, or to whose order, the payment must be effectu-

---

27. *Id.*, art. 1 commentary at 10.

28. *Id.*, art. 18 commentary at 3.

29. CÓDIGO DE COMERCIO, arts. 702 (VI), 705 (El Salvador).

30. *Id.*, art. 788 (III).

31. *Id.*, art. 793 (V).

32. *Id.*, art. 797.

ated."<sup>33</sup> Further "[t]he bill of exchange is transmissible by way of an indorsement even when it was not expressed to the order."<sup>34</sup>

Ecuador agrees that a bill of exchange shall contain "[t]he name of a person to whom or to whose order payment must be effectuated,"<sup>35</sup> and that "[a]ny bill of exchange even if it has not been drawn expressly to order, is transmissible by way of an indorsement."<sup>36</sup> The Ecuadorian check law closely follows the Geneva Check Convention.<sup>37</sup> Similar language is used in Venezuela regarding bills of exchange,<sup>38</sup> promissory notes<sup>39</sup> and checks.<sup>40</sup>

Mexico also adopts the view (as does El Salvador) that nominative instruments shall always be understood as issued to order, except when the clause "not to order or non-negotiable" is inserted in the text or in the indorsement.<sup>41</sup> So long as the instrument does not contain the latter phrase, it can be transmitted by indorsement and delivery.<sup>42</sup> Guatemala shares the view with Mexico that instruments issued to a determined person shall be presumed to be payable to order, and are transmissible by means of an indorsement and delivery.<sup>43</sup> On the other hand, "[t]he check may be to order or to bearer. If it does not express the name of the beneficiary it shall be reputed to bearer."<sup>44</sup>

Of the seven Latin American countries surveyed in this article, only Colombia requires that drafts and checks be made payable to order or to bearer. The difference in the Colombian law can be "blamed" on the influence of the United States.<sup>45</sup>

### *B. Ambiguous Words and Numbers*

The UCC states that "[w]ords control figures except that if the words are ambiguous figures control."<sup>46</sup> Under this rule, if in a

33. CÓDIGO DE COMERCIO, Título X, Cap. I, art. 6 (Argentina).

34. *Id.*, Título X, Cap. II, art. 12.

35. CÓDIGO DE COMERCIO, art. 410 (Ecuador).

36. *Id.*, art. 419.

37. LEY DE CHEQUES, arts. 5, 13.

38. CÓDIGO DE COMERCIO, Venezolano, arts. 410(2)(b), 419 (1965).

39. *Id.*, arts. 486-87.

40. *Id.*, arts. 490-91.

41. LEY GENERAL, art. 25.

42. *Id.*, art. 26.

43. CÓDIGO DE COMERCIO DE GUATAMALA, art. 418 (1975).

44. *Id.*, art. 497.

45. CÓDIGO DE COMERCIO, arts. 671, 713 (Colombia).

46. U.C.C. § 3-118(c); *Yates v. Commercial Bank & Trust Co.*, 432 So.2d 725 (Fla. 3rd

promissory note the amount of the principal is written as Five Hundred Thousand Dollars in one part and as Four Hundred Thousand Dollars in another part and the figure \$800,000.00 is used in still another part, it would appear that the figure (\$800,000.00) controls. What would happen in the suggested problem if the figures of \$800,000.00 and \$500,000.00 has been used along with the words Five Hundred Thousand and Four Hundred Thousand Dollars? The UCC would not seem to answer this problem, because it fails to indicate which "figures" control. The English rule that "[w]here the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable" would also seem to be of little help in solving the hypothetical problem.<sup>47</sup>

The draftsmen of the Geneva Draft Convention foresaw the hypothetical problem and provided the following answer:

Where the sum payable by a bill of exchange is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

*Where the sum payable by a bill of exchange is expressed more than once in words or more than once in figures, and there is a discrepancy, the smaller sum is the sum payable [emphasis added].*<sup>48</sup>

Through an abundance of caution, a similar provision was adopted in the Geneva Check Convention.<sup>49</sup> Nevertheless, the form check in use in much of the western world would seem to inhibit the making of the kind of mistake outlined in the italicized wording above. Mexico,<sup>50</sup> Ecuador,<sup>51</sup> Colombia,<sup>52</sup> Venezuela,<sup>53</sup> Argentina,<sup>54</sup> Guatemala<sup>55</sup> and Colombia<sup>56</sup> all follow the substance of the Geneva Draft Convention's provision.

In spite of the widespread adoption of the Geneva provision,

D.C.A. 1983).

47. Bills of Exchange Act, § 9-[2].

48. Geneva Draft Convention, art. 6.

49. Geneva Cheque Convention, art. 9.

50. LEY GENERAL, art. 16.

51. CÓDIGO DE COMERCIO, art. 415 (Ecuador).

52. CÓDIGO DE COMERCIO, art. 415 (Colombia).

53. CÓDIGO DE COMERCIO, art. 415 (Venezuela).

54. CÓDIGO DE COMERCIO, Título X, Cap.I art. 6 (Argentina).

55. CÓDIGO DE COMERCIO, art. 388 (Guatemala).

56. CÓDIGO DE COMERCIO, art. 623 (Colombia).

the draftsmen of the UN Draft Convention have forgotten one-half of the rule. The words "[i]f there is a discrepancy between the amount of the instrument expressed in words and the amount expressed in figures, the amount of the instrument is the amount expressed in words" have been omitted from the Draft Convention.<sup>57</sup>

### C. Agency

Under section 3-403 of the UCC, if an instrument is signed:

"Arthur Adams, agent," or

"Peter Pringle

Arthur Adams"<sup>58</sup>

then Arthur Adams can use parol evidence to prove to the payee that he has signed in a representative capacity. In that case, Arthur Adams would not be personally liable on the instrument. If Arthur Adams merely signs his name alone, then he cannot bring in parol evidence, even against the payee or other immediate party who may have full knowledge of Arthur Adams's agency status.<sup>59</sup>

The UCC seems to be more protective of the alleged agent than the English Bills of Exchange Act:

#### Personal liability of agent

(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal; or that of an agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.<sup>60</sup>

Under this section of the act, it would appear that if the name of a corporation is typed or printed on an instrument and one or more individuals signs his name followed by the word "Director," it is merely an indication that the signer is "filling a representative

---

57. U.N. Draft Convention art. 7(1).

58. U.C.C. § 3-403 comment 3.

59. *Id.*

60. Bills of Exchange Act, § 26.

character."<sup>61</sup> This alone would not be enough to absolve him from personal liability.

The Geneva Draft Convention and the Geneva Check Convention are both overly succinct regarding the agency question:

Whosoever puts his signature on a bill of exchange as representing a person for whom he had no power to act is bound himself as to a party to the bill and, if he pays, has the same rights as the person for whom he purported to act. The same rule applies to a representative who has exceeded his powers.<sup>62</sup>

The UCC follows the same rule by making the unauthorized agent personally liable on the instrument.<sup>63</sup>

Latin American law relating to ambiguous agency signatures seems relatively undeveloped. In Mexico, for example:

He that accepts, certifies, draws, issues, emits, indorses or by any other concept subscribes a credit instrument in the name of another, without sufficient power or without legal power to do so, is obligated personally as if he had operated in his own name, and if he pays, he acquires the same rights which correspond to the person represented.<sup>64</sup>

The same article points out that the unauthorized signature of the purported agent may be ratified by the alleged principal. A subsequent article provides that the alleged principal, by his acts or omissions may be precluded from asserting lack of authority of the alleged agent.<sup>65</sup> There seems, however, to be no provision governing ambiguous signatures. The Guatemalan law closely resembles the Mexican law on this point.<sup>66</sup>

El Salvadorian signers who do not have the power to act as an agent or who exceed their powers as an authorized agent are considered personally liable. In El Salvador also, nothing is said about the ambiguous signature.<sup>67</sup> Colombia follows a similar view,<sup>68</sup> but recognizes (in a fashion similar to the Mexican law) that the alleged principal may be precluded from asserting lack of authority of the agent if the principal's acts or omissions have misled a third

---

61. *Elliot v. Bax-Ironside* [1925] 2 K.B. 301.

62. Geneva Draft Convention, art. 8; Geneva Cheque Convention, art. 11.

63. U.C.C. § 3-404.

64. LEY GENERAL, art. 10.

65. *Id.*, art. 11.

66. CÓDIGO DE COMERCIO, art. 406 (Guatemala).

67. CÓDIGO DE COMERCIO, art. 417 (El Salvador).

68. CÓDIGO DE COMERCIO, art. 642 (Colombia).

party.<sup>69</sup> Here, again, there is no treatment of the ambiguous signer.

Argentina also binds the unauthorized agent personally, and fails to deal with the ambiguity problem. In addition, the Argentine law concentrates on the kind of mandate that must be given to the agent.<sup>70</sup> Venezuela follows a rule similar to those outlined above.<sup>71</sup> The Ecuadorian code provision resembles (with a slight change in language) the Geneva Draft and Check Conventions.<sup>72</sup>

Article 32 of the UN Draft Convention and article 34 of the UN Check Convention<sup>73</sup> appear to be a blend of the U.S. and civilian concepts with a slight tilting towards the civilian approach. Under paragraph 2 of both conventions, if Arthur Adams signs a draft, note or check as "Arthur Adams, as agent for Peter Pringle," and Peter Pringle has authorized this act, Pringle is liable and Arthur Adams has no liability. If Arthur Adams signs Peter Pringle's name (with authority) and then adds "by Arthur Adams," the same result holds true. Finally, if Arthur Adams merely signs Peter Pringle's name, with Peter Pringle's authority, the result again is the same.

Under paragraph 3 of both articles, if Arthur Adams signs without authority or in excess of his authority, he is personally lia-

69. *Id.*, art. 640.

70. CÓDIGO DE COMERCIO, Título X, Cap. I, arts. 8, 9 (Argentina).

71. CÓDIGO DE COMERCIO, art. 417 (Venezuela).

72. CÓDIGO DE COMERCIO, art. 417 (Ecuador).

73. U.N. Draft Convention, art. 32 reads,

(1) An instrument may be signed by an agent.

(2) The signature of an agent placed by him on an instrument with the authority of his principal and showing on the instrument that he is signing in a representative capacity for that named principal, or the signature of a principal placed on the instrument by an agent with his authority imposes liability on the principal and not on the agent.

(3) A signature placed on an instrument by a person as agent but without authority to sign or exceeding his authority, or by an agent with authority to sign but not showing on the instrument that he is signing in a representative capacity for a named person, or showing on the instrument that he is signing in a representative capacity but not naming the person whom he represents, imposes liability thereon on the person signing and not on the person whom he purports to represent.

(4) The question whether a signature was placed on the instrument in a representative capacity may be determined only by reference to what appears on the instrument.

(5) A person who is liable pursuant to paragraph (3) and who pays the instrument has the same rights as the person for whom he purported to act would have had if that person had paid the instrument.

Article 34 of the U.N. Check Convention uses the same wording, except the word "cheque" is substituted for the word "instrument."

ble. This, of course, is consistent with the rule in Anglo-American and civilian countries. The same paragraph also covers cases where the agent is authorized but signs in an ambiguous fashion. For example, if Arthur Adams signs his name merely as "Arthur Adams," or signs his name as "Arthur Adams, agent," without writing the name of the principal, then, in both cases Arthur Adams is personally liable. In the first case, Arthur Adams is liable because he has not indicated his agency status. In the second case liability occurs because he has failed to indicate the name of the principal, even though he has indicated that he is acting as an "agent." The commentary to paragraph 4 of article 32 of the Draft Convention clearly outlaws the use of any parol evidence to establish the name of the principal:

In the above cases where an agent signs with authority, it is important to determine whether or not he has acted in a representative capacity. Paragraph (4) emphasizes that such determination may be made only by what appears *ex facie* the instrument and not by any circumstances outside the instrument.

*Example.* A places his signature under a stamp of X Corporation which appears at the place where usually the signature of the drawer appears. The question whether A signed as an agent for X Corporation or as a co-drawer must be decided on the basis of what appears on the instrument (e.g. the distance between stamp and signature may be relevant) but not on the basis of evidence extrinsic to the instrument (e.g. the fact that A is director of X Corporation).

6. Since the only relevant factor is what appears *ex facie* the instrument, it is immaterial whether or not the holder had knowledge of the agent's authority or of his acting as agent. Furthermore, the above rules apply even if the holder is a protected holder.<sup>74</sup>

#### D. Burden of Proof - Holder in Due Course Status

There are two separate notions of burden of proof. These are the burden of coming forward with evidence at a trial and the burden of persuading the tier of fact to find one way or the other on a disputed point. These two notions can be difficult to separate. The problem of separating these notions is even more difficult when

---

74. U.N. Check Convention commentary at 5, 6.

dealing with comparative law and burdens of proof in negotiable instruments.

The Geneva Check and Draft Conventions delicately skirt the issue by saying that the possessor of an indorsable check or instrument is deemed to be the lawful holder if he establishes his title through an uninterrupted series of indorsements. The possessor, however, would have to give up the check or instrument if he/she acquired it in bad faith or if in acquiring it he/she had been guilty of gross negligence.<sup>75</sup> The phrase "is deemed" would seem to indicate that there is a rebuttable presumption that the possessor is a holder in due course, but that the presumption can be rebutted by proof of bad faith or gross negligence. The question of who has to sustain or overcome this presumption is, however, not answered.

The English Bill of Exchange Act states that:

every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.<sup>76</sup>

It would appear that the words "it is admitted or proved" mean simply that if there is sufficient evidence of defenses for a jury to consider, then the defense is "proved." Further, it would appear that after this defense is proved, the holder has the burden of proving good faith and the giving of value, while the defendant has the burden of proving that the holder took with knowledge of the defense.<sup>77</sup>

Under the UCC, when signatures are either admitted or proved to be genuine, the holder is entitled to recover, unless the defendant proves a defense (such as fraud, consideration failing in whole or in part, etc.). The holder must then prove that he/she is a holder in due course (in that he/she took for value, in good faith and without knowledge).<sup>78</sup> In short, the holder in the United States is presumed to be a holder in due course. This presumption can only be rebutted if the defendant proves a defense. The burden

---

75. Geneva Draft Convention, art. 16; Geneva Cheque Convention, arts. 19, 21.

76. Bills of Exchange Act, § 30(2).

77. BYLES ON BILLS OF EXCHANGE 208 (23rd ed. 1972).

78. U.C.C. § 3-307, 3-302.



then shifts back to the holder to prove his due course standing. It would appear that a holder in England must simply prove value (consideration) and good faith while his United States counterpart must prove value, good faith and lack of knowledge.

The UN Check and Draft Conventions have turned things upside down by providing that: "[e]very holder is presumed to be a protected holder, unless the contrary is proved."<sup>79</sup> The single commentary to these articles breathes some life into the word "presumed" by stating:

If a person is the holder of a cheque it is presumed that he is a protected holder. Therefore, if, in an action by the holder of the cheque against a party liable to him, such party brings a claim to the cheque or raises a defence against his liability, it is for the party bringing the claim or raising the defence to prove that the holder is not a protected holder.

In order to prove that the holder is not a protected holder, the defendant will have to prove either that the holder took with knowledge of a claim or defense,<sup>80</sup> that he knew the instrument had been dishonored by nonpayment, that the instrument was not complete and regular on its face when he took it, or that the time limit for presentment had expired.<sup>81</sup> In the vast majority of cases, all of these facts will be known only to the holder. For example, a maker or drawer may assert that the instrument was incomplete when it left his/her hands and that the holder took it when it was incomplete. The holder can then testify that although the instrument may have been issued while incomplete, it was complete and regular on its face when he/she took it. Proving a negative is a most difficult task.

This concept of "knowledge" becomes very tricky when the two conventions' definition of knowledge is considered: "[f]or the purposes of this convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or could not have been unaware of its existence."<sup>82</sup> The single commentary to these two sections notes that "[u]nder this article the concept of 'knowledge' covers (a) actual knowledge of a fact and (b) constructive knowledge, i.e., the person could not have been unaware of the

---

79. U.N. Draft Convention, art. 28, U.N. Check Convention, art. 30.

80. U.N. Draft Convention, art. 4(7); U.N. Check Convention, art. 6(6).

81. *Id.*

82. U.N. Draft Convention, art. 5; U.N. Check Convention, art. 7.

existence of a fact." This "constructive knowledge" aspect bears a startling similarity to the UCC language that a person has notice of a fact when "from all the facts and circumstances known to him at the time in question he has reason to know that it exists."<sup>83</sup> It therefore appears, under either the UN or UCC version that, if it is proved that a holder has knowledge of facts A, B, and C and the totality of these three facts leads to the conclusion that fact D exists, then a court would find knowledge of fact D.

The UN Check and Draft Conventions in their definition of a "protected holder" have ignored the concepts of good faith and consideration. A commentary<sup>84</sup> to article 6 of the Check Convention and a comment<sup>85</sup> to article 4 of the Draft Convention note that:

A person may be a protected holder even though he has not given value or consideration for the instrument. This rule is consistent with some legal systems, notably those of civil law inspiration, and departs from others (e.g. BEA Section 29(1), and UCC sections 3-302(1) (a) and 3-303). The present approach was selected because of the problems of unifying the different approaches to the relevance of "value" or "consideration" by legal systems.

Dispensing with the need for value was wise because although most truly commercial transactions involving negotiable instruments will involve consideration (which would also be sufficient "cause" under the civil systems) the occasional gift transaction might be valid under the civilian systems but fail under the Anglo-American systems. The cause of unification is too important to sacrifice to uphold a peculiarity of Anglo-American law.

On the other hand, both conventions have seemingly eradicated any good faith notion. While it is true that under the definitions of "knowledge," the draftsmen in both conventions<sup>86</sup> have included a citation to section 1-201(19) of the UCC which defines good faith, nothing in the text of the convention or commentary talks about good faith. The same commentary refers to sections 21 and 22 of the Geneva Check Convention and sections 16 and 17 of

---

83. U.C.C. § 1-201 (25)(c). The Seventh Circuit recognized this constructive notice rule in *Oscar Gruss & Son v. First State Bank of Eldorado*, 582 F.2d 424, 431, 24 U.C.C. REP. SERV. 1251 (7th Cir. 1978).

84. U.N. Check Convention, art. 6 commentary at 17.

85. U.N. Draft Convention, art. 4 commentary at 17.

86. U.N. Check Convention, art. 7; U.N. Draft Convention, art. 5.

the Geneva Draft Convention. These sections uniformly state that the possessor of a disposed instrument will be forced to give it up if he takes the instrument in bad faith or with gross negligence. The same sections also state that a party can set up defenses against a holder who knowingly acts to the detriment of the debtor. As will be discussed in a subsequent section of this article, the Latin American Countries have generally followed the bad faith and gross negligence concepts.<sup>87</sup> It is strange that the commentary to each convention is silent about the discarding of such a uniform legal notion. There may well be good reasons for discarding this bad faith concept, such as for the sake of speed and ease of negotiation and for the possibility that this might aid in the adoption of these conventions. The absence of any justification, however, seems counter-productive.

#### *E. How Does One Count the Elapsing of Time?*

Assume that a promissory note is issued payable one year from date, and that date is January 6, 1983; how does one determine the due date? The standard way in the United States is to exclude January 6, 1983, and to start counting from January 7, 1983. By adding 365 days, the maturity date arrived at is January 6, 1984 (the date of payment is included).<sup>88</sup> If the instrument has any other fixed number of days then the same process is repeated. But, assume that a note is payable one or two months from date, then how does one count when there are months with varying days? The UCC is silent on this problem.

Assume a further problem: the instrument is drawn in Rome, Italy, and payable in Lima, Peru, two months after date. How does one calculate the day of maturity when different time zones are involved? Again, the UCC is silent. The English Bills of Exchange Act seems content to say that the "Term 'month' in a bill means calendar month."<sup>89</sup> This may be helpful if the instrument is issued on the first day of a month, but what happens when the instrument is issued on January 25, 1983? How does one compute in light of the varying days in February and March?

Most of the problems posed above are nicely answered in two sections of the Geneva Draft Convention. Article 36 states:

---

87. See *infra* text accompanying note 220.

88. UNIFORM NEGOTIABLE INSTRUMENTS ACT (N.I.L.), § 86 (1896).

89. Bills of Exchange Act, § 14(4).

Where a bill of exchange is drawn at one or more months after date or after sight, the bill matures on the corresponding date of the month when payment must be made. If there be no corresponding date, the bill matures on the last day of this month.

When a bill of exchange is drawn at one or more months and a-half after date or sight, entire months must first be calculated.

If the maturity is fixed at the commencement, in the middle (mid-January or mid-February, etc.) or at the end of the month, the first, fifteenth or last day of the month is to be understood.

The expressions "eight days" or "fifteen days" indicate not one or two weeks, but a period of eight or fifteen actual days.

The expression "half-month" means a period of fifteen days.

Under the first clause, it would appear that if a note is issued on January 29, 1983, payable one month from date, then the note is payable on February 28, 1983. The definition of "half-month" as consisting of fifteen days nicely solves the problem of twenty-eight and thirty-one day months. The problem of different calendar zones is handled well in article 37:

When a bill of exchange is payable on a fixed day in a place where the calendar is different from the calendar in the place of issue, the day of maturity is deemed to be fixed according to the calendar of the place of payment.

When a bill of exchange drawn between two places having different calendars is payable at a fixed period after date, the day of issue is referred to the corresponding day of the calendar in the place of payment, and the maturity is fixed accordingly.

The time for presenting bills of exchange is calculated in accordance with the rules of the preceding paragraph.

These rules do not apply if a stipulation in the bill or even the simple terms of the instrument indicate an intention to adopt some different rule.

The draftsmen of the UN Draft Convention have chosen to deal with the time problem in a most disappointing, overly succinct manner:

Where an instrument is drawn, or made, payable at one or more months after a stated date or after the date of the instru-

ment or after sight, the instrument matures on the corresponding date of the month when payment must be made. If there is no corresponding date, the instrument matures on the last day of that month.<sup>90</sup>

In spite of the international character of the UN Draft Convention, nothing is stated as to how to measure dates in different calendar zones, etc. This lack of attention seems strange in light of the approach used in modern legislation in Latin America. For example, the Geneva Draft Convention rules are adopted in Argentina.<sup>91</sup> Guatemala follows the Geneva time rules for drafts drawn and payable in Guatemala, but seemingly omits any reference to the problem of different calendars.<sup>92</sup> Article 36 of the Geneva Convention has also been adopted in Mexico.<sup>93</sup> El Salvador has adopted article 36 of the Geneva Convention and the second paragraph of article 37.<sup>94</sup> Articles 36 and 37 are also in effect in Venezuela<sup>95</sup> and Ecuador,<sup>96</sup> while a portion of article 36 is in effect in Colombia.<sup>97</sup>

*F. The Holder in Due Course and the Time for Presentment of a Demand Draft of Promissory Note*

The UCC states that the purchaser of a demand instrument has notice that it is overdue when he takes it after "more than a reasonable length of time after its issue."<sup>98</sup> Under the English Bills of Exchange Act, a demand bill is deemed to be overdue "when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact."<sup>99</sup> The UCC further states that presentment must be made within a reasonable time in order to preserve the liability of secondary parties.<sup>100</sup> A reasonable time in that case is "determined by the nature of the instrument, any usage of banking or trade and the facts of the particular case."<sup>101</sup>

---

90. U.N. Draft Convention, art. 8(8).

91. CÓDIGO DE COMERCIO, Título X, Cap. V, arts. 38, 39 (Argentina).

92. CÓDIGO DE COMERCIO, arts. 944-46 (Guatemala).

93. LEY GENERAL, art. 80.

94. CÓDIGO DE COMERCIO, arts. 707, 637 (El Salvador).

95. CÓDIGO DE COMERCIO, arts. 444-45 (Venezuela).

96. CÓDIGO DE COMERCIO, arts. 444-45 (Ecuador).

97. CÓDIGO DE COMERCIO, arts. 674-75 (Colombia).

98. U.C.C. § 3-304(3)(c).

99. Bills of Exchange Act, § 36(3).

100. U.C.C. §§ 3-501, 3-502.

101. *Id.*, § 3-502(2).

The Anglo-American approach is consistent with the notion of a reasonable time as the standard; this approach is the direct opposite of the civilian approach of certainty. Under the Geneva Draft Convention, demand on the demand draft<sup>102</sup> and the demand note<sup>103</sup> must be made within one year of its date. Any indorsement after that date amounts to an assignment.<sup>104</sup> This one-year rule is preserved in the UN Draft Convention.<sup>105</sup>

The one-year rule is followed in Colombia,<sup>106</sup> Argentina<sup>107</sup> and Guatemala,<sup>108</sup> but any of the obligated parties may reduce this period by a notation on the bill. In Mexico,<sup>109</sup> a demand draft is payable within six months from its date, and, like Colombia, any of the obligated parties may reduce this term by noting the reduction on the draft. In El Salvador, demand drafts must be presented within one year of date.<sup>110</sup> Ecuador<sup>111</sup> and Venezuela<sup>112</sup> tie the acceptance and payment concepts together by stating that demand instruments must be presented for payment within the time fixed for the presentment of drafts payable at a certain time after sight. That time is fixed at six months after the date of issuance.<sup>113</sup>

Whether a country follows the one-year rule of the Geneva and UN Conventions or the six-month rule of some of the Latin American countries, the potential holder knows that he must purchase before the expiration of the period in order to be an indorsee rather than an assignee. In addition, once he becomes a holder he has a fixed period within which to present for payment. The Anglo-American potential holder has to pray that his conception of a reasonable time will meet with judicial approbation after he has purchased the instrument and some defendant has attacked his holder in due course status.

---

102. Geneva Draft Convention, art. 34.

103. *Id.*, art. 77.

104. *Id.*, art. 20.

105. U.N. Draft Convention, art. 51(f).

106. CÓDIGO DE COMERCIO, art. 692 (Colombia).

107. CÓDIGO DE COMERCIO, Título X, Cap. V, art. 36 (Argentina).

108. CÓDIGO DE COMERCIO, art. 464 (Guatemala).

109. LEY GENERAL, art. 128.

110. CÓDIGO DE COMERCIO, art. 734 (El Salvador).

111. CÓDIGO DE COMERCIO, arts. 430, 442 (Ecuador).

112. CÓDIGO DE COMERCIO, arts. 431, 442 (Venezuela).

113. *Id.*, art. 431.

### G. *Prohibition of Further Indorsements*

Under the UCC, "no restrictive indorsement prevents further transfer or negotiation of the instrument."<sup>114</sup> A comment to this section<sup>115</sup> points out that a signature such as "Pay A only," is ineffective to prevent A from negotiating or transferring the instrument to another. Takers from A and subsequent holders would not be put on notice that something was wrong by virtue of this kind of indorsement. The same comment points out that this kind of indorsement is rare in American practice. The author is puzzled as to why rarity of use should lead to the prohibition of use.

Under the English Bills of Exchange Act:

An indorsement is restrictive which prohibits the further negotiation of the bill . . . as, for example, if a bill be indorsed "Pay D only," . . . (2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, *but gives him no power to transfer his rights as indorsee unless it expressly authorizes him to do so* [emphasis added].<sup>116</sup>

It seems clear that an indorsement "Pay D only" would have the opposite effect in England from the effect it would have in the United States.

In accordance with the English Bills of Exchange Act, the Geneva Draft<sup>117</sup> and Check<sup>118</sup> Conventions state that an indorser "may prohibit any further endorsement; in this case, he gives no guarantee to the persons to whom the bill [cheque] is subsequently endorsed." The Ecuadorian Commercial Code closely replicates this language in its bill of exchange provisions<sup>119</sup> as well as in its check provisions.<sup>120</sup> Similarly, the Argentine indorser of a draft or a check<sup>121</sup> may prohibit further indorsements, and will not be responsible to subsequent indorsees. Venezuela is in accord as to drafts<sup>122</sup> and checks.<sup>123</sup> In Guatemala, any holder of a check "may

114. U.C.C. § 3-206(1).

115. *Id.*, comment 2.

116. Bills of Exchange Act, § 35.

117. Geneva Draft Convention, art. 15.

118. Geneva Cheque Convention, art. 18.

119. CÓDIGO DE COMERCIO, art. 423 (Ecuador).

120. LEY DE CHEQUES, art. 17.

121. CÓDIGO DE COMERCIO, Título XII, Cap. II, art. 16 (Argentina).

122. CÓDIGO DE COMERCIO, art. 423 (Venezuela).

123. *Id.*, art. 491.

limit its negotiability, by stamping on the document the clause: "not negotiable."<sup>124</sup> The Guatemalan law does not seem to give the indorsee any other way of restricting transfer.

The UN Draft<sup>125</sup> and Check Conventions<sup>126</sup> seemingly duplicate the above stated Guatemalan provision along with the English Bills of Exchange Act and the Geneva Conventions on Drafts and Checks:

When the drawer or the maker has inserted in the instrument, or an endorser in his endorsement [emphasis added], such words as "not negotiable," "not transferable," "not to order," "pay (X) only," or words of similar import, the transferee does not become a holder except for purposes of collection.

The commentaries to these two sections point out that the indorser has to put this limiting language in his/her indorsement. An indorsee under the above forms can not transfer the instrument even for the very limited purpose of collection. He/she has to collect directly from the drawee.<sup>127</sup>

#### H. Conditional Indorsements

The area of conditional indorsements is one of the most divergent ones, with the American view upholding them and the civilian and English view to the extreme opposite. Under the UCC, an indorsement may be conditional. For example, a payee can indorse a note or draft: "Pay to John Jones upon condition that he conveys Blackacre to me, /s/ Patrick Payee." Any taker from John Jones (except an intermediary bank) has to make sure that he is acting consistently with the indorsement and, to the extent that he is, can be a holder in due course.<sup>128</sup>

The English Bill of Exchange Act states that "[w]here a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not."<sup>129</sup> The same provision

---

124. CÓDIGO DE COMERCIO, art. 498 (Guatemala).

125. U.N. Draft Convention, art. 16.

126. U.N. Check Convention, art. 18. The word "cheque" is substituted for the word "instrument;" the article speaks to the "drawer of a cheque payable to a payee or to his order. . . ."

127. U.N. Draft Convention, art. 16 commentary at 2; U.N. Check Convention, art. 18 commentary at 2.

128. U.C.C. §§ 2-205, 3-206.

129. Bills of Exchange Act, § 33.



would seem applicable to indorsements on checks.<sup>130</sup>

Both the Geneva Check Convention<sup>131</sup> and the Geneva Draft Convention<sup>132</sup> state that "[a]n endorsement must be unconditional." Any written conditions are to be disregarded and are deemed not written.

The UN Check Convention repeats the language that "[a]n endorsement must be unconditional," and then adds that "[a] conditional endorsement transfers the cheque whether or not the condition is fulfilled."<sup>133</sup> Article 17 of the UN Draft Convention tracks the same language as the Check Convention.

Guatemala,<sup>134</sup> Argentina,<sup>135</sup> Venezuela,<sup>136</sup> El Salvador,<sup>137</sup> Mexico,<sup>138</sup> Ecuador<sup>139</sup> and Colombia<sup>140</sup> all agree that indorsements must be unconditional. Fortunately, or unfortunately, inasmuch as conditional indorsements are rarely utilized in practice in the United States, this lack of uniformity between the United States and the Anglo-civilian world may be of little consequence.

### I. *Conditional and Qualified Acceptances*

The UCC authorizes "*conditional acceptances, acceptances for part of the amount* [emphasis added], acceptances to pay at a different time from that required by the draft, or the acceptance of less than all of the drawees."<sup>141</sup> While section 3-412 does not expressly mention the term "conditional acceptance," the English Bills of Exchange Act expressly states that "[i]n particular an acceptance is qualified which is—(a) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated."<sup>142</sup>

This Anglo-American view is not shared by the civilian coun-

130. *Id.*, § 73.

131. Geneva Cheque Convention, art. 15.

132. Geneva Draft Convention, art. 12.

133. U.N. Check Convention, art. 19.

134. CÓDIGO DE COMERCIO, art. 423 (Guatemala).

135. CÓDIGO DE COMERCIO, Título X, Cap. II, art. 13 (Argentina).

136. CÓDIGO DE COMERCIO, art. 420 (Venezuela).

137. CÓDIGO DE COMERCIO, art. 664 (El Salvador).

138. LEY GENERAL, art. 31.

139. CÓDIGO DE COMERCIO, art. 420 (Ecuador).

140. CÓDIGO DE COMERCIO, art. 655 (Colombia).

141. U.C.C. § 3-412 comment 1.

142. Bills of Exchange Act, § 19(2)(a).

tries. For example, the Geneva Draft Convention provides that an "acceptance is unconditional, but the drawee may restrict it to part of the sum payable. Every other modification introduced by an acceptance into the tenor of the bill of exchange operates as a refusal to accept. Nevertheless, the acceptor is bound according to the terms of his acceptance."<sup>143</sup> Only a lawyer can appreciate how something can be a refusal and an acceptance at the same time.

Argentina has adopted most of the Geneva Draft Convention language regarding acceptances. It does, however, disallow the use of conditional acceptances by its use of a phrase which is common in Latin America: "[t]he acceptance must be pure and simple; the drawee may limit it to a part of the amount."<sup>144</sup> Venezuela also follows the "pure and simple" language.<sup>145</sup> Mexico tracks the Geneva language,<sup>146</sup> and Guatemala,<sup>147</sup> Colombia,<sup>148</sup> Ecuador<sup>149</sup> and El Salvador<sup>150</sup> are in accord, although there are some changes in language.

The approach of the UN Draft Convention is again to disallow the conditional acceptance:

- (1) An acceptance must be unqualified. An acceptance is qualified if it is conditional or varies the terms of the bill.
- (2) If the drawee stipulates on the bill that his acceptance is subject to qualification:
  - (a) He is nevertheless bound according to the terms of his qualified acceptance;
  - (b) The bill is dishonored by non-acceptance.
- (3) An acceptance relating to only a part of the amount of the bill is a qualified acceptance. If the holder takes such an acceptance, the bill is dishonoured by non-acceptance only as to the remaining part.<sup>151</sup>

A commentary to this article notes that "[i]f the holder takes the qualified acceptance and does not protest the dishonour he has rights against the acceptor under the qualified acceptance but par-

143. Geneva Draft Convention, art. 26.

144. CÓDIGO DE COMERCIO, Título X, Cap. III, art. 28 (Argentina).

145. CÓDIGO DE COMERCIO, art. 434 (Venezuela).

146. LEY GENERAL, art. 99.

147. CÓDIGO DE COMERCIO, art. 459 (Guatemala).

148. CÓDIGO DE COMERCIO, art. 687 (Colombia).

149. CÓDIGO DE COMERCIO, art. 434 (Ecuador).

150. CÓDIGO DE COMERCIO, art. 722 (El Salvador).

151. U.N. Draft Convention, art. 39.

ties secondarily liable to the holder are not liable."<sup>152</sup> In effect, this commentary is stating that the qualified acceptance does not relieve the drawer and indorsers unless the holder fails to protest the dishonor of the bill for the unaccepted amount. This is the direct antithesis of the UCC which states that where "the holder assents to an acceptance varying the terms of the draft each drawer and indorser who does not affirmatively assent is discharged."<sup>153</sup>

Under the English Bills of Exchange Act, when domestic bills are accepted for less than the face amount, indorsers and drawers must dissent within a reasonable time after they have received notice of the qualified acceptance or they shall be deemed to have assented to the qualified acceptance. If, however, a foreign bill is involved, and there is an acceptance for less than the full face amount, "it must be protested as to the balance."<sup>154</sup> In brief, the English law simply accommodates the civilian practice of holding drawers and indorsers liable for the unaccepted balance of the draft if a protest for its dishonor is made.

Argentina,<sup>155</sup> El Salvador,<sup>156</sup> Venezuela<sup>157</sup> and Mexico<sup>158</sup> seem to follow the rule that the drawer and indorsers remain liable in the event of an acceptance for part of the face amount, if a protest is made. Again, the Anglo-American position is an isolated one, but even the English have made an accommodation for the foreign position.

### *J. Alterations*

In the United States, if a drawee-bank pays a completed check which has been altered as to the amount, the drawer may recover the increased amount from the bank because the check, as altered, is not properly payable.<sup>159</sup> Of course, if the drawer's negligence has substantially contributed to the making of the alteration, the bank has a defense.<sup>160</sup> Further, the bank may have a "delay defense" if the drawer fails to inform the bank of the alteration in a timely

152. *Id.*, commentary at 2.

153. U.C.C. § 3-412(3).

154. Bills of Exchange Act, § 44(2).

155. CÓDIGO DE COMERCIO, Título X, Cap. VII, art. 47(a)-(b)(3) (Argentina).

156. CÓDIGO DE COMERCIO, arts. 752, 766 (El Salvador).

157. CÓDIGO DE COMERCIO, art. 459 (Venezuela).

158. LEY GENERAL, arts. 139, 150-69.

159. U.C.C. § 4-401.

160. *Id.*

fashion.<sup>161</sup> In general, however, most alteration losses fall upon the payor-bank.

In England, the payor-bank will normally be liable for any alteration increasing the amount of the check. The bank may be able to avoid the loss if it can show that its customer's negligence is the cause of the loss.<sup>162</sup> The English approach is entirely decisional; neither the Bill of Exchange Act nor the English Cheque Act of 1957 deals with the problem.

In the case of an incomplete check, both the United States<sup>163</sup> and England<sup>164</sup> protect the holder in due course who has taken the check after its unauthorized completion, or its completion in excess of the authority given by the drawer. In that instance, however, England protests the holder only if the instrument has been issued. The good faith drawee-payor is also protected in the United States.<sup>165</sup>

Both England<sup>166</sup> and the United States<sup>167</sup> agree that a holder in due course of a completed check which has been altered may enforce it according to its original tenor. When it comes to the question of the rights of successive indorsers, the terminology, if not the result, changes. In the United States, each indorser warrants to his indorser that the instrument has not been materially altered.<sup>168</sup> In England, the indorser "engages that on due presentment it shall be . . . paid according to its tenour . . ." <sup>169</sup>In brief, the American indorser's liability is based upon a warranty by operation of law that the instrument has not been increased in amount, while in England the indorser engages (promises) that he will pay to his indorsee the amount which appears on the face of the check. Different terminology is used, but with similar results.

The UN Check Convention seemingly has not attempted to legislate the liability of payor-banks for paying altered checks. This approach follows the earlier Geneva Check Convention. Both conventions agree with the basic notion that in the case of an alter-

---

161. U.C.C. § 4-406.

162. *E.g. Young v. Grote*, 4 Bing. 253, 130 Eng. Rep. 764 (1827); *London Joint Stock Bank v. McMillan*, 1918 A.C. 777.

163. U.C.C. § 3-407.

164. Bills of Exchange Act, § 20.

165. U.C.C. § 3-407.

166. Bills of Exchange Act, § 64.

167. U.C.C. § 3-407(2)(b).

168. *Id.*, § 3-417(2)(c).

169. Bills of Exchange Act, § 55(2)(a).

ation of a check, parties who sign subsequent to the alteration are bound in accordance with the terms of the altered text, and parties who sign before the alteration are bound in accordance with the original text.<sup>170</sup> A similar provision is found in the Geneva Bill of Exchange Convention.<sup>171</sup> The UN Draft Convention adds that "[f]ailing proof to the contrary, a signature is deemed to have been placed on the cheque after the material alteration."<sup>172</sup> A commentary points out that:

It should be noted that the rule on material alteration laid down in article 33 deals only with the liability on the cheque. It does not prevent a person who has suffered loss because of the alteration to claim damages under national law, for example from a drawer who facilitated the alteration by leaving open a space which enabled the payee to alter the figure and wording of the sum without it being apparent.<sup>173</sup>

The civilian approach to the question of liability of the payor-bank to its customers for altered checks differs from the general rule in the United States and England. For example, in Guatemala, the drawer may not complain to his payor-bank about an alteration if it occurs through his own fault or the fault of his agents, representatives or clerks.<sup>174</sup> Further, if the alteration is made on blank checks given by the bank, or approved by it, then the drawer customer may object only when the alteration is obvious or if opportune notice of the alteration is given to the bank. "Any covenant contrary to that disposed in this article is null."<sup>175</sup> The Mexican alteration provisions follow (with some change in wording) the same concepts as Guatemala.<sup>176</sup>

Banks in El Salvador, which pay forged checks, suffer the consequences "[i]f the check exhibits signs of alteration."<sup>177</sup> The statute seems somewhat inartfully drawn because the word *falsificado* is used to denominate both the standard meaning of the word "forged" and the meaning of the word "alteration" (*alteración*).

The relatively new check law of Argentina seems to pay very

170. Geneva Check Convention, art. 51; U.N. Check Convention, art. 33.

171. Geneva Draft Convention, art. 69.

172. U.N. Draft Convention, art. 33(2).

173. U.N. Draft Convention, art. 33 commentary at 5.

174. CÓDIGO DE COMERCIO, art. 515 (Guatemala).

175. *Id.*, art. 516.

176. LEY GENERAL, art. 194.

177. CÓDIGO DE COMERCIO, art. 818(II) (El Salvador).

little attention to the question of alteration. In cases where a checkbook and/or checks are lost or stolen, the holder must give immediate notice to the bank. The holder must act in the same manner when he has knowledge that the check has been altered. "Once the bank has received this notice, it shall not pay presented checks from those which were stolen, lost or *adulterado*."<sup>178</sup> The act makes no further mention of the word *adulterado*, but states that in cases where checks are forged, the loss falls on the bank unless the forgery of the drawer's signature is manifestly visible.<sup>179</sup>

Colombia's approach shows that it was shaped, in part, by the law of the United States. In Colombia, a bank is responsible to its depositor for the payment of a check whose amount has been increased, provided the depositor notifies the bank of the alteration within three months after the altered check is returned to him. In addition, if the alteration occurs as a result of the fault of the depositor, the bank is exonerated from responsibility.<sup>180</sup> As a further protection to the bank, the owner of the checkbook who loses one or more blank checks and who does not give timely notice to the bank, may object only if the alteration is obvious.<sup>181</sup>

#### K. Alterations: Prior and Subsequent Parties

The UCC has a somewhat clumsy way of stating what the liabilities of the parties are when there is an alteration of the instrument. The maker promises that he will pay "according to its tenor at the time of his engagement . . ."<sup>182</sup> The acceptor makes a similar promise.<sup>183</sup> What the drawer promises with respect to an alteration is not clear from section 3-413(2) of the code. Another section of the UCC states that the acceptance "is the drawee's signed engagement to honor the draft as presented."<sup>184</sup> The indorser also promises to "pay the instrument according to its tenor at the time of his indorsement . . ."<sup>185</sup> The guarantor also promises to pay "according to its tenor . . ."<sup>186</sup> The English Bills of Exchange Act

---

178. CÓDIGO DE COMERCIO, Título XIII, Cap. I, art. 5 (Argentina).

179. *Id.*, Título XIII, Cap. III, art. 36(3).

180. CÓDIGO DE COMERCIO, art. 732 (Colombia).

181. *Id.*, art. 733.

182. U.C.C. § 3-413(1).

183. *Id.*

184. *Id.*, § 3-410(1).

185. *Id.*, § 3-414(1).

186. *Id.*, § 3-416(1)(2).

also uses this clumsy way of holding every one liable according to the "tenour" of the instrument at the time each party signed.<sup>187</sup>

What the draftsmen of the UCC were struggling to say, but did not, is well stated in the 1930 Geneva Draft Convention:

In case of alteration of the text of a bill of exchange, parties who have signed subsequent to the alteration are bound according to the terms of the altered text; parties who have signed before the alteration are bound according to the terms of the original text.<sup>188</sup>

Similar language is contained in the Geneva Check Convention.<sup>189</sup>

Venezuela<sup>190</sup> and Ecuador<sup>191</sup> adopt the language used in the Geneva Conventions. El Salvador is in accord, but adds the notion that "[w]hen it may not be proved if a signature has been made before or after the alteration, it shall be presumed that it was made before."<sup>192</sup> Argentina,<sup>193</sup> Mexico,<sup>194</sup> Guatemala<sup>195</sup> and Colombia<sup>196</sup> are somewhat similar language.

The UN Draft and Check Conventions adopt much of the Geneva Draft and Check Conventions' language dealing with this aspect of alteration. However, some unfortunate language has been added (which is indicated in italics):

(1) If an instrument has been materially altered:

(a) Parties who have signed the instrument subsequent to the material alteration are liable thereon according to the terms of the altered text;

(b) Parties who have signed the instrument before the material alteration are liable thereon according to the terms of the original text. Nevertheless a party who has himself made, authorized, or assented to, the material alteration is liable on the instrument according to the terms of the altered text.

(2) Failing proof to the contrary, a signature is deemed to have

187. Bills of Exchange Act, §§ 54, 55, 64.

188. Geneva Draft Convention, art. 69.

189. Geneva Cheque Convention, art. 51.

190. CÓDIGO DE COMERCIO, arts. 478, 491 (Venezuela).

191. CÓDIGO DE COMERCIO, arts. 478, 488 (Ecuador).

192. CÓDIGO DE COMERCIO, art. 636 (El Salvador).

193. CÓDIGO DE COMERCIO, Título X, Cap. I, art. 88 (Argentina).

194. LEY GENERAL, art. 13.

195. CÓDIGO DE COMERCIO, art. 395 (Guatemala).

196. CÓDIGO DE COMERCIO, art. 631 (Colombia).

been placed on the instrument *after* [emphasis added] the material alteration.

(3) Any alteration is material which modifies the written undertaking on the instrument of any party in any respect.<sup>197</sup>

It should be noted that paragraph 2 above reverses the presumption in El Salvador, Argentina, Mexico, Guatemala and Colombia that the signer signed the instrument *before* the material alteration. This same subsection uses the unfortunate and ambiguous term "deemed." The commentary points out that:

In determining the liability of parties in a case of material alteration, the decisive factor is whether a party signed before or after the alteration. Since the point of time at which the instrument was altered is in many cases difficult to determine, *paragraph (2) establishes a rebuttable presumption that the alteration has been made before a signature was placed on the instrument. A party may rebut this presumption by proving that he signed before the alteration. Such proof may be extrinsic to the instrument* [emphasis added].<sup>198</sup>

In another section of the UN Draft Convention, the word "deemed" means an irrebuttable presumption.<sup>199</sup> Without the use of the commentary cited above, a court might have difficulty interpreting this section.

The astute reader who has knowledge of the UCC might be struck by the fact that the UN Draft and Check Conventions, when dealing with this alteration question, do not address the concept of a "fraudulent" alteration.<sup>200</sup> The commentary notes that the alteration of the instrument does not discharge the parties to the instrument of their liability.<sup>201</sup> Hence, any kind of material alteration, fraudulent or non-fraudulent, will trigger the operation of the provisions.

#### *L. Forgery of the Drawer's Signature*

It is well known that banks in England and the United States are unable to charge their customers' accounts for checks bearing

---

197. U.N. Draft Convention, art. 31; U.N. Check Convention art. 33.

198. U.N. Draft Convention, art. 31 commentary at 6.

199. See *infra* text accompanying note 297.

200. U.C.C. § 3-407.

201. U.N. Draft Convention, art. 31 commentary at 2.



the forged signatures of their customers-drawers. Whether the rule is grounded on Lord Mansfield's view that a drawee is bound to know its customer's signature,<sup>202</sup> or whether at some point there has to be finality of payment,<sup>203</sup> the result is the same. The Anglo-American concept of finality of payment is not the same as that found in many civilian countries. A civilian bank can often properly charge its customers' accounts when the customers' names have been forged. Neither the Geneva Check Convention nor the UN Check Convention covers this problem.

In Mexico, the forgery of the signature of a drawer may not be invoked by him/her against the bank if the forgery occurs from his/her fault or from the fault of his/her agents, representatives and clerks. If the check is forged on a blank furnished by the bank, the customer may object only if the forgery is obvious or if the customer has lost the blank checks or stubs and has given opportune notice to the bank about the loss.<sup>204</sup>

A slightly different approach has been taken in Argentina.

The bank shall respond for the consequences of payment of a check, in the following cases:

1. When the signature of the drawer was visibly forged.
2. When the check does not unite those essential requisites specified in art. 2 [required formalities of a check].
3. When the check does not correspond to the checkbook delivered to the drawer in conformity with what is disposed in art. 4.<sup>205</sup>

The drawer shall respond for the damages in cases of falsification of a check.

1. If his signature was forged on any of the checkbooks (*cuadernos*) received in conformity with that disposed in article 2 [the formalities of a check] and the forgery was not manifestly visible.
2. If the check was signed by a dependant or a person whose use of his signature was rightful.
3. When there was no compliance with any of the obligations imposed in article 5. [the drawer's duty to report lost or stolen

202. *Price v. Neal*, (1762) 3 Burr 1354, 97 Eng. Rep. 871 (K.B. 1762).

203. U.C.C. § 3-418.

204. LEY GENERAL, art. 194.

205. CÓDIGO DE COMERCIO, Título XIII, Cap. III, art. 35 (Argentina).

checks to the bank].<sup>206</sup>

The forgery is considered visibly manifest when it may be appraised by a simple sight, with the rapidity and prudence imposed by the normal banking movement in the comparison of the signature [on the check] with the one registered in the bank, in the moment of payment.<sup>207</sup> The Argentine Commercial Code then continues:

When the extremes indicated in the two preceding articles do not concur, the judges shall distribute the responsibility between the bank, the drawer and the beneficiary bearer, in its case, in accord with the circumstances and with the degree of fault incurred by each of them.<sup>208</sup>

Of the Latin American Commercial Codes examined in this article, the Argentine treatment of the forgery-fault seems the most sophisticated. Many of the other Latin American codes do, however, adopt the notion that the loss ought to be assessed against the person more at fault, whether the fault is personal to the customer or to a person who is closely related to or affiliated with him. For example, a Colombian bank is responsible to a depositor for the payment of a forged check, provided that the depositor notifies the bank of the forgery within three months after the bank returns the check to the depositor. If the forgery is due to the fault of the drawer, the bank is exonerated from responsibility. If the forgery was committed by the depositor's clerks, agents or representatives, then the loss falls on the depositor.<sup>209</sup>

Ecuador has taken a different approach to handling fraud. If the bank cashes a forged check which was not delivered by the bank to the drawer, the loss falls upon the bank. Forgery of checks furnished by the bank to the drawer results in the loss falling on whomever is at fault for the loss. If neither party is at fault, the loss belongs to the bank. If the drawer does not complain within six months from the delivery of the paid forged checks to the drawer, the loss belongs to the drawer. Any stipulation to the contrary is prohibited.<sup>210</sup>

The El Salvadorian drawer-customer of a bank is obligated to

---

206. *Id.*, art. 36.

207. *Id.*

208. *Id.*, art. 37.

209. CÓDIGO DE COMERCIO, art. 732 (Colombia).

210. LEY DE CHEQUES, art. 60.

give immediate notice in writing to the bank in the event of loss of his/her checks, so that the bank will not pay those checks.<sup>211</sup> Somewhat surprisingly, the commercial code does not seem to impose any sanction upon the customer who forgets or fails to notify the bank of a loss. This is indicated by a subsequent article of the code which states:

In case of payment of a forged check, the bank shall suffer the consequences:

- I. If the signature which appears as the drawer's is ostensibly different from the one given to the bank to recognize.
- II. If the check exhibits signs of alterations.
- III. If the check was not written (*extendido*) on the forms delivered by the bank to the drawer.<sup>212</sup>

#### M. *Forgery of the Payee's Signature*

Under the UCC, a "[h]older" means a person who is in possession of . . . an instrument . . . drawn, issued, or indorsed to him or his order or to bearer or in blank."<sup>213</sup> Under both this definition and the rule that an unauthorized signature is totally "inoperative as that of the person whose name is signed,"<sup>214</sup> it seems clear that a forged indorsement of the payee's name is wholly inoperative, and the possessor of the forged instrument can be a holder. Section 3-202 of the UCC states that if the instrument is payable to order it is negotiated by delivery "with any necessary indorsement." In short, no one can be a "holder" (let alone a holder in due course) if he/she takes under the forged indorsements of the payee or a special indorsee.<sup>215</sup> There are certain narrowly drawn exceptions to this general rule (for example, the imposter rule under section 3-405 and the negligence preclusion rule under section 3-406,) but the general rule prevents anyone from retaining possession of either the forged instrument or the proceeds of a check when the indorsement is forged. The "holder" of this check or draft is liable for breach of warranty to a payor bank or a nonbank drawee of a

---

211. CÓDIGO DE COMERCIO, art. 806 (El Salvador).

212. *Id.*, art. 818.

213. U.C.C. § 1-201(20).

214. U.C.C. § 3-404(1).

215. Benfield, *The New Payments Code and the Abolition of Holder in Due Course Status as to Consumer Checks*, 40 WASH. & LEE L. REV. 11, 23 (1983).

draft or the maker of a promissory note.<sup>216</sup> The bank violates its contract with the drawer if it pays the wrong person, therefore, the drawer has a right to insist that the payor recredit the customer-drawer's account.<sup>217</sup>

The basic underlying reason for the U.S. rule is that the payor has made payment under a mistake of fact. Therefore, it is unjust to deny restitution to the payor who has really paid out of its own funds. In the United States, payment in these cases is not final until the recipient of the check (or some intermediate party) makes restitution to the payor.

The preceding relationships and results are so commonplace in the United States that it seems to us that they must be universal. Much of the rest of the world, however, seems content with a system which places the loss on the customer by relieving the bank of liability and by insuring that the bona fide purchaser of the draft or check is neither liable to the bank, nor to the original owner, the payee.

England has chosen what might be termed a half-way house between the two extremes. Under the Bills of Exchange Act:

When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.<sup>218</sup>

This section must then be correlated with the following section of the Cheques Act of 1957:

Where a banker, in good faith and without negligence, (a) receives payment for a customer of an instrument to which this section applies; or (b) having credited a customer's account with the amount of such instrument, receives payment thereof for himself and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received pay-

---

216. U.C.C. §§ 4-207, 3-417.

217. U.C.C. § 4-401 comment 1.

218. Bills of Exchange Act, § 60.

ment thereof.<sup>219</sup>

Under these two sections, the payor bank is protected from liability when it pays a check bearing the forged signature of the payee, provided that it does so in good faith and in the ordinary course of business. The drawer then has no cause of action against the payor. The payee (the true owner) whose name has been forged, has no cause of action against the presenting or collecting bank (the depository bank under the Cheques Act of 1957). It would appear that the true owner then has a cause of action against the customer (if he can be found and is solvent) and any prior parties, including the forger. If the forger is the customer, then the payee will have little, if any, recourse for his/her loss. These two enactments place most of the cost of forgery upon customers while relieving the banks of the corresponding risks. Whether the U.S. solution or the English system is the "better" one, would depend upon which class (banks or customers) is being represented by the observer. Both systems have obviously survived, if not thrived, in spite of the disparity.

The civilian approach is the direct antithesis of the approach taken in the United States. In civilian countries, a forger can convey good title to a *bona fide transferee*, a payor (bank or non-bank drawee) is not obligated to verify the authenticity of the indorsements and payment under a forged indorsement may be rightful.

Part of the basic civilian approach is stated in the Geneva Draft Convention:

The possessor of a bill of exchange is deemed to be the lawful holder if he establishes his title to the bill through an uninterrupted series of endorsements, even if the last endorsement is in blank. In this connection, cancelled endorsements are deemed not to be written (*non écrits*). When an endorsement in blank is followed by another endorsement, the person who signed this last endorsement is deemed to have acquired the bill by the endorsement in blank.

Where a person has been dispossessed of a bill of exchange, in any manner whatsoever, the holder who establishes his right thereto in the manner mentioned in the preceding paragraph is not bound to give up the bill unless he has acquired it in bad faith, or unless in acquiring it he has been guilty of gross

---

219. The Cheques Act, 1957, 5 & 6 Eliz., ch.2, § 4.

negligence.<sup>220</sup>

Similar concepts are found in the Geneva Check Convention, although the wording differs slightly.<sup>221</sup>

Insofar as payment is concerned, the Geneva Draft Convention provides: "[h]e who pays at maturity is validly discharged, unless he has been guilty of fraud or gross negligence. He is bound to verify the regularity of the series of indorsements, but not the signature of the indorsers."<sup>222</sup> The Geneva Check Convention states the rule in even more terse language: "[t]he drawee who pays an endorseable cheque is bound to verify the regularity of the series of indorsements, but not the signature of the indorsers."<sup>223</sup>

The Geneva Draft Conventions' language regarding the "uninterrupted series of endorsements" is repeated in the Argentine Commercial Code.<sup>224</sup> The Conventions' imposition of a limited duty of inquiry upon the payor is also replicated in that code.<sup>225</sup> The phrase "uninterrupted series of endorsements" simply means that the payee's signature (genuine or forged) is the first signature on the reverse side of the check. Articles 19, 21 and 35 of the Geneva Check Convention are adopted in the Argentine Check Law. The Argentine draftsmen, however, add an interesting concept: although the payor is not bound to verify the authenticity of the signatures of the prior indorsers (as stated in the Geneva Convention) he is obligated "to verify the authenticity of the last indorser's signature."<sup>226</sup> The Geneva Draft Conventions' language has also been adopted in Venezuela without a real change in the text.<sup>227</sup>

El Salvador, while following much of the civilian view, adds some interesting concepts:

The owner of an instrument to order is the holder in whose favor it was issued, while there has not been any indorsement. The holder of an instrument to order which has been indorsed shall be considered the owner, provided that he justifies his

---

220. Geneva Draft Convention, art. 16.

221. Geneva Cheque Convention, arts. 19, 21.

222. Geneva Draft Convention, art. 40.

223. Geneva Cheque Convention, art. 35.

224. CÓDIGO DE COMERCIO, Título X, Cap. II, art. 17 (Argentina).

225. *Id.*, art. 43.

226. *Id.*, Título XIII, Cap. III, art. 32 (Argentina).

227. CÓDIGO DE COMERCIO, arts. 424, 448 (Venezuela).

right by means of an uninterrupted series of indorsements.<sup>228</sup>

The duty of the payor is artfully delineated:

He that pays is not obligated to ascertain the authenticity of the indorsements, nor does he have the power to require that it be proved, but he must verify the identity of the person who presents the instrument as the last holder, and the continuity of the indorsements.<sup>229</sup>

In a sense, both Argentina and El Salvador follow the "know your indorser" rule of the New York Stock Exchange.<sup>230</sup>

The Mexican law<sup>231</sup> is a virtual copy of the language used in El Salvador. Mexico, however, adds the thought that institutions of credit are authorized to credit the account of their customers for instruments even when the customer fails to indorse the instrument to the institution. Mexican law requires that a statement be written on the instrument that the amount has been credited to the customer's account.<sup>232</sup> This provision resembles section 4-205 of the UCC which authorizes the depository bank to indorse an instrument on behalf of the customer.

The Mexican law also provides for a *quasi in rem* procedure whereby the owner of an instrument may have the instrument cancelled if the instrument is lost or taken from him by robbery. One who purchases the instrument before the entry of a judgment of cancellation can neither be affected by this procedure nor be forced to surrender the instrument unless, it is proved that he purchased the instrument in grave fault or in bad faith.<sup>233</sup> If, the purchaser purchases the instrument after the publication of the decree of cancellation in the *Diario Oficial*, he is considered to be guilty of grave fault.<sup>234</sup>

Article 424 of the Ecuadorian Commercial Code follows article 16 of the Geneva Draft Convention fairly closely, while article 448 of the code follows article 40 of the convention. The draftsmen, however, added a gloss: "[h]e who pays at maturity, shall remain legitimately exonerated, unless there has been fraud or grave fault

228. CÓDIGO DE COMERCIO, art. 671 (El Salvador).

229. *Id.*, art. 672.

230. *Insurance Co. v. North America v. United States*, 35 U.C.C. REP. SERV. 1057 (E.D. Pa. 1983).

231. LEY GENERAL, arts. 38-39.

232. *Id.*, art. 39.

233. *Id.*, art. 43.

234. *Id.*, arts. 43, 45.

on his part."<sup>235</sup> The Ecuadorian Check provisions governing forgeries of the payee's signature closely resemble the Geneva Check Convention, although Ecuador (like El Salvador) imposes a duty upon the bank to verify "the identity of the person to whom payment is made."<sup>236</sup>

Colombia's treatment of this problem seems only a partial solution. Under the Colombian code, "the possessor of an instrument shall be considered the legitimate holder if he possesses it in conformity with its law of circulation."<sup>237</sup> The Colombian code also states that "[i]n order for the holder of an instrument to order to legitimate it, the chain of indorsers must be uninterrupted."<sup>238</sup>

The UN Draft Check Conventions attempt to reach a compromise between the extremely different views of the United States and the civilian countries. Under these two draft conventions, a person is a holder if he is in "possession of an instrument which has been endorsed to him, or on which the last endorsement is in blank, and on which there appears an uninterrupted series of endorsements, *even if any of the endorsements was forged or was signed by an agent without authority.* [Emphasis added]."<sup>239</sup>

The UN Draft Convention then goes on to state that:

(1) If an endorsement is forged, any party has against the forger, *and against the person to whom the instrument was directly transferred by the forger,* [emphasis added] the right to recover compensation for any damages that he may have suffered because of the forgery.

(2) The liability of a party or of the drawee who pays, or of any endorsee for collection who collects, an instrument on which there is a forged endorsement is not regulated by this Convention.<sup>240</sup>

The UN Check Convention has very similar language.<sup>241</sup>

The commentaries to both the Draft and Check Conventions point out that the effect of the above language is to make payment

235. CÓDIGO DE COMERCIO, art. 448 (Ecuador).

236. LEY DE CHEQUES, arts. 18, 30.

237. CÓDIGO DE COMERCIO, art. 647 (Colombia).

238. *Id.*, art. 661.

239. U.N. Draft Convention, art. 14; U.N. Check Convention, art. 16. The U.N. Check Convention uses the same wording, except the word "cheque" is substituted for the word "instrument."

240. U.N. Draft Convention, art. 23(1) & (2).

241. U.N. Check Convention, art. 25(1) & (2).



final as between the drawer and the drawee and between the drawee and the holder of the draft or check. The only non-final aspect is the fact that the payee can sue the forger or the first taker from the forger. This latter result is bottomed on the notion that the taker from the forger ought to know with whom he has dealt, and is, therefore, in the best position to prevent the fraudulent transmission of the instrument. The commentaries also note that if the first taker from the forger negotiates the instrument to another holder, the latter holder takes in bad faith and is not liable to the payee.<sup>242</sup> The comments also note that the use of the phrase "any party" enables a drawer who suffers a theft of the instrument (from the mails, for example) to sue the forger or the first taker from the forger, if the drawer suffers any loss from the theft and forgery.<sup>243</sup>

A casual reading of article 25 and its comments will give the reader a feeling of mental contentment. A second or third reading, however, will result in mental indigestion because of inconsistencies between the text and the commentary. For example, subsection 2 of article 25 states: "the liability of a party or of the drawee who pays, or of an endorsee for collection who collects, a cheque on which there is a forged endorsement is not regulated by this Convention." This subsection seems to state that the convention does not regulate the rights and duties of a party who pays or of a drawee who pays. However, commentary 20 to this section states:

*Finality of Payment.* Under Article 25 that advantage is substantially achieved; payment by the drawee is final. The legal relations between the drawee and the drawer, the payee and the drawer, the endorsers between themselves, the drawee and the person receiving payment are settled in a final way. The only "nonfinal" element is the rule that enables the person from whom the cheque was stolen to recover damages from the person who acquired the cheque from the forger.

In a kind of "over-kill" fashion, the commentary continues:

*Economy of remedies.* Payment by a drawee effects a discharge of his obligation to the drawer; the drawee may debit the drawer's account. There is no occasion for further action between them. It follows that there is no need for further action between the drawee and the person receiving payment, or be-

---

242. U.N. Draft Convention, art. 23 commentary at 27; U.N. Check Convention, art. 25 commentary at 27.

243. *Id.*, commentary at 26.

tween him and previous endorsers. The person whose signature is forged (payee or endorsee) loses his right to act upon the cheque, and therefore there is no need for further action by him against the drawer, drawee or any subsequent endorsee. All these potential actions are replaced by a single right of action to the owner of the cheque against the forger and the person who acquired the cheque from the forger.<sup>244</sup>

If these comments are correct, then subsection 2 of article 25 is superfluous because there is really nothing left to regulate by the law of the various countries insofar as the drawee or other payor is concerned. This suggestion is, however, contradicted by a further commentary to article 25: "[P]aragraph (2) makes clear that the convention makes no rule in respect of the liability of a party or the drawee to whom the cheque is transferred consequent upon payment of it by him."<sup>245</sup> This commentary seems to directly contradict the previous commentary. It also seems to be wrong internally because a holder, in presenting for payment does not transfer the draft or check to the drawee. Therefore, the drawee does not become a transferee in a legal sense. The drawee upon presentation is merely being called upon to pay, and is not acquiring title to the draft or check.

The next comment adds: "[P]aragraph (2) further lays down that the convention does not deal with the liability of a bank to which the forger has endorsed a cheque for collection and to which it is subsequently paid."<sup>246</sup> This commentary is apparently attempting to clarify the poor and conflicting drafting of subsections 1 and 2. Subsection 1 says that the first taker from the forger is liable to any party, while subsection 2 says that the convention does not regulate the liabilities of a collecting bank which in many, if not most, cases is the first taker from the forger. If the collecting bank's rights are not to be governed by the convention, then what is the reason for this omission? In the United States, the collecting bank can sue any of the prior indorsers (forger, and first taker, second taker, etc. from the forger) for breach of warranty, which then upsets the "finality" rule mentioned in the commentaries.<sup>247</sup> In short, the so-called uniformity of the convention could be destroyed in this area because of the failure to regulate the rights

---

244. *Id.*, commentary at 21.

245. *Id.*, commentary at 28.

246. *Id.*, commentary at 29.

247. *Supra* note 216.

and duties of the collecting bank.

### N. *Crossed Checks and Checks Payable in Account*

#### 1. CROSSED CHECKS

As discussed in the preceding section, a forger of the payee's name has the power in the civilian systems to pass on good title to a check, and the good faith drawee who pays a forged check is not liable to the drawer.<sup>248</sup> Even in England, legislation has been enacted to protect the payor and collecting banks.<sup>249</sup> In light of this policy, it seems almost inevitable that a countervailing rule would develop to protect against forgery. One of the most commonly adopted concepts has been the crossed check. The crossed check is simply an ordinary check with two parallel transverse lines with or without the word "banker" or the specific name of a bank inserted between the two transverse lines. If these two parallel transverse lines are present (with or without the word "banker" inserted between them), then the drawee-payor bank can pay only another bank (under some legislation) for "transit items"<sup>250</sup> or its own customer for an "on us"<sup>251</sup> item. If the specific name of a bank is inserted between the transverse lines, then the drawee-payor bank must pay only that specific bank. In the event that a drawee-payor fails to act in accordance with these rules, it is liable up to the face amount of the check.<sup>252</sup>

The real protections accorded by the crossed check concept are that if the check is drawn on the bank by one customer and presented for payment by another customer of the same bank, the drawee is in a position to determine the identity of the presenter and the authenticity of the indorsement. If the crossed check is a "transit item," and if the drawee-payor bank pays the collecting bank (as it is bound to do) then the presenting-collecting bank is in a good position to determine the identity of its customer and the authenticity of his indorsement.

---

248. See *supra* text accompanying note 46.

249. The Stamp Act, 1853, 16:17 Vict., ch. 59; the Cheques Act, 1957, *supra* note 219.

250. "Transit items" are items being handled by depository and collecting banks for payment by a drawee bank.

251. "On us" items refer to those situations where the drawee and depository bank are the same.

252. See Bills of Exchange Act §§ 76-81; Geneva Check Convention, arts. 37-38; see also, Murray, *Cross Checks, Account Payee, and Non-negotiable Checks: Some Suggestions from Foreign Law*, 20 HASTINGS L.J. 273 (1968).

If the drawee and presenting banks comply with the law, the only way that a forger can "beat" the system is to open an account in the name of the true payee and have sufficient identification to impersonate the true payee in the collection of the forged check. In this assumed case it appears that the English presenting bank would be absolved from liability if it were in good faith and acted in the ordinary course of business.<sup>253</sup> The same result follows in the civilian countries, as discussed in the preceding section.<sup>254</sup>

The Geneva Check Conventions' cross checked provisions are closely tracked in the UN Check Convention. It is to be noted, however, that article 70 of the UN Convention covers not only the drawee but also "the banker who takes or collects" a crossed check and makes it liable for any violation of the rules.

Guatemala<sup>255</sup> provides for the crossed check in language which does not track the Geneva Convention but which has similar results. The Argentina crossed check rules closely follow the Geneva Check Convention rules.<sup>256</sup> Even though the crossed check rules in El Salvador do not closely follow the check convention, the concepts are similar.<sup>257</sup> The Colombian crossed check rules are virtually the same as the Guatemalan,<sup>258</sup> and much of the wording of the Mexican provisions are the same as in Colombia.<sup>259</sup> Some of the wording of the crossed check provisions in Ecuador track the Geneva language, but certain phrases and clauses seem to have been omitted.<sup>260</sup> Venezuela does not appear to recognize the crossed check.

## 2. CHECKS PAYABLE IN ACCOUNT

The Geneva Check Convention provides yet another method of reducing the risk of forgery by the use of a check which can only be paid into the account of the payee:

The drawer or the holder of a cheque may forbid its payment in cash by writing transversally across the face of the cheque the words "payable in account" ("*a porter en compte*") or a similar

---

253. Cheques Act, 1957, § 4 (formerly § 82 of the Bills of Exchange Act).

254. See *supra* text accompanying note 218.

255. CÓDIGO DE COMERCIO, arts. 517-20 (Guatemala).

256. CÓDIGO DE COMERCIO, Título XIII, Cap. V, arts. 44-45 (Argentina).

257. CÓDIGO DE COMERCIO, art. 823 (El Salvador).

258. CÓDIGO DE COMERCIO, arts. 734-36 (Colombia).

259. LEY GENERAL, art. 197.

260. LEY DE CHEQUES, arts. 32-33 (Ecuador).

expression.

In such a case the cheque can only be settled by the drawee by means of a book-entry (credit in account, transfer from one account to another, set off or clearing-house settlement). Settlement by book-entry is equivalent to payment.

Any obliteration of the words "payable in account" shall be deemed not to have taken place.

The drawee who does not observe the foregoing provisions is liable for resulting damage up to the amount of the cheque.<sup>261</sup>

Neither the UCC nor the English Bills of Exchange Act recognize this procedure. The practice has developed in England, however, to use the phrase "account payee" or similar words, in conjunction with the crossed check. It has been held that bankers are put on notice by this legend and a disregard of it may well constitute negligence.<sup>262</sup>

Under the wording of the Geneva Check Convention, if the check is drawn with the words "payable in account" written on the face, a drawee bank can either credit the account of the payee if he/she is a depositor with the drawee, or make a clearinghouse settlement with a presenting-depository bank. The Geneva Convention is strangely silent about any duty of the depository bank to also make certain that the funds are paid to the account of the payee.

The El Salvadorian articulation of "payable in account" seems to be better than the Geneva wording:

The drawer or the holder may order that a check be not paid in cash, by means of the insertion in the document of the expression "for payment in account." In this case, the drawee shall only make payment by crediting the amount of the check in the account which it has or opens in favor of the holder, or to the bank in which it has been deposited to his account. The drawee who pays in another form, is responsible for irregular payment. When the expression is found on the face [of the check], the credit must be made for the first holder; when it is found across an indorsement, the credit shall be made in favor of said indorser.

The check is not negotiable starting from the insertion of the clause "for payment in account." The clause may not be erased.

---

261. Geneva Cheque Convention, art. 39.

262. BYLES, *supra* note 77, at 280.

The check for payment in account does not require the signature of the customer.<sup>263</sup>

Argentina tracks the Geneva rules rather closely.<sup>264</sup> A somewhat similar approach is taken in Mexico.<sup>265</sup> It is implied in both codifications that the account must be in the drawee bank and not in a presenting bank. This implication is made a little more clearly in the Guatemalan Code which provides that "[i]f the holder does not have an account and the bank refuses to open one, its refusal of payment will be, without responsibility."<sup>266</sup> This confinement of "payable in account" to an account in the drawee bank is even clearer in Colombia: "[i]n this case, the drawee shall only pay the check by crediting its amount in the account which the holder has or opens."<sup>267</sup> Ecuador also tracks the Geneva language rather closely.<sup>268</sup>

#### *O. Underlying Validity of a Draft or Check In Spite of Forged Signatures*

It is the experience of the author that law students (and sometimes lawyers) have difficulty comprehending that even though a negotiable instrument may have forged signatures, signatures of imaginary persons or signatures of incompetents, it still might have some legal and economic viability because of some genuine signatures on the instrument. This problem becomes acute when attempting to distinguish between the differing legal results which occur when a forgery of the drawer's signature is compared with a forgery of a payee or special indorsee's signature.

The UCC does not have a succinct, comprehensive statement covering this situation. The Geneva Draft Convention does, however, answer the problem directly:

If a bill of exchange bears signatures of persons incapable of binding themselves by a bill of exchange, or forged signatures, or signatures of fictitious persons, or signatures which for any other reason cannot bind the persons who signed the bill of exchange or on whose behalf it was signed, the obligations of the other

---

263. CÓDIGO DE COMERCIO, art. 824 (El Salvador).

264. CÓDIGO DE COMERCIO, Título XIII, Cap. VI, art. 46 (Argentina).

265. LEY GENERAL, art. 198.

266. CÓDIGO DE COMERCIO, art. 522 (Guatemala).

267. CÓDIGO DE COMERCIO, art. 737 (Colombia).

268. LEY DE CHEQUES, arts. 34-35.

persons who signed it are none the less valid.<sup>269</sup>

Very similar language is found in the Geneva Check Convention.<sup>270</sup>

The provisions of the Geneva Draft and Check Conventions are adopted in Argentina.<sup>271</sup> Somewhat similar language has been adopted in Mexico,<sup>272</sup> Guatemala<sup>273</sup> and El Salvador.<sup>274</sup> Ecuador has chosen a bifurcated approach: one article states that "the falsification of a signature, even when it is of the drawer or of the acceptor, does not affect the validity of the other signatures."<sup>275</sup> A prior article states that "[i]f a bill of exchange bears the signature of persons incapable of obligating themselves, this does not affect the validity of the obligations contracted by the other signatories."<sup>276</sup> The two foregoing articles are applicable to bills of exchange. Article 10 of the Geneva Check Convention is a part of the Ecuadorian law of checks.<sup>277</sup>

#### *P. The "Shelter Principle"*

It is a familiar rule in the United States that "a holder from a holder in due course has all the rights of a holder in due course," or as expressed by the UCC:

Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.<sup>278</sup>

The phrase "or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course" is illustrated by comment 2(c):

269. Geneva Draft Convention, art. 7.

270. Geneva Cheque Convention, art. 10.

271. CÓDIGO DE COMERCIO, Título X, Cap. I, art. 7; Título XIII, Cap. I, art. 10 (Argentina).

272. LEY GENERAL, art. 12.

273. CÓDIGO DE COMERCIO, art. 394 (Guatemala).

274. CÓDIGO DE COMERCIO, art. 635 (El Salvador).

275. CÓDIGO DE COMERCIO, art. 477 (Ecuador).

276. *Id.*, art. 416.

277. LEY DE CHEQUES, art. 9.

278. U.C.C. § 3-201(1).

A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes with notice of the fraud. B negotiates it to C, a holder in due course, and then repurchases the instrument from C. B does not succeed to C's rights as a holder in due course, and remains subject to the defense of fraud.

This provision of the UCC is both a statement of the general property concept that an owner can transfer all of his rights to another free of prior claims, and, at the same time, a public policy limitation on the property rule.

The English Bills of Exchange Act has a much narrower provision regarding the shelter principle:

A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.<sup>279</sup>

It should be noted that this provision makes no mention of the prior party concept articulated in the UCC. The UN Check and Draft Conventions, however, allegedly do cover the "prior party" principle: "The transfer of a cheque by a protected holder vests in any subsequent holder the rights to and upon the cheque which the protected holder had, except where such subsequent holder participated in a transaction which gives rise to a claim to or a defense upon the cheque."<sup>280</sup>

Although these articles make no mention of prior parties, a commentary does address this issue:

The shelter rule applies irrespective of whether the subsequent holder to whom the cheque is transferred is a previous party to the change. *Example D*. The payee P induces by fraud the drawer to draw a cheque to P, which P transfers to A who knows about the fraud. A transfers to B who is a protected holder. B transfers to C and C to A. A acquires the rights of a protected holder according to article 29(1) although as a previous party he was a holder against whom the drawer could have raised the defense of fraud.<sup>281</sup>

This UN provision, which allows a prior party to wash the in-

---

279. Bills of Exchange Act, § 29(3).

280. U.N. Draft Convention, art. 27; U.N. Check Convention, art. 29.

281. U.N. Check Convention, art. 29 commentary at 2.



strument clean by a negotiation to a "protected party," is the direct antithesis of the UCC provision. Unfortunately, the comment makes no mention of any reason for this approach. Is commerce really facilitated when knowing purchasers of negotiable instruments can work in cooperation with defrauders to cleanse the paper? It is one thing for a knowing purchaser to purchase from a protected holder and acquire his protected status. It is something else to allow the knowing purchaser to create a protected holder who can then convey good title back to the knowing transferor. It is suggested that this is carrying a good principle to extremes. This official commentary goes beyond the literal terms of the article. A close reading of the article does not necessarily lead one to the conclusion of the commentary.

Q. *Rights of the Transferee Without Indorsement*

Under the UCC,<sup>282</sup> if a payee (or special indorsee) transfers the instrument without indorsing it, the transferee is a holder because of the absence of the indorsement. He/she is, however, a transferee with all the rights of the payee (or special indorsee.) If the payee (or special indorsee) is a holder in due course, then the transferee has the same rights. In addition, the transferee has the right to have a court compel the transferor to indorse (unless there was some contrary agreement). This aspect of the "shelter principle" is paralleled in the English Bills of Exchange Act: "[w]here the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and, in addition, the transferee acquires the right the have the indorsement of the transferor."<sup>283</sup>

The Mexican and El Salvadorian Commercial Codes have provisions which closely parallel the Anglo-American laws. The Mexican Commercial Code states:

The transfer of an instrument made payable to a person (*nominativo*) by an ordinary assignment or by any other legal means different from the indorsement, subrogates the acquirer to all of the rights which the instrument confers; but it is subject to all of the personal objections that the obligor may oppose against the author of the transfer. The transferee has the right

---

282. U.C.C. § 3-201.

283. Bills of Exchange Act, § 31(4).

to demand the delivery of the instrument.<sup>284</sup>

The Mexican Code then adds:

He who proves that a negotiable instrument made payable to a person has been transferred by means distinct from an indorsement, may demand that the judge, by way of a voluntary action, make a record of the transfer on the same document or an affixed sheet. The signature of the judge must be certified.<sup>285</sup>

The language of the El Salvadorian Commercial Code closely tracks the language of the Mexican Commercial Code. However, the El Salvadorian Code adds a clause providing that "[t]he record which the judge places on the instrument, shall be taken as an indorsement."<sup>286</sup>

*R. Accommodated Parties: Who is the Party Being Accommodated?*

Under the UCC<sup>287</sup> and the prior NIL,<sup>288</sup> a person may sign in the status of a maker, indorser or acceptor as an accommodation party for another party on the instrument. It is often impossible in this case to determine who is the party being accommodated — (the principal debtor) from merely looking at the face or reverse side of the instrument. As a result, parol testimony can be used by the accommodation party to show for whom he/she signed, as against immediate parties and remote parties who have notice of the accommodation nature of the transaction.<sup>289</sup> Under this view, if two people sign as makers, they can testify that they signed for the benefit of the payee and thereby defeat liability when they are sued by the payee. In addition, an indorser can testify that he signed for the benefit of the maker or of another indorser-indorsee.<sup>290</sup>

This practice of admitting parol testimony has developed partly because the UCC has neither a provision requiring an accommodation party to indicate for whom he/she is acting as an ac-

284. LEY GENERAL, art. 27.

285. *Id.*, art. 28.

286. CÓDIGO DE COMERCIO, arts. 660, 661 (El Salvador).

287. U.C.C. § 3-415.

288. N.I.L., *supra* note 88, § 29.

289. U.C.C. § 3-415.

290. Murray, *Accommodation Party Pitfalls: A Statutory Change is Needed*, 15 U.C.C. L.J. 248 (1983).

commodation party, nor any provision stating the result if the accommodation party fails to indicate the name of the principal debtor. This failure to legislate is harmless if all men are angels, but if a maker can defeat liability by perjuring himself/herself by testifying that he/she signed for the payee, the maker might just succumb to temptation. By the same token, if a payee is sued by a subsequent party, the payee might be tempted to perjure himself/herself in order to escape liability.

Section 28(1) of the English Bills of Exchange Act states that an "accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefore, for the purpose of lending his name to some other person." This language seems broad enough to lead to the same result as in the United States.

The civilian system recognizes only one form of a "surety" on a negotiable instrument: the *aval*, which can be translated as a guaranty. The *aval*, is given under the Geneva Draft Convention by writing the words "good as *aval*" or other equivalent formula followed by the signature of the giver of the *aval* on the reverse side of the draft. The giver of the *aval* (the *avalista* in Spanish) can give the guaranty by merely signing his name on the face of the draft without adding the foregoing language.<sup>291</sup>

Under the Geneva Draft Convention,<sup>292</sup> "[a]n 'aval' must specify for whose account it is given. In default of this, it is deemed to be given for the drawer."<sup>293</sup> The Geneva Check Convention has an identical provision regarding checks.<sup>294</sup>

The UN Draft Convention repeats much of the wording of the Geneva Draft and Check Conventions, but turns part of the rule upside down by providing that a "guarantor *may specify the person for whom he has become guarantor, in the absence of such specification, the person for whom he has become guarantor is the acceptor or the drawee in the case of a bill, and the maker in the case of a note [emphasis added].*"<sup>295</sup> The commentary states that the *aval* is deemed to be in favor of the acceptor, a drawee or the maker of the note, because this "rule is justified by the fact that it is from the drawee, acceptor or maker that payment must initially

---

291. Geneva Draft Convention, art. 31.

292. *Id.*

293. *Id.*

294. Geneva Cheque Convention, art. 26.

295. U.N. Draft Convention, art. 42(5).

be demanded."<sup>296</sup> A further commentary states that the word "deemed" must be construed as creating an "irrebuttable presumption" that the *aval* is given for the acceptor, drawee or maker of a note, in the absence of a clear indication otherwise.<sup>297</sup>

The Geneva Draft Conventions' provisions dealing with promissory notes state that if the *aval* fails to indicate for whom it is given, it is deemed to have been given for the maker of the note.<sup>298</sup> Argentina,<sup>299</sup> Venezuela<sup>300</sup> and Ecuador<sup>301</sup> follow the Geneva Draft Convention. El Salvador, although following many of the same *aval* concepts which are found in the Geneva Draft Convention, deviates from the Draft Convention by stating that if the *aval* fails to indicate for whose benefit it is extended, then it shall be for the acceptor and if there is none, then, in favor of the drawer.<sup>302</sup> The same rule holds true in Mexico.<sup>303</sup>

Guatemala's treatment of this problem is most unusual. When the giver of the *aval* fails to indicate for whom he signs, "it shall be understood that it guaranties the obligations of the signatory who discharges (*liber*) the greatest number of obligors."<sup>304</sup> Colombia, on the other hand, follows the view that when the giver of the *aval* fails to indicate the party guaranteed, the *aval* guaranties the obligations of all of the parties to the instrument.<sup>305</sup>

### S. *Accommodation Parties and the Invalidity of the Principal Obligation*

Courts in the United States are split as to whether an accommodation party's liability is discharged when the principal obligation is deemed invalid because of forgery, fraud, duress, etc.<sup>306</sup> Nothing in sections 3-415 and 3-416 of the UCC (and their respective comments) is specifically directed to this question. It appears, under section 3-416, that when an accommodation party guaranties payment, the guarantor is liable (under the majority view) even

---

296. *Id.*, commentary at 4.

297. *Id.*, commentary at 5.

298. Geneva Draft Convention, art. 77.

299. CÓDIGO DE COMERCIO, Título X, Cap. IV, arts. 32-34 (Argentina).

300. CÓDIGO DE COMERCIO, art. 439 (Venezuela).

301. CÓDIGO DE COMERCIO, art. 439 (Ecuador).

302. CÓDIGO DE COMERCIO, art. 728 (El Salvador).

303. LEY GENERAL, art. 113.

304. CÓDIGO DE COMERCIO, art. 404 (Guatemala).

305. CÓDIGO DE COMERCIO, art. 637 (Colombia).

306. L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP, 271-73 (1850).

when it is proved that the signature of the principal debtor was forged.<sup>307</sup> The result is premised on the view that the payment guarantor is liable without any presentment, etc., to the principal debtor. In fact, the payment guarantor's liability "becomes indistinguishable from that of a co-maker."<sup>308</sup> It also appears that the simple accommodation party under section 3-415 cannot plead usury if, for example, the corporate principal debtor cannot plead it as a defense.<sup>309</sup> Part of the problem is that the UCC (and prior case law) recognizes two classes of sureties, the simple accommodation party and the guarantor. Even though the Restatement of Security<sup>310</sup> has tried to treat these two classes as one, the code and the cases appear to perpetuate the dicotomy. The instant problem, as well as other problems can be solved by consolidating sureties into one class with uniform rights and duties.

As stated in the preceding section of this article, the civilian system recognizes only one form of a "surety" on a negotiable instrument: the *aval*.<sup>311</sup> The Geneva Draft Convention provides that the *avalista's* (the guarantor's) "undertaking is valid even when the liability which he has guaranteed is inoperative for any reason other than defect of form."<sup>312</sup> The Geneva Check Convention also provides that the payment of checks can be guaranteed by use of the *aval*. The language in the Check Convention closely follows the provisions in the Draft Convention.<sup>313</sup>

Venezuela follows the same *aval* concepts, but adds the thought that the *avalista* is subrogated to the claim.<sup>314</sup> Mexico law provides that the guarantor is severally liable with the person whose signature has been guaranteed, and "his obligation is valid, even when the guaranteed obligation is void for any cause."<sup>315</sup> A similar rule prevails in Ecuador.<sup>316</sup> The Colombian version of this rule is worded differently but is conceptually the same.<sup>317</sup> The Ar-

307. *Universal Metals & Machinery, Inc. v. Bohart*, 19 Tex. 360, 539 S.W. 2d 874, 19 U.C.C. REP. SERV. 891 (1976).

308. U.C.C. § 3-416 official comment.

309. *See, e.g., Artistic Greetings, Inc. v. Sholom Greeting Card Co., Inc.*, 318 N.Y.S.2d 623, 8 U.C.C. REP. SERV. 1294 (1971).

310. RESTATEMENT OF SECURITY § 82 comment 6 (1937-40).

311. *See supra* text accompanying note 286.

312. Geneva Draft Convention, art. 32.

313. *Id.*, arts. 25-27.

314. CÓDIGO DE COMERCIO, art. 440 (Venezuela).

315. LEY GENERAL, art. 114.

316. CÓDIGO DE COMERCIO, art. 440 (Ecuador).

317. CÓDIGO DE COMERCIO, art. 636 (Colombia).

gentine version closely tracks the Geneva Convention language.<sup>318</sup> Guatemala affirms that the *avalista* remains liable "even when the obligation of the party accommodated [*avalado*] is null for any cause."<sup>319</sup> El Salvador, using different wording, follows the same notion.<sup>320</sup>

The UN Draft Convention and Check Conventions, for some unexplained reason, have deviated from the general rule used in civilian countries that the guarantor remains liable even though the principal obligation is void. Under virtually the same wording, both conventions advance the view that "[a] guarantor is liable on the instrument<sup>321</sup> [cheque]<sup>322</sup> to the same extent as the party for whom he has become guarantor, unless the guarantor has stipulated otherwise on the instrument." One of the commentaries notes that "the guarantor may base defenses against his liability on the instrument on the defences which the party for whom he became guarantor may invoke."<sup>323</sup> This complete deviation from the general civilian approach must have been dictated by the draftsmen's desire to compromise by shifting this concept towards the approach followed by the United States.

#### T. *Guaranty of Payment of a Check*

The concept of a guaranty of the payment of a check would seem to be entirely foreign to Anglo-American law (although the author sadly remembers having a few checks which he now wishes had been guaranteed). Under the UCC if a person signs his name on the reverse side of a check he can be considered an accommodation indorser.<sup>324</sup> The same result follows under the English Bills of Exchange Act.<sup>325</sup>

Under the Geneva Check Convention: "Payment of a cheque may be guaranteed by an 'aval' as to the whole or part of its amount. This guarantee may be given by a third person other than the drawee, or even by a person who has signed the cheque."<sup>326</sup>

318. CÓDIGO DE COMERCIO, Título X, Cap. IV, art. 34 (Argentina).

319. CÓDIGO DE COMERCIO, art. 403 (Guatemala).

320. CÓDIGO DE COMERCIO, art. 729 (El Salvador).

321. U.N. Draft Convention, art. 43.

322. U.N. Check Convention, art. 41.

323. *Id.*, commentary at 2.

324. U.C.C. §§ 3-402, 3-415, 3-416.

325. Bills of Exchange Act, § 56.

326. Geneva Cheque Convention, art. 25.

The convention then goes into the mechanics of the *aval*:

An 'aval' is given either on the cheque itself or on an 'al-longe.' It is expressed by the words 'good as aval', or by any other equivalent formula. It is signed by the giver of the 'aval.' It is deemed to be constituted by the mere signature of the giver of the 'aval' placed on the face of the cheque, except in the case of the signature of the drawer. An 'aval' must specify for whose account it is given. In default of this, it is deemed to be given for the drawer.<sup>327</sup>

The UN Check Convention closely tracks the language of the Geneva Convention, except that it adds the following language "a signature alone on the back of the cheque is an endorsement."<sup>328</sup> The giver of an *aval* under this clause must add the word *aval* or words of similar import in order to be distinguished from a mere indorser.

Colombia,<sup>329</sup> El Salvador,<sup>330</sup> Venezuela,<sup>331</sup> Mexico<sup>332</sup> and Guatemala<sup>333</sup> all recognize the ability to guaranty checks in a manner similar to the guaranty of drafts and with the same legal effects.

#### U. *Time of Presentment for Payment of Checks*

The UCC has taken a limited approach to the question of what is a reasonable time to present a check for payment:

In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection.

(a) with respect to the liability of the drawer, thirty days after date or issue which is later, and

(b) with respect to the liability of an indorser, seven days after his indorsement.<sup>334</sup>

327. *Id.*, art. 26.

328. U.N. Check Convention, art. 40(4)(b).

329. CÓDIGO DE COMERCIO, arts. 632-38 (Colombia).

330. CÓDIGO DE COMERCIO, arts. 803, 725-31 (El Salvador).

331. CÓDIGO DE COMERCIO, arts. 496, 438-40 (Venezuela).

332. LEY GENERAL, arts. 196, 109-16.

333. CÓDIGO DE COMERCIO, arts. 400-05 (Guatemala).

334. U.C.C. § 3-503(2).

What happens in the United States if a check is mailed from San Francisco to New York and it takes a week or so to wind its way to the payee or from the payee to an indorsee; is the delay in the mails to be taken into account? What happens if a check is drawn in Mexico City, Mexico, payable in New York: when must presentment be made? What is the result of a check drawn in New York and payable in Mexico City? Of course, one may dismiss the whole problem by saying that these are choice of law problems, not negotiable instrument problems. This academic "answer" is of little assistance to bankers, lawyers, businessmen, etc. On the other hand, if the UCC controls the question, presentment has to be made within a "reasonable time," whatever this term means.

The English law is scarcely more helpful. It states that "[i]n determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case."<sup>335</sup>

Some other countries deal with this problem in a more satisfying manner. In Mexico, for example:

Checks shall be presented for payment:

- I. Within fifteen calendar days which follow their date [of insurance]; if they are payable in the same place of their dispatch;
- II. Within one month, if they are dispatched and payable in diverse places in the national territory;
- III. Within three months, if they are dispatched in foreign countries and payable in the national territory; and
- IV. Within three months, if they are dispatched within the national territory to be paid in foreign countries, provided that another time has not been fixed by the laws of the place of presentation.<sup>336</sup>

Guatemala is content to state that checks must be presented "within fifteen days of their creation."<sup>337</sup> El Salvador's provisions are a replica of the Mexican provisions.<sup>338</sup> In Argentina, checks drawn within the country must be presented within thirty days and checks drawn out of the country, but payable in Argentina,

---

335. Bills of Exchange Act, § 45-[2].

336. LEY GENERAL, art. 181.

337. CÓDIGO DE COMERCIO, art. 502 (Guatemala).

338. CÓDIGO DE COMERCIO, art. 808 (El Salvador).



must be presented within sixty days of issuance.<sup>339</sup> Ecuador has a different approach to the time of presentment problem:

Checks issued drawn and payable in Ecuador must be presented for payment within the term of twenty days, counted from the date of their issuance. Those checks drawn in the exterior [outside of Ecuador] and payable in Ecuador must be presented for payment within the term of ninety days, counted from the date of their issuance.

Those checks drawn in Ecuador and payable in the exterior [outside of Ecuador] shall be subject, for presentment for payment, to the terms or times determined by the law of the state where the drawee bank has its domicile.<sup>340</sup>

Colombia has yet another method of dealing with the question:

Checks must be presented for their payment:

- 1) Within fifteen days from their date, if they are payable in the same place as of its issuance;
- 2) Within one month, if they are payable in the same country of their issuance, but in a different place in it;
- 3) Within three months, if they are issued in one Latin American country and payable in another Latin American country; and
- 4) Within four months, if they are issued in any Latin American country for payment outside of Latin America.<sup>341</sup>

Colombia's omission of any mention of its Canadian and United States neighbors to its north seems to be a studied one.

The Geneva Check Convention provides that:

A cheque payable in the country in which it was issued must be presented for payment within eight days.

A cheque issued in a country other than that in which it is payable must be presented within a period of twenty days or of seventy 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.

---

339. CÓDIGO DE COMERCIO, Título XIII, Cap. III, art. 25 (Argentina).

340. LEY DE CHEQUES, art. 25.

341. CÓDIGO DE COMERCIO, art. 718 (Colombia).

For the purposes of this article cheques issued in a European country and payable in a country bordering on the Mediterranean or vice versa are regarded as issued and payable in the same continent.

The date from which the above-mentioned periods of time shall begin to run shall be the date stated on the cheque as the date of issue.<sup>342</sup>

For some unexplained reason, the draftsmen of the UN Check Convention have turned away from this tradition of making time allowances for geographical differences, and, under that convention, a "cheque must be presented for payment within 120 days of its date."<sup>343</sup>

#### V. *Installment and Interest Bearing Instruments*

It is a common practice in the United States for promissory notes to bear interest and to be payable in installments. It is also possible, although less common, for bills of exchange to provide for installment payments bearing interest charges. Section 3-106 of the UCC seems to offer numerous possible combinations of interest and installment payments. The comparable provision in the English Bills of Exchange Act is not as broad as the UCC, but does permit payment in installments and the payment of interest.<sup>344</sup>

The Geneva Draft Convention illustrates a sharp turning away from the Anglo-American practice:

When a bill of exchange is payable at sight, or at a fixed period after sight, the drawer may stipulate that the sum payable shall bear interest. In the case of any other bill of exchange, this stipulation is deemed not to be written (*non-écrite*).

The rate of interest must be specified in the bill; in default of such specification, the stipulation shall be deemed not to be written (*non-écrite*). Interest runs from the date of the bill of exchange unless some other date is specified.<sup>345</sup>

It seems somewhat strange that drafts which have an indeterminate maturity date are allowed to bear interest, while those instruments with a fixed maturity date are not. In any event, the same

---

342. Geneva Cheque Convention, art. 29.

343. U.N. Check Convention, art. 43(b).

344. Bills of Exchange Act, § 9.

345. Geneva Draft Convention, art. 5.

convention provides a similar rule for promissory notes.<sup>346</sup> The Geneva Check Convention succinctly states that “[a]ny stipulation concerning interest which may be embodied in the cheque shall be disregarded.”<sup>347</sup>

Regarding installment payments of principal, the Geneva Draft Convention provides that bills of exchange may be payable at sight, at a fixed period after sight, at a fixed period after date or at a fixed date. “Bills of exchange at other maturities or payable by installments are null and void.”<sup>348</sup> The same rule prevails for promissory notes.<sup>349</sup>

The UN Draft Convention reflects a turning away from the Geneva Convention, with a broad swing back to the Anglo-American view.

The sum payable by a instrument is deemed to be a definite sum although the instrument states that it is to be paid:

- (a) with interest;
- (b) by installments at successive dates;
- (c) by installments at successive dates with the stipulation on the instrument that upon default in payment of any installment the unpaid balance becomes due.<sup>350</sup>

The commentary notes that the above proposed rules “respond to the majority view expressed by banking and trade circles that it would be desirable . . . to permit the drawing or making of instruments containing a stipulation of interest or with successive maturity dates.”<sup>351</sup> Under this proposed rule, it must be noted that the rate of interest has to be stated because the mere mention of interest without a stated rate “is deemed not to have been written.”<sup>352</sup> Further, the monetary amount of each installment must be specified on the face of the instrument.<sup>353</sup> The Draftsmen of the UN Check Convention have reaffirmed the old rule that any “stipulation on a cheque that it is to be paid with interest is deemed not to

---

346. *Id.*, art. 77.

347. Geneva Cheque Convention, art. 7.

348. Geneva Draft Convention, art. 33.

349. *Id.*, art. 77.

350. U.N. Draft Convention, art. 6.

351. *Id.*, art. 6 commentary at 2.

352. *Id.*, art. 7(4).

353. *Id.*, arts. 1(2)(b) and 6(b).

have been written."<sup>354</sup>

Although "banking and trade circles" might like the notions of installment payments and the payment of interest, the current legislation in much of Latin America is to the contrary. For example, in El Salvador, bills of exchange with "successive maturities" are null<sup>355</sup> and the stipulation of interest is invalid.<sup>356</sup> Interest on bills of exchange is outlawed in Mexico,<sup>357</sup> while instruments with successive maturities "shall always be understood as payable on sight for the totality of the sum which it expresses."<sup>358</sup> This rule that the total amount of the bill is payable on sight is a harsh sanction.

Venezuela follows the Geneva Convention and allows interest on bills of exchange which are payable at sight or at a certain time after sight, but outlaws interest on other bills.<sup>359</sup> Installment payments are again forbidden.<sup>360</sup> Like Mexico, Guatemala provides that if the draft calls for installment payments, it shall be payable at sight.<sup>361</sup> Unlike Mexico, Guatemala allows interest on sight drafts and those drafts which are payable at a set number of days after sight.<sup>362</sup>

Ecuador also forbids installment payments on bills of exchange<sup>363</sup> and in promissory notes.<sup>364</sup> Sight drafts and drafts payable at a certain time after sight, however, may carry interest. If the amount of interest is not specified, it is five per cent per annum.<sup>365</sup> Argentina is in accord with Ecuador and allows interest on sight drafts, but, if the interest rate is not specified, the clause shall not be considered written.<sup>366</sup> Installment payment drafts are also null in Argentina.<sup>367</sup>

Colombia, as distinguished from the other Latin American countries surveyed in this article, provides that the "bill of exchange may contain interest clauses and exchange clauses at a

---

354. U.N. Check Convention, art. 9.

355. CÓDIGO DE COMERCIO, art. 706 (El Salvador).

356. *Id.*, art. 704.

357. LEY GENERAL, art. 78.

358. *Id.*, art. 79.

359. CÓDIGO DE COMERCIO, art. 414 (Venezuela).

360. *Id.*, art. 441.

361. CÓDIGO DE COMERCIO, art. 443 (Guatemala).

362. *Id.*, art. 442.

363. CÓDIGO DE COMERCIO, art. 441 (Ecuador).

364. *Id.*, art. 488.

365. *Id.*, art. 414.

366. CÓDIGO DE COMERCIO, Título X, Cap. I, art. 5 (Argentina).

367. *Id.*, Cap. V, art. 35.

fixed or current rate.”<sup>368</sup> In a consistent vein, the bill may be payable “[w]ith successive certain maturities.”<sup>369</sup>

### W. *The Drawer Who Draws Without Recourse*

In the United States, a drawer of a bill of exchange promises that upon dishonor of the draft and notice of dishonor, he will pay the draft to the holder. However, “[t]he drawer may disclaim this liability by drawing without recourse.”<sup>370</sup> The comments to this section do not state that the disclaiming wording must be in writing, although the section heavily implies such a requirement by using the word “drawing.” The comments to the section, dealing with an indorsement without recourse, emphasize that the disclaimer “without recourse” must be in writing.<sup>371</sup> This notion of “without recourse” drawing can be traced back to the former NIL.<sup>372</sup> Under the English Bills of Exchange Act, the “drawer of a bill, and any indorser, may insert therein an express stipulation—(1) Negating or limiting his own liability to the holder.”<sup>373</sup>

The Geneva Bills of Exchange Convention tersely deals with this subject: “[T]he drawer guarantees both acceptance and payment. He may release himself from guaranteeing acceptance; every stipulation by which he releases himself from the guarantee of payment is deemed not to be written (*non-écrite*).”<sup>374</sup>

The above clause is part of the law in Argentina<sup>375</sup> and Guatemala.<sup>376</sup> In El Salvador,<sup>377</sup> Mexico<sup>378</sup> and Colombia,<sup>379</sup> the drawer cannot exclude his liability for both acceptance and payment. Ecuador<sup>380</sup> and Venezuela<sup>381</sup> follow the Geneva model, but without adopting the specific language used.

In spite of the common adoption of the rule that a drawer can-

368. CÓDIGO DE COMERCIO, art. 672 (Colombia).

369. *Id.*, art. 673(3).

370. U.C.C. § 3-413(2).

371. U.C.C. § 3-414, comment 1.

372. N.I.L., *supra* note 88, § 61.

373. Bills of Exchange Act, § 16(1).

374. Geneva Draft Convention, art. 9.

375. CÓDIGO DE COMERCIO, Título X, Cap. I, art. 10 (Argentina).

376. CÓDIGO DE COMERCIO, art. 449 (Guatemala).

377. CÓDIGO DE COMERCIO, art. 711 (El Salvador).

378. LEY GENERAL, art. 87.

379. CÓDIGO DE COMERCIO, art. 678 (Colombia).

380. CÓDIGO DE COMERCIO, art. 418 (Ecuador).

381. CÓDIGO DE COMERCIO, art. 418 (Venezuela).

not (at the very least) exonerate himself from liability for payment in the event that the drawer fails to pay, the UN Draft Convention adopts the view that the "drawer may exclude or limit his own liability by an express stipulation on the bill. Such stipulation has effect only with respect to the drawer."<sup>382</sup> In addition to this drastic change, a commentary to this section says it:

deals only with a stipulation made expressly on the bill. It does not prevent a drawer from excluding or limiting his liability by an agreement outside the bill; in such a case he may invoke the exclusion or limitation as a defence against a holder in accordance with article 25(1) unless that holder is a protected holder. . . .<sup>383</sup>

This commentary apparently encourages the use of parol testimony against holders who allegedly know of the extraneous disclaimer of liability. Encouraging the use of parol testimony is again advanced in a subsequent article which states that "[t]he maker may not exclude or limit his own liability by a stipulation on the note. Any such stipulation is without effect."<sup>384</sup> A commentary to this article repeats language similar to that regarding the drawer, and again allows the use of parol testimony to directly contradict a positive prohibition in the Draft Convention.<sup>385</sup> This is a strange way of drafting a treaty.

#### *X. Bearer Instruments and Special Indorsements*

The UCC states that a "special indorsement specifies the person to whom or to whose order it makes the instrument payable. Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement."<sup>386</sup> Under this section, an instrument which is payable to bearer on the face can be specially indorsed. Further, negotiation then requires the indorsement of the special indorsee. The paper is no longer negotiable by mere delivery.<sup>387</sup> The UCC reversed the NIL rule that when "an instrument payable to bearer, is indorsed specially, it may nevertheless be further negotiated by de-

---

382. U.N. Draft Convention, art. 34.

383. *Id.*, at commentary 7.

384. *Id.*, art. 35(2).

385. *Id.*, at commentary 4.

386. U.C.C. § 3-204(1).

387. *Id.*, official comment.

livery."<sup>388</sup> The English Bills of Exchange Act succinctly states the same rule: "[a] bill payable to bearer is negotiated by delivery."<sup>389</sup>

The whole problem is neatly avoided in the Geneva Draft Convention which provides for the issuance of instruments stating the "name of the person to whom or to whose order payment is to be made."<sup>390</sup> The Geneva Check Convention authorizes the use of bearer checks.<sup>391</sup> It then seemingly follows the British view that an "endorsement on a cheque to bearer renders the endorser liable in accordance with the provisions governing the right of recourse; but it does not convert the instrument into a cheque to order."<sup>392</sup>

The UN Draft Convention again disallows drafts and notes payable to bearer.<sup>393</sup> The UN Check Convention authorizes checks made payable to bearer,<sup>394</sup> and states that a transfer is made "by mere delivery of the cheque if it is drawn payable to bearer [emphasis added] or if the last endorsement is in blank."<sup>395</sup> The italicized words seem to say "bearer paper is always bearer paper." Another article states that a "person is a holder if he is: (a) in possession of a cheque drawn payable to bearer."<sup>396</sup> In spite of this attention to bearer checks, the author has not found any other article which clearly covers this problem. A commentary states, however, that "[i]t should be noted that a special endorsement of a cheque made payable to bearer does not convert the cheque into an order instrument. Thus, a bearer cheque with such a special endorsement may be transferred by a mere delivery."<sup>397</sup>

El Salvador prohibits the use of drafts made payable to bearer.<sup>398</sup> The same rule prevails as to promissory notes.<sup>399</sup> Bearer checks are permitted in El Salvador,<sup>400</sup> but the law seemingly fails to deal with the problem of a subsequent indorsement to a special indorsee. Contrary to the common civilian rule, bearer drafts are

388. N.I.L., *supra* note 88, § 40.

389. Bills of Exchange Act, § 31(2).

390. Geneva Draft Convention, art. 1(6).

391. Geneva Cheque Convention, art. 5.

392. *Id.*, art. 20.

393. U.N. Draft Convention, art. 1 §§ (2)(b), (3)(b), commentary at 8.

394. U.N. Check Convention, art. 1(2)(b).

395. *Id.*, art. 14(b).

396. *Id.*, art. 16(1)(a).

397. *Id.*, art. 17 commentary at 2.

398. CÓDIGO DE COMERCIO, art. 705 (El Salvador).

399. *Id.*, art. 792.

400. *Id.*, arts. 793(V), 797, 800.

authorized in Colombia.<sup>401</sup> The Colombian law deals with the problem, by stating that the "holder of a negotiable instrument (*titulo-valor*) may not change the form of circulation without the consent of the creator of the instrument."<sup>402</sup>

Argentina fits within the civilian mold by requiring that drafts<sup>403</sup> and promissory notes be payable to order.<sup>404</sup> Argentine checks may be issued to bearer,<sup>405</sup> but the law follows the Geneva Check Convention and states that the indorsement of a bearer check does not "convert the instrument into a check to order."<sup>406</sup>

The Guatemalan draft must also be made payable to order,<sup>407</sup> and the law is consistent for promissory notes.<sup>408</sup> Checks can be issued to order or to bearer.<sup>409</sup> Guatemala's general rules governing negotiable instruments (*titulos de credito*) contain a rule similar to that of Colombia: "[t]he holder of a negotiable instrument may not change the form of circulation without consent of the emitter [issuer], except for legal dispositions to the contrary."<sup>410</sup> Venezuela disallows bearer drafts<sup>411</sup> and promissory notes,<sup>412</sup> but does permit bearer checks,<sup>413</sup> without providing for the effects of a special indorsement.

Mexico positively forbids bearer drafts<sup>414</sup> and notes,<sup>415</sup> while permitting bearer checks.<sup>416</sup> Mexico, like Guatemala and Colombia, prevents the holder from changing the form of circulation from bearer to order paper without the consent of the issuer. The Mexican version is more clearly phrased than the laws of the other two countries. The text of the provision refers to *registered* (nominative) and bearer paper.<sup>417</sup>

401. CÓDIGO DE COMERCIO, art. 671(4) (Colombia).

402. *Id.*, art. 630.

403. CÓDIGO DE COMERCIO, Título X, Cap. I, art. 1(6). (Argentina).

404. *Id.*, Título XI, Cap. I, art. 101(5).

405. *Id.*, Título XIII, Cap. I, arts. 2(5), 2(6).

406. *Id.*, Cap. II, art. 18.

407. CÓDIGO DE COMERCIO, art. 447 (Guatemala).

408. *Id.*, art. 490.

409. *Id.*, art. 497.

410. *Id.*, art. 392.

411. CÓDIGO DE COMERCIO, art. 410(6) (Venezuela).

412. *Id.*, art. 486.

413. *Id.*, art. 490.

414. LEY GENERAL, art. 88.

415. *Id.*, art. 174.

416. *Id.*, art. 179.

417. *Id.*, art. 21.



Ecuador also disapproves of bearer drafts<sup>418</sup> and promissory notes.<sup>419</sup> Bearer checks are recognized there,<sup>420</sup> and Ecuador like Argentina, follows the Geneva Check Convention by providing that the indorsement of a bearer check does not convert it into an order instrument.<sup>421</sup>

### *Y. Restrictive Indorsements for Collection*

A troubling obstacle to the unification of the civilian and American systems is the disparate treatment of the restrictive indorsement for collection. The UCC states:

Except for an intermediary bank, any transferee under an indorsement which . . . includes the terms 'for collection', 'for deposit', 'pay any bank', or like terms . . . must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement.<sup>422</sup>

If the indorsee does apply any value consistently with the indorsement, he/she can be a holder in due course if he/she is otherwise in good faith and without knowledge of any defense or claim to the instrument.<sup>423</sup>

Under this approach, if a payee deposits his check in his/her depository bank under a "for deposit only" indorsement and the depository allows the depositor to withdraw funds before the check is paid by the payor-drawee bank, the depository bank may become a holder for value. If the bank is in good faith and is without knowledge of any defense or claim, it can then claim to be a holder in due course and enforce the check against the drawer if he stops payment on it.<sup>424</sup> Even if the depositor forgets to indorse the check, the bank is authorized to indorse it for him/her and, again, if the bank acts consistently with the indorsement it can be a holder for value.<sup>425</sup>

This provision in the UCC is new. It reverses the view, under the NIL, that a restrictive indorsement to a bank or other agent

418. CÓDIGO DE COMERCIO, art. 410(6) (Ecuador).

419. *Id.*, art. 486(5).

420. LEY DE CHEQUES, art. 5.

421. *Id.*, art. 19.

422. U.C.C. § 3-206(3).

423. *Id.*

424. *Pazol v. Citizens Nat'l Bank of Sandy Springs*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

425. U.C.C. § 4-205.

for collection destroys negotiability so that no one can be a holder thereafter.<sup>426</sup> The cases are split as to this result.<sup>427</sup>

The NIL rule, of course, was derived from the English source:

(1) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D only," or "Pay D for the account of X," or "Pay D or order for collection."

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorises him to do so.

(3) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.<sup>428</sup>

The English law then clearly destroys negotiability: "(1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise."<sup>429</sup> Under these provisions, the restrictive indorsement prevents negotiation, in the sense of a transferee becoming a holder in due course, but does not prevent a transfer of the paper.

One view of the old pre-UCC rule is exemplified by article 23 of the Geneva Check Convention:

When an endorsement contains the statement "value in collection" . . . "for collection", . . . or any other phrase implying a simple mandate, the holder may exercise all rights arising out of the cheque, but he can endorse it only in his capacity as agent.

In this case the parties liable can only set up against the holder defenses which could be set up against the endorser.

Under this Geneva wording, the agent for collection (such as a bank) has all the rights of its depositor insofar as proceeding against prior parties (such as the drawer) but cannot acquire

---

426. *Soma v. Handrulis*, 277 N.Y. 223, 14 N.E.2d 46 (1938).

427. W.E. BRITTON, *BILLS AND NOTES*, 152-165 (5th ed. 1961).

428. Bills of Exchange Act, § 35.

429. *Id.*, § 36(1).

holder in due course status.

The UN Check Convention has repeated much of the language of the Geneva Convention:

(1) When an endorsement contains the words "for collection", "for deposit", "value in collection", "by procuration", "pay any bank", or words of similar import, authorizing the endorsee to collect the cheque (endorsement for collection), the endorsee:

- (a) May only endorse the cheque for purposes of collection;
- (b) May exercise all the rights arising out of the cheque;
- (c) Is subject to all claims and defences which may be set up against the endorser.

(2) The endorser for collection is not liable upon the cheque to any subsequent holder.<sup>430</sup>

A commentary to this section points out that if a payee indorses the note "for collection" to A and A fraudulently transfers the check to B and B is refused payment by the drawee-bank, B has no cause of action against the payee. "In that respect, an endorsement for collection resembles an endorsement 'without recourse'."<sup>431</sup> The same commentary also notes that if the drawer has a defense which is good against the payee, it is also good against the holder for collection. Under the UCC, the holder for collection can, as previously noted, acquire holder in due course status and prevail over the drawer.

One further commentary deserves analysis:

The endorsee for collection cannot be a protected holder in his own right. However, if the endorser for collection is a protected holder, the transfer of the cheque to the agent for collection vests in him the rights on and to the cheque which the protected holder had (article 29). It follows that the endorsee for collection is subject only to those claims and defenses which may be set up against the endorser.<sup>432</sup>

It is submitted that this commentary is really irrelevant and adds a complication which is not needed in light of the operation of the proposed rule. Under the proposed rule, the agent for collec-

---

430. U.N. Check Convention, art. 22.

431. *Id.*, commentary at 2, example A.

432. *Id.*, commentary at 3(c).

tion "is subject to all claims and defences which may be set up against the endorser." If the endorser is a "protected holder," most defenses or claims cannot be asserted against the endorser, and, therefore, the same claims and defenses cannot be asserted against the indorsee for collection. The issue is not resolved by bringing in the property concept that a holder from a holder in due course is a holder in due course. Rather, the problem is an agency one which is solved by the proposed rule. This proposed agency rule would be effective in a country which refuses to follow the so-called "shelter principle."

Argentina,<sup>433</sup> Mexico<sup>434</sup> and El Salvador<sup>435</sup> adopt the language of the Geneva Draft Convention. This language includes the rule that neither the death nor subsequent incapacity of the principal revokes the authority of the agent for collection. Guatemala provides for the collection indorsement, but makes no mention that the agent for collection is subject only to defenses which can be raised against his principle.<sup>436</sup> Venezuela tracks the language of the Geneva Draft Convention, but makes no statement regarding the subsequent death or incapacity of the principle.<sup>437</sup> Ecuador, in its separate treatment of checks and drafts, appears somewhat inconsistent. The indorsement for collection of checks does not terminate because of subsequent death or incompetency.<sup>438</sup> No mention of this is made, however, in the "agent for collection indorsement" article dealing with bills of exchange.<sup>439</sup>

Colombia follows concepts which are similar to those followed by the above countries. Nevertheless, it adds the thought that if the indorser revokes the authority contained in the indorsement, he must give the debtor notice of the revocation if the revocation is not contained in the instrument or in a judicial proceeding for enforcement of the instrument. If the debtor pays while ignorant of the revocation, his payment is valid.<sup>440</sup>

---

433. CÓDIGO DE COMERCIO, Título X, Cap. II, art. 19 (Argentina).

434. LEY GENERAL, art. 35.

435. CÓDIGO DE COMERCIO, art. 669 (El Salvador).

436. CÓDIGO DE COMERCIO, art. 427 (Guatemala).

437. CÓDIGO DE COMERCIO, art. 426 (Venezuela).

438. LEY DE CHEQUES, art. 22.

439. CÓDIGO DE COMERCIO, art. 426 (Ecuador).

440. CÓDIGO DE COMERCIO, art. 658 (Colombia).

### Z. *Optional Presentment for Acceptance of Drafts*

It is familiar practice in the United States for a holder of a bill of exchange that has a fixed date of payment to present it for acceptance at an earlier date, in order to determine whether the drawee is going to pay it at maturity.<sup>441</sup> In the event that the holder's optional presentment for acceptance is refused, then the holder must treat this refusal as a dishonor and give notice to prior parties.<sup>442</sup> The English law on this point is not entirely clear.<sup>443</sup>

The UCC does not contain any explicit provision giving the drawer the right to stipulate in the draft that it either must not be, or cannot be, presented for acceptance before a specific date or before the occurrence of some specified event. It appears that under the wording of section 3-503, however, these results can be achieved: "Unless a different time is expressed in the instrument the time for any presentment is determined as follows: (a) where an instrument is payable at a fixed period after a stated date any presentment for acceptance must be made on or before the date it is payable."

The Geneva Draft Convention permits the drawer (except in the case of a bill payable at the address of a third party or in a locality other than the domicile of the drawee, or of a bill payable at a fixed period after sight) to forbid prior presentment for acceptance, or to stipulate that presentment for acceptance shall not be made before a stated date.<sup>444</sup>

In a rare recognition of the commercial practice in Latin America, the draftsmen of the UN Draft Convention have articulated the following rule:

Notwithstanding the provisions of article 45 [which deals with both optional and mandatory presentment for acceptance] the drawer may stipulate on the bill that it must not be presented for acceptance or that it must not be so presented before a specified date or before the occurrence of a specified event.<sup>445</sup>

The provision goes on to state that it is not a dishonor if present-

---

441. U.C.C. § 3-501(1)(a).

442. U.C.C. §§ 3-507(1)(a) & (2).

443. BYLES, *supra* note 77, at 87.

444. Geneva Draft Convention, art. 22.

445. U.N. Draft Convention, art. 46.

ment is made in spite of a prohibition and is refused. If the drawee accepts in spite of the prohibition, however, it is an effective acceptance.

The commentary is well worth quoting extensively:

Inquiries amongst banking and trade institutions have shown that stipulations requesting the holder not to present the bill before the occurrence of a specified event occur not infrequently. In some countries, particularly Latin American, it appears to be normal practice to delay presentment until the merchandise has arrived or (in some African countries) until after customs clearance. In some countries, drawees often refuse to accept documentary bills on the ground that the carrying vessel has not yet reached its destination point, and a bill may therefore direct a holder not to present it for acceptance until the vessel has arrived.<sup>446</sup>

Another commentary notes that in the event that a vessel should be shipwrecked, for example, then presentment for acceptance as directed by the stipulation is dispensed with, and under articles 48(b) and 50(1)(b) the holder has an immediate right of recourse against the drawer and any prior indorsers.<sup>447</sup>

Argentina is in accord with the UN Draft Convention, but adds that unless the drawer has stipulated that the draft must not be accepted, any indorser may write on the draft that it must be accepted "indicating or not indicating a term for this effect."<sup>448</sup> Venezuela's law agrees.<sup>449</sup> In Guatemala, the "drawer . . . may prohibit the presentment of the bill of exchange before a determined date."<sup>450</sup> Similarly, the El Salvadorian drawer may prohibit presentation for acceptance before a determined date which is specifically spelled out in the draft.<sup>451</sup> In Ecuador, the drawer may: 1) stipulate in the bill of exchange that it must be presented for acceptance; 2) prohibit presentment for acceptance (unless the bill is domiciled or payable a certain time after sight); or, 3) stipulate that the bill may not be presented before a determined date. Any indorser may stipulate that the draft must be presented for acceptance (with or without fixing a date for presentment) unless the drawer has stipu-

---

446. *Id.*, commentary at 2.

447. *Id.*, commentary at 3.

448. CÓDIGO DE COMERCIO, Título X, Cap. III, art. 24 (Argentina).

449. CÓDIGO DE COMERCIO, art. 430 (Venezuela).

450. CÓDIGO DE COMERCIO, art. 451 (Guatemala).

451. CÓDIGO DE COMERCIO, arts. 716, 717 (El Salvador).

lated that the draft is not subject to acceptance.<sup>452</sup>

In Mexico:

The presentment of bills of exchange drawn payable at a fixed date or a certain time after date shall be optional, unless the drawer has made it obligatory with writing or determined time for the presentment, consigning expressly in the bill of exchange this circumstance. This drawer may likewise prohibit presentment before a determined date, consigning it thusly in the bill. When the presentment of the bill is optional, the holder may make it not later than the last day before maturity.<sup>453</sup>

The Colombian law on optional presentment and the prohibition of presentment is similar to the Mexican law.<sup>454</sup>

#### AA. *Certified Checks*

In the United States, a drawer or payee of a check may request the drawee bank to certify the check. If the bank consents (it is normally optional)<sup>455</sup> to the payee's request<sup>456</sup> the drawer is discharged. Conversely, where the drawer has the check certified, the drawer remains liable.

When the bank certifies the check, it "engages" that it will make payment "according to its tenor at the time of his engagement."<sup>457</sup> It also "admits as against all subsequent parties . . . the existence of the payee and his then capacity to indorse."<sup>458</sup> Under these principles, if a possessor of a check erases the name of the real payee and inserts his own or an assumed name, then increases the amount of the check and has it certified, the bank is liable to a holder in due course who took from the dishonest possessor. This occurs because the bank promises to pay according to the tenor of the check and admits the existence of the payee (real or assumed) and his then capacity to indorse.<sup>459</sup>

The certification of a check in the United States does not ne-

452. CÓDIGO DE COMERCIO, art. 430 (Ecuador).

453. LEY GENERAL, art. 94.

454. CÓDIGO DE COMERCIO, art. 681 (Colombia).

455. U.C.C. § 3-411 (2).

456. *Id.*, § 3-411(1).

457. *Id.*, § 3-413(1).

458. *Id.*, § 3-413(3).

459. See U.C.C. § 3-417 comment 5 which adopts the holding of *Wells Fargo Bank & Union Trust Company v. Bank of Italy*, 214 Cal. 156, 4 P.2d 781 (1931).

gate its negotiability. If certification has any effect, it increases the check's marketability because the promise of a bank is "behind" the check. Somewhat surprisingly, the certification procedure is rarely used in England, except for the limited purpose of paying checks through a clearing house by non-member banks.<sup>460</sup>

The rejection of the idea and use of certified checks is even more pronounced in the Geneva Check Convention which states that a "cheque cannot be accepted. A statement of acceptance of a cheque shall be disregarded."<sup>461</sup>

The UN Check Convention takes another waffling position:

(1) Any statement written on a cheque indicating certification, confirmation, acceptance, visa or any other equivalent expression has only the effect to ascertain the existence of funds and prevents the withdrawal of such funds by the drawer, or the use of such funds by the drawer, or the use of such funds by the drawee for purposes other than payment of the cheque bearing such a statement, before the expiration of the time-limit for presentment.

(2) However, a Contracting State may provide that a drawee may accept a cheque and determine the legal effects thereof. Such acceptance must be effected by the signature of the drawee accompanied by the word "accepted".<sup>462</sup>

The commentary to this section states that subsection one creates an "irrebuttable presumption" that the statement "does no more than ascertain the existence of funds in the hands of the drawee-bank."<sup>463</sup> The drawee, by accepting, precludes itself from using the funds for a set-off against other debts owed to the drawee by the drawer. It also prevents the drawer from withdrawing these funds before the 120 day period for the presentment for payment has elapsed.<sup>464</sup> A final commentary to this section notes that in "view of the widespread practice of confirming cheques under the UCC, paragraph (2) placed between brackets, permits a Contracting State to provide for the acceptance of an international cheque and to determine the legal effects thereof."<sup>465</sup>

The draftsmen of the UN Check Convention, by stressing the

---

460. BYLES, *supra* note 77, at 243, n.44.

461. Geneva Cheque Convention, art. 4.

462. U.N. Check Convention, art. 36.

463. *Id.*, commentary at 2.

464. *Id.*

465. *Id.*, commentary at 3.



use of certified checks under the UCC, seem to show an ignorance of the widespread legislative approval of certified checks in Latin American countries. One of the most complete articulations of the Latin American approach is found in the Argentine Check Law:

The bank may certify or conform (*conformar*) a check, at the request of the drawer or of any holder, previously verifying that there exists sufficient funds in the account of the drawer, debiting, at the same time the sum necessary to pay it.

The amount thus debited shall remain to be paid to whom it belongs and withdrawing (*sustraido*) from all of the contingencies which originate from the person or solvency of the drawer, like that of his death, incapacity, bankruptcy, civil insolvency proceedings or judicial attachment, after the certification, shall not affect the provision [of the funds certified], or the right of the holder of the check, or the correlative obligation of the bank to make cash payment when it is presented for collection.

The certification may not be partial nor written on checks to bearer. The insertion on the check of the words "accepted" "approved [*visto*]", "good", or other analogous subscriptions by the drawee are equivalent to a certification.

The certification has the effects to establish the existence of the funds and to impede their withdrawal by the drawer during the agreed period.<sup>466</sup>

The Argentine law then goes on to state:

The certification may be made for a contractual period which may not exceed five business days; and if at the maturity of the check it has not been collected, the bank shall credit the account of the drawer for the sum which was reserved.

The certified check which has come due shall subsist with all of the proper effects of the check legislated in the chapters prior to the present one.<sup>467</sup>

The Mexican law is much more restrictive than the Argentine law. Only the drawer can request that the bank certify the check before its issuance. Further, the certified check is not negotiable, and can be revoked by the drawer if he returns it for cancellation.<sup>468</sup>

The El Salvadorian law seems to be in accord with the Mexi-

---

466. CÓDIGO DE COMERCIO, Título XIII, Cap. III, art. 24 (Argentina).

467. *Id.*, art. 49.

468. LEY GENERAL, art. 199.

can law, but adds that the drawer and indorsers are relieved from liability by the certification.<sup>469</sup> Guatemalan law disagrees with that of Mexico regarding the drawer's ability to cancel the certified check, but does provide for cancellation of the check upon the drawer's return of the check to the drawee-bank.<sup>470</sup> Ecuador's legal treatment of the certified check closely resembles the Mexican, El Salvadorian and Guatemalan provisions, but adds that since the certified check is non-negotiable, the "beneficiary may make payment directly or by means of a bank."<sup>471</sup>

Colombia, like Argentina, permits certification at the request of either the drawer or holder, but unlike Argentina states that the drawer and all indorsers are freed from responsibility by virtue of the certification.<sup>472</sup> The Colombian drawer may not revoke the certified check before the time for presentation elapses (fifteen days if the check is drawn and payable in the same place in Colombia).<sup>473</sup>

#### *BB. Post-Dated Checks*

The UN Draft Check Convention states in article 11:

- (1) A cheque is always payable on demand. It is so payable:
  - (a) If it states that it is payable at sight or on demand or presentment or if it contains words of similar import; or
  - (b) If no time of payment is expressed.
- (2) A stipulation on a cheque that it is payable at a definite time is deemed not to have been written.

At first blush, the above provision seems to forbid the use of post-dated checks. A much later provision, however, states that if "a check is presented before its stated date, refusal by the drawee to pay does not constitute dishonor by non-payment under article 46".<sup>474</sup> The commentary to this article then notes that article 11 is designed to cover post-dated checks and that the bank's refusal to pay does not constitute a dishonor. It appears under articles 11 and 47, that post-dated checks are permitted, and that a bank may pay upon presentment, in spite of the post-date, without liability

---

469. CÓDIGO DE COMERCIO, art. 825 (El Salvador).

470. CÓDIGO DE COMERCIO, art. 5 (Guatemala).

471. LEY DE CHEQUES, art. 37; *see also id.*, arts. 36, 38-40.

472. CÓDIGO DE COMERCIO, art. 739 (Colombia).

473. *Id.*, art. 742.

474. U.N. Check Convention, art. 47.

attaching to the drawer. In short, these UN check provisions resemble a blend of the UCC, which authorizes post-dated checks and makes their premature payment wrongful as to the drawer (under section 4-401), with some parochial state provisions which protect a bank which pays ahead of the stated date, unless the drawer informs the bank in writing of the details of the post-dated check prior to payment.<sup>475</sup>

The UN Check Convention's position regarding post-dated checks shows a turning away from the Geneva Check Convention. The Geneva Convention states that a "cheque is payable at sight. Any contrary stipulation shall be disregarded. A cheque presented for payment before the date stated as the date of issue is payable on the day of presentment."<sup>476</sup>

All seven Latin countries under discussion have adopted the Geneva Check Convention's provision, at least in concept. In Argentina, for example, the:

check is payable at sight. Any contrary mention shall be taken as not written. The check presented for payment before the date indicated as the date of issuance shall be paid on the day of presentment, there being applicable to it the legal dispositions, judicial and administrative, relative to the issuance of checks without provision of funds.<sup>477</sup>

Guatemala follows virtually the same wording, but adds that when the check is post-dated or issued without a date, then, in "these cases the day of presentment shall be taken legally as the date of its creation."<sup>478</sup> In El Salvador every check shall be paid at its presentment, even when it appears with a later date. In this case, the bank remains exempt from all responsibility for the payment.<sup>479</sup> Mexican law closely follows the Argentine approach.<sup>480</sup> In Ecuador, the "check presented for payment before the day indicated as the date of issuance, must be paid or protested."<sup>481</sup> Post-dated checks in Colombia are payable upon presentment.<sup>482</sup> Venezuela's approach is the most unusual. The check "may be payable at sight or

---

475. See, e.g., FLA. STAT. ANN. § 658.64 (West Supp. 1983).

476. Geneva Check Convention, art. 28.

477. CÓDIGO DE COMERCIO, Título XIII, Cap.III, art. 23 (Argentina).

478. CÓDIGO DE COMERCIO, art. 401 (Guatemala).

479. CÓDIGO DE COMERCIO, art. 804 (El Salvador).

480. LEY GENERAL, art. 178.

481. LEY DE CHEQUES, art. 24.

482. CÓDIGO DE COMERCIO, art. 717 (Colombia).

in a term no greater than six days from the day of presentment."<sup>483</sup>

### CC. Stop Orders

Under section 4-403 of the UCC and section 75 of the English Bill of Exchange Act, the drawee must refuse payment if it is ordered to do so by the drawer, provided that adequate and timely notice is given. A diametrically opposite approach is taken in the Geneva Check Convention which states that the "countermand of a cheque only takes effect after the expiration of the limit of time for presentment."<sup>484</sup> The UN Check Convention follows the Anglo-American model by providing that "[i]f the drawer countermands the order to the drawee to pay a cheque drawn by him, the drawee is under a duty not to pay."<sup>485</sup>

Colombia follows the UN Check Convention's approach, and provides that the "drawer may revoke the check, under his responsibility, even when the time for its presentment has not elapsed, without prejudice to that disposed in article 742. The revocation being notified to the bank, it may not pay the check."<sup>486</sup> Somewhat surprisingly, article 742 provides that the "drawer may not revoke the *certified check* [emphasis added] before the term for presentment has elapsed." Article 742 seems to be designed to permit the drawer to revoke a certified check if he/she is in possession of it. Only the drawer in possession of the check can stop payment.

Argentina,<sup>487</sup> and Mexico<sup>488</sup> also have laws which provide that the stop-payment order is effective only after the time for presentment has expired. In El Salvador, the "[t]he bank shall abstain from paying the check . . . when the drawer has provided by writing that payment not be made."<sup>489</sup> That code fails to indicate that the drawer must have a reason for stopping payment. In contrast, the law of Ecuador requires the stop order to be in a writing which states the reason for the revocation. Ecuadorian law also allows the bearer or holder who loses a check to petition the drawee bank to suspend payment. The drawee must then retain the amount of the check until either a judge adjudicates the matter, the drawer

---

483. CÓDIGO DE COMERCIO, art. 490 (Venezuela).

484. Geneva Check Convention, art. 32.

485. U.N. Check Convention, art. 66.

486. CÓDIGO DE COMERCIO, art. 724 (Colombia).

487. CÓDIGO DE COMERCIO, Título XIII, Cap. III, art. 29 (Argentina).

488. LEY GENERAL, art. 185.

489. CÓDIGO DE COMERCIO, art. 817 (El Salvador).

cancels the revocation, the prescriptive period elapses or the check is declared void in accordance with the Regulation of the Superintendent of Banks because it was stolen, deteriorated, lost or destroyed.<sup>490</sup>

Venezuela takes a rather dramatic stand against stopping payment. That law provides that he who frustrates the payment of a check after he issues it is guilty of a crime, with imprisonment from one to twelve months, or more if he has committed a criminal act of fraud.<sup>491</sup>

#### *DD. Partial Payments*

Section 3-603 of the UCC makes an oblique reference to the concept of partial payment when it states that the "liability of any party is discharged to the extent of his payment . . . to the holder." Comment 3 to the same section states that "[p]ayment to the holder discharges the party who makes it from his own liability on the instrument, *and a part payment discharges him pro tanto* [emphasis added]." Section 3-604 states that any party "making tender of full payment to a holder" is discharged to the extent of all subsequent liability for interest, costs and attorney's fees. This again recognizes that there is a possibility of partial payment. This limited treatment of partial payment seems to indicate that a holder has no duty to accept partial payment, and that acceptance is purely optional. On the other hand, if the drawee is a bank, an offer of partial payment necessarily constitutes a disclosure of the state of the customer's account and a possible invasion of his/her right of privacy.<sup>492</sup>

Fortunately, the question of partial payment of checks is not left unanswered in the UN Check Convention. Under the convention, the holder is not obliged to take a partial payment. If he does not take partial payment, the check is dishonored by non-payment. If the holder accepts partial payment, the check is then considered to be dishonored as to the unpaid amount. In a similar fashion, if the holder takes partial payment from a party to the check (other than the drawee), that party is discharged to the amount paid. The holder must then give the paying party a certified copy of the

---

490. LEY DE CHEQUES, art. 27.

491. CÓDIGO DE COMERCIO, art. 494 (Venezuela).

492. W.D. HAWKLAND, COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS 293 (1967).

check and any authenticated protest. The drawee or paying party may require that a mention of such partial payment be written on the check and that a receipt be issued to him/her.<sup>493</sup> In a consistent vein, when a party is discharged by partial payment to the extent of payment, any party who has a right of recourse against him is also discharged to the amount paid. Further, "[p]ayment by the drawee of the whole or a part of the amount of the cheque to the holder, or to any party who has paid the cheque in accordance with article 59, discharges all parties of their liability to the same extent."<sup>494</sup>

The UN Draft Convention follows the same principles regarding partial payment as those found in the UN Check Convention.<sup>495</sup> It is interesting to note that both the current Geneva Convention on Bills of Exchange and the Geneva Convention on Checks provide that the holder cannot refuse partial payment.<sup>496</sup>

This international oscillation between the extremes that a holder may or may not refuse partial payment, is reflected to a certain extent in some Latin American countries. In Guatemala, the holder of a bill of exchange may not refuse the offer of partial payment.<sup>497</sup> On the other hand, the bank must offer partial payment to the holder of a check if the drawer has insufficient funds to pay the entire check. If the holder accepts partial payment, a record is made of the acceptance and the record takes the place of the check.<sup>498</sup> As a result, partial payment is mandatory when a draft is involved, but optional where checks are used.

In Argentina, the law is consistent: holders of drafts and checks may not refuse partial payment.<sup>499</sup> In Venezuela, the holder of a draft is not obligated to accept partial payment.<sup>500</sup> A similar rule prevails in El Salvador for the holder of a draft<sup>501</sup> or a check.<sup>502</sup> In Mexico, the holder of a draft may not refuse partial

---

493. U.N. Check Convention, art. 62.

494. *Id.*, art. 67.

495. U.N. Draft Convention, art. 69.

496. Geneva Draft Convention Art. 39; Geneva Check Convention, art. 34.

497. CÓDIGO DE COMERCIO, art. 465 (Guatemala).

498. *Id.*, arts. 504, 506.

499. CÓDIGO DE COMERCIO, Título X, Cap. VI, art. 42 (drafts);  
*Id.*, Título XIII, Cap. III, art. 31 (checks) (Argentina).

500. CÓDIGO DE COMERCIO, art. 447 (Venezuela).

501. CÓDIGO DE COMERCIO, art. 736 (El Salvador).

502. *Id.*, art. 814.

payment,<sup>503</sup> while the holder of a check may refuse a partial payment.<sup>504</sup> The holder of a draft in Ecuador may accept or refuse a partial payment.<sup>505</sup> The same rule prevails as to the holder of a check, "but the drawee bank is obliged to pay the amount of the check until the total of the funds which it has to the disposition of the drawer."<sup>506</sup> The holder of a bill of exchange in Colombia may not refuse partial payment,<sup>507</sup> but if he/she is the holder of a check he/she may refuse partial payment.<sup>508</sup>

*EE. Drawer's Death, Incapacity or Bankruptcy*

Under section 4-405 of the UCC, neither "death nor incompetency of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetency and has reasonable opportunity to act on it." Further, the bank may pay for certify checks for a period of ten days after the date of death, even when it has knowledge of the customer's death. The bank has no grace period, however, when the customer has been adjudicated incompetent. Although the UCC makes no provision regarding the bank's duty to either pay or dishonor when a customer has been adjudicated bankrupt, the current Bankruptcy Reform Act<sup>509</sup> provides that the bank must dishonor when it learns of the filing of a petition in the bankruptcy court.

In England, it appears that banks should dishonor checks after they learn of the death<sup>510</sup> or incompetency of their customers. The bank's duty upon the bankruptcy of a customer, however, is not entirely clear.<sup>511</sup> The Bills of Exchange Act does not state whether bankruptcy or incompetency terminates the bank's right to pay checks.

The UN Check Convention takes no position regarding the duty of the drawee-bank upon the death, incompetency or bankruptcy of a drawer of a check. This problem may have been consid-

503. LEY GENERAL, art. 130.

504. *Id.*, art. 189.

505. CÓDIGO DE COMERCIO, art. 447 (Ecuador).

506. LEY DE CHEQUES, art. 29.

507. CÓDIGO DE COMERCIO, art. 693 (Colombia). *See also* art. 624.

508. *Id.*, art. 727.

509. Bankruptcy Reform Act, 11 U.S.C. § 542(c) (1983).

510. Bills of Exchange Act, § 75(2).

511. BYLES, *supra* note 77, at 247, 392.

ered to be a parochial one which does not need uniformity. On the other hand, the draftsmen of the Geneva Check Convention obviously thought that the problem requires a uniform answer: "[n]either the death of the drawer nor his incapacity taking place after the issue of the cheque shall have any effect as regards the cheque."<sup>512</sup>

The Geneva provision has been a model for Latin American codifications. In Guatemala, the "death or incapacity of the drawer, does not authorize the drawee to forbear to pay the check."<sup>513</sup> The Guatemalan Commercial Code appears to be silent as to the bank's responsibility when the customer has been declared bankrupt.

In neighboring El Salvador, the death or incapacity of the drawer does not authorize the drawee-bank to refuse to pay. However, a judicial declaration of either a state of suspension of payments, bankruptcy or insolvency obligates the bank to refuse payment from the time it receives notice.<sup>514</sup> Similarly, the death or supervening incapacity of the Mexican drawer does not authorize the drawee-bank to refuse to pay the check. Payment must be refused, however, when the bank receives notice that the drawee has been declared in a state of suspension of payments, bankruptcy or insolvency proceedings.<sup>515</sup> Ecuador adheres to the same view.<sup>516</sup> In Colombia, the bank must refuse to pay its customer's checks in the event of bankruptcy, insolvency proceedings or judicial or administrative liquidation of the drawer "from when there has been made the publication provided by law for these cases."<sup>517</sup>

In Argentina, if the check is issued prior to the death of the drawer or his incompetency, there is no effect on the check. The bank must, however, refuse payment when it has knowledge of the death or incompetency of the drawer and the date of the check is *later* than the date of either of these events.<sup>518</sup> The drawee bank must also refuse payment when it has knowledge that the drawer has been declared bankrupt or is in bankruptcy proceedings prior to the date of issuance of the check "or that the holder is found in

---

512. Geneva Cheque Convention, art. 33.

513. CÓDIGO DE COMERCIO, art. 509 (Guatemala).

514. CÓDIGO DE COMERCIO, art. 813 (El Salvador).

515. LEY GENERAL, art. 188.

516. LEY DE CHEQUES, art. 28.

517. CÓDIGO DE COMERCIO, art. 726 (Colombia).

518. CÓDIGO DE COMERCIO, Título XIII, Cap. III, art. 34(7) (Argentina).



the same state [of being bankrupt] at the time of presenting the check for payment."<sup>519</sup> This latter duty appears burdensome for the payor bank.

*FF. Statute of Limitations and Prescriptions*

The statute of limitations presents few problems when a payee sues a maker of a time promissory note since the time begins to run on the day after maturity. If the note is a demand instrument the time begins to run from the date appearing on the face of the instrument or the date of issue, if the instrument is undated.<sup>520</sup> On checks and drafts, the cause of action against the drawer and indorsers accrues upon demand following dishonor of the instrument. Notice of dishonor is considered a demand.<sup>521</sup>

The latter rule can result in a real problem if one assumes that a check is issued to the payee who indorses it to A and A then indorses it to B. B presents it for payment to the drawee, and the check is dishonored. B notifies all parties of the dishonor. The day before the expiration of the limitation period (which, of course, varies from state to state,) B sues A and does not join any other party to the check as a party defendant. In order to protect him/herself, B will have to interplead the drawer and the payee in this action, or file a separate action or actions against these prior parties on the same day that he/she is served. In the real world, this may be impossible to do, and the total loss may fall upon B. It can be objected that in this hypothetical, B, after being notified of dishonor, should have made him/herself aware of all of the developments or lack of developments in this matter, and, therefore, is to blame for his/her own loss. This objection can be countered by the fact that B might have been lulled into inaction upon the supposition that he/she was not bothered further because some prior party had paid A.

Prior to the UCC, many cases held that the statute of limitations begins to run against an indorser, insofar as suing prior indorsers (or the maker or drawer), from the time the indorser pays, not from the date of maturity of the instrument. Some of these cases were based upon the notion that the duty of prior indorsers to pay an aggrieved indorser arises out of an implied promise, not

---

519. *Id.*, art. 34(6).

520. U.C.C. § 3-122(1).

521. U.C.C. § 3-122(3).

from the instrument itself, and that, therefore, the time begins to run only upon payment. Other courts held that the duty of repayment is on the instrument itself, but that the time begins to run only when the aggrieved indorser pays the holder.<sup>522</sup> The present language of section 3-122 of the UCC should preclude this approach, although one should never be sanguine as to what courts will do when dealing with a statute.<sup>523</sup>

What is needed to protect B in the above hypothetical (or other parties to an instrument) is some legislative articulation giving B a period of time to act after he is sued. This protection is found in the Geneva Draft and Check Conventions. The Geneva Draft Convention states:

All actions arising out of a bill of exchange against the acceptor are barred after three years, reckoned from the date of maturity.

Actions by the holder against the endorsers and against the drawer are barred after one year from the date of a protest drawn up within proper time, or from the date of maturity where there is a stipulation *retour sans frais*.

Actions by endorsers against each other and against the drawer are barred after six months, reckoned from the day when the endorser took up and paid the bill or from the day when he himself was sued.<sup>524</sup>

The Geneva Check Convention's limitation section differs from that of the Geneva Draft Convention:

Actions of recourse by the holder against the endorsers, the drawer and the other parties liable are barred after six months as from the expiration of the limit of time fixed for presentment.

Actions of recourse by the different parties liable for the payment of a cheque against other such parties are barred after six months as from the day on which the party liable was paid the cheque or the day on which he was sued thereon.<sup>525</sup>

---

522. *Annotations*, 140 A.L.R. 888, 143, A.L.R. 1062. See also *Payne v. Payne*, 245 S.E.2d 133 (Va. 1978).

523. See *Gaffin v. Heymann*, 428 A.2d 1066, 32 U.C.C. REP. SERV. 176 (R.I. 1981) which held that a cause of action against an indorser in a suit by the holder began to run only from the time of demand made upon the indorser. The author has not found any post-U.C.C. cases involving a suit by one indorser against another.

524. Geneva Draft Convention, art. 70.

525. Geneva Cheque Convention, art. 52.

If the provision of either of the Geneva Conventions are used to solve the problem posed at the beginning of this section, when A sued B, B would have six months to sue the payee and the drawer, rather than being forced to sue on the same day that he/she was sued.

Argentina adopts the basic text of the Geneva Draft Convention with some changes in wording.<sup>526</sup> The six month limitation in the Geneva Check Convention has been extended to one year in the Argentine adoption.<sup>527</sup> Ecuador follows both Geneva Conventions' time limits.<sup>528</sup>

In El Salvador, the holder of a draft has three years from the date of maturity to sue the acceptor and one year from that date to sue the drawer or prior parties. Any action between prior parties must also be brought within one year of the voluntary or involuntary payment of drafts.<sup>529</sup> The El Salvadorian prescription rule for checks is quite terse:

The exchange actions for the check are prescribed in one year, counted:

- I. From the presentment, of the last holder of the document.
- II. From the day following the day on which the check was paid by the indorsers and guarantors.<sup>530</sup>

Venezuela follows the Geneva Draft Convention's wording for drafts,<sup>531</sup> but its rule governing time limits for checks is somewhat unusual:

The possessor of a check which has not been presented in the times established in the foregoing article and in which payment has not been demanded at maturity, forfeits his action against the indorsers. He likewise loses his action against the drawer if after the passage of the aforesaid times, the amount of the draft has failed to be available by act of the drawee.<sup>532</sup>

This latter provision somewhat resembles section 3-502 of the UCC, which states that the drawer of a check (or, the drawer of

---

526. CÓDIGO DE COMERCIO, Título X, Cap. XIII, art. 96 (Argentina).

527. *Id.*, Título XIII, Cap. X., art. 54.

528. CÓDIGO DE COMERCIO, art. 479 (drafts); LEY DE CHEQUES, art. 50 (Ecuador).

529. CÓDIGO DE COMERCIO, arts. 777-78 (El Salvador).

530. *Id.*, art. 820.

531. CÓDIGO DE COMERCIO, art. 479 (Venezuela).

532. *Id.*, art. 493.

any draft) may assign his rights against an insolvent bank to the holder of a check who has delayed in its presentment, and, to that extent, the drawer will be discharged.

Mexico follows the six-month period provided in the Geneva Check Convention,<sup>533</sup> and the three year period mentioned in the Geneva Draft Convention.<sup>534</sup> Colombia allows for a period of six months against the drawer and six months for secondary parties, with the time beginning to run from the date of the secondary parties' payment.<sup>535</sup>

*GG. Late Presentment of Checks and Insolvency of the Drawee*

As indicated in the preceding section, Venezuela apparently omits any prescription rule for the holder of a check against the drawer and substitutes a "tardy presentment-damage to drawer" rule as a substitute. Several other Latin American countries adopt a modified version of the Venezuelan approach and have both prescriptive periods and a "tardy presentment-damage to drawer" rule.

In Ecuador for example,

The bearer or holder who does not present the check for payment within the legal period, shall lose his action against the indorsers; and [he shall lose his action] against the drawer, when, having had funds, if they should be lost, after the term has expired for the bank having declared itself in liquidation.<sup>536</sup>

As mentioned in the preceding section, Ecuador also follows the Geneva Convention time limits.<sup>537</sup>

The Colombian version of the rule is expressed more clearly:

The exchange action against the drawer and his guarantors lapses for the check not having been presented and protested on time, if during all of the period of presentation the drawer had sufficient funds in the possession of the drawee and, for a cause not imputable to the drawer, the check was left unpaid. The exchange action against the other signatories lapses by the simple

---

533. LEY GENERAL, art. 192.

534. *Id.*, art. 165.

535. CÓDIGO DE COMERCIO, art. 730 (Colombia).

536. LEY DE CHEQUES, art. 42.

537. *Supra*, note 522.

lack of presentation or opportune protest.<sup>538</sup>

The Mexican rule is similar to the Colombian, but the phrasing is quite different.<sup>539</sup>

*HH. Rights of the Holder Against Prior Parties in Cases of Late Presentment or Notice of Dishonor*

In the preceding section, it was noted that several Latin American countries adopt the "tardy presentment-damage to drawer" rule. A somewhat similar rule involving indorsers will be discussed in this section.

Under section 3-802 of the UCC, "discharge of the underlying obligor on the instrument also discharges him on the obligation." This rule makes eminently good sense when, in the normal case of payment, it results in the discharge of a drawer of a check upon payment of the check by the payor bank or when the maker of a note pays it at maturity. The rule makes less sense when the instrument is discharged, not as a result of payment, but because, for example, a holder of a check delays presentment for more than seven days after the indorser negotiates the check to him and the indorser is then discharged for late presentment.<sup>540</sup> It also makes less sense where a holder fails to give timely notice of dishonor to an indorser of a check or note and the indorser is discharged.<sup>541</sup> In these latter cases, the indorser who is discharged may be unjustly enriched at the expense of the tardy holder.

A fairer approach is advanced in the Geneva Draft and Check Conventions. The holder is required to notify indorsers, and indorsers are required to notify each other; however, "[a] person who does not give notice within the limit of time . . . does not forfeit his rights. He is responsible for the injury, if any, caused by his negligence, but the damages shall not exceed the amount of the bill of exchange."<sup>542</sup>

Argentina adopts a modified version of the Geneva Check Convention's rule which protects the tardy holder.<sup>543</sup> The comparable terms of the Geneva Draft Convention are also followed in Ar-

---

538. CÓDIGO DE COMERCIO, art. 729 (Colombia).

539. LEY GENERAL, art. 191.

540. U.C.C. § 3-503(2)(b).

541. *Id.*, §§ 3-501(2)(a), 3-502, 3-508.

542. Geneva Draft Convention, art. 45; Geneva Check Convention, art. 42.

543. CÓDIGO DE COMERCIO, Título XIII, Cap. IV, art. 39 (Argentina).

gentina.<sup>544</sup> Colombia law adopts the view that "[t]he holder who omits the notice shall be responsible, up to a sum equal to the amount of the bill of exchange, for the damages and injuries which are caused by his negligence."<sup>545</sup> Venezuela also makes the tardy holder liable for all damages which do not exceed the amount of the bill of exchange.<sup>546</sup> The same rule holds true for promissory notes<sup>547</sup> and checks.<sup>548</sup> El Salvador requires the notary who prepares the protest to give notice, and if he fails to do so he will be liable for damages up to the amount of the bill of exchange.<sup>549</sup> Mexican law is in accord with similar provisions in El Salvador and Guatemala which provide that the notary who issues the protest should notify prior parties, but, it also allows brokers and "first political authority" to give notice if they issue the protest.<sup>550</sup> The party responsible for the delay in giving notice is liable for damages, and it seems to imply that the tardy holder does not lose his rights on the bill.<sup>551</sup>

The UN Draft Convention<sup>552</sup> and the UN Check Convention<sup>553</sup> continue to follow the Geneva Conventions and state: "[f]ailure to give notice of dishonour renders a person who is required to give such notice . . . to a party who is entitled to receive such notice liable for any damages which that party may suffer from such failure, provided that such damages do not exceed the amount referred to in article 66 or 67." Articles 66 and 67 generally enable the holder to recover principal, interest (if provided for in the instrument) and the cost of giving notices.

## II. *Waivers of Protest—Dangers for the Unwary*

Under the UCC, a "waiver of protest is also a waiver of presentment and of notice of dishonor even though protest is not required."<sup>554</sup> In the United States, protest is required (unless excused) for any draft drawn or payable outside of the United States,

---

544. *Id.*, Título X, arts. 49, 103.

545. CÓDIGO DE COMERCIO, art. 707 (Colombia).

546. CÓDIGO DE COMERCIO, art. 453 (Venezuela).

547. *Id.*, art. 487.

548. *Id.*, art. 491.

549. CODIGO DE COMERCIO, art. 763 (El Salvador).

550. LEY GENERAL, art. 155.

551. *Id.*

552. U.N. Draft Convention, art. 64.

553. U.N. Check Convention, art. 57.

554. U.C.C. § 3-511(5).

territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico.<sup>555</sup>

This "waiver of protest is also a waiver of presentment and of notice of dishonor" rule of the United States is a dangerous one since it is in direct conflict with the law in most other countries. In England, protest can be waived as can presentment and the giving of notice of dishonor. Each waiver must be spelled out, and the waiver of protest does not waive presentment or the giving of notice of dishonor.<sup>556</sup> The Geneva Check Convention<sup>557</sup> and the Geneva Draft Convention<sup>558</sup> agree that the waiver of protest "does not release the holder from presenting the cheque within the prescribed limit of time, or from giving the requisite notices."

El Salvadorian law agrees with the two Geneva Draft Conventions.<sup>559</sup> In Guatemala, on the other hand, protest is necessary only when the drawer of the draft puts the phrase "with protest" on the face of the draft.<sup>560</sup> The fact that protest is not required (unless the draft calls for it) does not dispense with the presentment for payment requirement and the necessity of giving notices of dishonor.<sup>561</sup> Venezuela, like El Salvador, requires protest,<sup>562</sup> but protest can be waived, and, if it is, it does not waive presentment or notice.<sup>563</sup> Ecuadorian law is consistent with that of Venezuela. Drafts<sup>564</sup> and checks are required to be protested,<sup>565</sup> but there does not seem to be any provision for waiving protest for dishonored checks.

In Colombia, protest is required only when the issuer or any holder inserts the clause "with protest" visibly on the face of the draft;<sup>566</sup> presentment for payment and notice of dishonor are mandatory.<sup>567</sup> Argentina also permits the waiver of protest, but this waiver does not free the holder from making presentment and

---

555. U.C.C. § 3-501(3).

556. Bills of Exchange Act, §§ 16, 46, 51(9).

557. Geneva Cheque Convention, art. 43.

558. Geneva Draft Convention, art. 46.

559. CÓDIGO DE COMERCIO, art. 754 (El Salvador).

560. CÓDIGO DE COMERCIO, art. 469 (Guatemala).

561. *Id.*, art. 470.

562. CÓDIGO DE COMERCIO, art. 452 (Venezuela).

563. *Id.*, art. 454.

564. CÓDIGO DE COMERCIO, art. 454 (Ecuador).

565. LEY DE CHEQUES, art. 41.

566. CÓDIGO DE COMERCIO, art. 697 (Colombia).

567. *Id.*, art. 707.

giving notice of dishonor of the draft.<sup>568</sup> Where checks are involved, the dishonor notation placed on the check by the drawee-bank constitutes the protest.<sup>569</sup> Mexican law is in accordance as to drafts<sup>570</sup> and checks.<sup>571</sup>

*JJ. Unjust Enrichment Actions After the Statute of Limitations Has Run*

As stated in a preceding section, the discharge of the party on the instrument also discharges him/her on the underlying obligation in the United States.<sup>572</sup> This result seems quite fair when the instrument is dishonored and the holder fails to notify the indorser by midnight of the third business day following the holder's receipt of notice of the dishonor.<sup>573</sup> The same result follows when the tardy holder fails to present the instrument for payment until more than seven days after the indorser negotiated the instrument to the holder.<sup>574</sup> So long as the indorser has no knowledge of insolvency proceedings instituted against the maker or drawer, he can pay his debts with bad checks which his debtors gave him.<sup>575</sup> This seems to be particularly unfair when the "bad check" is used to purchase goods or real property. In this case, the bad check buyer is enriched at the expense of the tardy seller.

The possibility of unjust enrichment also arises when a state or country has a very short statute of limitations or prescription. The problem also arises when the local law provides that any action against a prior party lapses or is forfeited when the making of protest is delayed beyond the prescribed limits. In brief, there should be some kind of a legal escape valve which protects the dilatory holder by preventing the indorser from being unjustly enriched. This legal escape valve has been created in some Latin American countries by the "unjust enrichment" action.

Among the Latin American countries discussed in this article, it appears that Ecuador has the most complete articulation of an "unjust enrichment" action in its Commercial Code. The code pro-

---

568. CÓDIGO DE COMERCIO, Título X, Cap. VII, art. 50 (Argentina).

569. *Id.*, Título XIII, Cap. IV, art. 38.

570. LEY GENERAL, art. 141.

571. *Id.*, art. 190.

572. *See supra* p. 294.

573. U.C.C. §§ 3-502(1)(a), 3-508(2).

574. *Id.*, § 3-503(2)(b).

575. *Id.*, § 3-417(2)(e).



vides that the holder of a bill of exchange loses his exchange action against the drawer, the indorsers and other parties (with the exception of the acceptor) if the time for presentment and the giving of protest has elapsed. The same code provision then states:

Nevertheless, in case of lapse (*caducidad*) or prescription the exchange action shall subsist against the drawer who has not made remittance to the drawee (*provision*) or against the drawer or an indorser who has been unjustly enriched, as well as, in case of prescription, against the acceptor who has received remittance from the drawer (*provision*) or who has been unjustly enriched, which shall be resolved in the same action initiated for the payment of the bill of exchange.<sup>576</sup>

The El Salvadorian unjust enrichment provision is much narrower than the one in Ecuador:

The exchange action against the issuer being extinguished by the lapse (*caducidad*) or by prescription, the holder of the negotiable instrument which lacks the action against the latter, and of exchange or causal action against other signatories, may demand from the issuer the sum in which he has been enriched to his [the holder] damage. This action prescribes in one year counted from the day in which the exchange action prescribed or lapsed.<sup>577</sup>

The Mexican<sup>578</sup> and Guatemalan<sup>579</sup> unjust enrichment rules closely parallel the one in El Salvador. Argentina's rule tersely states that "[t]he action of enrichment shall be prescribed in a year, counted from the day in which the exchange action was lost."<sup>580</sup>

### *KK. Miscellaneous Concepts*

*This section deals with various concepts which, although interesting, do not deserve treatment under separate sections.*

#### 1. JOINT AND ALTERNATIVE PAYEES

The UN Draft Convention provides that a bill or note may be made payable to two or more payees, and if:

576. CÓDIGO DE COMERCIO, art. 461 (Ecuador).

577. CÓDIGO DE COMERCIO, art. 649 (El Salvador).

578. LEY GENERAL, art. 169.

579. CÓDIGO DE COMERCIO, art. 409 (Guatemala).

580. CÓDIGO DE COMERCIO, Título X, Cap. XII, art. 96 (Argentina).

an instrument is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the instrument may exercise the rights of a Holder. In any other case the instrument is payable to all of them and the rights of a holder can only be exercised by all of them.<sup>581</sup>

This language closely resembles articles 3-116 of the UCC. For some reason, however, one of the commentaries under the UN Draft Convention directly conflicts with the comment under article 3-116. The UN Convention commentary states that where "an instrument is drawn or made payable to A and/or B, it is considered to be payable to both A and B, and not any one of them."<sup>582</sup> In contrast, the UCC comment states: "[i]f the instrument is payable to 'A and/or B,' it is payable in the alternative to A, or to B, or to A and B together, and it may be negotiated, enforced or discharged accordingly." These differing views might indicate that the use of the virgule ought to be avoided.<sup>583</sup>

## 2. LIABILITY OF TRANSFERORS WHO DO NOT INDORSE

Under the UCC, "no person is liable on an instrument unless his signature appears thereon."<sup>584</sup> Therefore, if persons transfer instruments under the blank indorsement of the payee without themselves indorsing the paper, they incur no liability if the maker or drawee (or prior parties) fails to pay the note or draft. In the event of forgery, the transferor without indorsement "warrants to his transferee"<sup>585</sup> that there has not been any forgery. However, he does not give any warranty to subsequent transferees. This seems incongruous because the non-indorsing transferor does warrant against prior forgeries to "a person who in good faith pays or accepts that" he has good title to the instrument and that he has no knowledge that the signature of the maker or drawer is unauthorized.<sup>586</sup> It is true that subsequent transferees may have difficulty in ascertaining the identity of prior transferors without indorsement, but payors may also have similar difficulties.

A much better approach has been advanced in the UN Draft

---

581. U.N. Draft Convention, art. 9(3).

582. *Id.*, at commentary 6.

583. *Dynalectron Corp. v. Equitable Trust Co.*, \_\_\_\_\_ F.2d \_\_\_\_\_, 35 U.C.C. REP. SERV. 1548 (4th Cir. 1983).

584. U.C.C. § 3-401(1).

585. *Id.*, § 3-417(2). Part of this hiatus is filled by § 4-207(2).

586. *Id.*, § 3-417(1).

Convention: “[a]ny person who transfers an instrument by mere delivery is liable to any holder subsequent to himself [emphasis added] for any damages that such holder may suffer on account of the fact that prior to such transfer”<sup>587</sup> a signature on the instrument was forged, the instrument was materially altered, a party has a valid claim or defense against him or the bill was dishonored by non-acceptance or non-payment. This liability extends only to those holders who take without knowledge of the particular defect. The commentary notes that liability under this rule is “off” (doesn’t arise from) the instrument, and thus presentment and protest are not conditions precedent to such liability. Liability “materializes the moment the instrument is transferred regardless of its date of maturity.”<sup>588</sup>

### 3. TIME ALLOWED FOR ACCEPTANCE

The drawee, under the UCC, has the right to defer acceptance without dishonor until the close of the next business day following presentment.<sup>589</sup> This rule is paralleled in the Geneva Draft Convention:

The drawee may demand that a bill shall be presented to him a second time on the day after the first presentment. Parties interested are not allowed to set up that this demand has not been complied with unless this request is mentioned in the protest. The holder is not obliged to surrender to the drawee a bill presented for acceptance.<sup>590</sup>

This provision has been adopted by Venezuela,<sup>591</sup> Argentina<sup>592</sup> and Ecuador,<sup>593</sup> but apparently not by the other countries surveyed in this article.<sup>594</sup> Under the UN Draft Convention, presentment for acceptance must be made on or before the day of maturity,<sup>595</sup> while presentment for payment must be made on the day of maturity or

587. U.N. Draft Convention, art. 41.

588. *Id.*, at commentary 2.

589. U.C.C. § 3-506(1).

590. Geneva Draft Convention, art. 24.

591. CÓDIGO DE COMERCIO, art. 432 (Venezuela).

592. CÓDIGO DE COMERCIO, Título X, Cap. III, art. 26 (Argentina).

593. CÓDIGO DE COMERCIO, art. 432 (Ecuador).

594. Parenthetically, the drawee in the Dominican Republic must accept a dishonor within 24 hours after presentment. CÓDIGO DE COMERCIO, art. 125 (*published in* CÓDIGO DE COMERCIO DE LA REPÚBLICA DOMINICANA (1983)).

595. U.N. Draft Convention, art. 47(e).

on the business day which follows.<sup>596</sup>

#### 4. DOCUMENTARY DRAFTS

The UCC describes a documentary draft as "any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft."<sup>597</sup> Other sections of the UCC state that a bank presented with a documentary draft under a letter of credit may defer honor until the close of the third banking day following receipt of the documents and may further defer honor if the presenter has expressly or impliedly consented to this.<sup>598</sup> Aside from a few other scattered references in the UCC, the documentary draft is ignored. There is nothing spelled out in articles 3 and 4 about the presenter's or holder's duties under a documentary draft. It is suggested that the adoption of the following (or similar) language into the UCC might be helpful:

The insertion of the clauses: documents against acceptance or documents against payment, or of the indications D/a or D/p in the text of the bill of exchange to which there are accompanying documents, shall oblige the holder of the bill of exchange not to deliver the documents except through the means of the acceptance or the payment of the bill or exchange.<sup>599</sup>

Mexico,<sup>600</sup> Colombia,<sup>601</sup> and El Salvador,<sup>602</sup> have rules which are similar to this one.

#### 5. "GRACE PERIOD" FOR PRESENTMENT FOR PAYMENT

Under the UCC, the holder of a draft or note must present it for payment on the date it is due. If he/she fails to do so, he/she will discharge indorsers unless he/she has a valid excuse for the tardy presentment.<sup>603</sup> If the presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next day

---

596. *Id.*, art. 51(e).

597. U.C.C. § 4-104(1)(f).

598. *Id.*, §§ 3-506, 5-112(1).

599. CÓDIGO DE COMERCIO, art. 450 (Guatemala).

600. LEY GENERAL, art. 89.

601. CÓDIGO DE COMERCIO, art. 679 (Colombia).

602. CÓDIGO DE COMERCIO, art. 712 (El Salvador).

603. U.C.C. §§ 3-501, 3-502, 3-511.

which is a full business day for both of the parties.<sup>604</sup>

The UN Draft Convention again seems to the UCC since it provides that presentment for payment must be made on "a business day," and also that it must be presented upon maturity "or on the business day which follows."<sup>605</sup> The Geneva Draft Convention follows a more liberal approach: the holder must "present the bill for payment either on the day in which it is payable or one of the two business days which follow [emphasis added]."<sup>606</sup>

Mexico<sup>607</sup> and El Salvador<sup>608</sup> seem to have anticipated the UN Draft Convention. They require presentment upon the first business day following a non-business day. Ecuador,<sup>609</sup> Venezuela,<sup>610</sup> Argentina,<sup>611</sup> and Guatemala<sup>612</sup> follow the more generous Geneva Draft Convention and allow for two days. Colombia seems to take the most relaxed position and has a provision which states that the draft must be presented "for its payment on the day of its maturity or within the eight following calendar days."<sup>613</sup>

#### 6. "ACCELERATION" OF MATURITY OF A DRAFT BECAUSE OF DEATH OR BANKRUPTCY OF A PARTY

The following hypothetical problem seems unanswered by the UCC: Assume that a draft is payable six months from date and that three months prior to the date of maturity, the drawee becomes bankrupt (or dies). Does this bankruptcy (or death) accelerate the maturity date of the draft so as to enable the holder to demand payment from the drawer of indorsers? A lawyer in the United States must investigate the federal bankruptcy laws and the probate laws of the various states in order to answer these questions.<sup>614</sup> Perhaps a better way has been articulated in

604. *Id.*, § 3-503(3).

605. U.N. Draft Convention, art. 51(a) & (e).

606. Geneva Draft Convention, art. 38.

607. LEY GENERAL, art. 81.

608. CÓDIGO DE COMERCIO, art. 733 (El Salvador).

609. CÓDIGO DE COMERCIO, art. 446 (Ecuador).

610. CÓDIGO DE COMERCIO, art. 446 (Venezuela).

611. CÓDIGO DE COMERCIO, Título X, Cap. VI, art. 463 (Argentina).

612. CÓDIGO DE COMERCIO, art. 463 (Guatemala).

613. CÓDIGO DE COMERCIO, art. 691 (Colombia).

614. U.C.C. § 3-511(3)(a) excuses presentment when the maker, acceptor or drawee of any instrument (except a documentary draft) is either dead or in insolvency proceedings. This selection also allows the holder recourse against other parties, but does not authorize the maturation of the instrument before maturity. F.M. HART AND W.F. WILLIER, *COMMER-*

## Venezuela:

The holder may exercise his remedies and actions against the indorsers, the drawer and others obligated:

...  
*Even before maturity,*  
 ...

In those cases of bankruptcy of the drawee, having accepted or not, of suspension of his payments even in the case in which there is no record of a judicial resolution, or by attachment of his goods which makes the result (payment) impracticable or fruitless.

In those cases of bankruptcy of the drawer of a bill which does not require acceptance.<sup>615</sup>

It appears that the Venezuelan provision was derived from article 43 of the Geneva Draft Convention with a few local embellishments:

The holder may exercise his right of recourse against the endorsers, the drawer and the other parties liable:

...  
*Even before maturity;*

- (1) If there has been total or partial refusal to accept;
- (2) In the event of the bankruptcy (*faillite*) of the drawee, whether he has accepted or not, or in the event of a stoppage of payment on his part, even when not declared by a judgment, or where execution has been levied against his goods without result;
- (3) In the event of the bankruptcy (*faillite*) of the drawer of a non-acceptable bill.<sup>616</sup>

In El Salvador, the bankruptcy of the drawee, his suspension of making payments or his insolvency matures the bill of exchange, and the holder can then exercise his rights on it.<sup>617</sup> Argentina<sup>618</sup> and Ecuador<sup>619</sup> have adopted provisions with language which closely resembles the Geneva-Venezuelan version. In Mexico, the holder may bring suit even before the maturity of the bill when

CIAL PAPER, § 9.25 (1983).

615. CÓDIGO DE COMERCIO, art. 451 (Venezuela).

616. Geneva Draft Convention, art. 43.

617. CÓDIGO DE COMERCIO, art. 760 (El Salvador).

618. CÓDIGO DE COMERCIO, Título X, Cap. VII, art 47 (Argentina).

619. CÓDIGO DE COMERCIO, art. 451 (Ecuador).

either the drawee or the acceptor has been declared bankrupt or in a state of insolvency.<sup>620</sup> The language used in Mexico differs from the language of the Geneva Draft Convention.

#### 7. THE PAYOR BANK: WHAT PROCEDURES WHEN A FORGED CHECK IS PRESENTED

Assume that a drawee bank is presented with a check for payment across the counter (or through the bank collection process,) and the employee of the bank suspects that it has been forged or altered, what does the bank do? It is, of course, obvious that the bank should dishonor, but what does the bank do with the check itself? The UCC remains strangely silent about this too often recurring problem. The problem is, however, nicely solved in El Salvador:

If the bank notices errors or it has suspicions of fraud or of falsity, it may retain the check giving immediate notice to the drawer and it shall pay or not pay, according to what the drawer directs. The delay may not exceed twenty-four hours. The bank shall extend to the holder a record of the presented check which remains in its possession. In this record it shall be recorded that the check is non-transferable.<sup>621</sup>

#### 8. THE ILLITERATE PAYEE AND BANK PAYMENT

Although illiteracy may not be a major problem in the United States, it is common enough to cause difficulties for banks. Unfortunately, the UCC is silent as to an approved method of making payment to an illiterate person. Again, the law in El Salvador is a helpful model:

If a check has been drawn in favor of a person who does not know how to or cannot sign, payment may be made to said person only, who shall take it personally to the office of the bank for collection; the indorsement shall be signed by a third person at the request of the beneficiary, who shall in addition stamp his thumb and fingerprints [on it]. If fingerprints cannot be taken, the signature shall be made in the presence of an official of the bank especially authorized for this purpose, who shall certify

---

620. LEY GENERAL, art. 150.

621. CÓDIGO DE COMERCIO, art. 809 (El Salvador).

this circumstance.<sup>622</sup>

Guatemala provides that a person may sign on behalf of a person who does not know how to or who cannot sign a negotiable instrument and his signature "shall be authenticated by a notary or by the secretary of the municipality of the place of payment."<sup>623</sup> The author has been unable to discover any legal authority for the use of fingerprints for the handling of checks in Guatemala. In spite of this apparent lack of authorization, the author has observed the use of fingerprints in the cashing of checks in banks in that country.

#### 9. INDORSEMENTS TO PLEDGEEES

The UCC has no provisions governing the payee's or special indorsee's indorsement to a pledgee which would prevent the pledgee from violating its trust by indorsing to a holder in due course. The Geneva Draft Convention does cover this problem:

When an endorsement contains the statements "value in security" ("*valeur en garantie*"), "value in pledge" ("*valeur en gage*"), or any other statement implying a pledge, the holder may exercise all the rights arising out of the bill of exchange, but an endorsement by him has the effects only of an endorsement by an agent.

The parties liable cannot set up against the holder defences founded on their personal relations with the endorser, unless the holder, in receiving the bill, has knowingly acted to the detriment of the debtor.<sup>624</sup>

It appears that the draftsmen of the UN Draft Convention have omitted any coverage of this pledgee indorsement; this is strange in light of the wide adoption of the Geneva provision or of similar language. For example, Guatemala<sup>625</sup> and Venezuela<sup>626</sup> follow the Geneva model with some language changes in language. Argentina,<sup>627</sup> Colombia,<sup>628</sup> and Ecuador<sup>629</sup> closely track the Geneva

---

622. *Id.*

623. CÓDIGO DE COMERCIO, art. 397 (Guatemala).

624. Geneva Draft Convention, art. 19.

625. CÓDIGO DE COMERCIO, art. 428 (Guatemala).

626. CÓDIGO DE COMERCIO, art.427 (Venezuela).

627. CÓDIGO DE COMERCIO, Título X, Cap. II, art. 20 (Argentina).

628. CÓDIGO DE COMERCIO, art. 659 (Colombia).

629. CÓDIGO DE COMERCIO, art. 427 (Ecuador).



wording. Mexico<sup>630</sup> and El Salvador<sup>631</sup> follow similar concepts, but add additional ideas and change the language used.

### III. CONCLUSION

This article has attempted to make a comparative analysis of the negotiable instrument laws of the United States with those of eight foreign countries and two existing and to proposed international conventions. It is the author's belief that some of these "foreign" concepts should be adopted in the United States. The differences in languages, customs, geography, etc., that divide us in other legal areas are not significant in the area of negotiable instrument laws. A more uniform approach to the issues which arise in regard to negotiable instruments will make international business transactions more predictable and consistent for those involved in international trade.

---

630. LEY GENERAL, art. 36.

631. CÓDIGO. DE COMERCIO, art. 668 (El Salvador).