SOUTH AFRICAN LAW COMMISSION

PROJECT 50

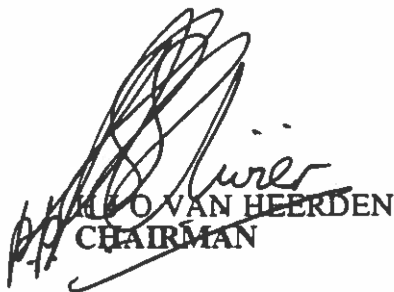
INVESTIGATION INTO THE PAYMENTS SYSTEM IN SOUTH AFRICAN LAW

REPORT

AUGUST 1994

TO MR A M OMAR, MP, MINISTER OF JUSTICE

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's report on the investigation into the payments system in South African law.



H J O VAN HEERDEN
CHAIRMAN

31 August 1994

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The present members of the Commission are:

The Honourable Mr Justice H J O van Heerden (Chairman)
The Honourable Mr Justice P J J Olivier (Vice-Chairman)
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The project leader responsible for the project is the Honourable Mr Justice P J J Olivier. The research for this project was undertaken under the direction of Professor F R Malan of the Rand Afrikaans University with the assistance of Professor J T Pretorius and Professor A N Oelofse of the University of South Africa.

ACKNOWLEDGMENT

This report concludes an extensive investigation into the payments system in South African law, the aim of which is to bring this branch of the law relating to all forms of instruments of payment into line with modern needs and with developments elsewhere in the world.

Under the direction of Professor FR Malan of the Rand Afrikaans University and with the assistance of Professors JT Pretorius and AN Oelofse of the University of South Africa a comprehensive working paper with contributions by Professor PEJ Brookes, attached to the University of South Africa, Dr NL Joubert, formerly attached to the Rand Afrikaans University, and Mr E Labuschagne, of the Rand Afrikaans University, was published by the Commission for general information and comment during December 1988. The Clearing Bankers Association of South Africa funded the investigation up to the publication of the working paper.

The formidable task of evaluating the comments and consulting with interested persons and bodies, as well as the compilation of a draft report for consideration by the Commission, was performed by Professor FR Malan and Professor JT Pretorius.

The Commission sincerely appreciates the sterling contributions of the academics who have actively participated in the reform of an important branch of the law.

The Commission appreciates, in particular, the indispensable contributions by Professors Malan and Pretorius who were not only closely involved throughout the investigation but who were also solely responsible for the finalization of the report stage of the investigation.

PREFACE

A working paper *(working paper 22 : Proposals for the Reform of the Bills of Exchange Act, 1964)* was published on 19 December 1988 and the closing date for comment on the proposals was 1 July 1989. The availability of the working paper was announced in the *Government Gazette* and a press statement to this effect was issued.

The working paper contained proposals for the introduction of two separate Acts -- a *Cheques Act* and a *Bills of Exchange and Promissory Notes Act.* The comments received on the working paper were analysed by Professor FR Malan and Professor JT Pretorius and are dealt with in this report. In addition, the Commission itself amended some of the proposals. These amendments are referred to specifically.

The following persons and institutions commented on *Working Paper 22*:

1.1 The Association of Insolvency Practitioners of Southern Africa;
1.2 Mr Justice GGA Munnik, Judge President of the Cape Provincial Division;
1.3 The Pretoria Bar Council on behalf of the General Bar Council;
1.4 The Association of Attorneys of the Republic of South Africa;
1.5 The Clearing Bankers Association of South Africa;
1.6 Professor AN Oelofse;
1.7 Standard Bank of South Africa on behalf of the Clearing Bankers Association;
1.8 Retailer's Committee on Bank Services;
1.9 Association of Corporate Treasurers of Southern Africa;
1.10 Webber Wentzel on behalf of the Clearing Bankers Association of South Africa; and
1.11 Mr Alec Pienaar on behalf of Standard Bank Investment Corporation.
1.12 In addition, members of the South African Law Commission visited the Automated Clearing Bureau and other processing centres in Johannesburg on the invitation of the Clearing Bankers Association in order to review procedures and operations.
1.13 The Law Commission has also received additional memoranda and representations from the banking industry, specifically with regard to the liability of the collecting bank and the transferability of cheques.

Generally, working paper 22 was received favourably. In particular, all the commentators approved of the introduction of two Acts, one dealing with bills and notes and the other with cheques. It is of some interest to note that a similar proposal has been made subsequent to the publication of the working paper in *Banking Services: Law and Practice Report by the Review Committee* (HMSO Cm 622 February 1989), under the chairmanship of Professor JB Jack (paragraphs 7.46ff and 8.01ff).

Some of the comments received concern style or deal with relatively minor matters. They are not referred to in this report. A few grammatical changes as well as some amendments not affecting the substance of the proposed legislation have also been made. They are not dealt with specifically.

Some alterations that take new legislation into account have been made. In particular, a revision of Article 3 and an amended Article 4 of the *Uniform Commercial Code* (see West Publishing Co *Selected Commercial Statutes* (1992)) were published in 1990 and the draft of the UNCITRAL Convention was finalised in 1988. Although reference is made to these new and important documents, they could not be treated extensively. All references to the Uncitral Convention have been updated and the new provisions of the UCC are referred to as the *Revised UCC* or *Revised Article 3* or *4*.

The final text of the proposed legislation is included in the annexures to this report.

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ABBREVIATIONS

BEA Bills of Exchange Act, 1882
GULB Geneva Uniform Law for Bills of Exchange and Promissory Notes
GULC Geneva Uniform Law for Cheques
NIL Negotiable Instruments Law
NPC New Payments Code
Records League of Nations *Records on the International Conference for the Unification of Laws on Bills of Exchange, Promissory Notes and Cheques* (1930) (C360 M151 1930 II M137 II)
SABEA Bills of Exchange Act, 1964
UCC Uniform Commercial Code
Draft Convention on International Bills of Exchange and International Promissory Notes (General Assembly resolution 43/165, annex)
Revised UCC Revised Uniform Commercial Code Article 3 and amended Article 4

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GENERAL INTRODUCTION

1 *Unity of the law*

The bill of exchange is a financial instrument necessary for the completion of commercial transactions. Its use is not confined to transactions in any specific country: it is a truly international instrument: 'un viadante nato che non si arresta per confini di territori, ma percorre trionfante le vie del mondo'.[1] Chalmers aptly referred to negotiable instruments as 'the most cosmopolitan of all contracts'.[2] For this reason, the international unification of the laws of bills, notes and cheques was pursued from an early stage. This quest for unification was aided by another factor, a desire to formulate, within human limits, a 'perfect' system of law governing bills and notes. This part of the law lends itself to precise formulation. As was said in an English judgment[3]: 'The law of negotiable instruments was peculiarly adapted to codification, because it was so largely precise and formal.' Camara[4] states: 'They [the rules governing bills and notes] constitute a rigid and geometrically perfect system.'

Today, two systems dominate the laws of bills of exchange[5], the one based on the Bills of Exchange Act of 1882 (BEA) and the other on the Geneva Uniform Law for Bills of Exchange and Promissory Notes of 1930 (GULB)[6] and Cheques of 1931 (GULC)[7]. The major and traditional differences that once existed between the German and French systems appear almost to have been overcome.[8]

The method of unification followed by the Geneva Conventions, viz that of imposing a duty on the states party to them to enact the uniform laws as part of their

1 Ferrara 'I Principi Direttivi delle Leggi Uniforme Cambiaria' 32 *Rivista del Diritto Commerciale e delle Obligazionni* 76 cited by Camara 'Inter-American Legislative Unification of Bills of Exchange and Promissory Notes' (1965) 11 *New York Law Forum* 503.

2 See his introduction to the third edition reprinted in A *Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities* (1927) 9ed xliv. See Balogh 'Critical Remarks on the Law of Bills of Exchange of the Geneva Convention' (1935) 9 *Tulane Law Review* 165.

3 *Bank of Baroda Limited v Punjab National Bank Limited and others* 1944 AC 176 183.

4 At 503.

5 See, inter alia, Zevenbergen 87ff and Yntena 'Unification of the Laws respecting Negotiable Instruments' (1951) 4 *International Law Quarterly* 178.

6 See par 5 infra.

7 See par 5 infra.

8 See Hirsch 'Einheitliches Wechselgesetz oder einheitliches Wechselrecht' (1961) 14 NJW 1089; Dabin *Fondements du Droit Cambiaire Allemand* (1959) 3.

own legislation, is not above criticism,[9] and has recently been replaced by a different technique, developed by the United Nations Commission on International Trade Law (Uncitral)[10], viz that of leaving it to the autonomy of the parties to make use of an instrument subject to the Uncitral rules.

2 Bills of Exchange Act 1882 (BEA)

The Bills of Exchange Act, 1882 became law in England and Scotland on 18 August 1882. It was drafted by Sir MacKenzie Dalzell Chalmers, then a member of the English Bar. The purpose of the BEA was to 'codify the laws relating to bills of exchange, cheques, and promissory notes', and it was the intention of the drafter to codify the existing law as embodied in approximately two thousand and five hundred cases and seventeen statutory enactments. The BEA is based on his *Digest of the Law of Bills of Exchange* of 1878. Although he founded his Digest principally on precedent, Chalmers was well aware of American decisions and developments on the continent.[11] 'Still, in drafting the Bills of Exchange Bill, my aim was to reproduce as exactly as possible the existing law, whether it seemed good, bad, or indifferent in its effects.'[12]

There is no doubt that the BEA was, and in some respects still is, an outstanding enactment. It has been described as 'the best drafted Act of Parliament which was ever passed'.[13] Although this statement goes too far, it is clear that the BEA would not have been so accepted widely[14] had it not been for its conciseness, precision and clarity. Denning LJ said: 'We no longer credit a party with the foresight of a prophet, or his lawyer with the draftsmanship of a Chalmers'.[15] The BEA was one of a series of enactments which were, 'like the imposing structures of Victorian architecture ... masterly in their logical order and simple classical language'.[16]

9 Gutteridge 'The Unification of the Laws of Bills of Exchange' (1931) 12 *British Yearbook of International Law* 13 17.
10 Infra par 6.
11 On the BEA, see Holden *History* 199-203, the preface to the third edition (1887) of *Chalmers* (reprinted in 11ed 1947).
12 Chalmers preface xli.
13 *Bank Polski v KJ Mulder & Co* 1942 1 All ER 396 398.
14 The BEA was adopted, to cite a few instances, in New Zealand (1883), Hong Kong (1885), Canada (1890), Australia (1909), Ceylon (Sri Lanka) (1928). It was accepted in Natal in 1887, the Cape Colony in 1893 and in the Orange River Colony and Transvaal in 1902.
15 *British Movietonews Ltd v London and District Cinemas Ltd* 1951 1 KB 190 202.
16 Schmitthoff *Commercial Law in a Changing Economic Climate* (1981) 2ed 7.

Clearly, the BEA is not a code in the continental sense.[17] It does not replace the common law: 'The subject could not be isolated. Bills of exchange and promissory notes have very special characteristics, but they are not and could not be removed from the operation of the general law'.[18] But, as the BEA in a sense replaced the cases and enactments that preceded it, 'the first step [to be] taken should be to interpret the language of the statute, and ... an appeal to the earlier decisions can only be justified on some special ground'.[19]

3 Negotiable Instruments Law (NIL)

The American law of bills and notes in the seventeenth and eighteenth centuries was based on two sources, viz the great number of state enactments on the subject and the English common law, particularly the English decisions after 1602.[20] Codification of the English law in 1882 provided an impetus for the unification of the different state laws.[21] The various movements striving for unity of the law - not only the laws of bills and notes - culminated in the National Conference of Commissioners on Uniform State Laws in 1891.

In 1895 John J Crawford, a member of the New York Bar, was instructed by the Conference to draft a bills of exchange act. His draft was presented to the Conference in 1896, and after a debate its adoption by the different states was recommended. This recommendation was followed and from 1897 to 1924 the NIL was enacted in all the American states.

Adoption of the NIL led to a debate on its merits, the so-called Ames-Brewster controversy. In a series of articles Ames, Dean of the Law School at Harvard, criticised the NIL. He was answered by Judge Brewster, then the President of the National Conference. Others soon entered the debate.[22] Ames objected, among other

17 *Bank of Baroda v Punjab National Bank* 1944 All ER 83 86.
18 *Stock Motor Plough Ltd v Forsyth* 1932 48 CLR 128 137.
19 *Governor and Company of the Bank of England v Vagliano Brothers* 1891 AC 107 144-5.
20 Britton 10.
21 See Beutel 'The Development of State Statutes on Negotiable Paper prior to the Negotiable Instruments Law' (1940) 40 *Columbia Law Review* 836; Eaton 'The Negotiable Instruments Law: its History and its Practical Operation' (1904) 2 *Michigan Law Review* 260.
22 See, inter alia, Ames 'The Negotiable Instruments Law' (1900) 14 *Harvard Law Reviews* 241, 'The Negotiable Instruments Law. A Word More' (1901) 15 *Harvard Law Review* 442; 'The Negotiable Instruments Law - Necessary Amendments' (1903) 16 *Harvard Law Review* 255 and Brewster 'A Defense of the Negotiable Instruments Law' (1901) 10 *Yale Law Journal* 84; 'The Negotiable Instruments Law - A Rejoinder to Dean Ames' (1901) 15 *Harvard Law Review* 26. The debate is reviewed in an excellent article by McKeehan 'The Negotiable Instruments Law. A Review of the Ames-Brewster Controversy' (1902) 41 *American Law Register* 437 (reprinted in Brannan *The Negotiable Instruments Law Annotated* (1911) 220).

things, to the way in which the NIL had been drafted and adopted: 'Codification with us is a new art, and it is not surprising, although it is unfortunate, that the Commissioners did not realize, the extreme importance of the widest possible publication of the proposed code, and the necessity of abundant criticism ....'.[23] His criticism, as well as that of others, led to continuing calls for the amendment or the eventual replacement of the NIL.[24]

4 The Uniform Commercial Code (UCC)

The American law of bills and notes entered an entirely new phase with the drafting of the Uniform Commercial Code by the American Law Institute and the National Conference of Uniform State Laws.[25] The first step towards the unification of commercial law was taken in 1932, and drafts of the UCC were prepared from 1940. A final draft was published in 1958, which was adopted, with subsequent amendments, by all the American states.

The UCC is not a code in the continental sense, but rather an integrated enactment that is based on, and provides for, the movement of goods:

> 'It is peculiarly a "private" law codification centering around the movement of goods by way of sale and the incidental services of railroads, warehouse men, bankers, finance companies and the like in connection with that movement. Its unity rests essentially on the functional unity of this movement of goods rather than on uniformity of conceptual treatment, but there are a number of important general concepts both of substance and drafting technique, for this code has been planned to endure and to afford both the courts and the people affected by it room to move in the best American Common Law tradition.'[26]

As no commercial transaction is complete without an instrument of payment, re-examination of commercial law necessitated an updating of the NIL. The UCC governs not only bills and notes, but all commercial subjects. Article 3 deals with

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23 (1900) 14 *Harvard Law Review* 241. For further literature on the NIL, see Eaton 'The Negotiable Instruments Law. Its History and Practical Operation' (1904) 2 *Michigan Law Review* 260 and Turner 'A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law' (1929) 38 *Yale Law Journal* 1047.

24 See, inter alia, Turner 'A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law' (1929) 38 *Yale Law Journal* 1047 and his 'Revision of the Negotiable Instruments Law' (1928) 37 *Yale Law Journal* 25.

25 See on the UCC, Beutel 'The Proposed Uniform Commercial Code as A Problem in Codification' (1951) 16 *Law and Contemporary Problems* 141; 'The NIL Should not be Amended' (1932) 80 *University of Pennsylvania Law Review* 368; Braucher 'The Legislative History of the Uniform Commercial Code' (1958) 58 *Columbia Law Review* 798; Mentschikoff 'Highlights of the Uniform Commercial Code' (1964) 27 *Modern Law Review* 167; Guttman 'Article 3 - Commercial Paper: an Updating of well-tried Concepts' (1965) 11 *Harvard Law Journal* 49.

26 Mentschikoff 'Highlights of the Uniform Commercial Code' (1964) 27 Modern Law Review 167 167-8.

bills of exchange, cheques, promissory notes and negotiable instruments of deposit and article 4 with bank collections. Article 3 did not depart radically from the NIL:

> 'There is ... no breach with accepted norms, but rather is the law relating to negotiable instruments brought up to date from its nineteenth century setting into the glare of the second half of the twentieth century.'[27]

5 The Geneva Uniform Laws (GULB and GULC)

5.1 The quest for unification of the law of bills and notes culminated in the International Conference for the Unification of Law on Bills of Exchange, Promissory Notes and Cheques held in Geneva from 13 May to 7 June 1930.[28] Thirty one states were present at the conference; the United States of America sent an observer, and representatives of the Economic Committee of the League of Nations, the International Chamber of Commerce and the International Institute for the Unification

27 Guttman 'Article 3 - Commercial Paper: An Updating of Well-tried Concepts' (1965) 11 Howard Law Journal 49 53. On the necessity of the UCC, see Llewellyn 'Why We Need the Uniform Commercial Code' (1957) 10 University of Florida Law Review 367; and for criticism of its provisions and underlying 'philosophy', see Gilmore 'The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman' (1981) 15 Georgia Law Review 605 who at 605 says: 'One of the ideas I took from Llewellyn's bounteous store was that the good faith purchaser is always right and that the story of his triumph was not only one of the most fascinating episodes in our nineteenth-century history (which it was), but was also one of continuing relevance for our own time (which, I have belatedly come to believe, it is not). That attitude, which was shared by almost all - perhaps all - the people who became involved in the Code's drafting, explains a great deal about the Code's treatment of third-party rights. What I propose to do in this article is to review the ideas that we accepted and to explain why (as I now think) we were in a large part (although not entirely) mistaken.' And at 627 he writes: 'We shall be living with our nineteenth-century code for quite a while yet. Perhaps next century we will have a twentieth-century Code which, like our own Code, will be out of date by the time it is enacted.' See paragraph 8 below.

28 This paragraph is based on the following works: *Records of the International Conference for the Unification of Laws on Bills of Exchange, Promissory Notes and Cheques* League of Nations C. 360. M.151 1930.II (cited as *Records*); *Unification of Laws relating to Bills of Exchange and Promissory Notes. General Report and Individual Reports* 1923 Geneva C. 487. M. 203 (cited as Report); Hudson and Feller 'The International Unification of Laws concerning Bills of Exchange' (1931) 34 *Harvard Law Review* 333; Hupka 'Das Haager Wechselrechtsübereinkommen und der Völkerbund' (1930) 4 *Rabelsz* 205; Chèron 'Vers L'Unification du Droit de Change' 1929 *Annales de Droit Commercial* 26; Gutteridge 'The Unification of the Law of Bills of Exchange' 1931 *BYBIL* 13; Von Flotow 'Der heutige Stand der Bestrebungen zur Vereinheitlichung des Wechselrechts' (1937) 1 *Rabelsz* 68; Quassowski 'Die Genfer Abkommen über die Vereinheitlichung des Wechselrechts' (1930) 4 *Rabelsz* 770; Wieland 'Das internationale Wechselrechtsübereinkommen vom 23. Juli 1912 und sein Geltungsbereich' (1913) 74 ZHR 1; Yntema 'Unification of the Laws respecting Negotiable Instruments' (1951) 4 *International Law Quarterly* 178.

of Private Law attended. Three conventions were concluded at this conference, viz the Convention providing for a Uniform Law for Bills of Exchange and Promissory Notes (with Protocol and Annexes); the Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes (with Protocol) and the Convention on the Stamp Laws in connection with Bills of Exchange and Promissory Notes (with Protocol). Representatives of twenty six states signed all three conventions, but the United Kingdom became party only to the third convention. The United States of America did not sign any of the conventions. The Conventions had to be ratified before 1 September 1932 to become enforceable on the ninetieth day after ratification by seven states, of which at least three were permanent members on the Council of the League of Nations.[29]

No convention dealing with cheques was concluded at this Conference, but a later conference for this purpose was envisaged. This was held in Geneva from 23 February to 19 March 1931.[30] Thirty states were represented, the United States of America attended as an observer. The decisions at this conference are contained in three conventions, viz, the Convention providing a Uniform Law for Cheques (with two Annexes and Protocol); the Convention for the Settlement of certain Conflicts of Laws in connection with Cheques (with Protocol) and the Convention on the Stamp Laws in connection with Cheques (with Protocol). The conventions were signed on behalf of twenty countries, but the United Kingdom became party only to the Convention on Stamp Laws and the United States declined to become a party to any of them. Ratification of the conventions had to take place before 1 September 1933.

5.2 The GULB and the GULC were preceded by various European codifications, both national and international. Jitta, a delegate at the first Geneva Conference, gives perspective to this development:[31]

> 'It appears worth noting that the law on bills of exchange was, originally, a law established by universal usage, and that during the course of history it has become a law bearing the stamp of many national legislatures. This fact may be of importance when we come to consider whether the law on bills of exchange may become, once more, a universal law.'

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29 Art IV and VI of the *Convention providing a Uniform Law*, art 3 and 5 of the Convention on the Stamp Laws and art 13 and 15 of the *Convention for the Settlement*.

30 See Feller 'The International Unification of Laws concerning Checks' (1930-31) 45 *Harvard Law Review* 668.

31 *Report* 13.

The most important early European codification is the Allgemeine Deutsche Wechselordnung of 1847 that codified and unified the laws on bills of exchange of the various German states. To acquire legislative force, the ADWO had to be enacted by the different states. It was taken over literally to become the uniform law from 7 May 1880 for Denmark, Sweden and Norway. The Swiss act of 1881 was inspired by the ADWO. In fact, the ADWO served as the model for several East and West European laws on bills of exchange.

Codification of the law of bills of exchange in France is much older. The pioneering enactment is the Ordonnance du Commerce of 1673[32] which was replaced in 1807 by the Code de Commerce. The Code inspired legislation in Poland (1809), Haiti (1826), Greece (1835), the Dominican Republic (1874) and influenced legislation in the Netherlands, Belgium, Spain and others.

5.3 The first initiative for the worldwide unification of the law of bills of exchange was taken in 1851 when an English advocate addressed the Universal Exposition in London and pleaded for the unification of commercial law.[33] More specifically, Asser in 1863 in Gent, in an address to the Association International pour les Progres des Sciences Sociales, advocated the unification of the laws of bills of exchange.[34] The foundation of the International Law Association in 1873 and its meetings in 1875 to 1879 added impetus to this call, as did the meeting of the Institut de Droit International in 1883 in Munich.[35] In 1885 the King of Belgium opened an international conference on commercial law in Antwerp. The international unification of the laws of bills of exchange was on the agenda, and a draft law was proposed which was revised at the subsequent conference in 1888 in Brussels. No convention, however, was concluded. Hudson and Feller[36] describe the work done thus:

> '[T]he work of Antwerp and Brussels was of considerable importance; it established that the best method for unification was a model law to be incorporated into the legislation of the various states, and it produced the first official international discussion of the subject.'

32 The standard commentary is that of Jousse *Commentaire sur l'Ordonnance du Commerce du Mois de Mars 1673; avec des Notes & Explications par V Bécane* 1828.
33 Hudson and Feller 339.
34 Hudson and Feller 339.
35 Hudson and Feller 339.
36 At 340.

Interest in the matter was revived by the conference of the International Law Association in Budapest in 1908. Of more importance, however, is the request of Die Ältesten der Kaufmannschaft in Berlin to Felix Meyer to undertake a comparative study of the different systems of the law of bills of exchange. His Das Weltwechselrecht[37] was influential. In the preface he writes: 'Möchte es ihm gelungen sein, zu dem grossen Werk eines einheitlichen Wechselgesetzes wenigstens einige Bausteine herbeigeschafft und nicht ganz ohne Nutzen für die Förderung des Wechselrechts gearbeitet zu haben.' His book was the necessary preparation for a draft uniform law, in particular that of the Hague conventions.[38] Mainly as a result of Meyer's work, the Netherlands government arranged an international conference on the unification of the laws of bills of exchange at The Hague from 23 June to 25 July 1910.

5.4 Both the United Kingdom and the United State were represented at this conference, but it was clear that neither would become party to a convention calling for the enactment of a uniform law. Sir George Buchanan, the British delegate, declared that his delegation was interested in the proceedings and took part:[39]

> 'However, it is our duty again to affirm that it is impossible for the government to go further or to depart from the attitude which it has taken from the beginning of this Conference. It is no question of national pride or obstinacy which has given rise to this attitude, but the necessity of safeguarding the interest of our mercantile community. A law which governs more than 120 000 000 people - including the United Kingdom, the British colonies, and most of the States of the United States of America without counting the vast population of the Indian Empire - cannot be modified without disturbing long-settled commercial relations, and without creating divergencies in legislation among the members of the Anglo-Saxon family.
> 'It is possible that, among the rule of English law, there are some which are antiquated and inconvenient, but in its main lines our law does but incorporate the usages of our commerce. It is not an arbitrary law imposed by the legislature on the commercial community, the legislature has but given the sanction of law to the usages of our commerce and trade, and in modifying that law we should upset long-established customs. There are other reasons in the domain of law which raise equal difficulties. We have no separate droit de change. We have no tribunals of commerce. We draw no distinct on between traders and non-traders. Our commercial law is an integral part of our common law, and it is the ordinary civil courts which give effect to its provisions in the same manner as they give effect to ordinary debts and obligations.
> 'You can well understand, after what I have just said, that it is impossible for the British delegation to associate itself officially in the drafting of a proposed uniform law when, by their instructions, they are forbidden to take any such undertaking into consideration.'

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37 1909 2 vol Leipzig.
38 Hupka 207 n2.
39 Cited by Chalmers *Report* 98-9.

The American delegate expressed a similar view:[40]

> 'There is great reluctance in America to undo the long and arduous work which has brought about uniformity in thirty-five American States, four territories, and in Great Britain and her dependencies. The scope and policy of American laws differ in some respects from the systems of the countries of the Continent. We have no code of commerce distinct from the common law, we recognise no distinction between merchants and others who draw bills or sign notes, and we have no separate tribunals dealing with commercial cases. Under these conditions, our difficulties would be greater, if we should undertake to adopt a uniform law, than in countries where a long succession of laws and usages are based upon the existence of a special commercial code.'

The result of the first Hague Conference was a provisional draft. The Dutch Government was also requested to convene a second conference in order to finalize the draft law. This conference was held at the Hague from 15 June to 23 July 1912 and a Convention on the Unification of the law relating to Bills of Exchange and Promissory Notes was approved. In terms of this convention, the signatory states undertook to enact the Uniform Regulation on Bills of Exchange as part of their national law. The Convention was signed by twenty eight countries, but not by the United Kingdom or the United States. South Africa was not represented at the conference, but the government had declared that it was in favour of the principle of unification.[41]

The Hague Regulation was an important step towards international unification of the law of bills of exchange. In a sense it was the fulfillment of a dream.[42] The drafters were inspired by ideals of international solidarity. Unfortunately, little much came from the Regulation, it was not ratified: the First World War shattered the idea of unification.[43]

5.5 After the war, the International Chamber of Commerce actively propagated unification.[44]. In 1920 the International Financial Conference requested the League of Nations to advance the cause of unification and in the same year the Economic Committee of the League appointed four jurists to investigate the matter. The report of Professor D Josephus Jitta, Sir MacKenzie Dalzell Chalmers, Professor Franz Klein and Professor Ch Lyon-Caen was published in 1923. They made the following recommendations: [45]

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40 Cited by Chalmers *Report* 99.
41 *Report* 21.
42 Wieland 23; Hupka 206.
43 See further *Records* 125.
44 Hudson and Feller 343-5.
45 See the *Report* (note 25 supra).

> '1 It is not at present possible to secure general uniformity in the law of bills of exchange. Generally speaking, Anglo-American law follows, and will continue to follow, its own lines, for constitutional and important practical reasons, this is clear from statements which have been made on many occasions.
> '2 We must be satisfied with uniformity among the great majority of the States of what is known as the continental type in both hemispheres.
> '3 It seems clear that the Hague Regulation which was signed by the representatives of 28 countries, is well adapted to form the basis of discussion at another meeting, it may perhaps be revised with due prudence.'

Several years passed before these recommendations were acted upon. In 1927 a Committee of Experts was appointed to draft the conventions and a uniform law. This Committee's report was published and as a result of favourable reaction received from member states of the League, the conference in Geneva in 1930 was arranged.

President of the Geneva Conference, which took place from 13 May to 7 June, was MJ Limburg, a Dutch official. In his opening address[46] he stressed the importance of unification and referred to the need for international co-operation. In terms of the convention providing a Uniform law of Bills of Exchange and Promissory Notes the parties to it undertook to enact the uniform law, being annexure 1 to the Convention, as part of their national law.[47] The same provision is found in the Convention providing for a Uniform Law for Cheques. The Conventions thus imposed on the parties the duty to enact uniform laws. However, each party had the right to invoke certain reservations, ie it had the right to formulate its own rules on certain aspects. 'Het opnemen der reserves is de prijs geweest, waarmede de aanvaarding van een groot aantal staten van de loi uniforme moest worden betaald.'[48]

The GULB and the GULC were enacted in most European countries[49], including the Federal Republic of Germany and the Netherlands, and also, as recently as 1986, Spain.[50]

46 *Records* 161 163.
47 Art 1. Scheltema 9 remarks: 'Wij wijzen er op, dat het verdrag dus, blijkens zijn eigen inhoud, niet bedoeld, *recht streeks* de onderdanen der aangesloten staten te binden, het verdrag bindt slechts staten; het bindt deze tot het totstandbrengen van een wet van bepaalden inhoud, en aan die wet zijn, op normale wijze, de onderdanen gebonden.'
48 Scheltema 9. The reservations are contained in the second annexure to the Convention.
49 For details, see Von Caemmerer et al *Internationale Rechtsprechung zum Genfer einheitlichen Wechsel- und Scheckrecht* 3 vol 1954 1967 and 1976.
50 On which see Bodenstein and Jahn *Neues Wechsel-und Scheckrecht in Spanien* (1986).

6 United Nations Commission on International Trade Law (UNCITRAL)

6.1 The United Nations Commission on International Trade law was established pursuant to Resolution 2205 (xxi) of the General Assembly of the United Nations, dated 17 December 1966.[51] The basic mandate of the Commission is to 'further the progressive harmonization and unification of international trade'.[52] The first meeting of the Commission was held in 1968, since then it has met each year. The Commission is assisted by a permanent Secretariat, whose headquarters is in Vienna. There are, in fact, many specialised agencies both within and outside the United Nations which concern themselves, inter alia, with matters of international trade law.[53] The task of co-ordinating the work of these many bodies in the field of international trade law is an important aspect of UNCITRAL's work, but the Commission has embarked on very important work of its own.[54] The work of UNCITRAL in the field of international trade financing has concentrated on five topics: negotiable instruments, electronic fund transfers, bankers' commercial credits, guarantees and standby credits. The Commission's work on negotiable instruments is of importance in this regard.

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51 This paragraph is based on Guest 'Current Work of the United Nations Commission on International Trade Law' in Chinkin Davidson & Ricquir *Current Problems of International Trade Financing* (1983) 134.

52 GA Res 2102, 20 UN GAOR, Supp (NO 14) UN Doc A/6014 (1965), reprinted in 1 UNCITRAL 18.

53 Guest 135.

54 Perhaps one of the most useful and influential aspects of the work of UNCITRAL has been the drafting of the UNCITRAL Arbitration Rules (adopted by Uncitral at its 9th session, 31 UN GAOR, Supp (No 17), UN Doc a/31/17, chap V sect C) which are increasingly being used in international trade. See, in this regard, Martin and Hunter 'The Uncitral Model Law' 1985 *International Business Lawyer* 399. The Commission has also promulgated the Uncitral Conciliation Rules (adopted by the General Assembly, 35 UN GAOR, Supp (No 17), UN Doc A/35/17 paraa 105, 106 (1980)) which may be used by some countries where conciliation is preferred to arbitration as a method of settling disputes. The work of the Commission has led to the drafting and opening for ratification of three international conventions, on Limitation of Actions (Prescription) in the International Sale of Goods (Convention on the Limitation Period in the International Sale of Goods (New York 1974) 13 ILM 949 (1974)); on the Carriage of Goods by Sea (the Hamburg Rules) (UN Convention on the Carriage of Goods by Sea, (Hamburg 1978) 17 ILM 608 (1978)) and on the International Sale of Goods (the Vienna Convention) (UN Convention on Contracts for the International Sale of Goods (Vienna 1980) 19 ILM 671 (1980)).

6.2 Draft Convention on International Bills of Exchange and International Promissory Notes.[55]

The subject of the harmonization of the law of negotiable instruments was considered by UNCITRAL during a general debate at its first session in 1968. At its second session in 1969, the Commission had before it a report by the International Institute for the Unification of Private Law (UNIDROIT) on the Possibilities of the Unification of the Law of Bills of Exchange.[56] After some discussion[57] it was decided

55 The Convention was accepted by the general assembly on 9 December 1988. See *Uncitral Yearbook* 1988 vol 19 A/RES/43/165 and, generally, Schütz *Die Uncitral-Konvention über Gezogene Wechsel und Internationale Eigenwechsel vom 9. December 1988* (1992); Klapper *Die Rechtstellung des Wechselinhabers nach dem UN-Wechselrechtsabkommen vom 9. December 1988* (1992) and Hermann 'International Bills of Exchange and Promissory Notes: Legal problems and Disparities Overcome by New United Nations Convention' in Horn (ed) *Studies in Transnational Law* vol 6 *The Law of International Trade Financel (1989) 259*; Hermann 'Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes' (1988) 10 *University of Pennsylvania Journal of International Business Law* 517; Von Marschall 'UNCITRAL's Proposed International Bill of Exchange' 1987 *Arizona Journal of International and Comparative Law* 6; Volken 'Das UNO-Übereinkommen vom 9. December 1988 über internationale Wechsel' 1990 *Schweizerische Zeitschrift für Wirtschaftsrecht* 100. Reference is also made to earlier drafts, in particular, United Nations Commission on International Trade A/CN9/211 dated 18 February 1982. See also *Report of the Working Group on International Negotiable Instruments on the Work of its Fourteenth Session* A/CN9/273 dated 28 January 1986. References are to the English text of this convention (General Assembly resolution 43/165, annex). Reference is also made to United Nations Commission on International Trade A/CN9/211 dated 18 February 1982. See also *Report of the Working Group on International Negotiable Instruments on the Work of its Fourteenth Session* A/CN9/273 dated 28 January 1986. All references to the commentary on the draft is to this document, unless otherwise stated. The Convention does not apply to international cheques since no provisions equivalent to Article 4 UCC exist. See Spanogle 'Introductory Note' 28 ILM 170 (1989) 72.

56 UN Doc 9/19.

57 During the discussion it was noted that there were two principal systems of negotiable instruments law, viz that represented by the Geneva Conventions of 1930 and 1931 (see paragraph 4 above) and that represented by the United Kingdom Bills of Exchange Act 1882 (see paragraph 2 above and the American Law of Negotiable Instruments (NIL, see paragraph 3 above, superseded by Article 3 of the Uniform Commercial Code). Those countries which followed the Anglo-American approach were mainly of civil law origin. Although the view was expressed that main differences between the two principal systems could be reconciled by the formulation of conflict of laws rules, it was felt that a uniform law approach was likely to produce more satisfactory results. It was, furthermore, unlikely that the common law countries would ratify the Geneva Conventions.

to create a new negotiable instrument, governed by its own UNCITRAL-formulated rules. It was, however, envisaged that the new negotiable instrument would be for *optional use* only.[58]

At its fourth session in 1971 the Commission resolved to proceed with work directed to the preparation of uniform rules applicable to a special negotiable instrument for *optional* use in international transactions. The Secretariat prepared a Draft Uniform Law on Bills of Exchange, which was presented to UNCITRAL in 1972.[59] The Commission then set up a Working Group consisting of representative of Egypt, France, India, Mexico, Nigeria, the USSR, the UK and the USA, charged with the task of preparing a final draft.[60]

The approach adopted was to take the Secretariat Draft[61] as the initial draft. This draft was revised on various occasions and after the text had almost been completed, had to be translated into several languages.[62] The Working Group completed its task in 1981 and published two documents: the Draft Convention on International Bills of Exchange and International Promissory Notes[63] and the Draft

58 The UNCITRAL models are not intended to be enacted by the various countries of the world. The intention is that it is left to the discretion of private parties to international transactions to use, if they so wish, this special type of instrument. Article 1 of the Draft Convention on International Bills of Exchange and International Promissory Notes makes it clear that the Draft Convention applies only to 'international bills of exchange and to international promissory notes'. An international bill, for example, is defined in Art 1(1) as a bill which, inter alia, contains in its text the words 'international bill of exchange (Uncitral Convention)'. The definition of an international promissory note must also contain a similar provision. The Secretariat prepared a study on the differences between the two major systems. In response to a questionnaire prepared by the Secretariat it was revealed that there was a widespread feeling that the existing rules of the respective systems were no longer suited to modern practices and the requirements of international trade (Guest 137). See in general: Allen *The Uncitral Convention Conventions on International Bills of Exchange and International Promissory Notes, and on International Cheques* (1983) 7ff; 3 *United Nations Commission on International Trade Yearbook (1973)* 145ff; Guiney 'Forged Indorsements under the Uncitral Convention Convention on International Cheques' (1983) 21 *Columbia Journal of Transnational Law* 584; Anonymous 'UNCITRAL 1985' (1986) 20 *Journal of International Trade Law* 119; Ganten and Jahn 'Neues internationales Wechselrecht vor dem Abschluss' (1987) 7 *Die Bank* 394; Selby 'UNCITRAL Considers Work Program for New International Economic Order' (1980) 74 *American Journal of International Law* 959; Yntema 'Unification of the Laws respecting Negotiable Instruments' (1951) 4 *International Law Quarterly* 17.

59 UN Doc A/CN9/67 (1972).

60 Guest 138. The Working Group was also requested to investigate the desirability of preparing uniform rules on international cheques. The mandate of the Working Group was subsequently extended to cover international cheques.

61 As later revised to include promissory notes.

62 All the drafts had to be translated, as the work proceeded, into English, French, Spanish and Russian. This undertaking presented its own problems (Guest 138). In the concluding stages they had to be translated into Chinese and Arabic. In the drafting of the text, concessions had to be made by all participants in order to reach common expressions that could be translated into, for example, German and Japanese.

63 UN Doc A/CN 9/211 (1981). See note 55 above.

Convention on International Cheques.[64] These drafts have been circulated to governments and banking institutions for their comments.[65] The Convention was accepted by the General Assembly on 9 December 1988.

From the point of view of the actual content, the rules of the UNCITRAL models represent, on several topics, a compromise between the Uniform Commercial Code[66] and the Geneva Conventions.[67] This feature renders the UNCITRAL model eminently suitable for the purposes of comparative law.[68]

It is debatable whether the UNCITRAL Convention will be adopted by individual states. Guest[69] explains:

> 'The question ... arises of how the new Conventions are to be adopted. The usual - possibly inevitable - course is for the General Assembly to authorise the convening of a Diplomatic Conference. In view of the technicality of the subject matter, the number of participants, and the length of the drafts, it is doubtful whether the Conference could be concluded in less than two or three months. The cost of such an operation is enormous.'

There are, moreover, further problems: 'First, the code is drafted in the Anglo-American style: it is extremely detailed and complex. Civil law countries may find this method of drafting alien and unacceptable. Secondly, the questions will arise whether it is open to states who have ratified the Geneva Conventions to ratify these new Conventions.

Thirdly, even if the Conventions are ratified and enter into force, the question arises whether traders and bankers will in fact use the new instruments (their use is purely optional) in preference to the existing regimes.'[70]

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64 UN Doc A/CN 9/212 (1981). See note 55 above.

65 Ganten and Jahn (1987) 7 *Die Bank* 394 396.

66 See paragraph 4 above.

67 See paragraph 5 above. See also Murray 'Drafts, Promissory Notes and Checks: A Comparison of Civilian, Quasi-Civilian and Non-Civilian Suggestions' (1983) 15 *Lawyer of the Americas* 211.

68 The *Report of the Working Group on International Negotiable Instruments on the Work of its Fourteenth Session* (A/CN 9/211 dated 18 February 1986) contains revised versions of certain articles of the draft Convention on International Bills of Exchange and International Promissory Notes as contained in document A/CN 9/211 (See footnote 5 above) based upon decisions of the Commission at its seventeenth session and of the Working Group at its thirteenth and fourteenth sessions. This document contains very valuable information.

69 Guest 139. See also Ganten and Jahn 398; Schütz 264-275 and Hermann 'Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes' (1988) 10 *University of Pennsylvania Journal of International Business Law* 517 540.

70 Guest 141-2.

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70 Guest 141-2.

7 The Uniform New Payments Code (NPC)

The New Payments Code project was formulated in the belief 'that existing Articles 3 and 4 of the UCC needed to be amended or replaced in order to establish a legal framework for all payment systems except for cash. The guiding philosophy of such an effort... was that the new legal framework should not distort user choices among different payment systems, whether they be paper or card based, or electronic. This was to be accomplished by having the same legal consequences attach to all kinds of transactions where technology and the nature of the transaction permitted.'[71] Several drafts of the NPC have been published[72] and several commentaries on it have appeared.[73]

The NPC project was, however, criticised from its inception, particularly for its broad scope and its attempt to lump together all kinds of payment mechanisms. Against its continuation it was argued that 'payment systems ... largely were operating satisfactorily under federal and state law and private agreement. While some issues could be discerned with pre-sight, they had not as yet developed and might never do so. A second, more important argument was that development was still progressing in the various systems, and premature rule making might arrest or artificially channel that development or, alternatively, cause a need to revise the statute shortly after its initial promulgation'.[74]

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71 Scott *An Introduction to the Uniform New Payments Code* 15 June 1983 at p 1 (Memorandum to the National Conference of Commissioners on Uniform State Laws). It is beyond the scope of these proposals to discuss in any detail the provisions of the *Electronic Fund Transfer Act* (15 USC par 1693ff). For a review of some of its provisions, see Visser *Die Regsbetrekkinge by Bankoutokaarte* (1987) 45ff and Penney and Baker *The Law of Electronic Fund Transfer Systems* (1980 with 1982 supplement) and, in particular, (1979) 13 *San Francisco Law Review*.

72 eg Permanent Editorial Board for the Uniform Commercial Code *Uniform New Payments Code PEB Draft No 3* June 2, 1983.

73 See inter alia: Benfield 'The New Payments Code and the Abolition of Holder in One Course Status as to Consumer Checks' (1983) 40 *Washington and Lee Law Review* 11; Brandel 'Electronic Funds Transfer: Commercial and Consumer Law Aspects' (1977) 82 *Commercial Law Journal* 78; Brandel and Geary 'Electronic Fund Transfer and the New Payments Code' (1982) 37 *Business Lawyer* 1065; Cherdack 'The Uniform New Payments Code: You Can Bank on It' (1985) 37 *University of Florida Law Review* 863; CHW 'Overcoming the Obstacles to Implementation of Point-of-Sale Electronic Fund Transfer Systems: EFTA and the New Uniform Payments Code' (1983) 69 *Virginia Law Review* 1351; Dow and Ellis 'The Proposed Uniform New Payments Code: Allocation of Losses resulting from Forged Drawer's Signatures' (1985) 22 *Harvard Journal on Legislation* 397; Ellis 'The Uniform New Payments Code: Highlights of Proposed Changes in UCC Articles 3 and 4' (1986) 23 *American Bar Law Journal* 617 and in particular, Vergari 'The New Uniform Payments Code' (1983) 9 *Rutgers Computer and Technology Law Journal* 313 and 'A Critical Look at the New Uniform Payments Code' (1983) 9 *Rutgers Computer and Technology Law Journal* 315.

74 Cited by Miller 'Report on the New Payment Code' (1986) 41 *Business Lawyer* 1007 1008.

For these and other reasons, the National Conference of Commissioners on Uniform State Laws resolved not to continue with the NPC but instead to pursue a project to revise articles 3 and 4 of the UCC for cheques and to draft provisions covering wholesale wire transfers.[75]

8 The Revised Uniform Commercial Code 1990

Articles 3 an 4 UCC were amended extensively in 1990. The Revised Articles 3 and 4 (and 4A) were undertaken for the purpose of 'accommodating modern technologies and practices in payment systems and with respect to negotiable instruments'.[76]

The Revised Article 3 is said to be 'the latest effort in the progressive codification of the common law of negotiable instruments that began with the English Bills of Exchange Act ... '.[77] The present Article 3, 'written for a paper-based system, do not adequately address the issues of responsibility and liability as they relate to modern technologies now employed ... '.[78]

Numerous changes were therefore made by the Revised Articles 3 and 4. Some of the important ones concern the liability of a representative signing an instrument without indication of his representative capacity and allowing him to escape liability except against a holder in due course (section 3-402 Revised UCC); the definition of 'good faith' to include a reference to the observance of reasonable commercial standards of fair dealing (section 3-307 Revised UCC) and the amendments to the definition of 'ordinary care' (sections 3-103(a)(7) and 4-104(c) Revised UCC) to enable banks handling cheques to dispense with their manual processing. Truncation is also provided for and the electronic presentment of cheques is authorised (section 4-110 Revised UCC). Some of these changes are referred to in the commentary on the proposed new clauses.

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75 Miller 1010.
76 *Prefatory Note* to Article 3 published in *Selected Commercial Statutes 1992 Edition* (1992) West at 297.
77 *ibid.*
78 *Prefatory Notes* at 298.

9 South African legislation

9.1 Provincial legislation

It is trite that the common law of South Africa is the Roman-Dutch law.[79] The common body of rules which governed negotiable instruments in Holland at the time of its introduction into South Africa was known as *wisselrecht*.[80] Until 1887 the wisselrecht was the sole source of the common law in South Africa with respect to negotiable instruments.[81]

In 1887 legislation was passed in Natal to 'declare' the law relating to bills of exchange, cheques and promissory notes.[82] The Natal Act was very closely modelled on the English Bills of Exchange Act of 1882.[83] In fairly rapid sequence, the Cape,[84] the Transvaal[85] and the Orange Free State[86] adopted statutes which superseded the wisselrecht.[87] The colonial statutes closely followed the English Bills of Exchange Act (the Natal Act more so than the others), which accounts for their mutual resemblance and for their membership of the Anglo-American family of bills of exchange codes. There were, however, various, although in some instances slight, differences between the respective statutes.[88] Cowen[89] submits that since the statutes of the Cape,

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79 See in general: Hahlo and Kahn 567ff; Hosten et al 185ff.

80 The *wisselrecht* was, in turn, greatly influenced by the lex mercatoria or law merchant. The law merchant can be described as those customs which were observed by the medieval merchants in the course of their trade. See in this regard: Holden *History* 30ff; *Goodwin v Robarts* (1875) LR 10 Ex 337 at 346-358; Cowen (1955) 15ff; Holdsworth vol 5 131ff; Chalmers xliii; Carter 'The Early History of the Law Merchant in England' (1901) 17 *LQR* 232. The *wisselrecht* was also influenced by the various Roman-Dutch law writers. See in this regard: Hahlo and Kahn 721ff; Cowen (1985) 132-134.

81 In some instances the wisselrecht was modified by judicial decisions (Hahlo and Kahn 721; Cowen (1955) 24). *Wisselrecht* is still relevant to the contract of aval (Malan 202; Evans 169-181); the requirement of iusta causa or redelijke oorzaak (*Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A); *Froman v Robertson* 1971 1 SA 115 (A); Malan 71-5 and the question of acquisition ex causa onerosa (Cowen (1985) 134).

82 Natal Law 8 of 1887. The draftsmen responsible for the bill took over the short title from a draft prepared in 1886, with the result that the short title of Law 8 of 1887 is 'The Bills of Exchange Law, 1886'.

83 See paragraph 2 above.

84 Bills of Exchange Act 19 of 1893 (Cape).

85 Bills of Exchange Proc 11 of 1902 (Transvaal).

86 Bills of Exchange Ord 28 of 1902 (Orange Free State).

87 Except where the particular statute was silent on a particular point; *Estate Liebenberg v Standard Bank of South Africa Ltd* 1927 AD 502 527.

88 See Cowen (1985) 135-136 on the differences between the four statutes. See also Hahlo and Kahn 722f who deal with some of the major differences between the English and the Roman-Dutch legal systems in this regard. The authors note that 'even the literal correspondence of the text of the English and the South African statutes does not always guarantee that the legal consequences will be the same in the two countries. Interpretation takes place in terms of domestic legal concepts, and where these differ in the English and Roman-Dutch law, the same words may yield a different conclusion' (722). The authors give several examples of 'the disadvantages of indiscriminate borrowing' where the 'endeavour to harmonise the English Bills of Exchange Act with Roman-Dutch concepts ... have exhausted the draftsman's powers of discrimination'.

Transvaal and Orange Free State were enacted to 'consolidate, amend and declare' the law, the prestatute decisions have less authority in these provinces than they do in Natal.

It is a well-accepted principle that incorporated legislation may be interpreted with reference to the legal system from which it was taken. *Estate Wege v Strauss*[90] explained: 'It may be stated as a general proposition that our courts would as a general rule, follow the authoritative interpretation of a section in an English statute as laid down by the higher courts if that occurs in a Union statute which in all its essentials is the same as the English statute in which the section occurs. If the decision is one of the Privy Council, and there is no difference between the Union statute and the English statute, and if there is nothing in our common law which would require a different interpretation, then we would follow the decision of the Privy Council; and if an interpretation has been put upon a section of a statute by one of the higher English courts, we would attach great weight to such an interpretation.'[91] In *John Bell & Co v Esselen*[92] Centlivres CJ said: 'Naturally all decisions of the Privy Council, like decisions in the House of Lords, are regarded with the very greatest respect and have very great persuasive force but the duty of this court in dealing with cases originating in the Union is to apply the principles of Roman-Dutch law as those principles are understood in the Union.'

9.2 Amendments prior to 1964

After the unification of South Africa in 1910, bills of exchange were regulated by the pre-Union legislation of the former colonies. Although the provincial legislation was

90 1932 AD 76 80-81.
91 Appeals to the Privy Council were abolished by Act 16 of 1950.
92 1954 1 SA 147 (A) 154. See also Malan 20; Cowen (1985) 144ff. In *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) 502 Holmes JA agreed with the following observation of De Villiers JA *in Moti & Co v Cassim's Trustee* 1924 AD 720 747: '[I]n 1882 the English law on the subject was codified in the Bills of Exchange Act of that year. The Transvaal Bills of Exchange Proclamation No 11 of 1902, like the Cape Act No 19 of 1893 is, with slight modifications, taken over verbatim from the English Act. Under the circumstances it appears to me a sound principle, where the wording of our statutes is the same as that of the English Act, to follow the construction which English Courts of law have placed upon it.'

uniformly amended[93] in certain aspects, it was not until 1964 that legislation was enacted to achieve general consolidation and uniformity.

9.3 The Bills of Exchange Act 34 of 1964

The Bills of Exchange Act of 1964 replaced the four pre-Union enactments with one uniform law. The main purposes of the Act[94] were standardization of the law, the long overdue provision of an Afrikaans version of the legislation and the modelling of its provisions on the provisions of the English Cheques Act of 1957.[95] Draftsmen achieved uniformity largely by (i) adopting the wording of those sections in which there were no differences between the four statutes; (ii) adopting the majority wording and rejecting the Natal wording where there was a difference; and (iii) adopting the Transvaal and Orange Free State wording where this differed from the wording of the Cape statute.[96]

In addition, changes in the arrangement of sections and subsections were made, as well as certain stylistic alterations. Hunt[97] remarked: 'The most regrettable of the ... Act is its failure to clear up the many difficulties which have been experienced over the years with various sections of the bills statutes. Must we now wait a further sixty or seventy years for the resolution of problems or anachronisms ...?' The Bills of Exchange Act has been amended on three occasions since 1964.[98]

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93 By the following Acts: The Bills of Exchange (Non-Business Days) Act 30 of 1913; The Bills of Exchange (Time of Noting) Act 23 of 1919; The Bills of Exchange (Time of Noting) Act Amendment Act 8 of 1921; The Bills of Exchange Amendment Act 25 of 1943; The Public Holiday Act 5 of 1952. On the 1943 Amendment, see Emmett 'The Bills of Exchange Amendment Act, 1943' (1944) 8 *THRHR* 65; Malan 'The Liberation of the Cheque' 1978 *TSAR* 107; 201 215 -216.

94 See in this regard: Hunt 'The New Bills Act' (1964) 81 *SALJ* 371; Cowen (1985) 136; Van der Merwe 'Enkele Probleme wat uit ons Wisselwetgewing Voortspruit' (1959) 22 *THRHR* 275; Davids 1964 *Annual Survey of the South African Law* 274; 1964 *Hansard* col 4058-9.

95 The Cheques Act of 1957 implemented the recommendations of the Mocatta Committee *(Report of the Committee on Cheque Endorsement* Cmnd 3 of 1956) that a bank be relieved of the necessity of ensuring the presence or regularity of indorsements on cheques and other negotiable instruments when these instruments are deposited for collection. See also the Report of the Select Committee on Bills of Exchange,SC 10 of 1963.

96 Cowen (1985) 139. See also Hunt (1964) 81 *SALJ* 371 372.

97 Hunt (1964) 81 *SALJ* 371 375.

98 By the Suretyship Amendment Act 57 of 1971; the Bills of Exchange Amendment Act 58 of 1977 and the Finance Act 77 of 1986.

9.4 Southern African legislation

The English Bills of Exchange Act served as a model for legislation in most Commonwealth countries. It is therefore not surprising that there is a great similarity in bills of exchange legislation in the countries of Southern Africa. Since the economies of the various countries in Southern Africa are linked with one another, it is important that the method of effecting payment and the legislation governing it be uniform. It is to the advantage of all the countries of the subcontinent to harmonise their legislation in this regard.[99]

9.4.1 Namibia[100]

The Roman-Dutch common law was introduced in Namibia by proclamation.[101] A further proclamation,[102] made the law of the Cape Province in relation to bills of exchange applicable to Namibia. Ordinance 8 of 1965 extended the 1964 South African Bills of Exchange Act to Namibia.[103]

9.4.2 Zimbabwe

Originally the Cape Act served as a model for the first legislation on bills of exchange.[104] The current Zimbabwean Bills of Exchange Act[105] is very similar to the South African legislation.[106]

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99 There is indeed a pressing need that at least the countries within the Customs Union should have similar legislation on such an important matter as bills of exchange.
100 The remainder of this paragraph is based on Cowen (1985) 141-4.
101 Proclamation 21 of 1919.
102 Proclamation 20 of 1920.
103 Proclamation 20 of 1920 was repealed in this regard.
104 Government Regulation 23 of 5/3/1895. This regulation was later incorporated, with amendments, in Chapter 218 of the Rhodesian Statutes of 1939.
105 Chapter 277 of the Consolidated Statutes.
106 See in this regard: Christie *Business Law in Zimbabwe* (1984) chapter 6; *Philsam Investments (Pvt) Ltd v Beverley Building Society and another* 1977 2 SA 546 (R) 551; *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 4 SA 553 (ZSC) 556 ('Our Legislator in the past has adopted South African legislation, not always with very great promptitude' per McNally JA).

9.4.3 Botswana

Before the independence of Botswana, the Roman Dutch common law had become the law of the land by proclamation.[107] A further proclamation,[108] put into effect the law of the Cape Province in relation to bills of exchange in Botswana. The current legislation[109] is to a great extent based on the South African legislation.

9.4.4 Lesotho

Before the independence of Lesotho, the Roman-Dutch common law had been applied by proclamation.[110] Chapter 74 of the Laws of Basutoland enacted the Cape Bills of Exchange Act. The current legislation on the subject is largely based on the South African legislation.[111]

9.4.5 Swaziland

The Roman-Dutch common law was made applicable in Swaziland by proclamation,[112] as was the Transvaal legislation on bills of exchange.[113] The current legislation is based, in the main, on the South African legislation.[114]

9.4.6 Zambia

Zambia adopted the English Bills of Exchange Act with minor changes.[115]

9.4.7 Malawi

Malawi adopted the English Bills of Exchange Act with minor alterations.[116]

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107 Proclamation 2 of 1885.
108 Proclamation 53 dated 8/9/1910.
109 Bills of Exchange Law 30 of 1964. Sections 83-86 of the 1964 South African Act were incorporated in Botswana in terms of Botswana *Government Gazette* dated 19/10/1964. See also Rooney 'A Decade of Legal Reform in Botswana' (1975) 92 *SALJ* 97 104.
110 Cowen (1985) 142.
111 The provisions of sections 83-86 of the 1964 South African Act were incorporated in Lesotho by Act 8 of 1964.
112 Proclamation dated 22/2/1907.
113 Proclamation 46 of 1943.
114 Chapter 46 of the Consolidated Laws. The provisions of sections 83-86 of the 1964 South African Act were incorporated in Swaziland by Proclamation 51 of 1964.
115 Cowen (1985) 142; Christie *Rhodesian Commercial Law* (1961) 148.
116 Cowen (1985) 143.

9.4.8 Transkei

In terms of section 2 of the Status of Transkei Act[117] any rule of law which was in force immediately prior to the commencement of the Act remains in force in the Transkei until repealed or amended. This means that the 1964 South African Bills of Exchange Act, as amended by the Suretyship Amendment Act,[118] applies in the Transkei.[119]

9.4.9 Bophuthatswana

Section 2 of the Status of Bophuthatswana Act[120] states that any rule of law which was in force prior to the commencement of the Act remains in force in Bophuthatswana until repealed or amended. The 1964 South African Bills of Exchange Act, as amended by the Suretyship Amendment Act[121] and the Bills of Exchange Amendment Act[122] therefore applies in Bophuthatswana.[123]

9.4.10 Venda

In terms of section 2 of the Status of Venda Act[124] any rule of law which was in force in Venda immediately prior to the commencement of the Act (13.9.79) remains in force until repealed or amended. The legal position in Venda regarding the South African Bills of Exchange Act is identical to that of Bophuthatswana.

117 Act 100 of 1976.
118 Act 57 of 1971.
119 Since the Bills of Exchange Amendment Act 58 of 1977 and the Finance Act 77 of 1986 amended the 1964 Bills of Exchange Act after the commencement of the Status of Transkei Act (26/10/1976), these acts would not be applicable in the Transkei. See Oelofse 1985 *Modern Business Law* 168 169. The Transkei has furthermore adopted the Bills of Exchange Amendment Act of 1981 dealing with 'non-business days.'
120 Act 89 of 1977.
121 Act 57 of 1971.
122 Act 58 of 1977.
123 Since the Finance Act 77 of 1986 was adopted after the commencement of the Status of Bophuthatswana Act (6/12/197 7), this Act does not apply in Bophuthatswana.
124 Act 107 of 1979.

9.4.11 Ciskei

In terms of section 2 of the Status of Ciskei Act[125] any rule of law which was in force in Ciskei immediately prior to the commencement of the Act remains in force until repealed or amended. The legal position in Ciskei regarding the South African Bills of Exchange Act is identical to those of Venda and Bophuthatswana.

10 Proposals for the Reform of the Bills of Exchange Act, 1964

10.1 It has been said that amendment of the Bills of Exchange Act, 1882 'is not by any to be enterprised, nor taken in hand, unadvisedly, lightly, or wantonly; but reverently, discreetly, advisedly, soberly, and in the fear of God'.[126] One applauds the appeal for caution in this statement, but perhaps we have, or should, overcome our awe of Chalmers: no legislation is sacrosanct.

10.2 This document envisages two separate acts, one dealing with bills and notes and the other with cheques. This has been the course followed in Australia. As early as 1964 the Manning Report concluded that, '[t]here is no doubt that the provisions of the law relating to cheques are of great importance to a large number of people, whereas the law relating to other bills of exchange is of much more specialised nature and of real interest and concern to comparatively few people'.[127] Separate acts would therefore lead to a better understanding of the law:[128] 'For the ordinary man in the street who has a bank account the task of ascertaining the legal effect of a cheque which he may draw, and the consequences, for example, of its dishonour, is virtually impossible.'[129] The Report continues:[130]

> 'When the existing laws were originally framed, cheques were used mostly in commercial transactions. It may be doubted whether the average man in the street could then write, let alone have a bank account. It was certainly not contemplated that most people would have a bank account and that cheques would be used so extensively that about thirty times as many cheques would be written annually as there are men, women and children in the community.'

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125 Act 110 of 1981.

126 Scott 'Comment on Benjamin Geva's Paper: "Reflections on the Need to Revise the Bills of Exchange Act - Some Doctrinal Aspects"' (1981-2) 6 *Canadian Business Law Journal* 331, but see McGinnis 'Statute Law and the Owl of Minerva: The Bills of Exchange Act, 1882' 1986) 24 *Alberta Law Review* 278 294.

127 *Report of the Committee appointed by the Commonwealth Government to Review the Bill of Exchange Act 1909-1958* 1964 paragraph 38 (hereinafter cited as the *Manning Report*).

128 *Manning Report* paragraph 39.

129 *Manning Report* paragraph 40.

130 *Manning Report* paragraph 42.

While some recommendations of the Manning Report were given effect to in 1970, it was not then possible to introduce an act dealing only with cheques. The Attorney-General explained that, '[t]he essential difficulty lies in translating into the second half of the twentieth century a code that was devised in the second half of the nineteenth century ... and, furthermore, a code that is primarily concerned with the elaborate ritual of the nineteenth century merchant doing business with bills of exchange rather than with the modern business use of cheques'.[131] A Cheques Bill was introduced in 1984 to carry out the Manning and other proposals and was, after extensive amendment, accepted as the Cheques and Payment Orders Act, 1986.[132] It deals with 'agency' cheques, ie cheques drawn by customers of non-bank financial institutions on the bank of the latter and with the protection of the latter against liability in the payment and collection of cheques. The Act also introduces a new instrument, the 'payment order', which is drawn on a non-bank financial institution.

10.3 It is accepted that it is desirable to treat cheques separately from bills and notes. The reasons advanced by the Manning Commission are sound, but more convincing are those considerations based on the different economic functions of bills and notes on the one hand, and cheques on the other. A cheque is essentially a payment instrument while bills and notes are credit documents. For this reason the Geneva Conventions provide for two separate acts, one dealing with bills and notes and the other with cheques.[133] It is said, perhaps not altogether correctly: 'Wer einen Wechsel gibt, braucht Geld, wer einen Betrag überweist oder einen Scheck gibt, hat Geld'.[134]

10.4 It is true that the bill has in recent times lost much of its attraction and that the cheque has increased in importance. The situation today is probably the opposite of what it was at time of the enactment of the Bills of Exchange Act, 1882. Sedgwick[135] eloquently summarises the position:

131 Cited in the *Explanatory Paper on Proposed Cheques Bill* 1984 prepared by the Attorney-General's Department Canberra (1984) at 8 and by Cowen 'The Liability of a Bank in the Computer Age in respect of a Stolen Cheque' 1981 *TSAR* 193 at 201.
132 See Tyree *Banking Law in Australia* (1990) 112ff; Morgan *Guide to Australian Cheque Law* (1987) passim.
133 See paragraph 5 above.
134 Baumbach-Hefermehl 75 and see at 13, 74ff and 447ff.
135 'Comment on Benjamin Geva's Paper: "Reflections on the Need to Revise the Bills of Exchange Act - Some Doctrinal Aspects"' (1981-2) 6 *Canadian Business Law Journal* 344 at 346. See also McGinnis 294-5 (n124 above).

> 'The Act applies to three types of negotiable instruments: bills of exchange (or drafts), cheques and promissory notes. In the organization of the statute the bill of exchange is treated as the centre-piece. Ninety-one years later, bills of exchange are no longer the medium of payment in commercial and personal transactions that they once were. To some extent they are used as independent instruments of payment in international trading transactions and in connection with the extension of bank credit by way of bankers' acceptances and letters of credit (where, however, the rights of the parties are largely governed by agreement or by special rules of law). Promissory notes are now used primarily as evidence of indebtedness and not as independent instruments of payment in transactions in which their negotiability is important. Cheques are now by far the most common form of negotiable instrument to which the Bills of Exchange Act applies, and even in the case of cheques, the rights of the banks are governed to a considerable extent by the common-law rules relating to the relationship between bank and customer: conversion, mistake, and fraud. Perhaps the lack of interest in amending the Act owes something to these changes in commercial practice over the years.'

It is submitted that there is ample reason for the enactment of a separate Cheques Act.[136] There are significant differences between bills and cheques in our legislation.[137] These differences, and in the proposed Cheques Act others are added, make it necessary to distinguish clearly and unequivocally between a cheque and a bill drawn on a bank payable on demand. It is suggested that the only way in which this can be done, is to require a cheque to be designated as such. This is the course followed by the Geneva Uniform Law of Cheques.[138]

10.5 Other considerations also call for a review of our legislation. The South African Bills of Exchange Act, 1964, and its predecessors, were designed for an entirely different system of law. South African law is Roman-Dutch or civil law, and concepts such as consideration and conversion are foreign to it. These concepts played a formative role in the structure of the English Bills of Exchange Act, 1882, and led to the enactment of many of its provisions, but are superfluous and misleading in our legislation. However, technological advances make compliance with some of the requirements of our Act, like those relating to presentment for payment, difficult, if not impossible. Many of its elaborate and dated provisions can be simplified. Thus, more than a new Cheques Act is necessary.

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136 See in particular, Cowen 'South African Banking Law and its Victorian Legal Framework. The Need for a Revised "Manning-Style" Cheques Act to ease the Way to Banking in the Twenty-First Century' 1982 *Acta Juridica* 117.

137 These differences relate to the drawee (section 1), the time of payment (section 1), presentment for payment (section 72), crossings (sections 75ff), the paying bank (sections 58, 79 and 83), indorsements (sections 83-6) and protest (section 74). See Holden 1 *Law and Practice* 8-17ff.

138 Article 1 GULC and article 1 GULB.

PART II

BILLS OF EXCHANGE AND PROMISSORY NOTES ACT

Act to amend the laws relating to bills of exchange and promissory notes

1 Definitions

(1) In this Act, unless the context otherwise indicates --
"acceptor" means the drawee who has accepted the bill drawn on him;
"bank" means the Reserve Bank or a bank as defined in section 1 of the Banks Act, 1990 (Act No 94 of 1990);
"bearer" means the person in possession of an instrument which is payable to bearer;
"bill" means a bill of exchange as defined in section 2;
"clearing house" means an association of banks;
"clearing house rules" means the rules of a clearing house designed to regulate the clearing of payments between members;
"drawee" means the person on whom a bill is drawn;
"holder" means the payee or indorsee of an instrument who is in possession of it, or the bearer of it;
"instrument" means a bill or a note;
"issue" means the first delivery of an instrument to a holder;
"note" means a promissory note as defined in section 2;
"party" means the drawer, maker, acceptor, indorser or the signer of an aval;
"payee" means the person in whose favour the drawer directs payment to be made or to whom the maker undertakes to pay;
"prescribed rate" means the rate of interest prescribed under the Prescribed Rate of Interest Act, No 55 of 1975, and which is applicable at the time when, in terms of this Act, interest begins to run;
"Registrar" means the Registrar of Banks as defined in section 1 of the Banks Act, 1990 (Act No 94 of 1990);
"Reserve Bank" means the South African Reserve Bank as defined in section 1 of the South African Reserve Bank Act, 1989 (Act No 90 of 1989);

(2) For the purposes of this Act, a person has notice of a fact if he

(a) has actual knowledge of it;

(b) has received a notification of it;

(c) has knowledge of other facts and circumstances giving rise to the likely inference that such fact exists.

(3) For the purposes of this Act, a person takes or pays an instrument in good faith if he takes or pays it honestly.

(4) For the purposes of this Act, a person takes an instrument for value if he acquires it under onerous title.

CHAPTER 1

REQUIREMENTS OF FORM

FORM AND INTERPRETATION

2 Definition of bill and note

(1) A bill of exchange is a written document, signed by the drawer, which contains an unconditional order whereby the drawer directs the drawee to pay a sum certain in money, on demand or at a definite time, to the payee or to his order, or to bearer.

(2) A promissory note is a written document, signed by the maker, which contains an unconditional promise whereby the maker undertakes to pay a sum certain in money, on demand or at a definite time, to the payee or to his order, or to bearer.

(3) An instrument payable on demand, or at a fixed period after sight, must be dated.

Comparative legislation

Sec 3(1) and 83(1) BEA
Sec 2(1) and 87(1) SABEA
Art 2(1) and (2) Uncitral Convention
Art 1 and 75 GULB
Sec 3-104 UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

2. *Definition of and requirements for bill of exchange.*

(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a specified or determinable future time, a sum certain in money to a specified person or his order, or to bearer.

87. *Promissory note defined.*

(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to bearer.

Commentary

1 The proposed definition does not differ substantially from the definitions in the SABEA. A bill or note is a "document." The SABEA, BEA and UCC require only that a bill or note be in writing and do not stipulate on what material the writing should appear. This led to speculation concerning whether a bill or note could be drawn or made on soap, sand, metal or even a computer screen (Malan 42 and Cowen 55). Since bills and notes are intended to circulate freely, the material used should be reconcilable with this function (Malan 42 and Cowen 55). Article 1 GULB and article 1 of the Uncitral Convention go some way towards recognising this function by stating that a bill or note is written "instrument" (see also Baumbach-Hefermehl 98ff on the nature of the "Urkunde"). It is submitted that the word "document" adequately excludes material not normally used to record contracts.

2 The words "at a fixed or determinable future time" in sections 2(1) and 87 SABEA are replaced by the words "at a definite time". This change means that a bill or note will become payable within a more strictly enforceable time period, as appears from clause 8 of this draft. The draft excludes the possibility of linking the due date to a dies certus an incertus quando, for example, the death of a person. It is submitted that the content and extent of a party's liability should, in principle, be clear from the instrument itself. This change is in accordance with articles 1, 33 and 75 GULB and articles 2(1) and (2), 3(1) and (2) and 9 of the Uncitral Convention. It is essential that the holder or a subsequent transferee knows beforehand exactly when the instrument becomes due (see Chafee "Acceleration Provisions in Time Paper" (1919) 32 *Harvard Law Review* 747 753-4). If a dies certus an incertus quando is permitted, the holder may have difficulty in ascertaining the due date (see sections 43(2)(a) and 43(1) SABEA). Similarly, a subsequent transferee would not know whether he is taking the instrument before its due date, which determines whether he can be a holder in due course (section 27(1)(a) SABEA). It is therefore submitted that a dies certus an

incertus quando should disqualify an order or promise from being a bill or note. The statement by Hudson and Feller "The International Unification of Laws concerning Bills of Exchange" (1931) 44 *Harvard Law Review* 333 359 that article 33 GULB is "unnecessarily drastic" is, in this respect, not justified.

Section 3-109(2) UCC also states the basic premise that the due date cannot be linked to an event that has an uncertain time of occurrence. Section 3-109(1)(d), however, qualifies this general principle by providing for a bill payable at a definite time, subject to acceleration upon a specified act or event. An acceleration clause could make the due date uncertain, and should be tolerated only as commercial demands require. Acceleration, it is therefore submitted, should be limited to the case of default in paying an instalment, as is done in section 7(1)(c) SABEA, article 7(3) of the Uncitral Convention and clause 8(1)(d) of this draft (Malan et al *Provisional Sentence* 29ff).

3 The question arises whether a so-called "series of bills" is payable "at a fixed or determinable future time" as required by section 2(1) SABEA. Although the question has apparently never been pertinently addressed in the South African cases, there are, nonetheless, some that seem to assume the validity of these documents. The problem concerns a series of bills or notes, each of which contains an acceleration clause rendering all due and payable on the dishonour of any one of them. Where the acceleration clause appears in a separate written agreement, clearly the validity of the bill or note would not be affected, since on the face of it each bill or note is payable on a fixed or determinable future date (see *Veritas International Promotions (Pty) Ltd v Trustees, Langad Trust and another* 1985 3 SA 945 (C)).

SA Bank of Athens Ltd v Solea and others 1977 2 SA 612 (W) concerned 46 promissory notes payable on different dates. On the back of each note had been stamped: "This negotiable instrument is one of a series. In the event of any one negotiable instrument not being paid on due date, or within seven days after written demand sent to the maker, all the remaining negotiable instruments in this series shall immediately become due and payable". The court regarded these documents as valid although their validity was never put in issue.

In *Interlease Ltd v Georgiladakis and another* 1980 1 SA 376 (W) the court dealt with a series of post-dated cheques, each containing a number in the series and the legend that the remaining ones would become due and payable were one of them dishonoured. The first one was presented for payment and dishonoured, whereupon the plaintiff sued for provisional sentence on the remaining documents. On the basis that "no cause of action accrues until presentment of a negotiable instrument has taken place" (at 378) the court refused provisional sentence. Without doubt the court assumed that the documents were valid cheques.

The facts in *Goodwin v Diplomat Hotel and others* 1982 3 SA 350 (W) were similar. Goldstone J refused provisional sentence on the ground that the acceleration clauses on the back of the documents were not confirmed by the drawer's signature. Nor had they been presented for payment. It is clear that Goldstone J accepted that the documents were valid cheques.

In *Moraitis v De Canha and another* 1984 1 SA 420 (W) provisional sentence was sought on 35 bills of exchange, all dated 9 January 1981 and drawn payable after the lapse of a stated number of days. Each contained an acceleration clause that was to operate on the breach of a certain agreement referred to in it. In his judgment, Slomowitz AJ made two statements that are, with respect, wrong. First, he said that the instruments were probably cheques because they were drawn on a bank (421 H). Since the instruments were not payable on demand, this is untenable. Secondly, he said that a bill can be "equally good" when it is payable on the occurrence of a determinable event, such as "a breach of contract" (423 G). But, according to section 9(1)(b) SABEA, a document qualifies as a bill only if the event on which it is payable is certain to happen. Breach of contract is not a certain event. (See Malan et al *Provisional Sentence* 27-30). However, provisional sentence was refused on another ground, viz that the breach of contract referred to in the acceleration clause could not be regarded as a "simple condition". Nevertheless the court considered the documents to be valid bills.

It is submitted that the acceleration clauses in these cases disqualified the documents from being bills or notes (*Rawjee and another v Michaellides* 1989 4 SA 605 (W)). An acceleration clause does not render the order or promise conditional, but results in the document not being payable "at a fixed or determinable future time" (section 2(1) SABEA) or "at a definite time" (clause 2(1) and (2) of this draft). The acceleration clause makes the document payable at two alternative times, one of them being linked to a condition that may or may not be fulfilled (see Malan et al *Provisional Sentence* 30-1).

Documents such as these do not and should not qualify as bills or notes. They are wholly incompatible with the certainty essential to a negotiable instrument. The exception recognised in section 7(1)(c) SABEA, article 7(c) of the Uncitral Convention and clause 8(1) of this draft has very limited import. It is restricted to acceleration on default in paying one of a number of instalments payable in terms of a single document.

4 Sections 2(2), (3) and (4) SABEA would be more logically accommodated in other sections of the draft. The main part of section 2(2) SABEA, which states that an instrument that does not comply with the requirements of subsection (1), is not a bill, is redundant. The rest of the subsection, which deals with an order to do something in addition to the payment of money, would belong more logically in the provision dealing with the sum payable (see clause 6 of this draft). Section 2(3) SABEA deals with unconditionality and is therefore inserted in clause 5 of this draft. Section 2(4) SABEA is redundant: it provides that a bill is not invalid by reason of the fact that it omits certain non-essential matter. This states the obvious. Section 2(4) SABEA is therefore omitted from this draft.

5 The question has often arisen whether an instrument payable "on or before" a certain date or "within" a certain period complies with the requirements of sections 2(1) and 87(1) SABEA. In *Weszak Beleggings (Edms) Bpk v Venter* 1972 1 SA 730 (T) (discussed by Petersen 1972 *SALJ* 163) the Transvaal full bench held such a document to be invalid, since it "merely limits the time within which payment must be made but does no fix the date of payment. The option reserved by the document creates an uncertainty and a contingency in the time of payment and cannot be a promissory note within the meaning of section 87(1) of the Act" (at 732). This case was followed in *Salot v Naidoo* 1981 3 SA 959 (D) (discussed by Cassim 1982 *SALJ* 552).The only remark to the contrary is Hiemstra J's obiter statement in *Allwright v Gluck* 1962 1 SA 562 (T) 563E, in which he expressed the view that a promise to pay "before or on" a stated date could be a promissory note. However, as was pointed out by Galgut J in *Weszak*, the validity of the document qua promissory note was not considered. *Salot* and *Weszak* are based on the majority judgment in *Williamson and others v Rider* 1963 1 QB 89. In a minority judgment, Ormerod LJ concluded that a promise to pay "on or before" a certain date means the same as a promise to pay on that specific date.

There are differing views on this matter. Some suggest that the view of Ormerod LJ is preferable (Malan 57; Byles 18). According to Baxter 67 the

difference of opinion lies in the question whether an order or promise "to pay" refers to the right to enforce payment by the obligee or to an option to pay by the obligor. Although Petersen 1972 *SALJ* 163 169 admits that *Weszak* is probably correct on the wording of section 87(1) SABEA (and see her comment in 1981 *Annual Survey of the South African Law* 362), she nevertheless makes the following remark:

> "But this may be regrettable if no uncertainty is created by the framing of what the maker intends to be a negotiable instrument in a manner which does not conform strictly to the wording of the definition."

It is submitted that uncertainty is created by an order or promise to pay "on or before" a specific date. The order or promise to pay may refer to the time when the instrument should be paid, but it could equally mean that payment has to be made if the document is presented before the specified date. It is submitted that, in view of the general requirement of certainty in bills and notes, documents payable "on or before" a specific date should not be recognised as such. Section 3-109(1)(a) UCC, which states that an instrument is payable at a definite time if it is payable on or before a stated date, should not, therefore, be followed.

It is recommended that the position as set out in *Weszak* and *Salot* should be retained.

6.1 Articles 3(1)(c) and 3(2)(c) of the Uncitral Convention and articles 1 and 75 GULB require that an instrument be dated. In contrast, in sections 2(1) and 2(4)(a) SABEA a date is not essential for the validity of a bill or note (see also sections 3(1) and 3(4)(a) BEA and sections 3-104, 3-114 and 3-115 UCC). These general provisions must be qualified in cases where the instrument is payable at a fixed period after date or sight. When the instrument is payable at a fixed period after date and the date is omitted, it is not payable at a fixed or determinable future time and is invalid qua bill or note. Such an instrument is incomplete and the ordinary provisions regarding incomplete instruments apply to it (eg section 18 SABEA and clause 13 infra). In addition, section 10 SABEA allows the holder to insert the true date (see clause 9). An instrument payable on a fixed period after sight (acceptance) also lacks a certain time for payment, but section 12(d) SABEA provides that the period in such a case begins to run "from the date of acceptance, if the bill is accepted, and from the date of noting or protest, if the bill is noted or protested for non-acceptance". (See, generally, *Korea Exchange Bank v Debenhams (Central Buying) Ltd* 1979 1 Lloyd's

Rep 548 and Hudson "Mistakes of Form in Bills of Exchange" 1981 *Journal of Business Law* 101.) A bill payable after sight but not yet accepted is not "incomplete" in the ordinary sense (since the "incompleteness" can be cured by the acceptance of the drawee only), but when it is accepted undated it will be incomplete and so attract the ordinary provisions concerning incomplete instruments. In terms of section 38(1)(a) SABEA a bill payable on a fixed period after sight must be presented for acceptance or negotiated within a *reasonable time*. To determine a reasonable time "regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case" (section 38(2) SABEA).

6.2 A similar uncertain provision determines when an instrument payable on demand must be presented for payment. Section 43(2)(b) SABEA provides that it must be presented for payment within a reasonable time after its issue or indorsement in order to render the drawer or indorser respectively liable. A "reasonable time" is defined in section 43(3) in terms similar to those in section 38(2) SABEA.

6.3 It is submitted that the duty to make presentment within a reasonable time in the two cases referred to above creates unnecessary uncertainty, particularly were the instrument is in the hands of a remote party. This uncertainty can be removed by determining for fixed periods for presentment, to run from the date of the instrument. This entails dating instruments payable on demand and after a fixed period after sight. It is therefore proposed that clause 2(3), in which the date of the instrument is made an essential in these cases, be accepted. There seems to be no reason why the date should be a requirement in all cases. (On the date, in general, see Penney "The Draft Convention on International Bills of Exchange and International Promissory Notes: Formal Requisites" 1979 *American Journal of Comparative Law* 515 526.)

7 According to the definition of a bill and a note in clause 2(1) and (2) of this draft (sections 2(1) and 87(1) SABEA), a bill or note must be payable to order or to bearer. It is not thought necessary to provide expressly for the insertion of words prohibiting negotiation since express provision is made for this in clause 26 (sections 6(3), 6(5) and 34(1) SABEA; article 11 GULB; sections 8(1), 8(4) and 36(1) BEA.

3 The drawer and maker

(1) An instrument may be drawn or made by a person having no or limited capacity to contract.
(2) An instrument may be drawn or made by two or more drawers or makers.

Comparative legislation

Sec 85(1) BEA
Sec 89(1) SABEA
Art 10 and 11 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

> 89. *Joint or joint and several liability on notes.*
>
> (1) A note may be made by two or more persons and they may be liable thereon jointly, or jointly and severally, according to its tenor.

Commentary

1 Neither the UCC nor the GULB makes specific provision for multiple drawers or makers of an instrument. Nevertheless, it is accepted that a bill can be drawn by two or more drawers and that a note can be made by two or more makers (eg Bailey 3-26; Baumbach-Hefermehl 107ff). Articles 10 and 11 of the Uncitral Convention expressly state that a bill may be drawn by two or more drawers, and a note be made by two or more makers.

2 Section 89(1) SABEA (following section 85(1) BEA) provides that a note may be made by two or more persons and that they may be liable jointly, or jointly and severally, according to the tenor of the instrument. It will be noted that the SABEA does not specifically provide for two or more drawers (although it does provide for two or more drawees in section 4(2)). The express provision for multiple makers, drawees and payees (see on this last category section 5(2)(a) and (b) SABEA) may create the impression that a bill cannot be drawn by two or more drawers. Although it is accepted in South African case law that a bill may be drawn by two or more drawers (see, for example, *Moon and Co Ltd v Eureka Stores (Pty) Ltd and others*

1949 4 SA 40 (T); *De Beer v Diesel and Electrical Engineering Co* 1960 3 SA 89 (T) 91 B; *Roelou Barry (Edms) Bpk v Bosch en 'n ander* 1967 1 SA 54 (C) 57H-58A; *Natridge Finance (Pty) Ltd v Pillay and others* 1971 4 SA 412 (D) 414H-415A; *Anglo-African Factors (Pty) Ltd v Cuppusamy and another* 1974 3 SA 399 (D); *Marshall and another v Bull Quip (Pty) Ltd* 1983 1 SA 23 (A) 28), the proposed clause 3(2) of the draft removes any doubt which could arise from the legislation itself.

3 Clause 3(1) is commented upon under clause 16.

4 The drawee

(1) The drawee must be named or otherwise indicated with reasonable certainty in a bill.
(2) A bill may be drawn on two or more drawees but an order directed to two or more drawees in the alternative or in succession is not a bill.
(3) A bill may be drawn by the drawer on himself.

Comparative legislation

Sec 5(2) and 6 BEA
Sec 3(2) and 4 SABEA
Art 1 and 3 GULB
Art 11 Uncitral Convention
Sec 3-102(1)(b) and 3-118(a) UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

3. *Effect if different parties to a bill are the same person, or drawee a fictitious person or not having capacity to contract.*

(1) A bill may be drawn payable to the drawer or his order, or it may be drawn payable to the drawee or his order.
(2) If in a bill, drawer and drawee are the same person, or the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill or as a note.
4. *Requirements as to drawee.*
(1) The drawee must be named or otherwise indicated with reasonable certainty in a bill.
(2) A bill may be addressed to two or more drawees, whether they are partners or not, but an order addressed to two or more drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange.

Commentary

1 Clause 4(1) of this draft follows section 4(1) SABEA (section 6(1) BEA). The drawee may therefore, instead of being named, be indicated with reasonable certainty. Interpreting this provision calls for common sense, eg, merely giving the address at which payment should be made is not a sufficient identification of the drawee. (The conclusion to the contrary in *Gray v Milner* (1819) 8 Taunt 739 (129 ER 571) is not acceptable (see Malan 43 n132). It was held in *Mason v Lack* (1929) 140 LT 696; 45 TLR 363 364 that *Gray* could not apply where the address given was that of a bank at which the defendant had no account, but it is submitted that it should have made no difference whether or not the defendant had an account there.)

Article 1 GULB expressly requires that a bill contain the "name" of the person who is to pay. This does not mean that his full name has to be used; any distinctive appellation will do (Baumbach-Hefermehl 102-3). Article 5(d) of the Uncitral Convention requires that the document contain an order to the drawee, but does not specify how the drawee should be indicated. Section 3-102(1)(b) UCC is to the same effect as the BEA and SABEA. It allows the identification of the drawee "with reasonable certainty". See also section 1(5) NIL, on which section 3-102(1)(b) UCC is based.

It is submitted that there is no adequate ground for amending section 4(1) SABEA.

2 Clause 4(2) of this draft allows a bill to be drawn on two or more drawees. This accords with sections 6(2) BEA and 4(2) SABEA except that the words "whether they are partners or not", are omitted. These words add nothing to the meaning of the provision. Although article 1 GULB does not expressly provide for two or more drawees, it is generally accepted that a bill may be drawn on two or more drawees (eg Baumbach-Hefermehl 103).

According to clause 4(2) of this draft, a bill may not be drawn on two or more drawees in the alternative or in succession. Again, there is agreement with sections 6(2) BEA and 4(2) SABEA. The reason for this rule is that the drawee's identity would otherwise be uncertain (Cowen 40). According to Baumbach-Hefermehl 103, an order addressed to two or more drawees in the alternative or in succession

constitutes an impermissible amalgamation of two or more bills. Section 3-102(1)(b) UCC allows two or more drawees in the alternative (but see section 128 NIL). According to paragraph 3 of the Official Comment this provision recognises "the practice of corporations issuing dividend checks and of other drawers who for commercial convenience name a number of drawees, usually in different parts of the country". There does not appear to be any need in South Africa to amend section 4(2) SABEA.

3.1 In terms of section 3(2) SABEA, if the drawer and drawee in a bill are the same person, the holder may treat the instrument at his option either as a bill or as a note. The traditional view is that when an instrument, in the form of a bill, is drawn by the drawer on himself, the holder may treat it "as being what it is not" *(Re British Trade Corporation Limited* 1932 2 Ch 1 (CA) at 14) ie, as a bill or a note. The instrument is not thereby transformed into a bill or a note, the holder merely has the option of treating it as such. The reason for section 3(2) SABEA is the fact that a person cannot give an order to himself (De Wet & Yeats 750-1; Malan 31-2; Chalmers & Guest 24; Weerasooria and Coops 152ff; Paget 362-3; Dijkman *The Certification of Cheques* (1986) 32ff; but see *Ross v London County Westminster and Parr's Bank Ltd* 1919 1 KB 678). Although clause 2(1) of this draft does not specifically require an order "by one person to another", this is implied in the definition, so that an instrument in the form of a bill or cheque but drawn by the drawer on himself (for instance, a bank cheque or a bank draft) will not be valid as such. (For a different interpretation. see Geva "Irrevocability of Bank Drafts, Certified Cheques and Money Orders" (1986) 65 *Canadian Bar Review* 107 118-9). The traditional construction of this section is not satisfactory and has led to specific legislation in, for instance, Australia, to provide for bank cheques and drafts (Weerasooria "The Australian Bank Cheque - Some Legal Aspects" (1976) 2 *Monash University Law Review* 180; Makim "The Australian Bank Cheque - Some Further Legal Aspects" (1976) 3 *Monash University Law Review* 66 and see Dijkman 33-5).

Section 3(2) SABEA is unsatisfactory in two further respects. First, the option the holder exercises may, for example, determine whether or not the rights on the instrument have become prescribed (see *In re British Trade Corporation Ltd* (1932) 1 Ch 1). Moreover, it is not clear whether the holder may change his mind or when he must make his choice. Secondly, since only the *holder* may treat the instrument as a

bill or a note (see *Capital and Counties Bank Ltd v Gordon* 1903 AC 240 250) uncertainty arises when the document is treated as one thing vis-à-vis one, but as something different vis-à-vis another party.

It is submitted that no compelling reason exists why a document in the form of a bill should not be dealt with as such. Although section 130 NIL was to the same effect as section 5(2) BEA, section 3-118(a) UCC returns to the pre-codification position in England (see *Miller v Thomson* (1841) 3 M & G 576 (133 ER 1271)) by providing that a draft drawn on the drawer be regarded as a note.

If the holder is allowed to treat the instrument as a note, he need not present it for payment to hold the "drawer-maker" liable (see Chalmers & Guest 19-20). However, it is submitted that there is no reason to exempt the holder from presenting for payment if the creator of the instrument has chosen to couch it in the form of a bill. In so doing, he chooses to be liable as drawer and not as the maker of a note.

3.2 Apart from the case where drawer and drawee are the same person, section 3(2) SABEA (section 5(2) BEA and section 130 NIL) gives the holder the option to treat the instrument as a bill or as a note in two further cases: the drawee is a fictitious person, or he is a person who has no contractual capacity. Neither has yet received attention in any reported cases (see also the remark by Britton 28). It is interesting to note that section 7(3) BEA refers to a fictitious or "non-existing" person, whereas section 5(2) BEA refers to a fictitious person only.

Section 3(2) SABEA prescribes the formal requirements for a bill only and does not concern itself with whether a particular party is liable on it. Seen in this light, there is little justification for the provision concerning the drawee who is either a fictitious person or a person who lacks contractual capacity. In both cases the document would comply with the formal requirements of a bill. On the wording of section 2(1) SABEA there might be some justification for a special provision regarding "fictitious" drawees, but not on the wording of clause 2(1) and (2) of this draft. An instrument drawn on a person who is a mere figment of the drawer's imagination is recognised as a valid bill in German law, although no special provision is made for this case (see Baumbach-Hefermehl 103; Hueck-Canaris 64; Zöllner 69-70).

If the instrument is a valid bill or note in terms of the operative definition, the holder cannot and should not be given the option to treat it as something else.

It is submitted that section 3(2) SABEA should be replaced by a provision stating simply that a bill may be drawn by the drawer on himself. This is done in clause 4(3) of this draft.

5 Unconditionality of order or promise

(1) An order or a promise is not unconditional if it is an order or a promise to pay out of a particular fund.

(2) An otherwise unqualified order or an otherwise unqualified promise is unconditional even if coupled with

> **(a) an indication of a particular fund out of which the drawee or maker is to reimburse himself, or of a particular account to be debited with the amount; or**
>
> **(b) a statement of the transaction which gave rise to the instrument; or**
>
> **(c) a statement that it is drawn against specified documents attached thereto for delivery on acceptance or on payment; or**
>
> **(d) a statement that it is drawn under or against a specified letter of credit or similar authority.**

(3) An order or a promise is not unconditional if it is stated to be subject to or governed by any other agreement or transaction.

Comparative legislation

See 3(3) BEA
See 2(3) SABEA
Sec 12 Cheques and Payment Orders Act 1986
Sec 3 NIL
Sec 3-105 UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

> 2. *Definition of and requirements for bill of exchange.*
>
> (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a specified or determinable future time, a sum certain in money to a specified person or his order, or to bearer.
> (2) An instrument which does not comply with the requirements specified in subsection (1) or which orders any act to be done in addition to the payment of money, is not a bill.

(3) An order to pay out of a particular fund is not unconditional within the meaning of sub-section (1) but an unqualified order to pay coupled with --
(a) an indication of a particular fund out of which the drawee is to reimburse himself, or of a particular account to be debited with the amount;
(b) a statement of the transaction which gives rise to the bill;
(c) a statement on the bill that it is drawn against specified documents attached thereto for delivery on acceptance or on payment of the bill, as the case may be; or
(d) a statement on the bill that it is drawn under or against a specified letter of credit or other similar authority,
is unconditional within the meaning of the said sub-section.

Commentary

1 The general requirement of unconditionality is stated in clauses 2(1) and 2(2) of this draft. "Condition" has a definite legal meaning (see De Wet & Yeats 131-5; 5 *LAWSA* paragraph 176; Christie 151-2; Wessels paragraph 1280-1311).

The GULB (articles 1 and 75) and the Uncitral Convention (articles 3(1) and (2) require unconditionality without further elaboration. In German law "condition" is interpreted in a wide sense to include not only conditions in the technical legal sense of the word, but also suppositions or conditions precedent to which the order or promise is subject. Zöllner 69 states that the requirement of unconditionality does not allow the validity of the cambial obligation to be made dependent on the validity of the causal relationship. Although this is not a condition in the strict sense of an uncertain future event, the requirement of unconditionality also applies to this case (see Jacobi 211-2). The purpose of the requirement is to ensure the free circulation of bills and notes. Thus, the content of any obligation on the instrument should appear from the document alone (see also Hueck-Canaris 61-2). It follows that an instrument making the order subject to a condition precedent cannot be a bill or note in German law. (See also Jäggi Druey and Von Greyerz 149-50.)

2 Legislation in most Anglo-American countries elaborates on the requirement of unconditionality. Section 3(3) BEA states that an order to pay out of a particular fund is not unconditional, but that an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or a statement of the transaction that gave rise to the bill, does not make the order conditional. Section 3 NIL is similar. Section 12(2) of the Australian Cheques and

Payment Orders Act 1986 provides that an order is not conditional merely because it is coupled with an indication of a particular account to be debited by the bank to which the order is addressed, or to a statement of the transaction giving rise to the order. Section 2(3) SABEA echoes section 3(3) BEA, except that two examples of unconditional orders are added, viz the order contains a statement that it is given against specified documents attached to it for delivery on acceptance or payment, and the order contains a statement that it is given under or against a specified letter of credit or similar authority.

3 Section 2(3) SABEA does not define "condition" but shows through examples which orders or promises will be conditional and which will not. Although they can be omitted without changing the legal position, to avoid uncertainty it is nevertheless advisable to retain the provisions of Section 2(3) SABEA. The cases mentioned in section 2(3) SABEA also occur in practice: See, for example, *Wingrove v Goodchild* (1892) 6 HCG 164 and *Brick and Potteries Co Ltd v Doornfontein Hebrew Congregation* 1907 TH 183 on payment from a specific fund; *Estate Swanepoel v Swanepoel* 1912 CPD 398 on reimbursement from a specific fund; *Shaw v Shaw and Adamson* (1896) 13 SC 81; *Ashburnham v Shepherd* (1883) 3 EDC 70 and *Van Zyl Hofmeyr and Warren v Swanepoel* 1913 CPD 244 on a statement of the transaction giving rise to the instrument; *Standard Bank of SA Ltd v Barnard* 1923 CPD 487 on documents attached for delivery on acceptance or payment; *The Oriental Banking Corporation v Lippert and Co* (1875) 5 Buch 152 on bills drawn against letters of credit. There is also a number of legislative provisions obliging certain officials to state the reason for payment on cheques or orders drawn on accounts under their control (see section 70(4) of the Insolvency Act 24 of 1936, section 28(4) of the Administration of Estates Act 66 of 1965 and section 394(4) of the Companies Act 61 of 1973).

In *Van Zyl Hofmeyr and Warren v Swanepoel* 1913 CPD 244 Maasdorp JP said about the Cape predecessor of section 2(3)(b) SABEA (at 246-7):

> "To meet a case of that class, which sets forth a transaction for which the note was given, and which at one time seemed to cause some difficulty as to the negotiability, or the unconditional character of the note, we find in section 2, sub-section 3(b), the following provision: 'An unqualified order to pay, coupled with the statement of the transaction which gives rise to the bill, is unconditional.'"

The deletion of section 2(3)(b) SABEA could thus reopen an unnecessary debate, and it is therefore suggested that it be retained.

4 The examples given in section 3-105 UCC are, in the main, orders and promises that would in any event have been conditional or unconditional as the case may be. However, in some cases certain additions to orders or promises that would or could have made them conditional, are deemed not to have that effect.

First, section 3-105 (1)(b) UCC states, inter alia, that an order or promise is not conditional if it is stated that the order or promise is made or that the instrument matures "in accordance with" or "as per" some transaction. The Official Comment (2) to paragraph (b) states that the clause is intended to resolve conflicting decisions on the effect of words such as "as per":

> "It adopts the general commercial understanding that such language is intended as a mere recital of the origin of the instrument and a reference to the transaction for information, but is not meant to condition payment according to the terms of any other agreement."

(See also Cosway "Negotiable Instruments - A Comparison of Washington Law and Uniform Commercial Code Article 3" (1963) 38 *Washington Law Review* 501 511ff.) It is submitted that this approach is correct but that, as words reciting the origin of the instrument are sufficiently covered by section 2(3)(b) SABEA, no specific reference to those expressions need be made. However, when the instrument expresses the order or promise to be "subject to" another agreement or transaction the position is different. Britton 32 correctly remarks:

> "It is believed that the element which destroys negotiability is the phrase 'subject to', etc, and not some particular clause which may appear in the transaction referred to, for the reason that all formal requisites seem to be designed to enable a prospective taker to determine by the inspection of the instrument alone whether it is negotiable or not - an ideal not always realised but toward which some progress is made.... If the red sign 'subject to' appears, this is enough, even though the transaction itself, to which the bill or note is subject, may actually contain nothing harmful to negotiability. Were it otherwise, negotiability would turn, not upon what appears on the instrument, but upon all sorts of collateral or underlying transactions. Endless confusion would result and commercial paper would not circulate with the speed necessary to support the credit structure of society."

Secondly, section 3-105(1)(g) states that an order or promise to pay out of a particular fund or the proceeds of a particular source is not conditional if the instrument is issued by a government or governmental agency or unit. According to Miller and Harrell 59 the purpose is to permit municipalities or other governmental agencies to issue cheques or other commercial paper in negotiable form even though

payment is limited to, for example, the proceeds of a particular tax.

Thirdly, section 3-105(1)(h) states that an order or promise is unconditional, although the instrument is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued (see Miller and Harrell 59). According to the Official Comment on this provision, it is designed to save the negotiability of the instrument only, and is not intended to change the law of any state concerning the liability of a partner, trustee, executor, administrator or any other person on such an instrument.

5 It is submitted that the three exceptions referred to should not be adopted in South African law. First, words such as "as per" merely recite the origin of the instrument and do not subject the order or promise to a condition. Whether they import a condition or amount to a statement of origin is a matter of construction. Secondly, the second exception is apparently based on the premise that a fund or source indicated by the government or a government agency will always exist and be able to cover the amount of the order or promise. It is suggested that there is no compelling reason to single out government paper and attribute negotiability to it in defiance of the ordinary rules governing bills and notes. Lastly, the third exception is also an exception to the rule that prohibits payment out of a specific fund only. As far as trusts are concerned, the liability of a trustee is in any event limited to the trust property (Honoré 50 54) so that there would be no reason for him to limit his liability expressly to the trust assets. The same applies to a deceased or insolvent estate (Corbett Hahlo Hofmeyr and Kahn 3-4). There is thus no good reason to make specific provision to validate conditional clauses dealing with trusts and estates. With regard to voluntary associations, a member who contracts on behalf of the association, renders himself liable (Bamford 193-8: 1 *LAWSA* par 533; Uys *Die Genootskapsooreenkoms* (1961) 124 but see 128-30). Thus, where the member contracts on the basis that recovery be restricted to association assets he limits his obligation to a specific fund. The same applies to a partner who contracts on the basis that the partnership assets alone can be attached in execution. It is submitted that there is no compelling reason to validate instruments that limit the liability of such a member or partner in so unequivocal a manner.

6 In the few cases in which the meaning of "unconditional" in section 2(3) SABEA have arisen the courts seem to have given "condition" its technical legal meaning. See

eg *Van Zyl Hofmeyer and Warren v Swanepoel* 1913 CPD 244 246; *S v Katzikaris* 1980 3 SA 580 (A) 594-7; *Mulla v Rajkumar* 1982 1 SA 246 (D). But they were not called upon to construe the word and it is submitted that, when required to do so they will interpret the requirement, as in German law, to refer not only to true condition, but also to condition precedent and assumptions on the basis of which the instrument is drawn. (See section 2(3)(a)-(d) SABEA; Britton 30ff). A specific provision in the draft referring to condition precedent or assumptions would therefore be superfluous. (See further Gilmore "The Commercial Doctrine of Good Faith Purchase" (1954) 63 *Yale Law Journal* 1057 1068; *Carlos v Fancourt* (1794) 5 TR 482 (101 ER 272).)

Section 3-105 (3)(a) UCC, on the other hand, merits inclusion: "A promise or order is not unconditional if the instrument (a) states that it is subject to or governed by any other agreement." As Britton 32 (see par 4 above) rightly says, it is the subjection to the other agreement that destroys negotiability.

6 Sum payable

(1) The sum payable in terms of an instrument is a sum certain in money although it is to be paid

> **(a) with interest;**
>
> **(b) by stated instalments;**
>
> **(c) by stated instalments, and upon default in payment of any instalment or interest the whole sum or the balance owing becomes due by virtue of a provision to that effect in the instrument; or**
>
> **(d) according to a rate of exchange indicated, or to be ascertained as directed, by the instrument.**

(2) Where more than one sum is expressed to be payable in an instrument, the lesser or least, as the case may be, of such sums is the amount payable: Provided the drawee may refuse to pay such instrument.

(3) Where an instrument is expressed to be payable with interest, it runs from the date of the instrument, unless the instrument otherwise provides.

(4) Where an instrument is expressed to be payable with interest, but no rate of interest is indicated, interest shall be payable at the prescribed rate.

(5) A document containing an order or a promise to do any act in addition to the payment of money is not an instrument.

Comparative legislation

Sec 9 and 83(3) BEA
Sec 7 and 87(3) SABEA
Art 5, 6 and 41 GULB
Art 8, 69 and 70 Uncitral Convention
Sec 3-106, 3-107 and 3-118(c) and (d) UCC
Sec 15 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

7. *Sum payable.*

(1) The sum payable by a bill is a sum certain in money within the meaning of this Act although it is required to be paid --
(a) with interest;
(b) by stated instalments;
(c) by stated instalments, and upon default in payment of any instalment the whole becomes due by virtue of a provision to that effect in the bill; or
(d) according to a rate of exchange indicated, or to be ascertained as directed, by the bill.
(2) If 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.
(3) If a bill is expressed to be payable with interest, interest runs, unless the instrument otherwise provides, from the date of the bill or, if it is undated, from the date of issue thereof.

87. *Promissory note defined.*
(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to bearer.
(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.
(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell it or dispose thereof.

Commentary

1 This draft regulates bills and notes only. The effect of the Usury Act, formally the Limitation and Disclosure of Finance Charges Act, 1968 (Act No 73 of 1968) on bills and notes is not investigated. It is doubtful whether the effect of this act on bills, cheques and notes was appreciated when it was enacted. Some of the problems created by that act have been referred to (Oelofse, Stassen and Du Plessis "Hersiening van die

Wisselwet" 1983 *Modern Business Law* 67 at 70 and see 1985 *Modern Business Law* 168 at 169), but no legislative attention has yet been given to the matter. It is therefore recommended that the act be the subject of a separate investigation. Many of its provisions are ignored in practice as they are difficult to understand. Eminent writers have failed to interpret them sensibly. Two can be cited here: Otto "Statutêre Regulering van Kredietooreenkomste: 'n Kritiese Evaluering" 1985 *TSAR* 11 at 22 makes this observation on the field of application of the above mentioned act and the Credit Agreements Act 75 of 1980: "Op die heel minste het dit tot gevolg dat daar ernstige onsekerheid bestaan aangaande die toepassingsterrein van die twee wette." Flemming *Kredietransaksies* (1982) 177-9 mentions three possible constructions of section 2(9) of the Usury Act (see 1982 *De Rebus* 498).

2 The amount for which a bill or note is drawn or made must be a sum certain in money (clause 2(1) of this draft and section 2(1) SABEA). This means that the sum payable must be ascertainable ex facie the document *(National Bank of Australia Ltd v MacArthur and Co* (1902) 23 NLR 279; *Moosa v Mahomed* 1938 TPD 473 476; *Weszak Beleggings (Edms) Bpk v Venter* 1972 1 SA 730 (T); *Botha v Bouverbeterings-Finansmaatskappy (Edms) Bpk* 1979 2 SA 200 (T) 203-4). By providing that a bill may be drawn "with interest" section 7(1)(a) creates some uncertainty. This could mean that an instrument specifying no rate of interest or a rate to be determined dehors the instrument could be valid as a bill or note (see De Wet & Yeats 749 n40). But it has been correctly held that the amount of interest payable should be determinable ex facie the instrument only (see *Moosa and Weszak and Hamman v Van der Merwe* 1947 1 SA 631 (SWA).

3.1 Section 7(1)(a) SABEA is followed literally in clause 6(1)(a) of this draft. The word "stated" is not inserted between "with" and "interest". The reason is that a legislative provision governs the position where a debt bears interest but the rate is not determined. According to section 1(1) of the Prescribed Rate of Interest Act 55 of 1975 the rate prescribed in terms of section 1(2) then applies. Although the prescribed rate does not appear ex facie the document, it has been submitted that a bill or note payable simply "with interest" is drawn or made for a sum certain in money (De Wet & Yeats 749 n40; Malan 45-6; Tager paragraph 22). This view is correct. The matter is put beyond doubt by clause 6(5) of this draft. The applicable rate will then be the

rate prescribed at the date when interest begins to run, and does not change should a different rate subsequently be prescribed. This accords with section 1(1) of the Prescribed Rate of Interest Act (see 1985 *De Rebus* 245). In *Fedmis Afdeling van Sentrachem Bpk v Crause* 1985 4 SA 413 (O) the prescribed rate was altered while interest was running, and interest was awarded at the new rate from the date of the amendment. It is submitted that this is not in accordance with section 1(1) of the Act.

The exception to the rule that the amount of interest payable must appear from the document itself is very limited. If the document provides for interest at a rate to be determined by extraneous factors (eg "interest at the prime overdraft rate of bank X") the Prescribed Rate of Interest Act and clause 6(5) of this draft do not apply (Malan 46). It follows that such a document is not valid as a bill or note.

3.2 The wording of section 9(1)(a) BEA is similar to that in section 7(1)(a) SABEA. The cases do not clarify the question whether and, if so, to what extent, an order or promise qualifies as a bill or note where the amount of interest cannot be determined exclusively from the document itself. In *Warrington v Early* (1953) 2 E & B 763 (118 ER 953) the defendant promised to pay 1 000 pounds "with lawful interest". The court apparently assumed that this was a valid promissory note, although the point was not raised directly. In *In re Commercial Bank of South Australia* (1887) 36 ChD 522 529 North J remarked obiter that five percent interest is payable on instruments payable with interest if no rate is specified. On the other hand, in *Lamberton v Aiken* (1899) 2 Session Cases 189, a Scottish court held that a document containing a promise to pay a certain sum "together with any interest that may accrue thereon" was not a valid note, since the sum payable was not a "sum certain in money". In *Halsbury's Laws of England* (4th ed) volume 4 paragraph 320 it is stated: "In England, where a bill or note is expressed to be with interest, but no rate is prescribed, a court would probably allow the appropriate commercial rate" (but see Kobrin and Stott 19). It should be noted that Halsbury does not deal with the case in which a rate of interest that can be determined with reference to extraneous factors is specified.

3.3 Section 3-106(1)(a) UCC provides that the sum payable is a sum certain even though it is to be paid with *stated* interest. It is accepted that the amount of interest payable must therefore appear ex facie the document (see paragraph 1 of the Official

Comment on the provision; Weber and Speidel 62-3; Reitman, Weisblatt, Schlichting, Rice and Cooper 112-33). There are two exceptions to this basic rule. First, section 3-118(d) states that, if the instrument provides for interest but no rate is given, the judgment rate at the place of payment applies. Secondly, it has been accepted that an instrument may validly stipulate for interest "at the maximum legal rate" allowed by any applicable usury legislation (Reitman, Weisblatt, Schlichting, Rice and Cooper 112-34, but see Hart and Willier par 2.11.2). In both cases reference to an extraneous source (a statute fixing the rate) is necessary, which is apparently tolerated because the source referred to is "easily available and fixed" (Miller and Harrell 60 and Hart and Willier paragraph 2.11.2). The suggestion that references to other interest rates (eg the prime overdraft rate of a specified bank) should be allowed (Leary and Tarlow "Reflections on Articles 3 and 4 for a Review Committee" (1975) 48 *Temple Law Quarterly* 919 962-4) has not met with success.

In contrast to the fairly strict approach regarding interest, sections 3-106(1)(c) and (e) UCC allow a stated discount in case of payment before maturity and costs of collection and attorney's fees on default. Both imply a substantial measure of uncertainty regarding the amount payable, and would clearly disqualify the instrument under South African law (*Weszak Beleggings (Edms) Bpk v Venter* 1972 1 SA 730 (T), *Moosa v Mahomed* 1938 TPD 473; *FJK Syndicate v Du Preez and Smit* 1943 WLD 116; *Katzel v Keyser and Reyneke* 1944 OPD 202; *Botha v Bouverbeterings-Finansmaatskappy (Edms) Bpk* 1979 2 SA 200 (T)). Neither can an order to pay an uncertain amount be saved by an acceptance for a fixed amount (see the obiter remarks in *Bank of Lisbon v Optichem Kunsmis (Edms) Bpk* 1970 1 SA 447 (W) 453, in which the court dissented from the contrary view expressed in *Perry and Co Ltd v Nelco Floors* 1956 2 SA 711 (W)).

3.4 With reference to section 28(1)(a) of the Canadian Bills of Exchange Act (7(1)(a) SABEA), the Supreme Court of Canada in *Macleod Savings and Credit Union Ltd v Perrett* (1981) 118 DLR (3d) 193 approved *Lamberton v Aiken* (1899) 2 Session Cases 189 and held that the amount payable (and therefore also any interest) must be determinable from the instrument alone. (See also *Bank of Montreal v A and M Investments Ltd* (1982) 136 DLR (3d) 181.) Delivering the court's judgment, Beetz J made the following statement, which seems difficult to reconcile with the rest of the judgment (at 199):

> "I wish to add that while certainty on the face of the instrument is the rule, certainty is not necessarily an absolute term. It may be a matter of judgment in some cases whether an explicit or implicit reference to extrinsic circumstances creates such a degree of uncertainty as unduly to affect the currency of the instrument and alter its nature."

In *Bank of Montreal v Dezcam Industries Ltd* (1983) 147 DLR (3d) 359 the instrument provided for interest "at the rate of interest charged by the Bank of Montreal to its most creditworthy customers from time to time". The British Columbia Court of Appeal found that there were different categories of "most creditworthy customers" to whom different rates applied. The document could therefore not be a promissory note, whether or not the reference to a rate to be determined extraneously was permissible. It was thus unnecessary to decide whether Beetz J's remark means that reference to an extraneous source to determine the interest rate could, in some cases, be permissible. The question again arose in *Royal Bank of Canada v Stonehocker and Stonehocker* 61 British Columbia Law Reports 265. In this case interest was promised at the prime interest rate of a specified bank plus one per cent. The court relied on the statement of Beetz J, and said that the Bills of Exchange Act should be interpreted in the light of prevailing economic conditions, which include fluctuating interest rates. It concluded that the interest rate need not be ascertainable only from the face of the document, but also by reference to "an appropriate objective standard". Whether the document in question had, in fact, referred to "an appropriate objective standard" had to be decided by the trial court. What would qualify as "an appropriate objective standard" is not clear. It is true that there is a need to provide for debts carrying interest at rates determined by market forces for the applicable rate of interest cannot always be expressed as a percentage. But whether it is necessary to accommodate these debts in the Bills of Exchange Act is a question not thoroughly canvassed by the court in *Stonehocker.*

3.5 The GULB sets extremely strict requirements for interest (see Hudson and Feller "The International Unification of Laws concerning Bills of Exchange" (1931) 44 *Harvard Law Review* 333 350). According to article 5 GULB, interest may be stipulated for only in the case of instruments payable on demand or at a fixed period after sight. The reason is that, in other cases, interest (if any) should be calculated beforehand and incorporated in the capital amount to be paid. Instruments payable on demand or after sight are the only cases where the day of presentment for payment is

not known at the time the instrument is drawn or made, and consequently a separate stipulation for interest is allowed (see Baumbach-Hefermehl 115-6; Jacobi 431; Roblot 114). Furthermore, the rate of interest must be stipulated in and be clear ex facie the document (see Brox 277; Hueck-Canaris 62). However, contrary to what one would expect, non-compliance with these strict provisions regarding interest does not disqualify the instrument as a bill or note. The stipulation regarding interest is simply "deemed not to be written". According to Jacobi 433, the philosophy underlying this rule is that the parties would prefer the validity of the instrument to its invalidity.

3.6 Article 8(5) of the Uncitral Convention follows article 5 GULB. It states that a stipulation for interest is "deemed not to have been written" unless it indicates the rate at which interest is payable. The instrument is accordingly not invalid on the ground that no rate is indicated. The only exceptions are provided for in Article 8(6)-(8).

3.7 Clause 6(1)(a) of this draft does not change the existing position. As there seems to be no overriding reason, and no evidence to the contrary was adduced, to recognise the negotiability of instruments with interest stipulations linked to an extrinsic source, the principle of certainty is, and should be, maintained. In enacting the Prescribed Rate of Interest Act the legislature clearly intended to lay down a rate to be applied in all cases in which the rate is not otherwise determined. So, too, does clause 6(4) of this draft.

4 Clause 6(1)(b) of this draft corresponds to Section 7(1)(b) SABEA that, in turn, is based on section 9(1)(b) BEA. Section 3-106(1)(a) UCC and article 7(c) of the Uncitral Convention also provide for payment in instalments. By contrast, article 33 GULB expressly disallows payment in instalments. According to Jacobi 448, the reason for the rule is that bills and notes are "commercial" paper money, and paper money embodies an obligation to pay a single amount. This reasoning is unconvincing. Not only are most forms of paper money not negotiable instruments (Oelofse "The Nature of Bank-notes Issued by the South African Reserve Bank" 1982 *Modern Business Law* 90; Pretorius 1986 *SALJ* 156-7, but see Cowen (1985) 8 and 248), but the analogy between negotiable instruments and paper money should not be carried too far. Not surprisingly, the consensus in banking and trade circles favours allowing instalments.

5 Clause 6(1)(c) of this draft follows section 7(1)(c) SABEA, except that, in addition, it provides for acceleration on non-payment of interest. Section 7(1)(c) SABEA appears in the section dealing with the requirements of a sum certain in money. It is not repeated in the provisions dealing with the time of payment. This is also true of section 7(1)(b) SABEA (which deals with instalments simpliciter). On the wording of the SABEA it could be argued that a document providing for instalments (with or without acceleration on default) complies with the "sum certain" requirements, but not with the "due date" requirements. As Malan 46 n158 points out, sections 7(1)(b) and (c) SABEA would be meaningless were it implied that these documents did not also comply with the "due date" requirements. Nonetheless, it is thought prudent to eliminate all doubt by providing for instalments (with and without acceleration) in the "due date" provisions as well (see clauses 8(1)(c) and (d) of this draft).

6 Clause 6(1)(d) of this draft corresponds to section 7(1)(d) SABEA. It recognises the distinction between money of account and money of payment (on which, see Mann *The Legal Aspect of Money* (1992) 266ff). For example, an instrument expressed in a foreign currency is expressed payable in South African currency. South African law allows a foreign currency debt to be paid in an equivalent amount of South African currency (see *Barry Colne and Co (Transvaal) Ltd v Jackson's Ltd* 1922 CPD 372; *Bassa Ltd v East Atlantic (SA) Co Ltd* 1932 NPD 386; *Voest Alpine Intertrading Gesellschaft MBH v Burwill and Co SA (Pty) Ltd* 1985 2 SA 149 (W)). The rule allows the rate of exchange at which the one currency is to be converted into the other to be determined with reference to extrinsic evidence (cf the words "to be ascertained as directed"). This deviation from the principle of certainty ex facie the document is a necessary one (see *Levinson v Batten and Co Ltd* 1940 TPD 41 48-9 and further the commentary on clause 67).

7 Article 8(3) of the Uncitral Convention (see article 41 GULB) provides:

> "If the amount of the instrument is expressed in a currency having the same description as that of at least one other State than the State where payment is to be made, as indicated in the instrument, and the specified currency is not identified as the currency of any particular State, the currency is to be considered as the currency of the State where payment is to be made."

This solves the problem in which, for example, an instrument is expressed in francs without specifying whether they be French, Belgian or Swiss. In such a case the place

of payment governs, so that French francs would be the relevant currency if the place of payment were in France. Enactment of this rule is unnecessary in South Africa as it is already applied by the common law. (See *Joffe v African Life Assurance Society Ltd* 1933 TPD 189; Forsyth and Bennett 180 n110, 309 and also *Aktiebolaget Tratalja v Evelyn Haddon and Co Ltd* 1933 CPD 156).

8 Section 7(2) SABEA (see section 9(2) BEA) provides for the case in which the amount of the instrument is expressed in both words and figures and there is a discrepancy between the two. The section concludes that the sum denoted by words is the amount payable. Article 8(1) of the Uncitral Convention is to the same effect. So too are section 118(c) UCC and article 6 GULB, except that both these provisions contain an addition to the general principle. Section 118(c) UCC states that where the words are ambiguous, the amount in figures is the amount payable. Article 6 GULB states that if the amount is expressed more than once in words or more than once in figures and there is a discrepancy, the smaller is the sum payable.

All these provisions, with the exception of article 6 GULB, fail to provide for the case in which the amount is expressed more than once in words or more than once in figures. Moreover, the basic rule that accords preference to the words seems to be a rule of thumb with no logical justification. The drawer or maker could just as easily make a mistake when expressing the amount in words, and the amount in figures could be the actual amount he intended to be payable. It is submitted that the only deduction to be made from an instrument drawn payable with differing amounts is that the lesser or least amount is the amount intended.

Section 15(2) of the Australian Cheques and Payment Orders Act, 1986 provides: "Where more than one sum is expressed to be payable in an instrument containing an order to pay, the lesser or least, as the case may be, of the sums so expressed to be payable shall be taken to be the only sum ordered to be paid by the instrument." This is a significant deviation from section 14(2) of the Australian Bills of Exchange Act, which follows section 9(2) BEA to the letter. Section 15(2) is based on a recommendation in paragraph 194 of the Manning Committee Report of 1964. It is submitted that section 15(2) should be followed.

Notwithstanding the provisions of sections 9(2) BEA and 7(2) SABEA, it has become established banking practice for the drawee not to pay an instrument with differing amounts, or to pay only the smaller amount, even though the smaller is the

amount expressed in figures. (See Riley 44; Cowen 370; Barker 59). On the basis that a mandatary is entitled to a clear and unequivocal order, the former practice has received judicial recognition *(London Joint Stock Bank Ltd v Macmillan and Arthur* 1918 AC 777 832). It is submitted that this practice should not be disturbed as it forms part of a contract of mandate that is regulated by a body of rules dehors the instrument. If clause 6(2) of this draft is enacted, the second practice referred to would apply also to the relationship between the drawer and holder.

9 Clause 6(3) corresponds with section 7(3) SABEA except that the latter part of the section is deleted. An instrument payable with interest but on which it is not stated from which date interest runs, is invalid qua bill or note, not because the date is an essential requirement for all bills and notes but because it is not an order or promise to pay a certain amount. Such an instrument is incomplete and the provisions relating to incomplete instruments (clause 13) apply.

Athough both section 3-112 Revised UCC and article 8 Uncitral Convention provide for instruments payable at variable rates, no evidence was presented to the Commission as to their desirability. No provision is therefore made for them.

10 Clause 6(5) of this draft accords with the concluding part of section 2(2) SABEA. Section 3(2) BEA and section 3-104(1)(b) UCC embody similar provisions. While the GULB does not have similar provisions, the result is the same (Zöllner 65; Jacobi 419; Roblot 113-4). The deletion of section 2(2) SABEA may give the impression that an order or promise to pay a fixed amount and to deliver or do something else could qualify as a bill or note. The concluding part of section 2(2) SABEA is accordingly retained.

Section 87(3) SABEA (section 83(3) BEA) appears to create an exception to the general principle stated in section 2(2) SABEA. Section 87(3) provides: "A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell it or dispose thereof." The precise meaning of this provision is uncertain. It may refer to a statement that something has already been given in pledge (see *Wise v Charlton* (1836) 4 A & E 786 (111 ER 979)), but, if this is so it constitutes no real exception to the general rule.

But section 87(3) SABEA may also mean that an additional promise to give something in pledge does not affect the character of the note (see Section 3-112(1)(c) UCC; and *City National Bank v Roberts* (1929) 266 Mass 329; 165 NE 470).

However, it is not clear why such an exception is either necessary or desirable, nor why it should be limited to notes. It is submitted that section 87(3) should be removed from the South African legislation.

11 An instrument must be directed at the payment of *money*. South African money is defined (see section 11 of the South African Reserve Bank Act 90 of 1989 and section 12 of the South African Mint and Coinage Act 78 of 1964). An instrument may also be expressed in foreign money (eg *Bank of Lisbon v Optichem Kunsmis (Edms) Bpk* 1970 1 SA 447 (W); section 14 of the South African Mint and Coinage Act 78 of 1964; section 70(d) SABEA). The question arises whether it is necessary to define "foreign money" in the South African legislation on bills and notes. Section 1-201 (24) UCC defines money as "a medium of exchange authorised or adopted by a domestic or foreign government as a part of its currency". This reflects the traditional "state theory" of money (see Silard "Money and Foreign Exchange" (being chapter 20 of the *International Encyclopaedia of Comparative Law* volume 17 3 n5). It allows any means of exchange to be money provided it is issued by the authority of the law (see Goode *Payment Obligations in Commercial and Financial Transactions* (1983) 2 and 6; Mann *The Legal Aspect of Money* (1992) 8 and 14ff). This theory is impliedly adopted by section 14 of the South African Mint and Coinage Act, which provides:

> "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, in the Republic, shall be made, executed, entered into, done and had according to the coins which are current and are a legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some foreign State."

According to the "societary theory", money is anything that is accepted as a general medium of exchange in a particular community, whether or not sanctioned by the state. Since the "state theory" has by implication been adopted by the South African legislature, it is not necessary to define "money" in any legislation concerning bills and notes.

Article 4(11) of the Uncitral Convention contains the following tentative definition of money:

> "'Money' or 'currency' includes a monetary unit of account which is established by an intergovernmental institution or by agreement between two or more states ... ."

The purpose of this definition is to allow an instrument to be expressed in monetary units of account such as the special drawing rights (SDR's) of the International Monetary Fund or the European currency units ECU's) of the European Economic Community. These monetary units are purely units of account, there being no "physical" medium of exchange known as SDR or ECU. The fact that the value of these units of account is expressed in terms of national currency units is further evidence of this. For this reason they are not money. Since their value in terms of national currencies is determined by formulae incorporating a basket of different national currencies, it would be a useful safeguard against currency fluctuations if these units could be used as the unit of account in a negotiable instrument, with a specified country's currency as the unit of payment. Although there can be no objection in principle to making use of these units of account in the law of negotiable instruments, the desirability of such a step is still debated. Therefore, it would be premature to provide in national legislation for these units of account.

12 Both the General Bar Council and the Clearing Bankers Association have recommended an amendment to clause 6(2) entitling the drawee to refuse payment where the words and figures used to indicate the amount payable differ. This amendment has merit and is adopted.

7 Payable on demand

(1) An instrument is payable on demand

(a) where it is expressed to be payable on demand, at sight, or on presentation, or where it contains words of similar import; or

(b) where no time for payment is expressed in it.

(2) An instrument payable on demand is overdue six months after its date.

(3) Where an instrument is indorsed when it is overdue, any presentment for acceptance or payment or any notice of dishonour necessary to hold liable the indorser who has so indorsed it is excused.

Comparative legislation

Sec 8 and 43(2)(b) SABEA
Sec 10 and 45(2) BEA

Sec 3-108 and 3-501(4) UCC

Art 9 Uncitral Convention

Art 20, 33 and 34 GULB

Art 14 and 66 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

8. *When bill is payable on demand.*

(1) A bill is payable on demand --
(a) if it is expressed to be payable on demand, or at sight, or on presentation; or
(b) if no time for payment is expressed therein.
(2) If a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts or any indorser who so indorses it, be deemed to be a bill payable on demand.
42. *Duties as to and consequences of qualified acceptance.*
(1) The holder of a bill may refuse to take a qualified acceptance, and, if he does not obtain an unqualified acceptance, may treat the bill as dishonoured by non-acceptance.
(2) A bill is duly presented for payment if it is presented in accordance with the following rules, namely-
(a) if the bill is not payable on demand, presentment must be made on the day it falls due;
(b) if the bill is payable on demand, presentment must, subject to the provisions of this Act, be made within a reasonable time, within the meaning of subsection (3), after its issue, in order to render the drawer liable, and within such a reasonable time after its endorsement, in order to render the indorser liable.

Commentary

1 Clause 7(1) is based on article 9(1) of the Uncitral Convention. The only difference between clause 7(1) on the one hand and sections 8(1) SABEA and 10(1) BEA and section 14(1) of the Cheques and Payment Orders Act 1986 on the other, is that the latter do not contain the words "or if it contains words of similar import". The addition of this phrase means that a demand instrument need not contain one of the standard expressions used. Article 33 GULB, for example, states that an instrument may be payable at sight and article 34 that an instrument payable at sight is payable on presentment. It is nevertheless generally accepted that the words "at sight" do not have to be used. Words such as "on presentment" or "at any time" would be sufficient (see Baumbach-Hefermehl 282). In the absence of case law on the question whether a demand instrument must contain one of the expressions used in section 8(1)(a) SABEA, the addition of the phrase referred to is advisable. Section 3-108 UCC indeed provides that instruments payable on demand *include* those payable at sight or on presentation and those in which no time for payment is stated. This provision makes it clear that no specific formula is required.

2.1 Section 43(2)(b) SABEA (section 45(2) BEA) provides that a bill payable on demand must be presented for payment within a reasonable time after its issue to render the drawer liable on it, and within such reasonable time after its indorsement to render the indorser liable. Section 43(3) SABEA provides: "In determining what is a reasonable time for the purposes of paragraph (b) of sub-section (2), regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case." Two observations can be made.

First, a "reasonable time" can differ from drawer to indorser. The times concerning two or more indorsers may be different. For example, an indorser may be liable because presentment was made within a reasonable time after his indorsement, but he may have no recourse against a prior indorser or the drawer, for the reason that presentment had not been made within a reasonable time after the prior indorsement or issue of the instrument. Secondly, a "reasonable time" cannot be determined with any measure of certainty, and the case law on it is of little assistance. In *Kerr v Donian* (1880) Foord 184 a period of two months was regarded as unreasonably long in the case of a cheque. In *Adamanta Diamond Mining Company Ltd v Wege* (1883) 2 HCG 172 the delay in presentment was apparently somewhere between one and two months. It was held to be unreasonably long. In *Bell v Cook and another* 1920 CPD 125 it was held that where a bank cashes a cheque drawn on another bank, the cheque must be presented or forwarded to the drawee bank on the day after such encashment. Very little can be gleaned from these cases. *Lovemore v White* 1978 3 SA 254(E) and *Hattingh v Pienaar* 1978 4 SA 328 (O) are concerned with the possible effect of unreasonable delay in presentment on the contract that forms the causa of the instrument and are not directly in point. A complicating factor is that a period that may be reasonable for a note may not be reasonable for a bill of exchange (see Cowen 307).

Section 34(3) SABEA should be read together with section 43(2)(b). It states that an instrument payable on demand is deemed to be overdue for the purposes of section 34(2) (which renders the taker of an overdue instrument subject to defects in title affecting the instrument when it becomes overdue) if it appears on the face of it to have been in circulation for an unreasonable length of time. Unlike section 43(3), section 34(3) gives but a vague indication of what a reasonable period is. It states simply that it is a question of fact.

2.2 A "reasonable time" for presentment is generally required by Anglo-American systems (sections 36(3) and 45(2) BEA; sections 1-204(2), 3-304(3)(c) and

3-503(1)(e) UCC; and of section 66 of the Cheques and Payment Orders Act 1986). In the United States this has led to cases very difficult to reconcile (see Weber and Speidel 255-6). On the more or less similar position under the NIL Britton 537 remarks:

> "In view of the widely varying facts and, doubtless, in view of different conceptions of a reasonable time possessed by courts and juries unaffected by the facts, the cases range over a wide field, so wide in fact, and so apparently contradictory, that generalisation of them becomes impossible. Widely varying periods of time have been held reasonable and unreasonable."

2.3 A different approach is found in the GULB and the Uncitral Convention. Article 34 GULB provides that an instrument payable on demand must be presented within one year of its date, failing which the holder loses his rights against all parties except the acceptor (article 53). A negotiation effected after maturity brings about only a cession (article 20 GULB). Article 51(d) of the Uncitral Convention provides that a bill payable on demand must be presented for acceptance within one year of its date, while article 55(f) states that an instrument payable on demand must be presented for payment within one year of its date. Article 29(d) of the Uncitral Convention completes the picture by stating that a holder, in order to qualify as a holder in due course ("protected holder" in the terminology of the Uncitral Convention), must have become holder before the time limit for presentment for payment has expired.

2.4 Clause 7(2) of this draft brings our legislation in line with the provisions of the GULB and the Uncitral Convention, with the following advantages: a) a certain period is determined for presentment of a demand instrument; b) this period applies uniformly to all the parties to the instrument and c) anyone taking the instrument can establish with certainty whether he qualifies as a holder in due course.

3.1 The indorsement of overdue paper is treated in much the same way in the Anglo-American legislation and the Uncitral Convention. On the other hand, the GULB takes a different approach. Section 8(2) SABEA (section 10(2) BEA) provides: "If a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts or any indorser who so indorses it, be deemed to be a bill payable on demand." The reason for this provision is that a bill must be presented on its due date

to hold an indorser liable (sections 43(1) and (2) SABEA). Proper presentment after the due date is impossible, so that an indorser who has indorsed after maturity cannot incur liability on the instrument. Section 8(2) SABEA, however, by deeming the instrument payable on demand, imposes liability on him. This rule has its basis in the original conception that an indorsement is tantamount to a new bill: "And it followed, rather naturally, that the liability of an indorser after maturity was conditioned upon a subsequent due presentment and due notice of dishonour" (Britton 602).

Generally the liability of the acceptor does not depend on presentment for payment (section 50(1) SABEA, but see section 50(2)), and he may accept the bill at any time (section 16(b) SABEA). Should he accept after maturity, his engagement to pay the bill "according to the tenor of his acceptance" (section 52(a) SABEA), ie to pay the holder at maturity, amounts to an undertaking to pay on demand. Nothing is gained, it is submitted by making express provision for that eventuality.

Two arguments can be brought against the adoption of section 8(2) SABEA in this draft. The first flows from proposed clause 7(2). Were this clause to be enacted, a holder who acquires after maturity would not always know when to present for payment: if the indorsement was undated, calculation of the one year period (see clause 7(2)) would become difficult. Secondly, the effect of section 8(2) SABEA on the status of a holder in due course is not clear. Certainly, there can be no holder in due course with respect to prior parties (see section 34(5) SABEA), but can there be one vis-à-vis post-maturity indorsers? Is there any need to elevate such a post-maturity purchaser to the status of a "holder in due course"?

3.2 Section 7 NIL and section 8(2) SABEA contain similar provisions, the effect of which is that a holder who has acquired an overdue instrument has to present it for payment as if it were payable on demand to hold liable an indorser who indorsed it after maturity (Britton 602-3). Moreover, such a holder could qualify as a holder in due course as against post-maturity indorsers (Britton 603 n6). That part of section 7 NIL referred to above has not been repeated in section 3-108 UCC, but that does not mean that the indorser incurs no liability on the instrument. On the contrary, section 3-501(4) UCC provides: "Notwithstanding any provision of this section, neither presentment nor notice of dishonour nor protest is necessary to charge an indorser who has indorsed an instrument after maturity." Thus, such an indorser becomes liable unconditionally on indorsing. Accordingly, he is in the same position as the

acceptor of a demand bill (see the Official Comment (8) on section 3-501 UCC). The reason given for this rule is that "presentment of overdue paper for the purpose of charging an indorser is unusual and not an expected commercial practice" (Official Comment (8) on section 3-501 UCC and see Miller and Harrell 146 n207). Since an instrument indorsed after maturity is no longer deemed to be payable on demand with respect to such indorser, it is clear that the taker of an overdue instrument can no longer be a holder in due course with respect to post-maturity indorsers (Official Comment on section 3-108 UCC).

3.3 The approach of the GULB is different. According to the first paragraph of article 20 GULB an indorsement after protest for non-payment, or after the expiration of the time limit for drawing up the protest, operates as an ordinary assignment or cession only. It follows that such indorsement does not function as a guarantee and that reliance on article 17 GULB, even with respect to these indorsers is excluded (Baumbach-Hefermehl 266ff; Zöllner 103). Jäggi Druey and Von Greyerz 185 explain this rule by stating that, from the mere fact that the bill was in circulation after due date, the person who took it should have concluded that it had been presented for payment without result. Consequently, the reason for the guarantee of acceptance and payment no longer existed as the question had already been decided in the negative. Jacobi 620-1 states that no prudent person would stand in for payment by the drawee of an overdue bill already dishonoured by non-payment. At the Geneva Conference (see *Records* 211) it was pointedly said that, "[no] reliance deserved to be placed any longer on such a bill, it had failed to fulfill its normal object".

3.4 Article 20 GULB has the advantages of certainty and simplicity. Nevertheless, it is not followed in this draft as it would involve too radical a change in the law. It is suggested that it would be preferable to dispense with any presentment or notice of dishonour, as does the UCC, than to do away altogether with the liability of a post maturity indorser. While it is true that indorsements of this kind are seldom made, the understanding at present is that such an indorser does incur liability: any change in the law could adversely affect those ignorant of it. Britton 603 n6 cites Cormack and Browne "Indorsement after Maturity and the New Bill Doctrine" (1935) 30 *Illinois Law Review* 46 who state:

> "The 'new bill' doctrine, as applied to the present problem, is the outgrowth of a mode of thought and expression which was valuable, and possibly indispensable, in the historical

> development of the law of negotiable instruments. It furnished a rationale for the assimilation of the position of the indorser to that of the drawer, and made possible the great advantages to be denied from the liability of a number of secondary parties, coming in at different times, upon the same negotiable instrument. ... It is not believed that this principle offers a sufficient answer to the hitherto unnoticed objection to the doctrine, that as here applied it operates as a 'trap for the unwary'. Only at the original maturity date of a negotiable instrument should presentment and notice be required ... . The position of an indorser after maturity should be the same as that of an indorser whose liability has been fixed by such action duly taken at maturity, as to the indorser after maturity, as in connection with proceedings against secondary parties generally, no steps to collect first from promising party should be required."

It is submitted that, with regard to the other problem raised (paragraph 3.1 above), namely whether there can be a holder in due course of an overdue instrument, the position is clear: in terms of clause 28 of this draft a holder in due course must take the instrument before it is overdue. It must be noted that the phrase on which such a holder's status at present depends (section 8(2): "deemed to be a bill payable on demand") does not appear in this draft. A holder after maturity can therefore under no circumstances be a holder in due course. His status with respect to parties both before and after maturity is the same.

4 The Clearing Bankers Association requested that the period within which a demand instrument becomes overdue be reduced from one year to six months.

Since no particular principle is involved and the period of six months fits in with banking practices, the request is given effect to.

8 Payable at a definite time

(1) An instrument is payable at a definite time where it is expressed to be payable

(a) on a stated date; or

(b) at a fixed period after a stated date or at a fixed period after date or at a fixed period after sight; or

(c) by stated instalments at stated dates; or

(d) by stated instalments at stated dates, and upon default in payment of any instalment or of interest the whole sum or the balance owing becomes due by virtue of a provision to that effect in the instrument.

(2) The due date of an instrument payable at a definite time is determined as follows:

(a) Where the date on which the instrument would fall due is a non-business day, the instrument is payable on the next business day.

(b) Where the instrument is payable at a fixed period after a stated date or at a fixed period after date or at a fixed period after sight, the due date is determined by excluding the day from which the period begins to run, and by including the day of payment.
(c) Where a bill is payable at a fixed period after sight, the period runs from the date of acceptance if the bill is accepted, and from the date of dishonour, if the bill is dishonoured by non-acceptance.

Comparative legislation

Sec 9 and 12 SABEA
Sec 11 and 14 BEA
Sec 3-109 UCC
Art 9 Uncitral Convention
Art 33, 35, 36 and 37 GULB

The relevant provisions in the Bills of Exchange Act 1964 are:

9. *When a future time is determinable.*

(1) A bill is payable at a determinable future time within the meaning of this Act, if it is expressed to be payable --
(a) at the expiration of a fixed period after date or sight; or
(b) on, or at the expiration of a fixed period after, the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.
(2) An instrument expressed to be payable on, or after the occurrence of, a specified event which may or may not happen, is not a bill, and the happening of the event does not cure the defect.
12. *Computation of time of payment.*
If a bill is not payable on demand, the day on which it falls due is determined as follows, namely --
(a) if the date on which the bill would fall due is a non-business day, the due date thereof shall be the next business day;
(b) there are no days of grace;
(c) if a bill is payable at the expiration of a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the period is to begin to run, and by including the day of payment;
(d) if a bill is payable at the expiration of a fixed period after sight, the period begins to run from the date of the acceptance, if the bill is accepted, and from the date of noting or protest, if the bill is noted or protested for non-acceptance.

Commentary

1 Section 9(1)(b) SABEA provides that a bill may be drawn payable "on, or at the expiration of a fixed period after, the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain." According to this provision a bill drawn payable at a person's death would be valid. There is no reason to afford negotiability to these instruments, and the view expressed in the Official Comment (1) on section 3-109 UCC is shared:

> "Almost the only use of such instruments (ie those payable on or at a time described in the above section) has been in the anticipation of inheritance or future interests by borrowing on post-obituary notes. These have been more common in England than in the United States. They are at best questionable paper, not acceptable in general commerce, with no good reason for according them free circulation as negotiable instruments. As in the case of the occasional note payable 'one year after the war' or at a similar uncertain date, they are likely to be made under unusual circumstances suggesting good reason for preserving defenses of the maker. They are accordingly eliminated."

These views apply equally to South Africa. Thus, section 9(1)(b) SABEA is eliminated. See Malan et al *Provisional Sentence* 28 and the commentary (2) to clause 2 above.

2 Clause 8(2)(a) and (b) of the draft follows section 12(a) and (c) SABEA, except that the reference to "the happening of a specified event" in section 12(c) SABEA is not repeated. Section 12(b) SABEA is also deleted, since the South African Act, unlike section 14(1) BEA in its original form (see Chalmers & Guest 77-8), does not provide for days of grace. Although the common law allowed for days of grace (Cowen 307 n56), this draft need not and does not provide for them.

Article 9(8) of the Uncitral Convention (see article 36(1) GULB) provides:

> "Where an instrument is drawn, or made, payable at one or more months after a stated date or after the date of the instrument or after sight, the instrument is payable on the corresponding date of the month when payment must be made. If there is no corresponding date, the instrument is payable on the last day of that month."

It is not necessary to incorporate this provision in our law, as the position is already covered by the common law (see *Rawstorne v Muller* (1871) 2 Roscoe 19; Steyn *Die Uitleg van Wette* (1981) 165). Article 36 GULB goes into greater detail, providing for the calculation of the due date on an instrument payable one or more months and a-half after date or sight, and where the due date is fixed at the commencement, middle or end of a month. It is submitted that the South African courts would come to the same conclusions without the assistance of any statutory provision. The same applies

to article 36(4) GULB, which provides that "eight days" or "fifteen days" indicate not one or two weeks, but a period of eight or fifteen actual days, and article 36(5), which states that "half month" means fifteen days. These provisions cater for less usual cases, which require no legislative provision. Article 37 GULB also provides for the calculation of the due date where there are calendar differences between the place of issue and the place of payment. These should be determined by the appropriate rules of private international law.

3 Clause 8(2)(c) concerns the due date of a bill drawn payable at a fixed period after sight. It should be noted that a bill cannot be drawn payable at a fixed period after acceptance, for it is not certain that the bill will be accepted *(Korea Exchange Bank v Debenhams (Central Buying) Ltd* 1979 1 Lloyd's Rep 548 (CA) and Hudson "Mistakes of Form in Bills of Exchange" 1981 *Journal of Business Law* 101).

To determine the due date of an instrument payable at a fixed period after sight section 12(d) SABEA provides that the period begins to run from the date of the acceptance, if the bill is accepted, and from the date of noting or protest where it is noted or protested for non-acceptance. Clause 2(2) of the draft requires that a bill payable at a fixed period after sight be dated. Where such a bill is accepted but the acceptance is not dated, the instrument is incomplete, and the provisions of clause 13 dealing with incomplete instruments and those of clause 9 apply to it. In this respect, it seems that the Uncitral Convention is defective in failing to provide for the determination of the maturity of a dishonoured bill payable after sight (but see section 3-122 UCC). Although it can be argued, in view of the provisions of section 12(d), that the date of he acceptance is not necessary for the validity of the instrument, the view taken here is that it is indeed necessary, particularly in the light of the provisions of section 10 SABEA.

4 Article 35 GULB, on the other hand, maintains absolute certainty by regarding an undated acceptance of a bill payable after sight as a dishonour as far as parties other than the acceptor are concerned (see also article 25(2) GULB). Consequently, the holder must protest the bill, in which case the date of protest determines its due date (Baumbach-Hefermehl 299ff). Since article 81 of the German Wechselgesetz requires protest to be on the bill itself or on a permanently affixed appendix, the date of protest is apparent from the document (see Jäggi Druey and Von Greyerz 182 n17).

However, to regard an undated acceptance as a dishonour seems somewhat drastic and it is suggested that these provisions should not be incorporated.

5 According to section 12(d) SABEA the date of noting or protest determines the due date of a bill payable after sight that has been dishonoured by non-acceptance. A problem that can arise concerning section 12(d) SABEA is that protest is not always necessary (eg because the bill is an inland bill). In such a case, the bill would still have to be protested to fix its due date (De Wet & Yeats 795 n424). This draft dispenses with protest in all cases, although an *optional* protest is provided for. Such an optional protest could be evidence of the date of dishonour, which determines the due date.

9 The date

(1) Where an instrument or any signature on it is dated, the date shall, unless the contrary be proved, be presumed to be the true date of the instrument or signature.
(2) An instrument or an acceptance may be antedated or post-dated, in which case the time when it is payable and all other periods of time provided for in this Act, shall be determined with reference to the stated date.
(3) If an instrument payable at a fixed period after sight is not dated, any holder may insert therein the true date of the the instrument or the true date of the acceptance, as the case may be, and the instrument or bill shall then be payable accordingly: Provided that

(a) if the holder in good faith and by mistake inserts a wrong date; or

(b) if a wrong date is inserted and the bill subsequently comes into the hands of a holder in due course,

the bill shall be payable as if the date so inserted is the true date.

Comparative legislation

Sec 10 and 11 SABEA
Sec 12 and 13 BEA
Sec 3-114 and 3-410(3) UCC
Art 9 Uncitral Convention

Sec 16 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

10. *Omission of date in bill payable after date.*

If a bill expressed to be payable at the expiration of a fixed period after date, is issued undated, or if the acceptance of a bill, payable at the expiration of a fixed period after sight, is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly: Provided that --
(a) if the holder in good faith and by mistake inserts a wrong date; or
(b) if a wrong date is inserted and the bill subsequently comes into the hands of a holder in due course,
the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

11. *Presumption as to correctness of date, and antedating and post-dating, and date of a non-business day.*
(1) If a bill, or the acceptance of or any indorsement on a bill, is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance or indorsement of the bill, as the case may be.
(2) A bill is not invalid by reason only that it is antedated or post-dated, or that it bears the date of a non-business day.

Commentary

1 Clause 9(1) is based on section 11(1) SABEA (section 13(1) BEA; Section 3-114(3) UCC; section 16(1) Cheques and Payment Orders Act 1986). Whether the date of an instrument or a signature is the true date is important for a variety of reasons, eg, in connection with the question whether a party had contractual capacity at the time he signed the instrument. In cases of purchase and sale the question whether ownership has passed often depends on whether payment was made by means of a post-dated or even dated instrument (see *Vivier v Waterberg Ko-operatiewe Landboumaatskappy Bpk* 1956 2 SA 665 (T) 670-1). The presumption created by clause 9(1) may be rebutted, not only by direct proof to the contrary, but also by an admission to the contrary (see *Galaun v Newton* 1961 1 SA 405 (D) 410).

2 According to section 11(2) SABEA (section 13(2) BEA and section 162)(b) and (c) of the Cheques and Payment Orders Act 1986) an instrument is not invalidated by the fact that it is antedated or post-dated, or because it bears the date of a non-business day. Clause 9(2) of this draft makes it clear that an instrument may be post or antedated. It also states that an acceptance may be antedated or post-dated. That an

instrument may bear the date of a non-business day needs no specific provision. The difference between section 11(2) SABEA and clause 9(2) is that the latter expressly provides that all time periods affecting the instrument be determined by the stated date. The question has arisen whether an instrument in the form of a demand instrument, but which is post-dated, is valid as such (Malan 257; Cowen (1985) 188-90 and 194 n81; Oelofse "Die Aard van 'n Vooruitgedateerde Tjek" 1981 *Modern Business Law* 51; and see Craigie "Post-dated Cheques" 1983 *Australian Business Law Review* 107). Such an instrument is apparently regarded as payable initially at a future date, but as a demand instrument payable from the moment the post-date arrives (Holmes JA in *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) 505). Clause 9(2) leaves no uncertainty about the status of such an instrument and makes it clear that it cannot validly be presented for payment before the post-date arrives. In all other respects, however, the instrument should be treated as a demand instrument.

The German courts have held that an instrument dated after the due date of the instrument is invalid (BGHZ 53,11 and Baumbach-Hefermehl 106). While it may be impossible in some cases to present such instrument for payment to charge the drawer or indorser, this is not always so. In this draft there is no impediment to due presentment of an instrument payable on a stated date, as long as that date is later than the stated date. Furthermore, since presentment on the due date is not usually necessary to render the acceptor liable (section 50(1) and (2) SABEA), there seems to be no sufficient reason to regard the instrument as invalid (see also Zöllner 71-2, who differs from the German courts).

3 Clause 9(3) of this draft provides for the insertion of the date of acceptance of a bill payable after sight in the case of undated acceptance by the drawee, in accordance with section 10 SABEA (Malan 193-4). Unlike section 10 SABEA however, clause 9(3) does not provide for an undated instrument payable after date, because such an instrument is (see clause 2(3)) incomplete, and falls under the provisions dealing with incomplete instruments. Clause 9(3) and section 10 SABEA afford wider protection than do the provisions governing incomplete instruments (see section 10(a) SABEA and clause 9(3)(a) with section 18 SABEA and clause 13). Clause 9(3) and section 10 SABEA are more comprehensive than section 3-410(3) UCC and article 42(3) of the Uncitral Convention. Section 3-410(3) UCC states that the holder may insert a date of

acceptance in good faith, but the position if he acts in bad faith is not clear. Article 42(3) of the Uncitral Convention simply states that the drawer or holder may insert the date of acceptance, but does not state what the effect of a wrong date would be.

10 The payee

(1) Where an instrument is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.
(2) An instrument may be drawn or made payable-
(a) to the drawer or to the drawee or to the maker;
(b) to two or more payees jointly or in the alternative, or to some of several payees in the alternative;
(c) to an office or the holder of an office by his title;
(d) to an estate or a trust or a fund.
(3) Where an instrument is payable to an office or the holder of an office by his title, it is payable to the holder of the office for the time being or to his principal.
(4) Where an instrument is payable to an estate or a trust or a fund, it is payable to the executor in, or the trustee of, that estate, or the trustee of that trust, or to the trustee or administrator of that fund, for the time being, as the case may be.
(5) Where an instrument is payable to two or more payees jointly, it is payable to all of them and may be negotiated, discharged or enforced only by all of them, unless one or some of them has authority to act on behalf of the other or others.

Comparative legislation

Sec 3(1), 5(1), 5(2), 30(4) and 87(2) SABEA
Sec 5(1), 7(1), 7(2), 32(3) and 83(2) BEA
Art 3(1) and 47 GULB
Art 5(e) Uncitral Convention
Sec 3-110 and 3-116 UCC
Sec 19 Cheques and Payment Orders Act 1986
Sec 3-110(c)(2) Revised UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

3. *Effect if different parties to a bill are the same person, or drawee a fictitious person or not having capacity to contract.*

(1) A bill may be drawn payable to the drawer or his order, or it may be drawn payable to the drawee or his order.
5. *Requirements as to payee.*
(1) If a bill is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty therein.
(2) A bill may be drawn payable --
(a) to two or more payees jointly;
(b) to one of two, or one or some of several, payees, in the alternative; or
(c) to the holder of an office.
30. *Manner of indorsing.*
(1) An indorsement, in order to effect a negotiation of a bill, must be written on the bill itself, be signed by the indorser, and be an indorsement of the entire bill: Provided that an indorsement written on the allonge of a bill or on a copy of a bill issued or negotiated in a country where copies are recognised, shall be deemed to be written on the bill itself.
(2) The simple signature of the indorser on the bill without additional words is sufficient to constitute an indorsement.
(3) A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not effect a negotiation of the bill.
(4) If a bill is payable to the order of two or more payees or indorsee who are not partners, all must indorse in order to effect a negotiation of the bill, unless the one indorsing has authority to indorse for the others.
87. *Promissory note defined.*
(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to bearer.
(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

Commentary

1 Clause 10(1) corresponds with section 5(1) SABEA (see section 7(1) BEA, section 3-110(1) UCC and section 19(1) Cheques and Payment Orders Act 1986). It follows that the payee need not necessarily be indicated by name, and a misspelling of his name will not invalidate the instrument, provided the payee can be identified with reasonable certainty (Cowen 62-3; Malan 47-8; Malan et al *Provisional Sentence* 37ff; *Soref Bros (SA) (Pty) Ltd v Khan Brothers Wholesale* 1976 3 SA 339 (D) 340; *Standard Mineral Water Works (Pty) Ltd v Grobler* 1977 4 SA 66 (T) 67; *Rovic Noordkaap v Roux* 1980 4 SA 59 (O) 61; Nagel "Aspekte van Voorlopige Vonnis in die lig van Artikels 5(1), 27(1) en 30(5) van die Wisselwet" 1986 *Modern Business Law* 158). Article 1 paragraph 6 GULB requires that the *name* of the person to whom or to whose order payment is to be made be stated. This has been interpreted to mean that the payee can be indicated by name only (Baumbach-Hefermehl 105-6). The Uncitral Convention has no specific requirement in this regard. Article 3(1)(a) states that a bill of exchange "directs the drawee to pay a definite sum of money to the

payee or to his order" (see article 1(3)(b)). Article 5(e) provides that the payee is "the person in whose favour the drawer directs payment to be made or to whom the maker promises to pay". It is submitted that there is no reason to depart from section 5(1) SABEA.

2 Section 3(1) SABEA provides that a bill may be drawn payable to the drawer or the drawee (section 5(1) BEA; section 3-110(1)(a) and (b) UCC)). Although articles 3(1) GULB is silent on the possibility of drawing a bill payable to the drawee; it is accepted, however, that this is possible (Zöllner 70-1; BGHZ 56, 323 197 *Wertpapier Mitteilungen* 1149). Neither do the GULB and the Uncitral Convention provide for a note payable to the maker. While some differences exist in German law on the question whether such a document is valid, it is difficult to see why it should not be valid when a bill may be drawn on the drawer himself and payable to himself (Hueck-Canaris 64-5). Section 3-110(1)(a) UCC expressly allows a note to be payable to the maker's order. There is indeed no reason why such a document should not comply with the formal requirements of a note. Of course, the maker incurs liability only when he has indorsed it.

Section 87(2) SABEA provides: "An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker." The reason advanced for this provision is that a person cannot make a promise to himself (Byles 340; De Wet & Yeats 814). Although this may be a valid argument on the definition of a note in section 87(1), which requires a promise made by one person to *another*, it loses much of its persuasiveness in view of the definition of a note in clause 2(2) of this draft, which does not insist that the maker and payee be different persons. It has also been said that instruments payable to the maker's order "are incomplete instruments, and have no binding effect on anyone till indorsed" (*Hooper v Williams* (1848) 2 Exch 13 20 (154 ER 385), and see *Britannia Electric Lamp Works Ltd v D Mandler and Co Ltd and Mandler* 1939 2 All ER 469 472). *Formal validity* is confused with *liability*. Moreover, it seems anomalous that a note payable to the maker's order should not be recognised as formally valid when an order by a drawer to himself is so recognised (see section 3(2) SABEA and clause 4(3) of this draft).

Consequently, it is suggested that provision be made for the formal validity of a note payable to the maker's order. This is done in clause 10(2)(a), which retains the provisions of section 3(1) SABEA. Section 87(2) SABEA then becomes redundant. In

terms of clause 10(2)(a) such a note is valid qua note even before it is indorsed by the maker. He would, of course, become *liable* on it only on indorsement and delivery, but that is not material to the question whether the document is or should be regarded as formally valid before such time.

3 Clause 10(2)(b) combines paragraphs (a) and (b) of section 5(2) SABEA (section 7(2) BEA; section 3-110(1)(d) UCC). Articles 10(1)(b) and (2)(c) of the Uncitral Convention provide that a bill or note may be payable to two or more payees. Although alternative payees are not expressly provided for, the possibility is nevertheless implicitly recognised in article 9(3). The Uncitral Convention and the legislation cited follow the same approach. Nowhere does the GULB expressly provide for two or more payees, although article 47 perhaps implicitly recognises the possibility of two or more payees. Even so, it is generally accepted that an instrument may be payable to two or more payees.

As the existing position appears to need no modification, section 5(2)(a) and (b) SABEA are retained. Clause 10(2)(b) should be read with clause 10(5), which is new. On the basis of section 3-116 UCC and article 10(3) of the Uncitral Convention, its purpose is to establish the effect of an instrument being made payable to two or more payees jointly. Clause 10(5) renders unnecessary the re-enactment of section 30(4) SABEA. While section 3-116(a) UCC and article 9(3) of the Uncitral Convention cater for all the consequences of indicating two or more payees in the alternative. Suffice it to say that any one of these payees who is in possession of the instrument should be regarded as the only payee. The Official Comment on section 3-116 UCC correctly states that an instrument payable to A and/or B is payable in the alternative to A or to B, or to A and B together.

4 Section 5(2)(c) SABEA provides that a bill may be drawn payable "to the holder of an office". It differs from its English counterpart (section 7(2) BEA) in that the latter provides for a bill payable to the holder of an office "for the time being". The phrase "for the time being" also appeared in the repealed colonial legislation and why it was omitted from the SABEA on its enactment in 1964 is not known. The relevant part of Section 7(2) was passed to neutralise the judgment in *Cowie v Sterling* (1856) 6 E & B 333 (119 ER 889) (see *Yates v Nash* (1860) 29 LJCP 306 (141 ER 1294)), which held that a note payable to "the secretary for the time being" of a society was invalid because the payee had not been identified with sufficient certainty. Correspondingly, section 7(2) BEA makes it possible to give a valid "floating" promise or order. In two

old South African cases *(Niebuhr v Rabie* (1894) 1 OR 312 and *Trustees of the Griqualand West Board of Executors v Crouch* (1890) 6 HCG 10) the validity of a "floating" promise seems to have been upheld even before the introduction of Section 7(2) BEA in South Africa. Since no reference was made to the English authorities to the contrary, the validity of a floating promise in South African law is, in the absence of specific legislation, not beyond doubt. See also section 3-110(c)(2) of the Revised UCC.

Uncertainty has resulted from the omission of the phrase "for the time being" in section 5(2)(c) SABEA and the section can be interpreted in three ways (Cowen 64; De Wet & Yeats 747-8; Malan 48 n178; Tager paragraph 26). Since the original intention was to provide for a floating order or promise (ie the payee is *any* person who happens to hold the relevant office at any relevant time), the question is: should the phrase "for the time being" simply be re-inserted (as suggested by Cowen 64-5)? The difficulty is that the omission of the words "for the time being" in the instrument may lead to the invalidity of the instrument (see the remarks of Laurence JP in *Trustees of the Griqualand West Board of Executors v Crouch* (1890) 6 HCG 10 12). It is submitted that the drawer or maker who indicates the payee as the holder of an office intends the order or promise to be "floating", whether he adds the words "for the time being". To regard the designation as merely descriptive of the actual incumbent of the office at the time of issue seems unrealistic. For this reason clause 10(2)(c) of this draft omits these words, but clause 10(3) makes it clear that the promise or order is "floating" whether the words "for the time being" are added. Following section 3-110(1)(f) UCC (see paragraph 3 of the Official Comment on section 3-110 UCC), clauses 10(2)(c) and 10(3) also provide for the situation in which the instrument is made payable to the office itself (eg, "the British Embassy in South Africa").

5 Section 3-110(1)(e) UCC provides for instruments payable to estates, trusts or funds. It is submitted that it be followed (Malan 56; Cowen 70). This is done in clauses 10(2)(d) and 10(4).

11 Payable to order

(1) An instrument is payable to order where it is expressed to be payable -

(a) to a specified person; or

(b) to a specified person or to his order; or

(c) to the order of a specified person;

and does not contain words prohibiting negotiation or indication an intention that the instrument is not negotiable.

(2) Where an instrument is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order.

Comparative legislation

Sec 8(4) and (5) BEA

Sec 6(3) and (4) SABEA

Sec 3-110 UCC

Art 1(6), 11(1) and 75(5) GULB

Sec 21 and 24 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

6. *Negotiability of bills*

(1) A bill must be payable either to bearer or to order to be negotiable.
(2) A bill is payable to bearer if it is expressed to be so payable, or if the only or last indorsement on it is an indorsement in blank.
(3) A bill is payable to order if it is expressed to be so payable, or if it 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.
(4) If a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order at his option.

Commentary

1 Clause 11, section 6(3) and (4) SABEA (section 8(4) and (5) BEA) embrace the same principles. There are three ways in which an instrument can be made payable to order. Although articles 1(6) and 75(5) GULB provide simply that "the name of the person to whom or to whose order payment is to be made", should be stated, the same three possibilities exist (Baumbach-Hefermehl 105; Zöllner 70; Hueck-Canaris 64-5; Brox 281; Jäggi Druey and Von Greyerz 152). Articles 3(1)(a) and 3(2)(a) of the Uncitral Convention require the instrument to be payable "to the payee or to his order". Like the GULB, the Uncitral Convention does not expressly identify the three possibilities. Section 1 of the Australian Cheques and Payment Orders Act 1986

embodies a similar provision (see paragraph 113ff of the Report accompanying the bill).

The position is somewhat different under the UCC. Section 3-110(1) UCC states that an instrument is payable to order "when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as 'exchange' or the like and names a payee". It follows that "words of negotiability" are essential, with the result that an order to pay X, with no addition, would not be an order instrument (Miller and Harrell 66). Nevertheless, section 3-805 UCC subjects such instrument to all the rules that apply to negotiable instruments payable to order, except that there can be no holder in due course of it (Weber and Speidel 75-7). Thus, it can be transferred by negotiation (ie delivery with any indorsement) and discharged by payment made in good faith to the holder. In terms of the South African common law an instrument payable to a specific person without an order clause could not be acquired in due course and could not be negotiated at all (*Thompson, Watson and Co v Malan* (1843) 2 Menzies 270; *Enslin v Haupt* (1877) 7 Buchanan 58; *Van der Merwe v Franck* (1885) 2 SAR 26; *Jagger v Duncan* (1887) 2 SAR 214). Insistence on the order clause seems unduly formalistic and is clearly out of step with the international trend. The existing position should therefore be retained.

2 Clause 11(2) has no counterpart in the UCC, GULB or the Uncitral Convention (but see the comparable section 8(5) BEA and section 24 of the Australian Cheques and Payment Orders Act 1986) and is not indispensable. However, as the repeal of section 6(4) SABEA could create uncertainty about the effect of drawing or making an instrument payable to "the order of X" instead of to "X or order" the subsection is consequently retained in clause 11(2).

3 Section 3-110 (3) UCC provides: "An instrument made payable both to order and to bearer is payable to order unless the bearer words are hand-written or typewritten." This provision is explained in paragraph 6 of the Official Comment:

> "Subsection (3) is directed at occasional instruments reading 'Pay to the order of John Doe or bearer.' Such language usually is found only where the drawer has filled in the name of the payee on a printed form, without intending the ambiguity or noticing the word 'bearer'. Under such circumstances the name of the specified payee indicates an intent that the order words shall

> control. If the word 'bearer' is hand-written or typewritten, there is sufficient indication of an intent that the instrument shall be payable to bearer."

Although the rule of construction set forth in this subsection has merit as some prima facie indication of the intention of the parties when applied to ordinary contracts, it is not followed in this draft for there appears to be no ambiguity in the instrument described in the Comment; it is clearly payable to bearer and should be so treated.

12 Payable to bearer

An instrument is payable to bearer where -
(a) it is expressed to be so payable; or
(b) it is expressed to be payable to the order of bearer; or
(c) it is expressed to be payable to order or bearer; or
(d) it is payable to "cash" or the "order of cash" or to "cash or order"; or
(e) the only or last indorsement on it is an indorsement in blank.

Comparative legislation

Sec 6(2) SABEA
Sec 8(3) BEA
Sec 3-111 and 3-204(2) UCC
Sec 22 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

> 6. *Negotiability of bills*
>
> (1) A bill must be payable either to bearer or to order to be negotiable.
> (2) A bill is payable to bearer if it is expressed to be so payable, or if the only or last indorsement on it is an indorsement in blank.

Commentary

1 Clauses 12(a) and (e) restate section 6(2) SABEA (section 8(3) BEA). These two clauses also correspond with sections 3-111(a) and (b) and 3-204(2) UCC. The GULB does not permit an instrument to be drawn or made payable to bearer. Since the same result can be achieved by drawing or making the instrument payable to the drawer or

maker, followed by his indorsement in blank, it is difficult to see why it should not be possible to do this directly. According to Jacobi 384 the prohibition, at least in Germany, is intended to prevent a circumvention of paragraph 795 BGB, but this consideration does not apply to South Africa.

2 Clause 12(b) is based on section 3-111(a) UCC and clause 12(c) is based on clause 18(b) of the Australian Cheques Bill of 1984. It is debatable whether these two provisions are necessary. In *Bate v Heywood* (1882) 2 EDC 153 it was, for example, held that an instrument payable to "X or order or bearer" is a valid bearer instrument. These two provisions are included ex abundanti cautela.

3 The English courts have held that an instrument payable to "cash", to "cash or order" or to the "order of cash" is not a valid bill, cheque or note, although it may be valid as a mandate to pay to the person presenting the document (*North and South Insurance Corporation Ltd v National Provincial Bank Ltd* (1936)1 KB 328; *Cole v Milsome* (1951) 1 All ER 311; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* (1962) 3 All ER 565): "cash" is not, and does not purport to be, the name of a person. Moreover, the instrument is not expressed payable to bearer.

There has been speculation on the question how the South African courts would treat an instrument payable to "cash", "cash or order" or the "order of cash" (Cowen 72-4; Malan 47-8; Tager par 26; Burchell "Cash or Order" 1951 *SALJ* 324; Hunt "Pay cash or order" 1963 *SALJ* 550; Malan et al *Provisional Sentence* 25). Goldstone J settled the matter in *Christellis v Brahberg Boerdery (Edms) Bpk* 1983 4 SA 87 (W), a judgment confirmed by the full bench of the Transvaal Provincial Division in *Hiles v Venter h/a CH Venter Agencies* 1983 4 SA 22 (T). In *Christellis* Goldstone J found that "cash" is not the name of a person, so that the document could not be regarded as an order instrument. As it was not expressed payable to bearer and section 6(2) SABEA precluded any related implication, it was held not to be a bearer instrument. It follows from section 2(1) and (2) SABEA that the document did no qualify as a bill or cheque. The plaintiff relied too on section 5(3) SABEA, which permits an instrument payable to a fictitious person to be treated as payable to bearer, but this contention was also rejected, since the "cash" does not purport to be the name of a person, fictitious or not. The question was left open whether the document could still be regarded as a valid mandate to the bank to pay to the person in possession of the document.

In *Hiles* Van Dijkhorst J followed Goldstone J. According to Van Dijkhorst J (see page 24G-H of the report) Goldstone J did, in fact, decide that the document in question did not qualify as a valid mandate to the bank to pay the possessor of the document. However, it is submitted that this is not so. All that Goldstone J said in this regard was that the document was not liquid, whatever its true nature might have been. Van Dijkhorst J himself left open the question whether a mandate had been constituted. For further discussion of these two judgments, see Nagel 1983 *De Jure* 397; Visser "'Pay Cash or Order': The First South African Decisions" 1984 *SALJ* 201; Dijkman "Cheques Payable to 'Cash or Order"' 1984 *TSAR* 92.

4 It is submitted that the legal position is in need of reform to accommodate what the drawer or maker usually intends when making an instrument payable to "cash", "cash or order" or the "order of cash". There is little doubt that in commercial circles the words "pay cash" have acquired the meaning of "pay bearer" (Burchell 330; Hunt 551 and 554; Visser 205; Dijkman 94). In *Christellis* Goldstone J said (at 88B): "The usual intention of the drawer of such cheque is that the bank upon which the cheque is drawn will pay the amount thereof to the person to whom the cheque is handed by the drawer thereof." A change in the law would reflect this intention. Clause 12(d) accordingly provides that an instrument is payable to bearer if it is payable to "cash", the "order of cash" or "cash or order".

The suggested provision does not go as far as section 3-111 UCC, which provides that an instrument is payable to bearer if it is payable to "cash" or the "order of cash", or contains "any other indication that does not purport to designate a specific payee". According to subparagraph (ii) and (iii) of clause 18(c) of the Australian Cheques Bill of 1984, a cheque is payable to bearer if it is expressed to be payable to "an impersonal thing" or "the purpose for which the cheque is drawn". It follows that an instrument payable to a dog, a cat or "one keg of nails" (see Weber and Speidel 72 and paragraph 2 of the Official Comment on section 3-111 UCC) would be valid qua a bearer instrument. This proposal has not been enacted: Morgan *Guide to Australian Cheque Law* (1987) 34. Since it cannot be said that the creator intends these instruments to be payable to bearer, there is no reason to uphold their validity.

5 The General Bar Council objected to clause 12(d) making an instrument payable to bearer where it is expressed to be payable to "cash" or "the order of cash" or to "cash or order" (paragraphs 2.6 and 3.3 of their commentary).

Unfortunately, this objection is not motivated and, since there appears to be no sound reason to delete the proposed paragraph, the suggested paragraph, which is enthusiastically supported by the Association of Attorneys, is retained.

INCOMPLETE INSTRUMENTS

13 Incomplete instruments

(1) Where a signed document in the form of an instrument lacks any of the necessary requirements, it may be completed as an instrument using the signature as that of any party to it.

(2) Where a document referred to in sub-section (1) is completed as an instrument --

(a) any party who signed it after completion shall be liable on it as completed;

(b) any party who signed it before completion

(i) shall be liable to a holder other than a holder in due course only to the extent that it is completed in accordance with any authority given by him;

(ii) shall be precluded from asserting against a holder in due course or a person who in good faith and without notice has paid it, that it was completed contrary to any authority given by him.

Comparative legislation

Sec 20 BEA
Sec 18 SABEA
Sec 13, 14 and 15 NIL
Sec 3-115 UCC
Art 10 GULB
Art 12 Uncitral Convention
Sec 18 Cheques and Payment Orders Act 1986
Sec 3-115 Revised UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

18. *Inchoate instruments.*

(1) If a person places his signature upon, and affixes a stamp to, a blank paper and delivers such paper to any other person in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount such a stamp will cover, using the said signature for that of the drawer, the acceptor or an indorser.
(2) If a bill is wanting in any material particular, the person in possession of it has in like manner a prima facie authority to fill up the omission in question in any way he thinks fit.
(3) In order that any instrument referred to in sub-section (1) or (2) may, when completed, be enforceable against any person who became a party thereto prior to its completion, it must be filled up within the time agreed on or, if no time is agreed on, within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument after completion thereof is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within the time allowed and strictly in accordance with the authority given.
(4) For the purposes of sub-section (3) the question what a reasonable time is, is a question of fact.

Commentary

1 Although it has been said that "[h]et gebruik van blanco ondertekening maakt het misbruik daarvan mogelijk" (Ronse I 85), one should accept that there may be circumstances in which the signatory of an instrument is not in a position to issue a completed bill or note. An incomplete bill or note may be signed for a variety of reasons: for example, the signatory of an incomplete instrument may deliver it to a trusted associate for completion and issue where the sum for which the instrument will be payable is not yet known. The potential abuse of incomplete instruments should be weighed against the interests of commerce and the fact that it is often necessary to make use of an incomplete bill or note. It would seriously hinder the negotiability of negotiable instruments if the signatory of an incomplete bill or note were allowed to raise the incompleteness of the instrument at the time of its issue as a defence against a bona fide third party who acquired it after its completion; such third party would usually not know when the instrument had, in fact, been completed. Most legal systems recognise that it is necessary in such an event to protect the bona fides of third parties.

The starting point is therefore that the law should take into account that people do make use of and often sign incomplete instruments, and that the consequences of such practice be regulated by law (see Ronse I 81ff). In principle, there is no reason why the signatory of an instrument should himself complete it to incur liability. (Ronse I 77). The law should set and maintain a balance between the interests of bona fide third parties on the one hand, and those of the person who signs the incomplete

instrument, on the other (Malan 173ff). The liability of the signatory should, however, not be based on fault per se but rather on the dangerous nature of negotiable instruments (*Baxendale v Bennett* (1873) 3 QB 525 (CA) 531; *Wilson and Meeson v Pickering* 1946 KB 422 (CA) 428-9). The loss should fall on the party whose conduct in signing the incomplete instrument made the abuse of the incomplete instrument possible, rather than on the innocent third party who acquires it after completion.

2 Section 18 SABEA is modelled on section 20 BEA. Sections 14 and 15 NIL were similar to section 20 BEA. Clause 13 of this draft contains elements of both section 3-115 UCC and article 12 of the Uncitral Convention. Other comparative aspects of the proposed draft are considered below. The shortcomings of section 18 are relevant here:

2.1 In the first place it should be noted that both the SABEA and the BEA deal with the situation in which a person places his signature either on a blank piece of paper (subject to what is said below with regard to the stamping of the blank piece of paper; section 18(1) SABEA; section 20(1) BEA) or on a bill which is "wanting in any material particular" (section 18(2) SABEA; section 20(1) BEA). A bill wanting in any particular is discussed later; it is necessary first to deal with the situation in which a person places his signature on a blank piece of paper. At common law, the person who signs a blank piece of paper is held liable to a holder in due course if he delivers the instrument to another with the intention that it be completed as a bill and negotiated (Malan 176-7; Cowen 186-7. De Wet & Yeats 784 do not require the document to be delivered with the instruction to complete and negotiate it. See, however, Malan 176 n25 and also *Silver v Shapiro* 1926 TPD 141 146; *Smith v Prosser* 1907 2 KB 73 (CA) 748 754). At common law, when a person gives his signature on a blank piece of paper to a collector and the paper is subsequently converted into a negotiable instrument, the signatory has an absolute defence even as against a holder in due course (*Preuss v Seligmann & Prins* (1864) 1 Roscoe 198 at 205 and 208).

The practice codified in section 18 of signing a blank piece of paper and delivering it to another in order that it may be converted into a negotiable instrument is of ancient origin. Paragraph 3 of the Official Comment to section 3-115 of the UCC says:

> "This [the use of a blank piece of paper] had utility only in connection with the ancient practice of signing blank paper to be filled in later as an acceptance, at a time when communications were slow and difficult. The practice has been obsolete for nearly a century. It affords obvious opportunity for fraud, and should not be encouraged by express sanction in the statute."

It is doubtful whether this practice is relevant today. With the standardisation of the size of both bills and cheques, the ancient practice of placing a signature on a blank piece of paper has become even more antiquated.

Section 18(1) SABEA differs from section 20(1) BEA with regard to the requirements of affixing a stamp to the blank piece of paper since schedule 8, Part V of the Finance Act 1970 repealed the word "stamped" and the words "the stamp will cover" in section 20(1) BEA. The requirement of section 18(1) BEA relating to the affixing of a stamp to the blank piece of paper did not form part of the common-law requirements for incomplete instruments (De Wet & Yeats 784). In view of the fact that cheques no longer have to be stamped (section 9 of the Revenue Amendment Act 118 of 1984 no longer requires the stamping of cheques), this stipulation in section 18(1) SABEA is indeed obsolete as far as cheques are concerned.

It is submitted that the obsolete practice of signing a *blank* piece of paper is redundant in a modern bills of exchange act. In the unlikely event of a person signing a blank piece of paper and delivering the instrument to another with the intention that it be completed as a bill and negotiated, common-law rules will suffice. As the common-law does not require the affixing of a stamp to the piece of paper, it is also submitted that providing for this would be superfluous in the draft. Common-law defences, like lack of delivery *(Baxendale v Bennett* (1873) 3 QBD 525 (CA); *Herbert v Steele* 1953 3 SA 271 (T) 275) or delivery for a special purpose (*Smith v Prosser* 1907 2 KB 735 (CA); *Silver v Shapiro* 1926 TPD 141) would remain should a person sign a blank piece of paper. The unauthorised conversion of a piece of paper into a negotiable instrument would likewise remain an absolute defence (*Preuss v Seligmann Prins* (1864) 1 Roscoe 198 at 205, 208).

2.2 Secondly, some uncertainty surrounds the requirement of delivery of an incomplete instrument in both section 18 SABEA and section 20 BEA. An incomplete instrument stolen, for example, from the signatory before its completion, may cause lack of delivery to be raised as a defence against a bona fide third party (holder in due course) who acquires it after its completion *(Baxendale v Bennett* (1873) 3 QBD 525

(CA); *Smith v Prosser* 1907 2 KB 735 (CA); *Silver v Shapiro* 1926 TPD 141 at 146-7; *Van der Merwe v Myburgh* 1929 OPD 114 at 120. See also Byles 34; Cowen 185; Malan 174-5; De Wet & Yeats 784). The non-delivery of an incomplete bill is an absolute defence against a holder and a holder in due course (Malan 173-4). Section 15 NIL was more explicit in this regard: "Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery." (See Britton 205ff, who explains that section 15 NIL was merely a codification of the common law, viz *Baxendale v Bennett* (1873) 3 QBD 525 (CA)). Section 3-115 UCC reverses the rule contained in section 15 NIL and paragraph 5 of the Official Comment explains:

> "Since under this Article ... neither non-delivery nor unauthorized completion is a defence against a holder in due course, it has always been illogical that the two together should invalidate the instrument in his hands. A holder in due course sees and takes the same paper, whether it was complete when stolen or completed afterward by the thief, and in each case he relies in good faith on the maker's signature. The loss should fall upon the party whose conduct in signing blank paper has made the fraud possible, rather than upon the innocent purchaser."

A similar conclusion is reached in article 10 GULB despite the fact that its wording creates the contrary impression. As Ronse I 90 explains:

> "De ondertekenaar heeft het risico van het misbruik van zijn blanco-handtekening geschapen o.m. door het stuk niet te vernietigen of veilig te bewaren. Hij draagt daarom de gevolgen van de toerekenbare schijn tegenover derden die te goeder trouw op het valse stuk mochten vertrouwen."

(See also Baumbach-Hefermehl 147-8). Article 12 of the Uncitral Convention does not require a valid delivery before the signer of an incomplete instrument can incur liability to a holder without knowledge (see also *Report of the Working Group on International Negotiable Instruments* (A/CN 9/273 dated 28/1/86 at 24).

We share the sentiments expressed in paragraph 5 of the Official Comment to section 3-115 UCC. There seems to be no valid reason why the non-delivery of an incomplete bill should be raised as a defence against a holder in due course. In principle, the loss should fall upon the party whose conduct in signing the incomplete instrument makes the abuse of the instrument possible rather than upon the innocent

third party who acquires it after its completion. Clause 13(2)(b)(ii) of this draft embodies this principle. It should also be borne in mind that clause 13(1) of this draft applies only to "documents in the form of an instrument" (see par 2.8 below and cf section 3-115 (1) UCC that applies to "a paper whose contents at the time of signing show that it is intended to become an instrument") and not to all signatures placed on a blank piece of paper. The person who signs a document in the form of an instrument should bear the risk of the document falling into the wrong hands. The liability of the signatory is not based on fault, but rests on his risk-creating conduct.

2.3 Thirdly, it should be pointed out that neither section 18 SABEA nor Section 20 BEA deals expressly with the rights of the person who in good faith pays or takes for value an instrument completed contrary to the authority of the signatory. Care should be taken not to confuse the unauthorised completion of an incomplete document with its unauthorised alteration, as different considerations and principles apply to the latter (see Ronse I 91). The payor (for example, the drawee) of an instrument does no usually know whether or not the instrument was completed contrary to the authority of its signatory. Since the signatory of a bill need not personally complete the remainder of the bill, an examination of the bill itself would not necessarily reveal that the instrument had been tampered with, as in the case of an alteration. Although the standard South African and English textbooks do not deal specifically with this problem, there can be no doubt that on general principles the bona fide payor of an instrument completed contrary to the authority of the signatory would be protected if he pays the holder of the instrument (Malan 244ff). Clause 13(2)(b)(ii) of this draft would therefore merely codify the existing law in this regard. It is significant that section 4-401 UCC read with paragraph 5 of the Official Comment to section 3-115 makes provision for a similar result.

2.4 Both section 18(3) SABEA and section 20(2) BEA contain the principle that a holder who is not a holder in due course cannot enforce an instrument against the signatory of an incomplete instrument unless it was completed strictly in accordance with the authority given (see Malan 174-5; Cowen 185; De Wet & Yeats 784). This equitable rule that the signatory of an incomplete instrument is not liable to a holder other than a holder in due course in terms of an unauthorised completion of an instrument accords with section 3-115 UCC, article 10 GULB and section 18 of the Australian Cheques and Payment Orders Act 1986). The principle is also embodied in

clause 13(2)(b)(i) of this draft and is a restatement of the existing law. It stands to reason that the signer of an instrument completed in accordance with the authority given should incur liability in accordance with the agreement between the parties. Ronse I 83 explains: "Indien de voltooiing van een onvolledige wisselbrief in handen van een derde te goeder trouw, een geldige wisselbrief doet ontstaan, ook wanneer de voltooiing gebeurde in strijd met de overeenkomst bij de uitgifte, dan is dit a fortiori het geval wanneer de wisselbrief werd voltooid overeenkomstig de afspraken bij de uitgifte." (See Malan 174-5 but contrast *Glenie v Bruce Smith* 1908 1 KB 263 (CA)). It therefore follows that the signatory of an incomplete bill should be liable to a holder other than a holder in due course at least to the extent that the instrument was completed in accordance with the authority given by him. No logical reason exists why the mere fact that the instrument was completed contrary to the authority given should discharge the signatory from all liability to a holder other than a holder in due course. A holder other than a holder in due course should be entitled to adduce evidence to prove the extent of the actual authority in respect of the completion of the instrument. A similar principle is found in section 62(1) SABEA. It is submitted that clause 13(2)(b)(ii) of this draft is an improvement on the existing law in that it represents a logical extension of it, viz that the signatory of an incomplete bill is liable to a holder other than a holder in due course to the extent that the instrument was completed in accordance with the authority given by him.

2.5 With reference to the previous paragraph it should also be pointed out that section 18(3) SABEA requires that in order for an instrument to be enforceable by any party other than a holder in due course against any party who became a party to it prior to its completion, "it must be filled up within the time agreed on or, if no time is agreed on, within a reasonable time ...". Section 70(2) of the BEA merely requires the incomplete instrument to be filled in within a reasonable time. Both sections stipulate that what is a reasonable time is a question of fact. It has been held that the statutory requirement for completing blanks within a reasonable time did not apply at common law (*Golub v Rachaelson* 1925 WLD 188; *Silver v Shapiro* 1926 TPD 141 and see De Wet & Yeats 784; Cowen 187). Although section 14 NIL also contained the requirement that the instrument be filled in within a reasonable time, reference to this requirement was omitted in section 3-115 UCC. In paragraph 1 of the Official Comment to the latter section the view is expressed that the requirement is entirely

superfluous, "since any authority must always be exercised in accordance with its limitations, and expires within a reasonable time unless a time limit is fixed". This reasoning cannot be faulted. It is noteworthy that neither article 10 GULB nor article 12 of the Uncitral Convention contain the requirement that the instrument be filled in within a reasonable time. Section 18(2) of the Australian Cheques and Payment Orders Act 1986 does, however, contain this requirement. Since the common law does not require the filling in of the instrument within a reasonable time, it is submitted the arguments advanced in paragraph 1 of the Official Comment to section 3-115 UCC merit following.

2.6 Neither section 18 SABEA nor section 20 BEA deals specifically with the legal position of a person who signs a previously incomplete instrument after its completion. Nor is this question dealt with in section 3-115 UCC, article 10 GULB or section 18 of the Australian Cheques and Payment Orders Act 1986. Article 12(2)(b) of the Uncitral Convention provides that "[a] party who signed the instrument after the completion is liable according to the terms of the instrument so completed". Article 12(2) of the Convention also makes it clear that liability in terms of article 12(2)(b) does not depend on the instrument being completed in accordance with the authority. Although it may be true that the same result would probably be achieved by applying the general principles of estoppel in our law, it is submitted, nevertheless, that article 12(2)(b) of the Uncitral Convention should, ex abundanti cautela, be adopted. A similar provision is found in section 62(1) SABEA. Clause 13(2)(a) of this draft should therefore be regarded as a codification of the existing law.

2.7 Both section 10 SABEA and section 12 BEA make provision for the insertion of the date of an instrument if it is issued undated. Although section 13 NIL treated an undated instrument as something different from an incomplete instrument, section 3-115 UCC failed to adopt this approach. The approach is explained in paragraph 1 of the Official Comment: "Section 13 is eliminated because it has suggested some uncertain distinction between undated instruments and those incomplete in other respects, and has carried the inference that only a holder may fill in the date. An instrument lacking in an essential date is merely one kind of incomplete instrument, to be treated like any other." Again, it is submitted that this reasoning cannot be faulted. It is also significant that neither article 11 GULB nor article 12 of the Uncitral

Convention draw the uncertain distinction between undated instruments and other incomplete instruments. It is recommended that the UCC approach be followed.

2.8 Section 18(2) SABEA provides that if a bill (or promissory note because of section 93(1)) is "wanting in any material particular", the person in possession of it has "prima facie authority to fill up the omission" in any way he thinks fit. This provision is modelled on section 20(1) BEA; section 14 NIL contained a similar provision. This "authority" was traditionally referred to as a "transferable authority to create a bill" (Malan 174; Chalmers & Guest 98 and see *Van der Merwe v Myburgh* 1929 OPD 113 at 120) and the delivery of the instrument was seen as an invitation to complete the bill (*Herbert v Steele* 1953 3 SA 271 (T) 274). Since this clause no longer regards the non-delivery of an incomplete instrument as an absolute defence as against a holder in due course, it is inappropriate to retain the concept of transferable authority to create a bill, although the non-delivery of an instrument may still have relevance at common law (paragraph 2.1 above). While the exact meaning of the phrase "prima facie authority to fill up the omission" is far from clear (Britton 196-8 and see *Galaun v Newton* 1961 1 SA 405 (D) 410; *Mijlof t/a Cape Building Ceramics v Jackson* 1980 3 SA 13 (C) 17) the better view, it is submitted, is that it relates to the onus of proof (Malan 174 n14; Malan et al *Provisional Sentence* 63ff and *Braz v De Atouguia* WLD Case No 8182/87 256 1987 and see Cowen 185; paragraph 6 of the Official Comment to section 3-115 UCC). In terms of clause 13(2) of this draft every holder of an instrument is presumed, until the contrary is proved, to be a holder in due course. Since every holder is presumed to be a holder in due course it is unnecessary and, it is suggested, confusing to deal with the concept "prima facie authority to fill up the omission" in this clause. There is no reason why the onus of proof should be any different in the case of incomplete instruments. The existence of authority to complete an instrument, or otherwise, is a question of fact.

The "authority" in terms of section 18(2) SABEA relates to documents that are "wanting in any material particular". Although it has been held that the authority given by the statute where an instrument is "wanting in any material particular" extends to every incomplete feature of the instrument because the word "material" does not restrict the right of filling blanks to such particulars as are necessary for the creation of a valid bill or not (*Galaun v Newton* 1961 1 SA 405 (D) 408-9 and see Cowen 185; Malan 174-5), it is submitted that the ambit of incomplete instruments

should be restricted to documents which lack any of the essential requirements of instruments. Clause 13 of this draft follows the approach of section 3-115 UCC (see paragraph 2 of the Official Comment to section 3-115 UCC and Anderson 321) and article 12 of the Uncitral Convention in this regard. Failure to insert the date on an instrument may render it "lacking any of the necessary requirements" of an instrument under certain circumstances, whereas failure to indicate the specified interest payable would not necessarily have the same effect. Where such a document is completed as an instrument it will, for this draft, be enforceable.

The words "a document in the form of an instrument but lacking any of the necessary requirements of it" in clause 13(1) of this draft are preferred to the phrase "a paper whose contents at the time of signing show that it is intended to become an instrument" in section 3-115 UCC, because they clearly indicate that the question whether a document is *in the form* of an instrument but lacking any of the necessary requirements, should be determined objectively without reference to the intention of the parties (Malan 174-5, but compare *Gerald McDonald and Company v Nash and Company* 1924 AC 625 (HL) 645). No attempt has been made to determine when a document is in *the form of an instrument* because his is a question of fact in every case, but it is submitted that a document is in such a form if it is in the form of a printed bill of exchange, cheque or promissory note, or where the document contains an order or a promise. A document in the form of an instrument not completed as an instrument obviously does not fall under the provisions of this clause.

3 The General Bar Association supports the proposed section.

4 The Clearing Bankers Association proposes that a new subsection be inserted in clause 13 of the proposed Bills of Exchange Act that reads as follows:

> **"Where a document referred to in subsection (1) is payable a certain number of days after date but is not dated, the drawee may insert what he believes to be the correct date thereof."**

It is submitted that the recommendation should not be followed since that what the proposed subsection seeks to accomplish is already fully catered for by the provisions of clauses 9 and 13 of the proposed Bills of Exchange Act.

ALTERATION

14 Alteration

(1) Where an instrument is materially altered:

(a) parties who have signed the instrument after the material alteration has been made or who made, authorised or assented to the material alteration shall be liable on it as altered;

(b) parties who have signed the instrument before the material alteration has been made shall be liable on it as if the alteration had not been made: Provided that a party who by his negligence contributed to the making of the alteration shall be precluded from setting up the alteration against a holder in due course or a person who has paid the instrument in good faith and without notice.

(2) For the purposes of sub-section (1), an alteration is material if it alters or purports to alter the liability of any party to the instrument and includes any alteration of the date, the sum payable, the names of the parties and the time of payment.

Comparative legislation

Sec 64 BEA
Sec 62 SABEA
Sec 124, 125 NIL
Sec 3-406, 3-407 UCC
Art 69 GULB
Art 35 Uncitral Convention
Sec 91 Australian Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

62. *Effect of alteration of bill or acceptance.*

(1) If a bill or an acceptance is materially altered the liability of all parties who were parties to the bill at the date of alteration and who did not assent to it, must be regarded as if the alteration had not been made, but any party who has himself made, authorised or assented to the alteration, and all subsequent indorsers are liable on the bill as altered.

(2) For the purposes of sub-section (1) material alterations include any alteration of the date, the sum payable, the time of payment and the place of payment, and, if a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

Commentary

1.1 Section 62(1) SABEA does not follow section 4 BEA (section 63(1) of the Natal Law No 8 of 1887, on the other hand, is based on section 64 BEA) and the present wording of section 62(1) is apparently based on the judgment of Bell J in *Blackburn's Trustee v Landsberg and another* (1845) 5 Searle 180 (see Cowen 347 and *Estate Ismail v Barclays Bank* 1957 4 SA 17 (T) 24). In terms of section 64 BEA, where a bill or note or the acceptance of a bill was materially altered without the assent of all the parties liable on the instrument, the instrument was "avoided" (section 63(1) of the Natal Law used the word "discharged"; see *Electricity Printing Works (Pty) Ltd v Kathlyns Cosmetics (Pty) Ltd* 1964 4 SA 378 (N) 380) except as against a party who had himself made, authorised or assented to the alteration, and against subsequent indorsers (see Byles 249ff).

1.2 It is submitted that the rationale of section 2(1) SABEA is sound, because the signatory of an altered bill cannot, in principle, be held liable according to the tenor of the bill as altered, if the alteration was made without his consent. There can be no objection, on the other hand, to his liability on the bill as it existed at the time of his signature (Malan 178-9 and see *Blackburn's Trustees v Landsberg and another* (1865) 5 Searle 180 and *Estate Ismail v Barclays Bank* 1957 4 SA 17 (T) 24). A similar approach is adopted in section 3-407 UCC (see paragraphs 1 and 3 of the Official Comment to section 3-407 UCC and article 69 GULB (see Ronse I 376). Clause 14(1)(a) and (b) of this draft embody the underlying principles of section 62(1) SABEA and the difference in wording is used merely to emphasise these principles more clearly. These provisions require no further comment.

2.1 The proviso to clause 14(1)(b) of this draft does require further comment. It is based on section 3-406 UCC. Paragraph 1 of the Official Comment to section 3-406 of the UCC explains that the section adopts the doctrine of *Young v Grote* (1827) 4 Bing 253 (130 ER 764) "which held that a drawer who so negligently draws an instrument as to facilitate its material alteration is liable to a drawee who pays the altered instrument in good faith". Malan, however, points out that English law distinguishes the relationship between the drawer and the drawee, on the one hand, and the relationship between the drawer, acceptor and indorser and subsequent holders, on the other. The contractual relationship between the drawer and drawee requires the drawer to employ reasonable care in the drawing of cheques and bills on

the drawee. Should the drawer fail to draw a bill or a cheque with the necessary care, the drawee may debit the account of the drawer with the amount of the instrument as altered. The drawer has no such duty to subsequent holders of the instrument. Nor does such a duty rest on the acceptor or indorser. These parties do not owe to subsequent holders a duty of care that will be breached by the negligent drawing, indorsing or accepting of the instrument (Malan 179ff). South African law appears to follow English law in this respect (see *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1973 2 SA 281 (C); *Union Government v National Bank of South Africa Ltd* 1921 AD 121 149).

It is submitted that section 3-406 UCC should be followed. The reasoning adopted in paragraph 2 of the Official Comment to section 3-406 of the UCC cannot be faulted:

> "The section extends the above principle [ie the principle in *Young v Grote* supra] to the protection of a holder in due course and of payors who may not technically be drawees. It rejects decisions which have held that the maker of a note owes no duty of care to the holder because at the time the instrument is drawn there is no contract between them. By drawing the instrument and 'setting it afloat upon a sea of strangers' the maker or drawer voluntarily enters into a relation with later holders which justifies his responsibility."

Malan has argued that the drawer, acceptor and indorser of a bill should owe a duty of care to subsequent parties to apply reasonable care in the manner of drawing, accepting and indorsing the instrument and it is unnecessary to repeat his arguments (Malan 179ff and see Anon "Careless Spaces on Negotiable Instruments" (1917) 31 *Harvard Law Review 779; Preuss and Seligmann v Prins* (1864) 1 Roscoe 198 at 205). The wording of the proviso to clause 14(1)(a) makes it clear that a party who, by his negligence, contributes to the making of an alteration shall be precluded from setting up the alteration against a person who in good faith pays or takes the instrument for value.

2.2 It is submitted that the approach adopted by section 3-406 UCC be followed and no attempt made to define negligence that contributes to an alteration (see paragraph 3 of the Official Comment to section 3-406 UCC). It is for the courts to decide on the

circumstances of the particular case and they will no doubt be guided by the general principles of causality (see *Barclays Bank DCO v Straw* 1965 2 SA 93 (0) 96).

3 Clause 14(2) of this draft follows section 62 SABEA. The inclusion of the words "alters or purports to alter the liability of any party to the instrument" is based on the decision of Miller J in *Electricity Printing Works (Pty) Ltd v Kathlyns Cosmetics (Pty) Ltd* 1964 4 SA 378 (N) 380 (see Chalmers & Guest 533; *Koch v Dicks* 1933 1 KB 307 at 320-1 and see *Mobeni Supersave v Suleman* 1992 3 SA 660 (N)).

CHAPTER 2

NEGOTIATION

15 Negotiation of instrument

(1) Negotiation is the transfer of an instrument in such a manner as to constitute the transferee the holder of the instrument.
(2) An instrument payable to bearer is negotiated by delivery.
(3) An instrument payable to order is negotiated by delivery coupled with any necessary indorsement.
(4) Where an instrument drawn or made payable to bearer is indorsed specially, it remains payable to bearer and may be further negotiated by delivery, but the person indorsing specially is liable as indorser only to those holders who acquired the instrument through his indorsement.

Comparative legislation

Sec 29 SABEA
Sec 31 BEA
Sec 40 Cheques and Payment Orders Act 1986
Sec 3-202 UCC
Art 13 Uncitral Convention
Art 11 GULB

The relevant provisions in the Bills of Exchange Act 1964 are:

29. *Negotiation of bill.*

(1) A bill is negotiated if it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.
(2) A bill payable to bearer is negotiated by delivery.
(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.
(4) If 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 the transferee in addition acquires the right to have the bill indorsed by the transferor.
(5) If any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Commentary

1 The Bills of Exchange Act 1964 uses the terms "negotiate", "negotiation" and "negotiable" imprecisely. (See Cowen 113-5; Byles 99ff; Malan 112ff and sections 6(5), 27(1), 29(1), 34(2), 80 and 81 SABEA). Section 29(1), in particular, is ambiguous: does it define a "negotiation" or does it merely state when a negotiation is effected without defining the term? The purpose of clause 15(1) is to define "negotiation" and to make it clear that negotiation is a special form of transfer, viz a transfer of the instrument in such a manner that the transferee is constituted holder.
"Negotiation", then, is a technical term and its meaning as defined in clause 15(1) corresponds with that in section 3-202(1) UCC. Neither the Uncitral Convention (article 13) nor the GULB (article 11) uses this expression. Both refer to the "transfer" of the instrument only. However, in view of the structure of our legislation it is thought better to define the term precisely than to discard it.

2 The wording of clause 15(2) corresponds with that of section 29(2) SABEA and needs no comment.

3 Clause 15(3) is based on the second part of section 3-202 (1) UCC and amends section 29(3) SABEA, which provides that a bill payable to order is negotiated "by the indorsement of the holder completed by delivery". The purpose of the change is to ensure that the first delivery of an order instrument to the payee qualifies as a negotiation so enabling the payee to qualify as a holder in due course. This matter is further commented upon under clause 28.

4 Special indorsement on bearer instrument

Comparative legislation

Sec 6(2), (3), 14(a), 29-36 SABEA
Sec 8(3) BEA
Cl 19 Australian Cheques Bill (1984)
Sec 23 Cheques and Payment Orders Act 1986
Sec 3-204 (1) UCC
Sec 9(5), 34, 40 NIL

The relevant provisions in the Bills of Exchange Act 1964 are:

6. *Negotiability of bills*

(1) A bill must be payable either to bearer or to order to be negotiable.
(2) A bill is payable to bearer if it is expressed to be so payable, or if the only or last indorsement on it is an indorsement in blank.
(3) A bill is payable to order if it is expressed to be so payable, or if it 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.
14. *Optional stipulations by drawer or indorser.*
The drawer and any indorser of a bill may insert therein an express stipulation --
(a) negativing or limiting his own liability to the holder;
29. *Negotiation of bill.*
(1) A bill is negotiated if it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.
(2) A bill payable to bearer is negotiated by delivery.
(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.
(4) If 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 the transferee in addition acquires the right to have the bill indorsed by the transferor.
(5) If any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.
30. *Manner of indorsing.*
(1) An indorsement, in order to effect a negotiation of a bill, must be written on the bill itself, be signed by the indorser, and be an indorsement of the entire bill: Provided that an indorsement written on the allonge of a bill or on a copy of a bill issued or negotiated in a country where copies are recognised, shall be deemed to be written on the bill itself.
(2) The simple signature of the indorser on the bill without additional words is sufficient to constitute an indorsement.
(3) A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not effect a negotiation of the bill.
(4) If a bill is payable to the order of two or more payees or indorsee who are not partners, all must indorse in order to effect a negotiation of the bill, unless the one indorsing has authority to indorse for the others.
(5) If in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he must, in order to effect a negotiation of the bill, indorse the bill as he is therein described, adding his proper signature.
(6) If there are two or more indorsements on a bill, each indorsement is deemed, until the contrary is proved, to have been made in the order in which it appears on the bill.
(7) An indorsement may be made in blank or special and may also contain terms making it restrictive.
31. *Indorsement in blank and special indorsement.*
(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.
(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.
(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.
(4) If a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to himself or his order or to some other person or the order of the latter.

32. *Restrictive indorsement.*
(1) An indorsement is restrictive if it prohibits the further negotiation of the bill, or if it 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 is 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) If 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.
33. *Conditional indorsement.*
If 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.
34. *Continuance of negotiability, and negotiation of overdue or dishonoured bill.*
(1) If 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.
(2) If an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and no person who takes it can acquire or give a better title than that which the person from whom he took it had.
(3) (a) A bill payable on demand is deemed to be overdue within the meaning, and for the purposes, of this section when it appears on the face of it to have been in circulation for an unreasonable length of time.
(b) The question what an unreasonable length of time for the purpose of paragraph (a) is, is a question of fact.
(4) Every negotiation of a bill is prima facie deemed to have been effected before the bill was overdue, except where the date of the relevant indorsement is a date after the maturity of the bill.
(5) If a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour: Provided that nothing in this sub-section contained shall affect the rights of a holder in due course.
35. *Negotiation of bill to party already liable thereon.*
If a bill is negotiated back to the drawer, a prior indorser or the acceptor, such drawer, indorser or acceptor may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.
36. *Rights and powers of the holder.*
The rights and powers of the holder of a bill are as follows, namely --
(a) he may sue on the bill in his own name;
(b) if he is a holder in due course, he holds the bill free from any defect in the title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;
(c) if the title is defective and --
(i) he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; or
(ii) he obtains payment of the bill in due course the person who made such payment gets a valid discharge of the bill.

4.1 In *Interlease Ltd v Massyn* 1979 3 SA 801 (O) a South African court was for the first time called upon to decide whether a bill originally drawn payable to bearer is, by a special indorsement, converted into one payable to a specified person or order.

The court answered in the negative. Van Heerden J's judgment was followed in *Pienaar v Maritz h/a Coal Suppliers* 1985 1 SA 547 (T) and is approved by Reinecke 1979 *TSAR* 260; Malan 208 nl89 125-6; Dijkman "Conversion of a Bearer Instrument to an Order Instrument by means of Special Indorsement" 1985 *TSAR* 105 and Labuschagne "Verandering van Toonderwissel na Orderwissel" 1985 *TSAR* 96. Sinclair questions its correctness 1979 *Annual Survey of the South African Law* 319 and "Special or Restrictive Indorsements on Bearer Instruments" (1985) 102 *SALJ* 231. (See Malan et al *Provisional Sentence* 43ff on which this paragraph is based.)

4.2 *Interlease* is based primarily on section 6(2): "A bill is payable to bearer if it is expressed to be so payable, or if the only or last indorsement on it is an indorsement in blank." Van Heerden J (at 803) said that to determine whether a bill is payable to bearer, the order of the drawer must first be examined.

> "Om te bepaal of 'n wissel aan toonder of order betaalbaar gestel is, moet klaarblyklik in eerste instansie na die opdrag van die trekker gekyk word. Indien hy bepaal het dat die wissel aan toonder betaalbaar is, is die betrokke wissel een wat, om die woorde van art 6(2) te gebruik, 'aldus betaalbaar gestel is'. Dit kom dan nie daarop aan of die enigste of jongste endossement op die wissel 'n blanko endossement is nie. Sodanige wissel word verhandel deur blote lewering en die houer is die persoon wat in besit daarvan is. Wat ookal die funksie van 'n endossement op naam op so 'n wissel mag wees, kan dit nie afding op die feit dat die wissel aan toonder betaalbaar gestel is nie."

This approach, which relies on section 6(2) (section 8(3) BEA), is also followed by some of the leading authorities (Falconbridge (1969) 478-9 651-2; Riley 41; Richardson 83; Byles 99). Van Heerden J's judgment implies that a holder does not have the power to convert into an order instrument one which is drawn payable to bearer. The court suggested that such an alteration would be a material one in terms of section 62. If, however, the holder does have this power, the court suggested, he would also have to alter the drawer's order as expressed in the instrument; a mere special indorsement would be insufficient (see at 804). (See in this regard the provisions of section 23 of the Cheques and Payment Orders Act 1986.)

4.3 The view taken in *Interlease* corresponds with the position in English law before codification, viz that a bill drawn payable to bearer remained so payable despite a subsequent special indorsement (*Interlease* 804).

The common law recognised another rule as a corollary to the above, viz that an instrument drawn payable to order and indorsed in blank remained payable to bearer despite any subsequent special indorsement. It was said in *Walker Barber and another v MacDonald* (1848) 2 Ex 527 (154 ER 600) at 531-2 that:

> "This was an action upon a bill of exchange, brought against the defendant, by whom it had been specially indorsed. Before that indorsement the bill had been indorsed in blank, and was therefore payable to bearer. It was decided ... that when a bill had been so indorsed, and is payable to bearer, no subsequent holder can restrain its negotiability." (See also *Smith v Clarke* (1794) Peake 295 (170 ER 162).)

However, this latter rule was changed by section 8(3) BEA in terms of which a bill is payable to bearer if it is expressed to be so payable or if the only or last indorsement on it is an indorsement in blank. Chalmers (1909 7th ed) at 26-7 remarks:

> "This sub-section alters the law. It was intended to bring the law into accordance with the mercantile understanding by making a special indorsement control a previous indorsement in blank. Before the Act it was held that where a bill was indorsed in blank, its negotiability to bearer was not affected by a subsequent special indorsement, though the special indorser was only liable on his indorsement to such parties as made title through it."

The effect appears to be that a bill drawn payable to bearer remained so payable despite the presence of a special indorsement on it, but that the special indorser incurred liability only to such holders as took title through the special indorsement. In the latter respect the special indorsement limits the liability of the special indorser (see section 14(a)).

4.4 In broad terms the NIL codifies the position as set out above (Britton 146ff). The relevant provisions are:

> 9 "The instrument is payable to bearer -
> (1) When it is expressed to be so payable; ...
> (5) When the only or last indorsement is an indorsement in blank."
>
> 34 "A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."
>
> 40 "Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

The interpretation of these sections and the possible conflict between sections 9 and 40 formed one of the subjects of the Ames-Brewster controversy, ie the debate between Ames and Brewster on the merits of the NIL. See, inter alia, Ames "The Negotiable Instruments Law" (1900) 14 *Harvard Law Review* 32 246-7; "The Negotiable Instruments Law. A Word More" (1901) 15 *Harvard Law Review* 442 444-5; "The Negotiable Instruments Law - Necessary Amendments" (1903) 16 *Harvard Law Review* 255 256-7; Brewster "A Defense of the Negotiable Instruments Law" 10 *Yale Law Journal* 84; "The Negotiable Instruments Law - A Rejoinder to Dean Ames" (1910) 15 *Harvard Law Review* 26 31-2 and the excellent review of this debate by McKeehan "The Negotiable Instruments Law. A Review of the Ames-Brewster Controversy" (1902) 41 *American Law Register* 437 499 561 (reprinted in Brannan *The Negotiable Instrument Law Annotated* (1911) 2ed 220). (See the brief reference to this controversy in Sinclair "Special or Restrictive Indorsements on Bearer Instruments" (1985) 102 *SALJ* 31 233-5 and the discussion of Brannan "Some Necessary Amendments of the Negotiable Instruments Law" (1913) 26 *Harvard Law Review* 493 500-2.)

It is not necessary to review all aspects of this controversy. Suffice it to say that the apparent conflict between sections 9(5) and 40 appears to have been resolved. Britton 148 states:

> "It has sometimes been argued that Section 40 re-enacts the rule of *Smith v Clarke*, that an order instrument once indorsed in blank, its method of negotiation cannot be controlled by subsequent special indorsements. But if the expression 'payable to bearer' as used in Section 40 were interpreted to include instruments which were payable to order on their face and became payable to bearer by virtue of blank indorsements, as well as instruments which were payable to bearer on their face, the result would be that Section 40 would nullify Section 34 and the implication from Section 9(5). A rule of construction forbids such interpretation. Where two sections of the same or different statutes overlap, and one construction obliterates one section and another construction permits each section to operate over a portion of the field, that construction should be adopted which enables each section to have some operative effect. As applied to the problem under discussion, this means that Sections 34 and 9(5) have reference to instruments payable to order on their face and Section 40 applies only to instruments payable to bearer on their face."

(See also McKeehan 240 and *Beutel's Brannan Negotiable Instruments Law* 7ed (1945) 628ff by Beutel and the note in (1923) 23 *Columbia Law Review* 488-9.)

Section 3-204 (1) UCC (also section 23 of the Cheques and Payment Orders Act 1986) reversed the rule in section 40 NIL. The second sentence of section 3-204(1) UCC reads:

> "Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement."

The change in the law is motivated as follows (Official Comment to sec 3-204):

> "The last sentence of subsection (1) reverses the rule of the original section 40, under which an instrument drawn payable to bearer and specially indorsed could be further negotiated by delivery alone: The principle here adopted is that the special indorser, as the owner even of a bearer instrument, has the right to direct the payment and to require the indorsement of his indorsee as evidence of the satisfaction of his own obligation. The special indorsee may of course make it payable to bearer again by himself indorsing in blank."

4.5 The rule of the UCC cited above conflicts with article 20 GULC, which provides that an indorsement on a bearer cheque imposes liability on the indorser, but does not convert the cheque into an order instrument (Baumbach-Hefermehl 553; Zöllner 163; Hueck-Canaris 182). Baumbach-Hefermehl 553 remarks:

> "Durch das Indossament wird ein Inhaberscheck nicht in einen Orderscheck verwandelt; über die Natur des Papiers entscheidet allein der Aussteller."

4.6 Sinclair ((1985) 102 *SALJ* 231 and 1979 *Annual Survey of the South African Law* 319) doubts the correctness of *Interlease* and states that it must be accepted that our legislation does not provide a solution ((1985) 102 *SALJ* 237). She questions the court's reliance on section 6(2) SABEA and further bases her argument on sections 32 and 34 that, she says, makes no distinction between order and bearer instruments ((1985 102 *SALJ* 235). With respect to section 6(2) ("A bill is payable to bearer if it is expressed to be so payable ..."), she states that the sub-section does not provide that a bill drawn payable to bearer always remain so payable (1979 *Annual Survey of the South African Law* 321). This, of course, is true, but nothing, it is submitted, turns on it. She then argues that the interpretation of section 6(2) that a bill drawn payable to bearer always remain so "would conflict with one's acceptance of the interpretation of section 6(3), which uses the same words (ie "expressed to be so payable") to describe an order instrument. One does not argue that the drawer's authorisation of payments to X or order cannot be altered so that the instrument is converted into a bearer one" (1979 *Annual Survey of the South African Law* 321). But this construction of section 6(3) SABEA is not convincing. The Act specifically provides for the conversion into a bearer instrument of an instrument drawn payable to order (section 31(1)). The words "expressed to be so payable" must clearly be

given the same meaning in both sub-sections, but where express provision is made for the conversion of order bills into bearer bills that specific provision should be followed. No similar provision is made, it should be noted, for the conversion of a bill drawn payable to bearer into an order instrument. Thus, it is submitted that instruments drawn payable to bearer remain so payable by virtue of the provisions of section 6(2), despite the presence on them of special indorsements.

Sinclair also finds support for her view that *Interlease* was wrongly decided in sections 32 and 34 SABEA which, she argues, do not distinguish between instruments drawn payable to bearer and those drawn payable to order. While it is true that these sections make no express distinction between the two kinds of instrument there are, it is suggested, cogent reasons why a restrictive interpretation of them should be followed. (Sinclair (1985) 102 *SALJ* 235 calls this interpretation "rather strained".)

Sections 32 and 34 SABEA are contained in that part of the Act that deals with "negotiation" (sections 29 to 36 SABEA). A bill is negotiated, section 29(1) tells us, if it is transferred from one person to another in a manner that constitutes the transferee the holder. Sub-section (2) describes the method of negotiating a bill payable to bearer and sub-section (3) the method in which a bill payable to order is negotiated, viz "by the indorsement of the holder completed by delivery". Sections 30 to 33 follow and set the requirements of indorsements, ie indorsements necessary to effect a negotiation. Only order instruments are negotiated by indorsement; an indorsement is not required to bring about the negotiation of a bearer instrument. These sections do not expressly use the word "indorsement" in relation to order instruments. However, it is submitted that, because they are concerned with the negotiation of bills, the word "indorsement" is used in the sense of an indorsement necessary to effect a negotiation.

This is apparent from a reading of section 30(1) SABEA. It states that an indorsement "in order to effect a negotiation of the bill" must comply with certain requirements. An indorsement is not needed to bring about the negotiation of a bearer bill. (See also sections 30(4), (5) and (6) and cf section 34(4) SABEA.) Section 30(7), which also deals with the requirements of indorsement necessary for negotiation, then provides that an indorsement may be in blank or special and may also contain terms making it restrictive. Section 31(1) is explicit. An indorsement in blank specifies no indorsee "and a bill so indorsed becomes payable to bearer" (italics added). Clearly,

the subsection envisages an indorsement in blank on a bill payable to order: A blank indorsement on a bill drawn payable to bearer does not convert it into a bearer bill; it is already payable to bearer. Sections 32 and 34(1)(a) make no express distinction between order and bearer paper, but it is unlikely, that "indorsement" was meant to be used in a different sense in them.

Apart from what has been said above, it should be noted that section 34(1)(a) SABEA is ambiguous. It states that a bill negotiable in its origin remains negotiable until it is "restrictively indorsed". But not all restrictive indorsements prevent further negotiation (see section 32) so that, if one ascribes to "negotiable" in section 32 the meaning of "transferable" (Sinclair (1985) 102 *SALJ* 235), section 34(1)(a) cannot be given its literal meaning.

The interpretation of "indorsement" above does not, however, apply throughout the Act. Not all the sections dealing with "indorsement" and "indorser" are concerned with an indorsement effecting a negotiation. Some deal with the liability of the indorser, others with his right of recourse. An indorsement may not be necessary to bring about a negotiation but it may well found the liability of the indorser. Thus, for example, section 53(2) SABEA, which describes the liability of the indorser, and section 55 SABEA, which determines the amount recoverable on dishonour, should be construed to refer also to the indorser of a bearer bill.

4.7 The rule that an instrument drawn payable to bearer remains so payable is justified by various policy considerations. In South Africa, Reinecke 1979 *TSAR* 260 has shown that in certain circumstances it is to the drawer's advantage to draw a bill payable to order, eg where he bears the risk of loss through the post. In other cases, it is preferable to draw the instrument payable to bearer, as when the payee requests or authorises posting. In the first case, the drawer is discharged from liability only when the drawee makes payment to the payee or his order (save where sections 58 and 79 SABEA apply), but in the second case if payment is made to any person in possession. Similarly, when the liability of the drawer or maker on the instrument is in issue, he can discharge his liability in the case of an order instrument only by paying to the payee or his order, whereas in the case of a bearer instrument by paying to any person in possession. Reinecke 261 concludes:

> "As die trekker van die dokument gevolglik versoek word om die dokument te betaal, sal hy in die geval van 'n orderdokument hom moet vergewis dat al die endossemente in orde is terwyl hy in die geval van 'n toonderdokument eenvoudig aan die besitter kan betaal."

The same considerations led Britton 147 (see also Malan 208 n189) to say:

> "The reason for the rule is that to permit a subsequent holder to control the method of negotiation would cast upon the obligor the risk of forged or unauthorised indorsements of special indorsees, a risk which he did not assume by his contract to pay the bearer."

McKeehan 236 states the rationale for the rule in similar terms. He refers to the custom of merchants that the original rule that a blank indorsement on a document drawn payable to order was controlled by a subsequent special indorsement:

> "[T]he custom of merchants, which has now been adopted by both the English and American acts, says that in the case of an instrument originally payable to order, a blank indorsement is controlled by a subsequent special indorsement, because in such a case the maker's promise embraces only those who make title through the special indorsement. But a note originally payable to bearer is another matter. It is a violation of the plain tenor of such a note to treat it as other than payable to bearer. That is the maker's absolute promise - to pay the bearer. His promise cannot be qualified or changed in any way by a subsequent holder. The only effect of a special indorsement on such a note is that the indorser can be held liable only by those who make title through his indorsement."

4.8 One of the effects of the rule that a special indorsement does not convert an instrument drawn or made payable to bearer into an order instrument is that the special indorser incurs liability only to the special indorsee and to persons acquiring title through him. The instrument itself remains payable to bearer and may be negotiated by delivery alone. The special indorsement can thus be seen as comprising words limiting or restricting the liability of the special indorser (section 14(a) SABEA). If the rationale of this rule is taken to its logical conclusion, words prohibiting negotiation added to an indorsement on an instrument drawn payable to bearer merely limit the indorser's liability, so that he would incur liability only to his immediate transferee, and do not restrict further negotiation.

However, this question is to some extent regulated by section 6(5) SABEA. A bill must be drawn payable "to a specified person or his order, or to bearer" (section 2(1)). Despite this requirement, which seems to make the validity of a bill depend on its negotiability, viz transferability by delivery and necessary indorsement, the Act recognises as a valid bill or note an instrument containing words "prohibiting transfer, or indicating an intention that it should not be transferable" (section 6(5)). Such an instrument is valid as between the parties to it but is not negotiable. See VTHD "The Crossed Cheque: Its Legal Effect" 1953-54 19-20 *The Irish Jurist* 47; Holden I

Banking 285; Jacobs 68-9; Chalmers & Guest 54; section 6(1), but Chorley 55-6). In *Impala Plastics (Pty) Ltd v Coetzer* 1984 2 SA 392 (W) at 395 Fleming J said:

> "That a bill of exchange - which by definition is an order to pay to a party or order (or bearer) - may nevertheless be 'not-negotiable' in its very issue and before any negotiation, is tolerated by the legislation."

The question often arises: What is the effect of words prohibiting negotiation on an instrument that also bears words of negotiability, viz "order" or "bearer". In *Aboobaker v Gableite Distributor (Pty) Ltd* 1978 4 SA 616 (D) the court had to decide the effect of the words "not transferable" between the two parallel lines of a crossing on a cheque payable to a named payee and order. The court said at 618 that, "upon a proper construction of section 6, once the cheque contains clearly legible words clearly 'prohibiting transfer' within the meaning of 6(5), then, in terms of that sub-section, 'it is not negotiable'. It is perhaps not without significance that ss (1) does not say that if a bill is payable either to bearer or to order it is negotiable, but that it must be payable either to bearer or to order 'to be negotiable'". The implication seems to be that where a bill drawn payable to order contains words prohibiting transfer only the named payee can be holder of it: To be holder, subsequent parties must acquire by negotiation, ie by indorsement of the payee and delivery, and the payee, by virtue of section 6(5), is unable to negotiate the instrument (see Malan 314ff, although he does not explicitly distinguish between cheques drawn payable to order and those payable to bearer).

Words prohibiting negotiation on an instrument payable to bearer, create a much more complicated situation. In *Impala Plastics (Pty) Ltd v Coetzer* 1984 2 SA 392 (W) the court followed the approach in *Aboobaker*. Provisional sentence was claimed by the plaintiff on cheques payable to "Omega Barfel or bearer" but crossed and marked "not transferable" between the lines of the crossing. The defendant objected to the claim, stating that plaintiff could not have become holder of the cheques, none of which purported to have been indorsed or negotiated, because "becoming the bearer of the cheques, and accordingly the holder thereof, was not legally possible" (at 393). The court upheld this argument, stating (at 397) that the plaintiff had not established that it had obtained "a right to sue on the cheques". Presumably, this means a finding that the plaintiff was not holder. The court seems to accept that "on non-transferability" section 6(5) may be exhaustive, "by stating that if in fact words conveying an intention against transferability occur, the bill is valid between the parties, but transferability is lacking" (at 397). Referring, at 397, to "the

impact which a limited number of words would have upon a reader" and asking "whether sufficient has been written to negate negotiability" the court held that the cheques were not transferable. On this basis it concluded that "in day to day law and in banking practice (even when it is not a law unto itself) the specific cheques in this matter with their specific appearance will be taken as cheques that were intended to be not transferable despite also proclaiming to be payable to a named party or bearer". The effect of this judgment seems to be that no one but the original holder can be holder of a cheque payable to bearer that also contains words prohibiting negotiation.

But with respect, another interpretation of section 6(5) SABEA is possible. This sub-section provides that a bill containing words prohibiting transfer "is valid as between the parties to the bill, but is not negotiable". The question then is: Who are the parties? Clearly the drawer, the payee (if one is named and he is in possession) or any bearer. The method of acquiring possession is irrelevant to becoming bearer. In particular, the instrument need not have been negotiated to the bearer. Any possessor holding a bill payable to bearer is the bearer of it. That the payee in *Impala* was incapable of negotiating or transferring the instrument has no bearing, it is submitted, on the question whether the plaintiff qualified as bearer. The question whether the cheques were delivered by the payee to the plaintiff is of no concern. Any such delivery is ineffective as a negotiation, because the instruments were by virtue of section 6(5) SABEA, incapable of being negotiated. The fact that the plaintiff became holder on taking possession does not transform the delivery to him into a negotiation; he is holder because he is in possession of an instrument payable to bearer. It follows that there cannot be a holder in due course of an instrument payable to bearer but containing words prohibiting negotiation, for a holder in due course must acquire by negotiation (section 27(1)). On the other hand, because any possessor of such an instrument can be holder, it can be discharged by payment made in due course to him. However, where the instrument is payable to order, there can clearly be only one holder of it, viz the named payee.

The use of words prohibiting negotiation on an instrument in section 6(5) is not entirely satisfactory. There is no reason why the words permitting negotiation should be taken as pro non scripto. It would be preferable to carry out the intention of the drawer as expressed by words such as "order" or "bearer", ie the transfer of the instrument to another who takes as holder should be possible but only, it is suggested, in so far as negotiability in this sense is reconcilable with the words prohibiting

negotiation. It is submitted that a proper balance would be reached allowing the holder of an instrument on which words prohibiting negotiation appear to negotiate it for collection on his account. (See *Hibernian Bank Ltd v Gysin & Hanson* 1939 1 All ER 166 (CA) 168.) Hence, clauses 25 and 26 are proposed. In a sense such an instrument remains valid as between the parties (section 6(5)). Section 6(5) provides that a bill containing words prohibiting negotiation, "is valid as between the parties to the bill, but is not negotiable".

4.9 The rule has also been criticised on policy grounds (Sinclair (1985) 102 *SALJ* 238-9). Brannan "Some Necessary Amendments of the Negotiable Instruments Law" (1913) 26 *Harvard Law Review* 493 501 refers to the desirability of allowing the holder to restrict negotiation by special indorsement. Referring to crossed cheques he shows that, because bearer cheques can be crossed by the holder, the legislature has, in effect, given the holder the right to alter the drawer's original instruction and to make the cheque payable "to" a bank (see Sinclair 238).

The first consideration is clearly valid, and is reflected in the comment to section 3-204 of the UCC, viz, that the special indorser "as the owner even of a bearer instrument, has the right to direct his payment and to require the indorsement of his indorsee as evidence of the satisfaction of his own obligation". However, it is submitted that this consideration has not sufficient weight to override the policy considerations in favour of the rule referred to above.

The second consideration is also true, but the fact that the legislature has seen fit to introduce crossings and to enable a holder to qualify the instruction of the drawer does no justify a further qualification of the drawer's or maker's contract.

Sinclair (1985) 102 *SALJ* 239 also criticises the rule as being ambivalent because a discharge can be effected by payment to any bearer but only the special indorsee can compel the special indorser to make payment. She poses the question whether the special indorser would effect a discharge by making payment to a holder who acquired by delivery. It is submitted that, if the special indorsement is seen as a qualification of the indorser's liability there is no ambivalence in the rule. Clearly, the special indorser would be discharged by a payment made to a holder who acquired by delivery alone. Only an absence of good faith could invalidate his payment. As was pointed out above, the special indorsement could well attribute notice to him of defects in the holder's title.

4.10 The Act is not explicit, and the consequences of the rule should be regulated with greater precision. Clause 15 (4) is based on section 40 NIL and attempts to overcome some of its disadvantages.

16 Effect of incapacity and illegality

The negotiation of an instrument is effective to constitute the transferee the holder of the instrument even if
(a) the instrument is negotiated by a person having no or limited capacity to contract;
(b) the negotiation of the instrument is affected by illegality.

Comparative legislation

Sec 20 SABEA
Sec 22 BEA
Sec 30 Cheques and Payment Orders Act 1986
Sec 3-207 UCC
Art 15(3) Uncitral Convention
Art 7 GULB
Art 10 GULC

The relevant provision in the Bills of Exchange Act 1964 is:

> 20. *Capacity of parties.*
>
> (1) Capacity to incur liability as a party to a bill is coextensive with capacity to contract.
> (2) If a bill is drawn or indorsed by a minor or a corporation having no capacity or power to incur liability on a bill, the drawing or indorsement of the bill entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Commentary

1 Section 20(2) of the SABEA supplements sections 52 and 53 that set out the liabilities of the acceptor, drawer and indorsers. It should be noted that an acceptor is precluded from denying to a holder in due course "the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill" (section 52(b)(i)). The drawer is precluded from denying to a holder in due course the

existence of the payee and his then capacity to indorse (section 53(1)(b)), and an indorser is precluded "from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill ..." (section 53(2)(c)). Presumably, this means that the indorser is precluded from disputing the validity of the instrument qua bill or note. Clauses 3(1) and 16, however, are explicit and validate an instrument drawn or made by or a negotiation by a person having no or a limited capacity to contract: a bill drawn by a person having no or a limited capacity to contract would otherwise have been a nullity; so also a negotiation effected by, for example, a lunatic. See generally Reinecke "Minderjarige se Kontrakte: 'n Nuwe Gesigspunt" (1964) 27 *THRHR* 133 137-8; Boberg *The Law of Persons and the Family* (1977) 641-2. As a consequence of the validity of an indorsement or a negotiation made by a person having no or a limited capacity to contract, the person who acquires the instrument becomes *holder*. However, whether he also obtains the rights of his transferor is a different matter, which is dealt with in the commentary on clause 21 below.

2 Clauses 3(1) and 16 avoid the expression "entitles the holder to receive payment of the bill, and to enforce it against any other party thereto", since its meaning is not entirely clear (see *Explanatory Paper on Proposed Cheques Bill 1984* 67-8). The proposed clauses also omit reference to the phrase "passes the property therein", used in section 22 NIL and which was one of the subjects in the Ames-Brewster controversy. See Ames "The Negotiable Instruments Law" (1900) 14 *Harvard Law Review* 241 247-8; Brewster "The Negotiable Instruments Law - A Rejoinder to Dean Ames" (1901) 15 *Harvard Law Review* 26 32;, Ames "The Negotiable Instruments Law. A Word More" (1901) 15 *Harvard Law Review* 442 445; Brewster "A Defense of the Negotiable Instruments Law" 10 *Yale Law Journal* 84; McKeehan "The Negotiable Instruments Law. A Review of the Ames-Brewster Controversy" 41 *American Law Register* 437 499 561 reprinted in Brannan (1911) 220 244ff.

Paget (1982) 32, referring to section 22(2) BEA, states that this section "clearly means the discharge of the drawee from his obligation to the drawer". If this statement is intended to mean that the drawee is entitled to debit the account of the drawer because of section 22(2) BEA, it is incorrect (see *Explanatory Paper on Proposed Cheques Bill 1984* 67-8). The section merely gives validity to an otherwise invalid instrument or indorsement; it does not impose liability where none existed before. Neither do clauses 3(1) and 16 impose liability on a person with no or a limited capacity to contract: they only validate the instrument and the negotiation as

such. Other factors determine whether liability is imposed or the rights of the transferor conveyed.

3 Section 20(2) SABEA refers to a "minor or a corporation having no capacity or power to incur liability on a bill". This provision has often been criticised, for incompleteness and for other defects. De Wet & Yeats 771 n227 write:

> "Die wetgewer swyg oor die transportfunksie van 'n toestemmingslose handtekening van 'n vrou onder die maritale mag en 'n verkwister, maar dit lyk belaglik om aan 'n minderjarige se handtekening wel 'n transportfunksie toe te ken as dieselfde nie ook vir eersgenoemdes geld nie."

See also Oelofse, Stassen and Du Plessis "Hersiening van die Wisselwet" 1983 *Modern Business Law* 67 70-1. (While the Matrimonial Property Act 88 of 1984 may render the examples given by the authors out of date, the validity of their point remains.) In using the expression "a person having no or limited capacity to contract", clauses 3(1) and 16 intend to treat all persons suffering an incapacity in the same way. "Person", of course, includes a juristic person (section 2 of the Interpretation Act 33 of 1957 as amended).

4 Our courts have recognised that a negotiation can be invalid by reason of illegality. See De Kock J in *Apollo Club v Yannakou* 1973 2 SA 177 (T) 178A-B; Margo J in *Apollo Club v Yannakou* 1973 2 SA 177 (T) 181G-H; Holmes JA in *Apollo Club v Yannakou 1974* 1 SA 614 (A) 622 and Trollip *JA in Yannakou v Apollo Club 1974* 1 SA 614 (A) 628F and see Scott *The Law of Cession* (1991) 79ff on the legality of a cession. The effect of the invalidity of an indorsement would be that the transferee or "indorsee" does not become holder of the instrument, so that any further negotiation by him by way of indorsement becomes impossible. It should be noted that, in the case of an instrument payable to bearer the position is different: to be holder it is not necessary to have acquired a bearer instrument by negotiation, possession alone is sufficient (see Malan 129ff; Cowen 242).

It follows that it is necessary to safeguard the rights of bona fide third parties. This is accomplished by validating a negotiation affected by illegality. In this regard the Official Comment (2) to section 3-207 UCC is apposite:

> "It is inherent in the character of negotiable paper that any person in possession of an instrument which by its terms runs to him is a holder, and that anyone may deal with him as a holder. The

> principle finds its most extreme application in the well-settled rule that a holder in due course may take the paper even from a thief and be protected against the claim of the rightful owner. Where there is actual negotiation, even in an entirely void transaction, it is no less effective".

Article 7 GULB goes much further by providing that "[i]f 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 persons who have signed it are none the less valid". It should be noted that this article refers to forged signatures as well. This is in line with article 16 GULB, which recognises that a person can be a holder of an instrument even if there is any of the indorsements being forged. For reasons set out in the commentary on clause 36, this approach is not followed in this draft and, consequently, neither are the provisions of article 7 GULB.

Clause 16(b) is based on section 3-207 UCC. It is not necessary to repeat all the provisions of that section since, in our law, a negotiation would in any event be effective even if obtained by fraud, duress or mistake (section 3-207(b) UCC) or made in breach of a duty (section 3-207(d) UCC). It also follows that a provision as article 15(3) of the Uncitral Convention that the holder need not be in *lawful* possession is not necessary: it is clear that our law does not require the holder to be in lawful possession of the instrument (Cowen 242; *Ganie v Parekh and another* 1966 4 SA 618 (N) 622; Malan 129ff).

Finally, it should be noted that even if the circumstances set out in this clause bring about a negotiation, it does not follow that the rights of the transferor pass also to the transferee. The circumstances in which they do pass are set out in clause 17.

5 The meaning of the term "illegality" requires some explanation. *In Palmer v Goldberg* 1961 4 SA 781 (N) 784 the court interpreted the word as it is used in section 28(2) SABEA and said:

> "[T]he illegality in this respect may consist either in the contract being against the general principle of the common law or in its being the subject of special prohibition or interdiction by statute. ... [C]ommon law illegality obtains when the consideration is founded upon a transaction which is against sound morals, public policy, public rights or public interest. ... It seems that it is quite clear that the illegality must be an illegality in the ordinary sense of that term when it is used in relation to contract, that is something related to an offence against morals or public policy, or public interest or something which is prohibited by statute."

This construction is generally accepted and means, for instance, that a gambling transaction would be regarded as an instance of illegality. See *Geysdorp Trading Co v Nathym (Pty) Ltd* 1954 2 SA 575 (T) 577; *Joffe v Goldstein* 1942 WLD 183 185 187; *Smith v Theatre Cafe* 1949 2 SA 519 (T) 564; *Du Preez v Graham* 1966 3 SA 496 (O) 498-9; *Fairthorn (Pty) Ltd v Zacharopolos* 1974 4 SA 262 (N) 264-5; *Joseph v Hein* 1975 3 SA 175 (W) 178. It should be noted, however, that "illegality" is used in this draft in the sense of unlawfulness ("ongeoorloofdheid") so that a merely unenforceable but legal transaction is not included in the concept.

17 Effect of transfer of instrument

(1) The transfer of an instrument vests in the transferee the rights to and upon the instrument the transferor has, except where the transferee derives his title through a holder in due course and has been a party to any fraud or illegality affecting the instrument.
(2) Except where it is otherwise agreed, the transfer without indorsement of an instrument payable to order by the holder gives the transferee the right to the unqualified indorsement of the transferor.

Comparative legislation

Sec 52 Cheques and Payment Orders Act 1986
Sec 27(3) SABEA
Sec 29(3) BEA
Sec 3-201 UCC
Art 14 and 27 GULB

The relevant provisions in the Bills of Exchange Act 1964 are:

27. *Holder in due course.*

(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following circumstances, namely --
(a) he must have become the holder of it before it was overdue, and if it had previously been dishonoured, without notice thereof; and
(b) he must have taken the bill in good faith and for value, and at the time the bill was negotiated to him, he must have had no notice of any defect in the title of the person who negotiated it.
(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act if he obtained the bill, or the acceptance thereof, by fraud or other unlawful means, or for

an illegal consideration, and is deemed to have been so defective if he negotiates the bill in breach of faith, or under such circumstances as amount to fraud.
(3) A holder, whether for value or not, who derives his title to a bill though 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.

Commentary

1 Section 27(3) SABEA provides that, "[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". This provision is often seen to be necessary for the protection of a holder in due course, "for otherwise it might be practically impossible for him to negotiate the instrument further, by reason of defects in his transferor's title becoming known after he had acquired the instrument" (Cowen 286 and see Malan 171). Holden *History* 183 calls the rule embodied in this section "the most cogent illustration of the favoured position occupied by the bona fide holder for value" and continues that, "[w]ere it otherwise, the bona fide holder for value might be prejudiced, for he would have to find an innocent transferee before he could dispose of the instrument". See also paragraphs 25-8 of the *Report of the Working Group on International Negotiable Instruments* on the work of its Fourteenth Session (Vienna, 9-20 December 1985). Thus, where a bill is negotiated to a holder in due course and after dishonour returned to the drawer, the drawer acquires the rights of the holder in due course and may enforce them against the acceptor even if he had been unable to succeed had he sued as drawer (*Jade International Steel Stahl und Eisen GmbH & Co KG v Robert Nicholas (Steels) Ltd* 1978 2 Lloyd's Rep 13; 1978 3 WLR 39; 1978 1 QB 917 (CA) and see *North Coast Plastic and Packaging Industry (Pty) Ltd v Haynes Industries (Pty) Ltd* 1981 1 SA 913 (A) 918; *Abraham v Du Plessis* 1962 3 SA 162 (T) 168).

2 Although it is true that section 27(3) is an example of the protection given a holder in due course, it is by no means essential and, indeed, merely illustrates an obvious point, viz that anyone can transfer what he has (see comment 3 to section 3-201 UCC). A holder in due course obtains "a good and complete title to the bill" (section 36(c)(i) SABEA and Malan n165 at 171), and there is no reason why he should not be able to transfer his rights in the same way as the beneficiary of any other rights. The same applies to any other holder. The usual way in which a holder disposes of his

rights arising from the instrument is by transferring the corporeal instrument: Transfer of ownership in the instrument also effects a transfer of the rights vested in the holder (Malan 13ff; Cowen (1985) 52ff). This is so whether the instrument is also negotiated to the transferee. The above is expressed in clause 17(1), which is based on section 3-201(1) UCC. See also, article 14 GULB, which provides that an "endorsement transfers all the rights arising out of a bill of exchange".

3 It is suggested that the real importance of section 27(3) SABEA lies in the limitation it places on the transfer of rights and in the prevention of the abuse of the position of a holder in due course. Section 3-201(1) UCC provides, somewhat similarly, that a transfer vests in the transferee the rights of the transferor "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". Comment (3) to section 3-201 UCC states:

> "Its [the section's] policy is to assure the holder in due course a free market for the paper ... . The provision is not intended and should not be used to permit any holder who has been a party to any fraud or illegality affecting the instrument, or who has received notice of any defence or claim against it, to wash the paper clean by passing it into the hands of a holder in due course and then repurchasing it".

This section, however, seems to go further than the comment warrants, for mere notice of a claim or defence as a prior holder, as opposed to an intention "to wash the paper clean", is sufficient to restore the transferee to his previous position. This provision has rightly been criticised as unsatisfactory, Braucher "UCC Article 3 - Commercial Paper - New York Variations" (1962) 17 *Rutgers Law Review* 57 66. In clause 17(1) of this draft the formulation of section 27(3) SABEA is retained. It provides unequivocally that the rights of the transferor are not transferred to the transferee if the latter derives title through a holder in due course and has taken part in any fraud or illegality affecting the instrument.

4 Further, it should be noted that transfer of the rights of the transferor is made dependent on the passing of ownership in the instrument. Where transfer of ownership is not intended, as when an instrument is given to an agent for collection or a person incapable of incurring liability on the instrument transfers it, ownership in the

instrument does not pass and, consequently, the rights remain in the transferor. However, the transferee becomes holder by virtue of the provisions of clause 16.

5 Section 29(4) SABEA provides that when the holder of a bill payable to order transfers it "for value" without indorsing it, the transfer gives the transferee such title as the transferor had, and that the transferee in addition acquires the right to have the bill indorsed by the transferor. The meaning of the expression "for value" in this section is controversial (see eg Malan 139 and Cowen 117 n107). But whether it means the intention to transfer the rights or includes the transfer of the instrument to a donee or refers only to a holder under onerous title the confusion can be avoided by omitting all reference to "value" and giving effect to the intention of the parties. Compare section 3-201(3) UCC, which commences: "Unless otherwise agreed any transfer for value ...". It is submitted that there is no merit in retaining the requirement that the transfer be "for value": the governing principle should be the agreement between the parties, and their intention need not be express but can be implied from the circumstances.

The Bills of Exchange Act 1964 and this draft make provision for several kinds of indorsement. Section 29(4) SABEA refers only to the holder's right to have the instrument indorsed without specifying the kind of indorsement. This is unsatisfactory, and clause 17(2) thus provides that the transferee acquires the right to the unqualified indorsement of the transferor (see section 3-201(3) UCC). This right is, of course, subject to any agreement to the contrary between the parties. See Britton "Transfers and Negotiations under the Negotiable Instruments Law and Article 3 of the Uniform Commercial Code" (1953) 32 *Texas Law Review* 153 155. It is not thought necessary to provide specifically, as section 3-201(3) UCC does, that a negotiation is brought about only when the indorsement is made, for this appears to be a settled principle of our law. (See Malan 114; *Volkskas Bpk v Darrenwood Electrical (Pty) Ltd* 1973 2 SA 386 (T) 391.)

18 Negotiation by indorsement

(1) To effect a negotiation of the instrument, an indorsement must be written by or on behalf of the holder on the instrument or on an allonge thereto.
(2) An indorsement may consist of the simple signature of the indorser without additional words.

(3) An indorsement effects a negotiation of the instrument even if it is accompanied by words of cession, waiver, suretyship, guarantee, limitation of liability or words of similar import.

Comparative legislation

Sec 3-202 UCC
Art 13 Uncitral Convention
Sec 41 Cheques and Payment Orders Act 1986
Art 13, 68 and 69 GULB
Sec 30 SABEA
Sec 32 BEA

The relevant provisions in the Bills of Exchange Act 1964 are:

30. *Manner of indorsing.*

(1) An indorsement, in order to effect a negotiation of a bill, must be written on the bill itself, be signed by the indorser, and be an indorsement of the entire bill: Provided that an indorsement written on the allonge of a bill or on a copy of a bill issued or negotiated in a country where copies are recognised, shall be deemed to be written on the bill itself.
(2) The simple signature of the indorser on the bill without additional words is sufficient to constitute an indorsement.
(3) A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not effect a negotiation of the bill.
(4) If a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse in order to effect a negotiation of the bill, unless the one indorsing has authority to indorse for the others.
(5) If in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he must, in order to effect a negotiation of the bill, indorse the bill as he is therein described, adding his proper signature.
(6) If there are two or more indorsements on a bill, each indorsement is deemed, until the contrary is proved, to have been made in the order in which it appears on the bill.
(7) An indorsement may be made in blank or special and may also contain terms making it restrictive.

Commentary

1 Clause 18(1) is based on section 30(1) SABEA but leaves out all reference to an indorsement made on a copy of the instrument. Copies of bills are not used in most common-law countries. In Europe, however, copies are sometimes used to negotiate the instrument while the original is being forwarded for acceptance. See Zöllner 142;

Hueck-Canaris 145; Roblot 144; articles 68 and 69 GULB. Incorporation of the provisions relating to copies in this part of the draft seems unnecessary, as the matter is adequately covered by section 70(a) SABEA.

An "allonge" is a slip of paper annexed to a bill for indorsements where there is no room for them on the instrument itself. The word is a technical one and its use well established. See Byles 100-1; Chalmers & Guest 304; Riley 98. It is therefore not defined, nor is the expression "on a paper so firmly affixed thereto as to become part thereof" (section 3-202(1) UCC) used. See further *Explanatory Paper on Proposed Cheques Bill 1984* at 86-7. Allonges are seldom encountered, when they are, it is almost always with reference to bills.

2 Clause 18(1) contains the phrase "by or on behalf of the holder", which does not appear in section 30(1) SABEA. The clause deals with an indorsement "to effect a negotiation" of the instrument, and it follows that an indorsement to effect a negotiation can be made only by a holder. See *Steele v M'Kinlay* (1880) 5 App Cas 754 772; *Thal v Cleveland Oil Co* 1922 CPD 7 10; Chalmers & Guest 305; Jacobs *A Short Treatise on the Law of Bills of Exchange* (1943) 76-105; Goode 455ff; Byles 198ff; Riley 142ff. Jacobs 105 says: "Strictly, an indorser is the payee or any subsequent indorsee who has signed the bill for the purpose of negotiation, ie he is one of those whose signatures are on the bill in the chain of title from the payee to the holder ... ." It should be noted that, in terms of this draft it is possible for a stranger (a non-holder) to incur liability either as an indorser or as the signer of an aval. See clause 46 and the commentary below. The requirement in clause 18(1) that an indorsement be made "by or on behalf of the holder" must therefore be read subject to the opening phrase "[t]o effect a negotiation of the instrument".

3 Clause 18(2) follows sections 30(2) SABEA and requires no further comment.

4 Clause 18(3) is new and is based on section 3-202(4) UCC. The Official Comment (6) on the latter section states that it is intended to reject decisions holding that the addition of the phrase, "I guarantee payment", indicates an intention not to indorse but to guarantee only (see Britton 138ff): "Any signature with such added words is an indorsement, and if it is made by a holder is effective for negotiation; but the liability of the indorser may be affected by the words of guarantee ...". (See Cosway "Negotiable Instruments - A Comparison of Washington Law and Uniform Commercial Code Article 3" (1963) 38 *Washington Law Review* 719 at 741).

The few South African cases that concerned related problems appear to be according to the suggested provision. See *Blou v Georgiades* 1959 1 SA 219 (T) and *Van Rooyen v Nussbaum* (1909) 19 CTR 663. Clause 18(3) does not purport to impose liability as indorser on a person so qualifying his indorsement; it merely brings about his indorsement as such so that a negotiation of the instrument can be effected by it. The liability of the person indorsing is conditioned or limited by the words added to his signature.

19 Payee or indorsee misdescribed

Where an instrument is payable to a person under a misspelt name or a name other than his own, he may indorse the instrument in that name or in his own name or both, but an indorsement in both names may be required by a person paying or taking the instrument.

Comparative legislation

Sec 30(5) SABEA
Sec 32(4) BEA
Sec 3-203 UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

30. *Manner of indorsing.*

(1) An indorsement, in order to effect a negotiation of a bill, must be written on the bill itself, be signed by the indorser, and be an indorsement of the entire bill: Provided that an indorsement written on the allonge of a bill or on a copy of a bill issued or negotiated in a country where copies are recognised, shall be deemed to be written on the bill itself.
(2) The simple signature of the indorser on the bill without additional words is sufficient to constitute an indorsement.
(3) A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not effect a negotiation of the bill.
(4) If a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse in order to effect a negotiation of the bill, unless the one indorsing has authority to indorse for the others.
(5) If in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he must, in order to effect a negotiation of the bill, indorse the bill as he is therein described, adding his proper signature.

Commentary

Section 32(4) BEA, unlike its South African counterpart, is more flexible and replaces "must" with "may" and allows the indorser to choose, "if he thinks fit", to add his proper signature. Section 3-203 UCC is perhaps the most comprehensive and provides: "Where an instrument is made payable to a person under a misspelled name or one other than his own he may indorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument."

Section 30(5) SABEA is not clear: Why should a person, in the case provided for, indorse in both his true name and in the incorrect name to effect a negotiation? Determining whether an instrument is complete and regular for purposes of holding in due course is a different matter (see section 27(1) SABEA). But where the question is simply whether a person is holder, the form of the indorsement through which he acquired is hardly relevant, provided it is indeed the indorsement of the payee or indorsee. See *Bird & Co (London) Ltd v Thomas Cook & Son Ltd and Thomas Cook & Son (Bankers) Ltd* 1937 2 All ER 227 (KB) 231 and compare *Arab Bank Ltd v Ross* 1952 1 All ER 709 (CA) 715 where Denning LJ said:

> "Thus, by a misnomer, a payee may be described on the face of the bill by the wrong name. nevertheless, if it is quite plain that the drawer intended him as payee, then an indorsement on the back by the payee in his own true name is valid and sufficient to pass the property in the bill."

Section 30(5), if strictly applied, could lead to injustice and unnecessary technicalities (see Malan 88-9), and it is therefore proposed that section 3-203 UCC be adopted. See, further, Matzukis "Indorsement by a Wrongly Designated Payee or Indorsee" 1987 *THRHR* 324.

20 Order of indorsements

Where there are two or more indorsements on an instrument, each indorsement is presumed, until the contrary is proved, to have been made in the order in which it appears on the instrument.

Comparative legislation

Sec 30(6) SABEA

Art 20 Uncitral Convention
Sec 32(5) BEA
Sec 3-414(2) UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

30. *Manner of indorsing.*

...

(6) If there are two or more indorsements on a bill, each indorsement is deemed, until the contrary is proved, to have been made in the order in which it appears on the bill.

Commentary

Clause 20 follows section 30(6) SABEA and requires no further comment.

21 Partial indorsement

An indorsement which purports to transfer a part only of the amount payable by the instrument, or which purports to transfer the instrument to two or more indorsees severally, does not effect a negotiation of the instrument.

Comparative legislation

Sec 30(1) and (4) SABEA
Sec 32(3) BEA
Sec 3-202(3) UCC
Art 12 GULB

The relevant provisions in the Bills of Exchange Act 1964 are:

30. *Manner of indorsing.*

(1) An indorsement, in order to effect a negotiation of a bill, must be written on the bill itself, be signed by the indorser, and be an indorsement of the entire bill: Provided that an indorsement written on the allonge of a bill or on a copy of a bill issued or negotiated in a country where copies are recognised, shall be deemed to be written on the bill itself.

...

(4) If a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse in order to effect a negotiation of the bill, unless the one indorsing has authority to indorse for the others.

Commentary

Clause 21 follows section 30(1) and (3) SABEA and requires no further comment.

22 Indorsement in blank

(1) An indorsement in blank specifies no indorsee, and an instrument so indorsed becomes payable to bearer.
(2) Where an instrument payable to order has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the instrument to himself or his order or to some other person or to the order of the latter.

Comparative legislation

Sec 31 SABEA
Sec 34 BEA
Sec 3-204 UCC
Art 13 and 14 GULB
Art 15 and 16 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

31. *Indorsement in blank and special indorsement.*

(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.
(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.
(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.
(4) If a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to himself or his order or to some other person or the order of the latter.

Commentary

Clause 22 follows section 31(1) and (4) SABEA and requires no further comment.

23 Special indorsement

(1) A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable.
(2) The provisions of this Act relating to the payee apply with the necessary modifications to an indorsee under a special indorsement.

Comparative legislation

Sec 31 SABEA
Sec 34 BEA
Sec 3-204 UCC
Art 13 and 14 GULB
Art 14(2)(b) Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

31. *Indorsement in blank and special indorsement.*

(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.
(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.
(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.
(4) If a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to himself or his order or to some other person or the order of the latter.

Commentary

Clause 23 follows section 31(2) and (3) SABEA and requires no further comment.

24 Conditional indorsement

Where an instrument is indorsed conditionally --
(a) the indorsement effects a negotiation of the instrument whether or not the condition is fulfilled; and
(b) the person who pays the instrument does not have notice of a claim to or a defence upon the instrument merely by reason of the fact that the instrument is indorsed conditionally.

Comparative legislation

Sec 33 BEA
Sec 33 SABEA
Sec 39 NIL
Sec 3-202 (4), 3-205 and 3-206 UCC
Art 12 GULB
Sec 45 Cheques and Payment Orders Act 1986
Art 18 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

33. *Conditional indorsement.*

If 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.

Commentary

1 Section 33 SABEA provides that if 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 is fulfilled. This section is based on section 33 BEA, which amended the common-law position whereby the conditional indorsee's right against the conditional indorser was qualified and the payer deprived of the right to discharge the instrument unless the condition had been fulfilled (Britton 152, Byles 104).

Thus, at common law, when the payee indorsed a bill conditionally before acceptance and the drawee afterwards accepted it, the drawee was bound by the condition; if it was not performed the property in the bill "reverted" to the payee who could recover from the acceptor (*Robertson v Kensington and others* (1811) 4 Taunt 30 (128 ER 238).) It follows that had the acceptor paid the indorsee, he could have been compelled to pay the instrument again to the payee (Byles 104). Between indorser and indorsee, however, the condition was binding (Falconbridge 649).

2 The rule contained in section 33 is inadequate in three respects (see Labuschagne *Die Wisselendossement in die Suid-Afrikaanse Wisselreg* (1986) 149-61):

2.1 It does not state explicitly that a conditional indorsement effects a negotiation of the instrument whether or not the condition is fulfilled. At best it implies that the conditional indorsee becomes a holder of the instrument.

2.2 Section 33 provides that the payer may disregard the condition. This raises the question whether the instrument is discharged by payment despite non-fulfillment of the condition. Does the statement that payment is "valid" imply that the instrument is discharged or does the condition give notice of a defect in the title of the indorsee to the payer?

2.3 If it is accepted that a negotiation comes about whether or not the condition is fulfilled the question arises: Does the person acquiring the instrument become a holder in due course? In other words, does the mere fact that the instrument is indorsed conditionally attribute to the holder notice of a defect in title?

3 Each legal system provides a different answer.

3.1 Article 12 GULB stipulates that an indorsement must be unconditional. Any purported condition is deemed not to have been written. This provision could be highly prejudicial to an indorser ignorant of the consequences of conditional indorsement (Zöllner 90).

3.2 Article 18(2) of the Uncitral Convention provides that a conditional indorsement transfers the instrument whether or not the condition is fulfilled. Thus, the indorsee becomes a holder.

3.3 Section 3-202(4) UCC provides, inter alia, that words of condition accompanying an indorsement do not affect its character as an indorsement (see also section 3-206(1)). The Official Code Comment (6), however, states that although the signature is an indorsement, the qualifying words may affect the liability of the indorser. Section 3-206(3) provides that any transferee under a conditional indorsement (except an "intermediary bank") must pay or apply any value given by him for or under security of the instrument consistently with the indorsement and that to that extent he becomes a holder for value and can be a holder in due course provided the other requirements of holding in due course are met. This section differs

from section 39 NIL, in terms of which any person to which an instrument is negotiated by a conditional indorsement holds the instrument or its proceeds "subject to the rights of the person indorsing conditionally" (see Weaver and Craigie 309-10).

3.4 Section 45 of the Cheques and Payment Orders Act 1986 provides: (a) that a conditional indorsement is effective as an indorsement whether or not the condition is fulfilled; (b) that the payer may disregard the condition and (c) that the fact that the indorsement is conditional "shall be disregarded for the purpose of determining whether the holder is a holder in due course". The *Explanatory Paper* states in paragraph 224 that "[a] holder of a conditionally indorsed cheque may ... become a holder in due course notwithstanding that the condition is unfulfilled and despite the fact that he did not enquire as to whether it had been fulfilled". This implies that a holder in due course takes the instrument free from the defence that the condition had not been fulfilled.

4 Clause 24 is proposed to ensure that (a) a negotiation is effected by a conditional indorsement whether or not the condition is fulfilled and that (b) the mere fact that an instrument is indorsed conditionally does not attribute notice of a claim to or a defence upon the instrument to the payer or taker. Between immediate parties and as against a remote party who is not a holder in due course, non-fulfillment of the condition can be raised as a claim or defence, but not against a party who pays the instrument in good faith or takes it in due course.

25 Indorsement for collection

(1) An indorsement for collection expresses an authority to collect payment of the instrument by words as, for example, "for deposit"; "for collection"; "value in collection; "pay any bank".
(2) The indorsee under an indorsement for collection
  (a) may exercise all the rights arising out of the instrument;
  (b) is subject to all claims and defences which are available against his indorser;
  (c) may negotiate the instrument for collection only.
(3) The indorser who indorses an instrument for collection is not liable on the instrument to a subsequent holder.

26 Restrictive indorsement

(1) Where the drawer or the maker has inserted in the instrument, or an indorser in his indorsement, words prohibiting negotiation, or indicating an intention that the instrument should not be negotiable as, for example, "not negotiable", "not transferable" or "pay [X] only", the instrument may be negotiated for collection only.
(2) The person to whom an instrument is negotiated for collection
(a) may exercise all the rights arising out of the instrument;
(b) is subject to all claims and defences which are available against the person who negotiated the instrument to him;
(c) may negotiate the instrument for collection only.

Comparative legislation

Sec 35 BEA
Sec 32 SABEA
Sec 36, 37, 38 NIL
Sec 3-205, 3-206 UCC
Art 11, 15, 18 GULB
Art 21 and 22 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

32. *Restrictive indorsement.*

(1) An indorsement is restrictive if it prohibits the further negotiation of the bill, or if it 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 is 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) If 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.

Commentary

1 The holder of an instrument is not necessarily its owner, nor is he entitled to the personal rights embodied in it. He may also be a mandatary of the owner authorised merely to collect payment. In this case, the principal remains owner of the instrument and entitled to the personal rights in respect of it. Usually, when an instrument is negotiated by indorsement or otherwise the parties agree to transfer ownership in the bill to the transferee. However, they may also agree that the transferee be appointed the mandatary of the transferor authorised by him to collect payment. The indorsement in such a case need not be expressly for collection. It may also take the form of a blank or special indorsement, ie an indorsement in the same form as an indorsement transferring ownership. But because the parties do not intend ownership in the instrument to pass to the transferee, the indorser remains owner of and creditor in respect of the instrument. The relationship between the indorser and his mandatary is governed primarily by the mandate given the latter to collect payment, and on the instrument the indorser incurs no liability to his indorsee. Because an indorsement coupled with a mandate for collection also brings about a negotiation of the instrument, the indorsee is constituted a holder, even if he is not the owner of it or the creditor entitled to the rights of the indorser. As holder, the indorsee is entitled to exercise the powers given by the Act to a holder. In European legal systems an indorsement not expressly for collection is known as a "secret" indorsement because the authority or mandate to collect is not expressed in the indorsement (Ronse 1 203ff; Scheltema-Meijer 109-10). See generally Malan et al *Provisional Sentence* 157ff on which the commentary to these clauses is based.

2 It is also possible to indorse an instrument expressly for collection to give expression to the relationship of mandate between the indorser and his indorsee. An example of such an indorsement at common law is: "Voor mij betaal aan NN" (Pothier 1 2 7; 1 3 9, 12; Le Long xxxi parère; Lochau 1.9) and see *Bhanabhai and Co (HK) Ltd v Wearwell Clothing co (Pty) Ltd* 1986 4 SA 350 (D). At common law, an indorsee under such indorsement was obliged to present the bill for acceptance and payment and to pay over to his indorser, the owner of the instrument, the amount collected. He also had to have the bill protested for non-acceptance and non-payment and do everything necessary to enforce his principal's bill. The indorser indemnified him against all expenses incurred in the execution of the mandate, but incurred no liability to him as indorser (see Pothier 1 4 33; Heineccius 2 10).

3 Article 18 GULB provides specifically for an indorsement for collection:

> "When an indorsement contains the statements 'value in collection' ('valeur en recouvrement'), 'for collection' ('pour encaissement'), 'by procuration' ('par procuration') or any other phrase implying a simple mandate, the holder may exercise all rights arising out of the bill of exchange, but he can only endorse it in his capacity as agent.
> "In this case, the parties liable can only set up against the holder defences which could be set up against the indorser.
> "The mandate contained in an endorsement by procuration does not terminate by reason of the death of the party giving the mandate or by reason of his becoming legally incapable."

4 Article 21 of the Uncitral Convention follows much the same pattern:

> "(1) When an indorsement contains the words 'for collection', 'for deposit', 'value in collection', 'by procuration', 'pay any bank', or words of similar import, authorising the endorsee to collect the instrument (endorsement for collection), the endorsee:
> (a) May only endorse the instrument for purposes of collection;
> (b) May exercise all the rights arising out of the instrument;
> (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 instrument to any subsequent holder."

5 Section 32 SABEA, in line with section 35 BEA, classifies an indorsement for collection as a restrictive indorsement. The Act recognises two forms of restrictive indorsement. An indorsement is restrictive, first, if it prohibits further negotiation of the bill, and secondly, if it indicates that it is merely an authority to deal with the bill as expressed in the indorsement and not a transfer of the ownership in it. An example of the first is "pay D only", and of the second "pay D for the account of X" and "pay D or order for collection".

6 Indorsements prohibiting further negotiation are very rare. Indeed, in *Edie and another v East-India Company* (1761) 2 Burr 1216 (97 ER 797) at 1224 Denison J said: "I never heard of an indorsement to A only." The view of one of the witnesses is summarised (at 1221): "Indeed if the bill should be indorsed 'pay the contents to AB only', it was looked upon, he said, to be a restriction of the payment to AB personally."

Where the word "only" is omitted in an indorsement, no restriction on negotiability is created. The word "only" was at one time seen by Chalmers (1909) as effecting no more than an indorsement without recourse. In *Power v Finnie* (1797) 4 Call Va 411 (cited by Britton 153), on the other hand, the court said that the word

"only" could have been used for no other purpose than to make the indorsee an agent, although it admitted that such an indorsee could also acquire property in the instrument. Before codification there appears to have been considerable uncertainty about the effect of these indorsements (see Britton 154).

In our law a restrictive indorsee under an indorsement prohibiting negotiation can be owner of the instrument and creditor in respect of the rights evidenced by the instrument. However, he cannot negotiate the instrument further. The mere omission of words of negotiability in the indorsement does not make it restrictive in this sense (section 31(3) and section 6; Jacobs 122). This form of indorsement is used

> "[w]here the indorser desires to transfer the ownership in the bill to the indorsee himself, but to prevent the indorsee from negotiating it, ie to prevent him transferring the bill so as to constitute his transferee the 'holder' ..." (Jacobs 122, Riley 101).

7.1 Restrictive indorsements and words restricting negotiability are treated differently in the different legal systems. Article 11 GULB provides:

> "Every bill of exchange, even if not expressly drawn to order, may be transferred by means of endorsement. When the drawer has inserted in a bill of exchange the words 'not to order' or an equivalent expression, the instrument can only be transferred according to the form, and with the effects, of an ordinary assignment."

Article 15 GULB provides:

> "In the absence of any contrary stipulation, the endorser guarantees acceptance and payment. He may prohibit any further endorsement; in this case, he gives no guarantee to the persons to whom the bill is subsequently endorsed".

A prohibition on further negotiation does not convert the bill into a non-transferable instrument. The instrument remains negotiable, and all the indorsements, except the restrictive indorsement itself, have the usual functions. The restrictive indorser incurs liability only to his immediate indorsee. However, where the *drawer* inserts in the bill a clause prohibiting negotiation it may not be negotiated by the payee. (See Zöllner 93; Hueck-Canaris 91ff; Roblot 235.)

7.2 The Uncitral Convention attaches the same consequences to an indorsement prohibiting negotiation as it does to a clause to that effect inserted by the drawer or maker. Article 16 provides:

> "When the drawer or maker has inserted in the instrument, or an indorser in his endorsement, 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".

This approach is preferred to that of the GULB. Chafee "Remarks on Restrictive Indorsements" (1945) 58 *Harvard Law Review* 1182 at 1212 makes the valid point "[t]hat restrictive words on the back of an instrument should not have a greater effect than the same words on its face" (see also at 1217ff). The commentary (2) to article 16 states:

> "The purpose of such insertion is to ensure that payment of the instrument may only be claimed by the payee or the endorsee or the agent for collection, as the case may be. This insertion does not affect the character of the instrument as a bill or note but the indorsee does not become a holder except for purposes of collection. He may not further transfer the instrument, not even for purposes of collection; he would have this power only if the endorsement to him would have been made expressly for purposes of collection (see art 20)."

7.3 The provisions of the UCC are much more complex. Section 3-205 lumps together all kinds of indorsement under the description restrictive indorsement. An indorsement is restrictive which is either

> "(a) conditional; or (b) purports to prohibit further transfer of the instrument or (c) includes the words 'for collection', 'for deposit', 'pay any bank', or like terms signifying a purpose of deposit or collection; or (d) otherwise states that it is for the benefit or use of the indorser or of another person".

The purpose of the provisions in the UCC dealing with restrictive indorsements is "generally to require a taker or payor under restrictive indorsement to apply or pay value given consistently with the indorsement, but to provide certain exceptions applying to banks in collection process (other than depositary banks), and to some other takers and payors" (Comment (2) to sec 3-205 UCC). Cosway "Negotiable Instruments - A Comparison of Washington Law and Uniform Commercial Code Article 3" (1963) 38 *Washington Law Review* 501, 719; (1965) 40 281; (1968) 43 499; in (1965) 40 281 at 283 states:

> "The primary concern of the Code is to insure that in the most frequent pattern involving restrictive indorsements, bank collection of instruments, the restrictive indorser may expect his bank to protect his interests. He may not, however, expect other banks to look out for him, for

> they may ignore the restrictive indorsement, and are bound only by actual knowledge of some breach of duty."

Section 3-206 UCC provides:

> "(1) No restrictive indorsement prevents further transfer or negotiation of the instrument.
> "(2) An intermediary bank, or a payor bank which is not the depositary bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment.
> "(3) Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words 'for collection', 'for deposit', 'pay any bank', or like terms (subparagraphs (a) and (c) of Section 3-205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course.
> "(4) The first taker under an indorsement for the benefit of the indorser or another person (subparagraph (d) of Section 3-205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such taker is a holder in due course if he otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsement unless he has knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty (subsection (2) of Section 3-304)."

Several aspects of this section require further comment: First, a restrictive indorsement prohibiting negotiation is ineffective as such, and does not prohibit further negotiation. The instrument can be further negotiated. In this respect the UCC resembles article 15 GULB. Article 21 of the Uncitral Convention also allows further negotiation, but only for purposes of collection. The provisions of the UCC in this regard are justified in the following way (Comment (2) to section 3-206 UCC):

> "Such indorsements have rarely appeared in reported American cases. Ordinarily further negotiation will be contemplated by the indorser, if only for bank collection. The indorsee becomes a holder, and the indorsement does not of itself give notice to subsequent parties of any defense or claim of the indorser. Hence this section gives such an indorsement the same effect as an unrestricted indorsement."

Secondly, section 3-206(2) UCC provides that an intermediary bank or a payor bank (not being the depositary bank) is not given notice nor is it affected by a restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment. These banks, ie banks that are not the direct indorsees under the restrictive indorsement, are entitled to disregard the restrictions in such

indorsements. "Such banks ordinarily handle instruments, especially checks, in bulk and have no practicable opportunity to consider the effect of restrictive indorsements" (Comment (3) to section 3-206 UCC).

Thirdly, with regard to conditional (section 3-205(a) UCC) and "agency" or collection indorsements (section 3-205(c)), a duty is placed on any transferee to pay or apply any value given by him consistently with the indorsement. To the extent that he does so he may be a holder in due course. A bank must always act consistently with an indorsement by its immediate transferor and to the extent that it does so, it becomes a holder for value (Hart and Willier paragraph 3A.08). (However, an intermediary bank may disregard the restriction; section 4-205 (2) UCC, and does not have to be given notice of claims or defences due to the indorsement (Hart and Willier paragraph 3A.08).)

Fourthly, where the indorsement is a "trust" indorsement (section 3-205 (d) UCC), the first taker must pay or apply any value given by him consistently with the indorsement and to that extent he becomes a holder for value (section 3-206 (4)). A subsequent holder is not given notice nor is he otherwise affected by the "trust" indorsement unless he has knowledge that a fiduciary or other person has negotiated the instrument for his own benefit or in breach of duty (section 3-206 (4)).

Fifthly, the restrictive indorser incurs liabilities on the instrument identical to those of an ordinary indorser (section 3-414) and, in addition, becomes liable under section 3-419, which imposes warranties on a transferor (Hart and Willier paragraph 3A.04).

8 Many differences exist between the treatment of a restrictive indorsee in the UCC, GULB and the Uncitral Convention. Under Article 18 GULB the indorsee for collection can indorse the instrument further only in his capacity as agent, in which event defences available against the indorser can be set up against the holder. Article 21 of the Uncitral Convention specifically authorises the indorsee for collection further to indorse the instrument for collection. He may also exercise all the rights of his indorser on the instrument, and is subject to claims available against the latter. The indorser for collection is not liable to further parties. The UCC expressly allows the restrictive indorsee to be a holder in due course but places on him certain duties for the benefit of the restrictive indorser.

The GULB and the Uncitral Convention therefore maintain that an indorsement for collection is not suited for financing. As Chafee (1945) 58 *Harvard Law Review* 1182 1239 says:

> "[I]nasmuch as the transportation ['collection'] indorsement is somewhat unsuited to financing, the law might regard it as wholly outside the policy of free circulation. The rule takes the position that, in view of the complications arising from express notice of the depositor's rights, we had better classify an indorsement containing such a notice as no indorsement at all. Put these instruments out of the running like overdue paper. Make it plain to banks, which are requested to make advances on paper of this sort, that they will be taking long chances if they consent. Avoid twilight zones. Equities should either be wholly cut off or not cut off at all. If the bank has enough confidence in the depositor's individual credit to let him have the desired money, well and good, but the bank ought to be told flatly that this is all it can count on. The bank ought to be aware that it stands in the borrower's shoes, just as when it takes a pledge of a chattel which turns out not to belong to the pledgor. The view has the merit of simplicity."

It will be submitted that our Act is also based on this view. The UCC, on the other hand, is clearly based on the approach that "[s]o long as there is no wrong to the depositor, banks which pay value in good faith will receive the usual protection of holders in due course" (Chafee 1240).

9 As has been said, our Act refers to two forms of restrictive indorsement. An indorsement is restrictive, first, if it prohibits further negotiation of the instrument, and secondly, if it expresses that it is a mere authority to deal with the bill as so directed and does not involve a transfer of the ownership (section 32(1) SABEA).

An indorsement prohibiting transfer may involve a transfer of ownership in the instrument to the indorsee, but an indorsement for collection merely gives the indorsee (section 32(2))

> "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".

It should be noted that section 32(2) SABEA, by its terms, applies not only to an indorsement for collection, but also to an indorsement prohibiting further negotiation. If the restrictive indorsement permits further negotiation, all subsequent transferees take the instrument with the same rights and subject to the same liabilities as does the first indorsee under the restrictive indorsement (section 32(3) SABEA).

Several aspects of section 32 SABEA need elaboration:

First, section 32 fails to differentiate between two kinds of indorsement. One prohibits further negotiation, the other expresses a mandate. Chafee (1945) 58 *Harvard Law Review* 1182 1198, referring primarily to the provisions of the NIL, which include a reference to a "trust" indorsement, said "[t]he worst cause of trouble is that the existing law, including the Negotiable Instruments Law, treats all restrictive indorsements as a unit and assumes that they should all have the same legal effect". The restrictive indorsement prohibiting further negotiation may involve a transfer of ownership; an indorsement for collection merely constitutes the indorsee a holder, so enabling him to exercise all the powers of a holder. The two kinds of indorsement should be separated. It is recommended that the Uncitral Convention be followed in this respect.

Secondly, the terms of section 32(2) SABEA also apply to an indorsee under a restrictive indorsement prohibiting further negotiation. However, there seems to be no reason why the rights of such an indorsee should be limited to the right to receive payment and the right to sue any party his indorser could have sued. Such an indorsee can be owner of the instrument and a holder in due course. He does not just exercise the rights of his indorser; he acquires them. Furthermore, there is no reason why his indorser should not incur liability to him on the instrument. An indorser for collection does not incur liability on the instrument to his mandatary. Not all restrictive indorsements are, however, "for collection". The conclusion seems inescapable that section 32(2) was intended to deal with restrictive indorsements of the second kind, viz those for collection, and not with all restrictive indorsements. The imprecise words "the right ... to sue any party thereto that his indorser could have sued" are ambiguous and suggest that the restrictive indorsee is a mere mandatary authorised to collect and is not the owner. This provision clearly applies only to indorsees for collection.

Thirdly, restrictive indorsements prohibiting further negotiation, although rare, could impede the collection and payment of instruments. The payor would have to show that payment was made, if not to the indorsee personally, to someone authorised by him. A purported indorsement by the restrictive indorsee could, of course, be evidence of such authority but need not be. To facilitate the payment and collection of instruments bearing endorsements restricting further negotiation, it is proposed that the indorsee under such indorsement be given the right to indorse further, but only for collection. The transferee thus becomes a holder, but because he is a mere mandatary of the indorser, he cannot be a holder in due course and can exercise the rights of his indorser only.

Fourthly, it is clear that an indorsement for collection brings about negotiation of the instrument so that the indorsee becomes holder of the instrument. Payment to him can effect a discharge of the instrument, provided all the requirements of payment in due course are met. In particular, it must be pointed out that the words of the indorsement that indicate that it is made for collection do not give notice of a defect in the holder's title.

Fifthly, the Act is silent on the question whether the restrictive indorser incurs liability on the instrument to the indorsee and any subsequent parties. Section 53(2) SABEA does not exempt the restrictive indorser from its provisions. However, section 32(2) SABEA empowers the indorsee to sue any party his indorser could have sued without having to reveal that the indorser is liable to him. It has already been pointed out that the application of these provisions to an indorsement prohibiting further negotiation could have inequitable consequences. Clearly, they should apply only to indorsements for collection. Further, the question arises: does the Act deal with the liability of the restrictive indorser (for collection) to subsequent parties? Is he liable at all?

Sixthly, section 32(3) SABEA makes it clear that where a restrictive indorsement authorises further negotiation "all subsequent indorsees take the bill with the same rights, and subject to the same liabilities, as the first indorsee under the restrictive indorsement". In *Murrow v Stuart* (1853) 8 Moore 267 273 (14 ER 102) the same idea was expressed: "Unquestionably by this mode of indorsement you do, in commercial sense, put a check to the negotiability of the instrument, inasmuch as it ceases to represent any property in the holder, and consequently is not transferable in the usual and ordinary course of mercantile transactions." (See *Ancher and others v Bank of England* (1781) 2 Dougl 637 639-40 (99 ER 404); *Snee and Baxter v Prescot Dawson Julian & Le Blom Elder & Younger & Tollet* (1743) 1 Atk 245 249 (26 ER 157).) Thus, the indorsee under an indorsement for collection and all subsequent indorsees do not acquire any of the rights of the indorser; they merely enforce them qua holders.

Seventhly, section 32(3) SABEA contains a curious phrase: subsequent indorsees take the instrument "subject to the same *liabilities*" as the first indorsee under the restrictive indorsement. The relationship between the indorser and the indorsee for collection is governed by a mandate. In terms of this mandate the indorsee has certain duties to his principal, for instance, to account to him. Where the restrictive indorsee further endorses, the new indorsee will be contractually bound to his indorser but not to the first restrictive indorser, viz the principal (De Villiers and

MacIntosh *The Law of Agency* (1981) 313-4; *Turkstra v Kaplan* 1953 2 SA 300 (T) 302). Generally, there is no contractual nexus between a subagent and the principal. However, section 32(3), it seems, places the duties of the first restrictive indorsee on the second indorsee. Falconbridge (1969) 651 explains:

> "The object of a restrictive indorsement is to prevent the money received in respect of the bill from being applied to the use of any person other than the person specified; to whomsoever the money may be paid, it will be paid in trust for such person, and into whose hands whatsoever the bill travels, it carries that trust on the face of it."

(See also *Lloyd and others v Sigourney* (1829) 5 Bing 525 531-2 (130 ER 1164) (in which, at 531, it was, said that no inconvenience to commerce would result: "[T]he only result will be, to make parties open their eyes and read before they discount"); *Treuttel and Wurtz v Barandon & another* (1817) Taunt 100 103 (129 ER 320).) The idea of an indorsement creating a trust imposing liabilities on the indorsee is well expressed in *Murrow v Stuart* (1853) 8 Moore 267 271 (14 ER 102):

> "[B]etween the restraining indorser, and a subsequent indorsee, they are a notification that the restricted indorsee has no property in the bill, that he is a mere agent or trustee for his principal; and that he can appoint no sub-agent, except for the purpose of holding the bill, or the money, upon a similar trust. The subsequent indorsee, therefore, being himself also a mere agent, can have no action on the bill, if it is dishonoured, nor hold it, or the money received upon it, against the principal; and if, instead of paying the money to the principal, he chooses to pay it to the immediate agent, he becomes responsible for its misapplication."

It seems that the provision that the liabilities of the restrictive indorsee are transferred to a subsequent indorsee was inspired by the notion that a trust in favour of the restrictive indorser is created. Such a provision is difficult to justify in our law, which holds a subsequent indorsee for collection contractually liable to account to his own indorser on whose authority he relies.

Finally, it is sometimes difficult to determine whether the restrictive words in an indorsement indicate a mandate to collect. Section 32(1) gives two examples: "Pay D for the account of X" and "Pay D or order for collection".

Chalmers & Guest at 315ff cites further examples:

> "Pay D or order for the use of X" *(Evans v Cramlington* (1687) 2 Show KB 509 (89 ER 1070) (Ex Ch))
> "Pay the money to my use" *(Snee v Prescott* (1743) 1 Atk 245 (26 ER 157))

"Pay the contents to my servant for my use" *(Edie v East India Co* (1761) 2 Burr 1216 (97 ER 797))
"The within must be credited to D, value in account" *(Ancher v Bank of England* (1781) 2 Dougl 637 (99 ER 404))
"Pay the contents to my use"/"Pay the contents to the use of X"/"Carry this bill to the credit of X" *(Rice v Stearns* (1807) 3 Mass R 226)
"Pay D or order for our use, value received in account" *(Wilson v Holmes* (1809) 5 Mass R 543)
"Pay D or order for the account of X" *(Treuttel v Barandon* (1817) 8 Taunt 100 (129 ER 320))
"Pay D or order for my use" *(Sigourney v Lloyd* (1828) 8 B & C 622 (108 ER 1174); 5 Bing 525 (130 ER 1164))
"Pay to the order of D & Co under provision of my note in favour of X" *(Wedlake v Hurley* (1830) Lloyd & Welsby 330, 1 C & J 83 (148 ER 1344))
"Pay to D Bank, value on collection" *(Yeoman Credit Ltd v Gregory* 1963 1 WLR 343, 1963 1 All ER 245, 1967 2 Lloyd's Rep 302)."

Other examples of indorsements used in the collection process are:

"Pay any bank, banker or trust company"; "Voor ons aan de order van ..."; "For deposit"; "Value for collection".

The precise effect of all these expressions is not certain. An indorsement to pay any bank, banker or trust company is not referred to in our Act or in the BEA, and the practice of crossing cheques in the UK and South Africa probably accounts for the relative scarcity of this kind of indorsement (see Chafee 1211, 1207ff). The purpose of this kind of indorsement is to simplify the collection process by enabling banks to indorse items to be collected with one stamp (see Britton 162). The first question is whether an indorsement to pay any bank is valid. Section 31(3) SABEA provides that the provisions of the Act relating to the payee apply mutatis mutandis to an indorsee under a special indorsement. Section 5(1) requires the payee, in the case of a bill not payable to bearer, to be named or otherwise indicated on it with reasonable certainty. As there is no reason to assume that such an indorsement makes the instrument payable to bearer (but see Britton 163 on the NIL), the question is whether the indorsee is indicated with sufficient certainty. It is true that he is not named, only a class being indicated. This seems, it is submitted, to be an indication with reasonable

certainty (Britton 162), so that any bank would be indorsee. But if the indorsement is valid, the question arises: Is it restrictive, viz does it express that it is a mere authority to deal with the instrument as thereby directed (section 32(1) SABEA)? Britton 162, writing on the provisions of the NIL, denies that these words indicate an agency:

> "These words in no way indicate that the bank to which an item is forwarded is taking the same as an agent for the indorser. An indorsement, to be restrictive, in the language of section 36(2) [NIL] must, 'constitute the indorsee the agent of the indorser'. That is, the indorsement itself must establish the relation between the parties."

But this argument is not conclusive. Chafee (1945) 58 *Harvard Law Review* 1182 1228 argues:

> "If these words are habitually used when the instrument is passing through the collection mechanism, and are rarely used when it has been discounted and rediscounted by the first bank, then a businessman would understand that 'Pay any bank or banker' is almost surely a transportation indorsement. Although it does not expressly state the agency of the floating indorsee, a businessman ought to know from the words that the agency is there just the same ...".

There are no reported cases in South Africa on the effect of such an indorsement, but it is submitted that it expresses an agency to collect and should be specifically regulated. The effect of an indorsement "for deposit" was equally uncertain under the NIL. Britton 161 submits that it does not indicate an agency. However, it seems reasonably clear that, in terms of our section 32(1), a restrictive indorsement is constituted.

10 The proposed clauses 25 and 26 reflect the following considerations: first, that an indorsement for collection be separated from indorsements prohibiting further negotiation; secondly that the meaning of words prohibiting further negotiation both in the instrument and in an indorsement be restricted so that a negotiation for collection can be effected, and thirdly; that the powers of a holder for collection be specifically set out.

11 The Clearing Bankers Association requested that this clause be amended to refer only to "restrictive words" inserted by the drawer or maker in the instrument and not to such words included in an indorsement. No particular reason is given and the

proposed amendment can as a result not be accepted. Furthermore, the suggested amendment does not indicate what effect should be given to words prohibiting negotiation that are inserted in an indorsement. The recommendation of the Association would leave a serious gap in the proposed legislation.

27 Re-acquisition of instrument

(1) Where an instrument is returned to or re-acquired by a prior party, he may re-issue or further negotiate the instrument and strike out his own or any subsequent indorsement, but is not entitled to enforce payment against any intervening party to whom he was previously liable.
(2) An instrument may be negotiated when it is overdue except by the drawee, the acceptor and the maker.

Comparative legislation

Art 23 and 24 Uncitral Convention
Sec 3-208 UCC
Sec 48, 50 and 121 NIL
Sec 37 BEA
Sec 35, 57, 59 and 61 SABEA

The relevant provisions in the Bills of Exchange Act 1964 are:

35. *Negotiation of bill to party already liable thereon.*

If a bill is negotiated back to the drawer, a prior indorser or the acceptor, such drawer, indorser or acceptor may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.
57. *Discharge by payment in due course.*
(1) A bill is discharged by payment in due course or is discharged proportionally by payment of part of the amount for which the bill is drawn, noted by indorsement on the bill, if such payment be made by or on behalf of the drawee or acceptor.
(2) Subject to the provisions of sub-sections (3), (4) and (5), a bill is not discharged if it is paid by the drawer or an indorser.
(3) If a bill payable to a third party or the order of the latter, is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re issue the bill.
(4) If a bill is paid by an indorser, or if a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor and antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.
(5) If an accommodation bill is paid in due course by the party accommodated, the bill is discharged.

> 59. *Discharge by acceptor becoming holder.*
> If the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.
> 61. *Discharge by cancellation of bill, and discharge of party by cancellation of his signature.*
> (1) If a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.
> (2) (a) Any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent.
> (b) If a signature is so cancelled any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged.
> (3) A cancellation made unintentionally or under a mistake or without the authority of the holder, is inoperative: Provided that if a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who allege that the cancellation was made unintentionally or under a mistake or without authority.

Commentary

1 Section 35 SABEA provides that when a bill is negotiated back to the drawer, a prior indorser or the acceptor, he may, subject to the provisions of the Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of it against any intervening party to whom he was previously liable.
Other relevant provisions are:

Section 57(3) SABEA allows the drawer of a bill payable to the order of a third party who has paid it, to enforce payment against the acceptor, but prohibits him from reissuing it. Section 57(4), on the other hand, restores to an indorser or the drawer of a bill payable to his own order who has paid it, his former rights as regards the acceptor and antecedent parties, allowing him to strike out his and prior indorsements and to negotiate the instrument again. Section 57(4) provides that an accommodation bill will be discharged if it is paid by the party accommodated. Section 59 states that if the acceptor is or becomes holder of the bill in his own right, the bill will be discharged. Section 61 governs the cancellation of bills and the signatures of the parties.

2 The rationale of section 35 is the prevention of a circuity of actions. In *Wilkinson & Co v Unwin* 1881 7 QBD 636 at 637 it was said:

> "It has been established that if the indorser of a bill of exchange subsequently becomes the indorsee, he can maintain no action against the intermediate indorsers, because he would himself be liable to them by reason of his antecedent indorsement. But there are several other cases which have decided that, if the holder of the bill would not be liable to the indorser whom he is suing by reason of any previous indorsement of his own, he may enforce his claim because no

> circuity of action arises; the holder of the bill may always show such circumstances as do away with any liability by reason of his previous indorsement."

See also at 639 and *Bishop v Hayward* (1791) 4 TR 470 at 471 (100 ER 1124); *Wilders and others v Stevens* (1846) 15 M & W 208 (153 ER 824) and Chalmers & Guest 326.

It is clear that there may be circumstances in which the holder will not be liable against an intervening party, for instance, where he indorsed without recourse or indorsed for the accommodation of the intervening party. Correctly, it is submitted, the section excludes his right to enforce payment only against intervening parties to whom he was previously liable.

3 Sections 57(3) and (4) SABEA make a curious distinction: the drawer of a bill payable to a third party or order may not on payment re-issue it. But if the bill is payable to his own order, he may. In *Beck v Robley* (1774) 1 HBL 89 (126 ER 54) Lord Mansfield said: "When a draft is given payable to A, or order, the purpose is that it shall be paid to A, or order; and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill."

This case refers specifically to a bill payable to the order of a third party. But if it is payable to the drawer's order it can be re-issued and re-negotiated. In *Williams and others v James* (1850) 15 QB 498 (117 ER 548) Lord Campbell CJ at 505 said:

> "Prima facie a payment by the drawer is for the benefit of the acceptor; but the drawer has his remedy against the acceptor, and may take the bill from the indorsee and sue upon it in his own name, or may employ the indorsee to do so. In this case there clearly was an understanding that the bill should not be extinguished, but that the remedy on the part of the drawers should be preserved."

Patteson J at 505 made it clear that these remarks applied to a bill payable to the drawer's order:

> "I am of the same opinion as to the right of the drawer, with this qualification only, that he must be payee as well as drawer. If the bill were payable to a third person, and dishonoured, and the drawer took it up, there would be a distinction. The drawer could not then re-issue".

See also *Callow v Lawrence* (1814) 3 M & S 95 (105 ER 546). Section 57(4) SABEA appears to codify *Beck v Robley*. However, no real basis seems to exist for the

distinction between the two cases, viz between bills payable to the drawer's order and bills payable to the order of a third party (see Britton 691-2).

All parties, except in certain well-defined cases, should be entitled to re-issue and re-negotiate the instrument. In particular, neither the drawee or acceptor, nor the maker should be entitled to negotiate the instrument after maturity. See *Richard Atenborough v MacKenzie* (1856) 25 Law Journal Reports, Exchequer 244; *Morley v Culverwell* (1840) 7 M & W 174 (151 ER 727). Before maturity, the maker or acceptor can discount and re-negotiate the instrument. It is thus proposed that the provisions of article 22 of the Uncitral Convention be followed.

4 The right of the re-acquiring party to strike out indorsements not necessary to his title should be dealt with in this clause. All prior parties re-acquiring the instrument should be entitled to cancel such indorsements. Furthermore, the provisions of this clause should not be limited to parties re-acquiring by negotiation. They should extend to re-acquisitions by any method (see section 3-208 UCC) "returned to or reacquired by".

CHAPTER 3

RIGHTS OF THE HOLDER

28 Holder in due course

A holder in due course is a holder who has taken an instrument,

> **(a) complete and regular on the face of it by negotiation before it is overdue;**
>
> **(b) in good faith and for value and without notice of any dishonour or any claim to the instrument or any defence available to prior parties.**

Comparative legislation

Sec 27(1) SABEA
Sec 29(1) BEA
Sec 52 NIL
Sec 3-302, 303 and 304 UCC
Art 16 and 17 GULB
Art 29 Uncitral Convention
Sec 50(1) Cheques and Payment Orders Act 1986
Sec 3-302 Revised UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

> 27. *Holder in due course.*
>
> (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following circumstances, namely --
> (a) he must have become the holder of it before it was overdue, and if it had previously been dishonoured, without notice thereof; and
> (b) he must have taken the bill in good faith and for value, and at the time the bill was negotiated to him, he must have had no notice of any defect in the title of the person who negotiated it.

Commentary

1 *Historical and comparative aspects*

1.1 "Holder in due course", as Byles (1899) 16th edition states (at 2 n(i)), "shortens considerably the former lengthy definition, 'bona fide holder for value before due without notice'." The holder in due course is the most important contribution of

English jurisprudence to the law of negotiable instruments. He characterises modern "Anglo-American" law (section 52 NIL, 3-302 UCC, 27(1) SABEA and 29(1) BEA) and lives on in the guise of the "protected holder" of article 29 of the Uncitral Convention - a rather unfortunate expression, for every holder is to some extent "protected". (See Klapper *Die Rechtsstellung des Wechselinhabers nach dem UN-Wechhselrechtsabkommen vom 9. Dezember 1988* (1992) 34ff and Von Marschall "Uncitral's Proposesd International Bill of Exchange" (1987) 4 *Arizona Journal of International and Comparative Law* 6 12). The holder in due course signifies both freedom from defences and good faith acquisition of property in the instrument obtained from a non dominus. These two cardinal principles of negotiable instruments are thus unified in the person of the holder in due course.

Initially, however, the two principles were treated separately. For example, in *Hussey v Jacobs* (1696) 1 Salk 344 (9 ER 301) the unavailability of defences against a holder who acquired the instrument "bona fide upon good consideration" was confirmed. In *Anon* (1698) 1 Salk 126 (91 ER 118), Ld Raym 738 (91 ER 1393) trover against the person who obtained a lost bill in good faith and for value was rejected "by reason of the course of trade, which creates a property in the assignee or bearer". These decisions were subsequently confirmed and expanded upon by Lord Mansfield in *Miller v Race* (1758) 1 Burr 452 (97 ER 398); *Grant v Vaughan* (1764) 3 Burr 1516 (97 ER 959) and *Peacock v Rhodes and another* (1781) 2 Dougl 634 (99 ER 402). For a fuller discussion, see Ulmer "Geschichtliche und rechtsvergleichende Studien zum englischen Wechselrecht" in *Festgabe für Phillip Heck, Max Ruemelin, Arthur Benno Schmidt* (1931) 178 and Greene "Personal Defences under the Geneva Uniform Law on Bills of Exchange and Promissory Notes: A Comparison" (1962-3) 46 *Marquette Law Review* 281. When the character of a negotiable instrument came to be more fully defined, it became possible to comprehend both freedom from defences and good faith acquisition of property in the single concept of the holder in due course. "Holder in due course" is defined in sections 29(1) BEA and 27(1) SABEA, and this definition is, with some amendments, followed in section 3-302 UCC.

1.2 In sharp contrast to the Anglo-American legislation referred to, the Geneva Uniform Law treats the unavailability of defences separately from the good faith acquisition of property. Indeed, the concept of a "holder in due course" is not known in the GULB.

Article 17 GULB deals with freedom from defences and provides:

> "Persons sued on a bill of exchange cannot set up against the holder defences founded on their personal relations with the drawer or with previous holders, unless the holder, in acquiring the bill, has knowingly acted to the detriment of the debtor."

Article 16 GULB is concerned with the protection of the holder against claims of ownership:

> "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, canceled endorsements are deemed not to be written. 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 negligence."

It is apparent from these provisions that two different standards of good faith are used and that value is not required as a condition for the operation of either principle.

2 "For value"

2.1 Clause 28 requires that a holder, to be a holder in due course, must have taken the instrument "for value". Clause 1(4) provides that, "[f]or the purposes of this Act, a person takes an instrument for value if he acquires it under onerous title". It is necessary to provide that "for value" bears this specific meaning.

First, although section 27(1) SABEA requires a holder in due course to have obtained the bill "for value", "value" is a controversial concept and, if given a literal construction (see section 25(1)(a)), would mean that a person who acquired by donation would also be able to qualify as a holder in due course. That such an interpretation is possible was suggested recently by Viljoen "'Waarde' in die Suid-Afrikaanse Wisselreg" in *EM Hamman-Gedenkbundel* (1984) 1 at 15-7:

> "[D]aar [is] niks in a 27(1) self ... wat daarop dui dat die samehang waarin die woord 'waarde' gebruik word iets anders is as die waarde wat gelykstaan aan justa causa van artikel 25(1)(a) nie. Daar is geen ander artikel in die Wet self wat meer helderheid bring nie."

Secondly, section 25(2) SABEA, by deeming a holder "if value has at any time been given for a bill" to be a holder for value vis-à-vis the acceptor and all parties to the bill who became parties before that time, gives the impression that any holder can become a holder in due course even if he had not himself given value for the instrument.

Cowen (1985) 58 suggested that section 27(1)(a) be interpreted "as leaving the rule of the *Wisselrecht* unimpaired; that rule being to accord protection only to a bona fide acquirer ex causa onerosa". In similar vein, Malan 151ff suggests that, since the meaning of "value" in section 1 applies only "unless the context otherwise indicates", "for value" in section 27(1)(a) be construed to mean "under onerous title". Other authors seem to agree with these interpretations: Cowen (1966) 283-5; Wille and Millin 696ff; Klapka 49; Petersen (1971) 88 *SALJ* 155 159; Riley 91; Britton 214.

2.2 In the South African cases the holder in due course is referred to in different ways, but all indicate, it is submitted, an acquisition under onerous title: he is said to be holder "for valuable consideration" *(Dell NO v Otto* 1883 HCG 53 55), or "for due consideration" (*Sandeman v Solomon* (1907) 28 NLR 140 143), or as one who has given value for the bill *(Factory Investments (Pty) Ltd v Ismails* 1960 2 SA 10 (T) 15, but see Viljoen 17) or as a bona fide "onerous indorsee" (*Hovil & Matthew v Wood* (1840) 1 Menz 97 99; *Kennell v Harries* (1830) 1 Menz 85) or as a holder who has given a quid pro quo (*Danka v Barclays Bank DCO* 1967 4 SA 291 (T); *Netherlands Bank of South Africa Ltd v Smith* 1971 3 SA 647 (W) 652; *Haynes Industries (Pty) Ltd v North Coast Industries (Pty) Ltd* 1978 1 SA 1987 (D) 1090 and see *Golden Prism v But-Shor Investments & Distributors (Pty) Ltd* 1978 1 SA 512 (D) 515; *North Coast Plastic and Packaging Industry (Pty) Ltd v Haynes Industries (Pty) Ltd* 1981 1 SA 913 (A) 917), or as one who acquired ex causa onerosa (*Hadzipetros v Onasis Discount Store* 1971 3 SA 608 (D) 611).

2.3 In our common law the concept of holder in due course is unknown. However, the old authorities often discussed the question whether certain defences available against an immediate party could be raised against a subsequent holder. Unfortunately no easy or simple answer can be discerned from them. See the discussions of Friedel *De L'Inopposabilité des Exceptions en matière D'Effets de Commerce* (1981) 8-17 19-32 and Schaps *Zur Geschichte des Wechselindossaments* (1892) 117-21 141-3 168-74 from which it appears that not all the old authorities required the giving of

value. However, our own common-law writers and the later Italian commercial lawyers placed considerable emphasis on the giving of value by the holder before certain defences available against prior parties were rendered unavailable against him.

When posed the question whether the acceptor could raise certain defences against an indorsee, Casaregis *Discursus Legales de Commercio* (1670) disc 48.19 stated: "[Q]uod exceptio inadimpleti, vel alia, quae obstat cedenti, vel giranti, non obstat cessionario, vel giratario ex causa onerosa." See also Ansaldus *De Commercio et Mercatura Discursus Legales* (1629) 2.37 and Schaps 117-8 and Friedel 27. The question became more complicated when the liability of the drawer or an indorser was involved: often the availability of defences was made dependent on the clause in the bill acknowledging the receipt of value. When the effect of this clause was that value had indeed been received (per la valuta havuta or conta) the exceptio non numeratae could not be raised against the indorsee. See Casaregis disc 48.6,7; Scaccia *Tractatus de Commercii et Cambio* (1619) 2 gl 8.5.6. See Dupius *L'Art des Lettres de Change* (1690) 5.22-3. Although the question was not always directly addressed, it seems that an acquisition ex causa onerosa was necessary in these circumstances. See Van der Keessel *Praelectiones* th 600 and the discussion of Malan "Oor Waarde, Banke en die Reëlmatige Houer" 1977 *THRHR* 126 133-4. It is submitted that there is sufficient common-law and modern authority to insist that a holder in due course acquires under onerous title. It is noteworthy that, although articles 16 and 17 GULB do not require the giving of value, some foreign legal systems, by applying their rules relating to unjust enrichment, in effect achieve the same result. See Baumbach-Hefermehl 210 and Zöllner 137.

2.4 The next question concerns the nature and adequacy of the consideration for which the instrument is obtained. Section 3-303 UCC provides:

> "A holder takes the instrument for value
> (a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or
> (b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due, or
> (c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person."

In the following words, comment 3 on section 3-303 UCC justifies the rule that an executory consideration is value only to the extent to which it is performed:

> "An executory promise to give value is not itself value, except as provided in paragraph (c). The underlying reason of policy is that when the purchaser learns of a defence against the instrument or of a defect in the title he is not required to enforce the instrument, but is free to rescind the transaction for breach of the transferor's warranty ... . There is thus not the same necessity for giving him the status of a holder in due course, cutting of claims and defenses, as where be has paid value. A common illustration is the bank credit not drawn upon, which can be and is revoked when a claim or defense appears."

See also Geva "Reflections on the Need to Revise the Bills of Exchange Act - Some Doctrinal Aspects" (1981-2) 6 *Canadian Business Law Journal* 289 274-5 278-80.

However, this approach is not followed consistently. Section 3-303(b) provides that value is present where an instrument is taken in payment or as security for an antecedent debt. Surely the same considerations would apply to this case: the holder, on receiving notice of claims or defences, can revert to his rights against his counter-party on the consideration? See Cosway (1965) 40 *Washington Law Review* 281 296.

Section 3-303 (c) UCC states recognised exceptions to the rule that an executory consideration is not value.

Section 3-303 (a) is of particular importance as it implies that bank credit is not value unless the credit is actually advanced. See Britton 235ff; Anon "Bank Credit as Value: The Commercial Code Article III" 1948 *Yale Law Journal* 1419 and Malan "Oor Waarde, Banke en die Reëlmatige Houer" 1977 *THRHR* 126.

It is submitted that this approach is contrary to our law: the adequacy of the consideration for the instrument is not questioned, neither that it may be executory. Thus, a holder can be a holder in due course where he acquired the instrument by discounting *(Cape of Good Hope Bank v Elliott Brothers and Sutherland* (1841) 1 Menz 102; *VS Rajah & Co v Fann* 1976 2 SA 351 (D)), or in payment of a pre-existing debt (section 25(1)(b); *Golden Prism v But-Shor Investments & Distributors (Pty) Ltd* 1978 1 SA 512 (D)), or as a consideration for an undertaking to take care of an illegitimate child (*Van Graan v Buytendag* 1907 TS 505) or in fulfillment of a duty to pay maintenance (*Hadzipetros v Onasis Discount Store* 1971 3 SA 608 (D)).

A bank's undertaking to make credit available against an instrument deposited for collection is sufficient to constitute value for the purposes of section 27(1) SABEA. See *Volkskas Beperk v Bloems Timber Kilns (Pty) Ltd* 1975 4 SA 108 (W) 117 120; *North Coast Plastic and Packaging Industry (Pty) Ltd v Haynes Industries*

(Pty) Ltd 1981 1 SA 913 (A) 917; *Netherlands Bank of South Africa Ltd v Smith* 1971 3 SA 647 (W) 652; *Freeman v Standard Bank of South Africa* 1905 TH 25 31; *L Underwood Ltd v Barclays Bank* 1924 1 KB 799 805-6 and Malan 133-5 and authorities cited. In *Haynes Industries (Pty) Ltd v North Coast Industries (Pty) Ltd* 1978 1 SA 1087 (D) 1091-2 the court accepted that value was constituted by "the obligation on the part of the bank to honour cheques drawn against ... uncleared bills ... ". In none of these cases was it suggested that value is given only to the extent of the consideration performed or the credit actually drawn upon. In all these cases, it is suggested, the holder (bank) acquired under onerous title even though his own actual advance may have been smaller than the amount of the instrument. But it must be emphasised that an acquisition will be under onerous title only if the holder or bank was *legally obliged* to make credit available against uncleared effects (see *Volkskas Beperk v Bloems Timber Kilns (Pty) Ltd* 1975 4 SA 108 (W) 120) or, if this is not the case he had in fact made advances against them. It is submitted that the concept of onerous title is sufficiently flexible to accommodate the granting of bank credit, and that it would be better to follow our case law rather than adopt section 3-303 UCC. Barak "The Uniform Commercial Code - Commercial Paper. An Outsider's View (1968) 3 *Israel Law Review* 7 28-9 also rejects the UCC rule:

> "Countless bills are given against executory consideration, such as bills to secure the payment of rent or of installments. In all these cases the holder will not be considered a holder in due course as long as he has not provided the consideration in full. The application of this principle would also give rise to numerous practical difficulties. Take the case of a bank which grants its client credit by way of an overdraft equal in amount to the bills which he negotiates to the bank. The bank will not be deemed to have given the client consideration for the bills negotiated to it so long as the client has not availed himself of the overdraft. Let us assume that the client has negotiated a number of bills to the bank and has drawn against them a number of cheques from his account. Which of the bills negotiated to the bank will be considered as being held by it in due course? Again, when may the executory obligation of the holder be said to have been discharged? Is complete discharge necessary or is partial payment sufficient?"

3 *"In good faith .... and without notice"*

3.1 *Introduction*

Section 94 SABEA provides: "A thing is deemed to be done in good faith within the meaning of this Act, if it is in fact done honestly, whether it is done negligently or not."

A holder in due course must acquire the instrument not only "in good faith" but also "without notice" of a prior dishonour or of any defect in the title of the person who negotiated it (section 27(1) SABEA). "Title" and "defects in title" are discussed in paragraph 4 below. Suffice it to state that "defects in title" refer to certain claims and defences available against the holder. The Act does not define "notice", nor does it state under which circumstances a person has "notice" of a certain fact. These matters are left to judicial construction.
It is clear that the subjective elements in the definition of a holder in due course differ considerably from those required by articles 16 and 17 GULB. A brief review of the divergent requirements follows.

3.2 *The Geneva Uniform Law*

3.2.1 *Prelude*

There was little uniformity in the European legal systems before their acceptance of the Geneva Uniform Law. To a large extent the divergence of views was caused by the different doctrinal approaches to the foundations of cambial liability. Initially, the holder's right of action was characterised as a ius paratae executionis, which entitled him to payment without delay and to execution over the person and property of the debtor (Stanz *Böser Glaube im Wechselrecht* 1950 8-9). This meant that no, or few, defences could be raised against the holder's claim. Lochau 2.22, for example, was of the opinion that, "de strengheid van het wisselrecht zoo groot is, dat het verzet van niet aangeteld geld in het geheel geen plaats heeft". This approach is typical of the view that the debtor incurs liability to every holder merely by signing the instrument (Kreationstheorie). The good faith or otherwise of the holder is irrelevant. Herein rests the objection to these and other "strict" approaches. A corrective became necessary. The Ordinance on Bills of Exchange for Lübeck of 1662 found this corrective in dolus malus but did not define bad faith (Stanz 11 15). The Austrian *Erläuterungen der Wechselordnung in puncto trockener Wechsel* of 30 January 1727 was more precise: all defences were excluded unless the indorsee "mit dem Giranten eine dem Aussteller schädliche Verständnis, oder eine andere ohngebürende Handlung unternommen hatte ..." (Stanz 16). The same approach was expressed in the *Edikt des höchsten Handelsconseils des Königs beider Sizilien* of 11 October 1786 in terms of which "bloss und allein die Einrede des Betruges der zwischen den Austellern und Inhabern des Wechsels in der Acceptanten zu hintergehen gespielet worden,

zugelassen werde" (Stranzl 18). Article 82 of the *Allgemeine Deutsche Wechselordnung* of 1848 made no mention of the good faith of the holder: it allowed the debtor to raise only those defences "welche aus dem Wechselrecht selbst hervorgehen oder ihm unmittelbar gegen den jedesmaligen Kläger zustehen". However, the harshness of this rule was tempered by the courts, and defences that would otherwise have been inadmissible became available where the holder had been guilty of collusion with the indorser (eg RG 27, 62 at 65 (1904)).

A somewhat similar view was advanced by certain French authors who did not allow protection to the holder who was party to an entente frauduleuse. But the dominant French view was that mere knowledge of defences rendered them available against the holder. Friedel *De L'Inopossabilite des Exceptions en matière D'Effets de Commerce* 1981 147 writes:

> "[P]our la grande majorité de la doctrine, et surtout pour la jurisprudence française ... le simple connaissance, au moment de l'acquisition du titre de l'existence d'un vice de l'obligation du débiteur susceptible de donner lieu à une exception, suffisait à constituer le porteur de mauvaise foi et à lui rendre l'exception opposable."

In the Netherlands, article 148(a) of the repealed *Wetboek van Koophandel* provided:

> "Degene, die uit den wisselbrief wordt aangesproken, kan een verweer, gegrond op zijne verhouding tot den trekker, den nemer of een der vorige houders, niet tegenwerpen aan den houder, tenzij deze bij verkrijging van den wisselbrief met het bestaan van den grond van het verweer bekend was of moest zijn."

More variety is found in the Hague Rules (see Stanz 30). Article 17 of the draft of the First Hague Convention merely referred to bad faith. Article 16 of the draft of the Second Hague Convention, *Convention on the Unification of the Law relating to Bills of Exchange and Promissory Notes*, on the other hand, allowed defences against the holder only where he was a party to collusion, an arglistiges Einverstandnis or entente frauduleuse. The Committee of Experts reporting in 1928 (see Friedel 145-6) rejected this rather limited approach and proposed that defences be available against a holder who acquired the instrument with knowledge of a defence available against a prior party.

Against this varied background the Geneva rules were formulated.

3.2.2 *Article 17 GULB*

The crucial phrase in article 17 GULB is the proviso at the end: "unless the holder, in acquiring the bill, has knowingly acted to the detriment of the debtor". This formula is a compromise and expresses the opinion of the majority of delegates that mere knowledge of defences is insufficient to render them available. Giannini, the Italian delegate, perhaps best summarized the view at the conference: "Are you content with this formula? No. Will you vote for it? Yes. I will vote for it because I do not like it: since, however, no one likes it, this means that it is the only formula upon which every one will agree" *(Records of the International Conference for the Unification of Laws on Bills of Exchange, Promissory Notes and Cheques* League of Nations C360; M 151 1930 11 at 293). Kössler "Zur Auslegung des Art 17 des Genfer einheitlichen Wechselgesetzes" (1933) 29 *Schweizerische Juristen-Zeitung* 276 in a somewhat similar fashion refers to the formula as "der Wechselbalg einer Kautschuhformel".

It is clear that article 17 requires something more than mere knowledge of defences, on the other hand, an entente frauduleuse or collusion is not necessary. There is also unanimity that the state of mind of the holder at the time of acquisition of the instrument must be investigated. Mala fides superveniens non nocet. However, precisely how the phrase should be construed is the subject of a continuing debate. Greene "Personal Defenses under the Geneva Uniform Law on Bills of Exchange and Promissory Notes: A Comparison" (1962-63) 46 *Marquette Law Review* 381 304 summarizes his conclusions in this regard:

> "The conclusion seems justified that the interpretation of art 17 UL by the courts and writers of France, Germany, Austria, Switzerland and Italy is contradictory and, in each of these countries, in a state of confusion. The formula adopted at Geneva (acting knowingly to the detriment of the debtor) was intended as a compromise between an entente frauduleuse and plain bad faith as criteria for the determination of the holder's position with respect to personal defenses valid against a transferor. The formula did not work satisfactorily, as foreseen at Geneve, if for no other reason than simply because, in the great majority of cases, where the acquirer of an instrument knows that the debtor has valid defenses against a transferor, he also knows that, by cutting off these defenses, he is acting to the detriment of the debtor and should refuse to acquire the instrument. In other words, he knows 'something is wrong' and, therefore, cannot be acting in good faith. Thus, in spite of various tortured interpretations by courts and writers alike, the basic criterion still remains that of good or bad faith and courts will still, in spite of the various artificial circumlocutions, consider knowledge of existing defenses as incompatible with the requirement of good faith which is essential in both European and Anglo-American law."

Greene's criticism is perhaps too harshly formulated, but the central point is valid: in the majority of cases knowledge of defences is equivalent to knowledge of the debtor's detriment. See in this regard Jacobi 86ff and further Carry "La Regle de L'Inopposabilité des Exceptions en matière D'Effets de Change et la Bonne Foi du Porteur" in *Aequitas und Bona Fides Festgabe zum 70. Geburtstag von August Simonius* (1955) 293; Ronse II 417-28 and Hefermehl "Zum Anwendungsbereich des Art. 17 WG" (1980) 144 *ZHR* 34.

3.2.3 *Article 16 GULB*

The intention of the drafters of article 17 GULB was to relieve the holder of any duty to investigate the instrument in order to discover whether defences were available against prior parties. Ronse I 423-4 says:

> "De wisselwet heeft een zeer grote bescherming aan de verkrijger willen verlenen, waardoor hij ontslagen is van iedere onderzoekingsplicht nopens het al dan niet bestaan van verweermiddelen die tegen zijn endossant konden ingeroepen worden. Dit komt duidelijk tot uiting in het opvallend verschil in de formulering van de eis van goede trouw in artikel 17, vergeleken met artikel 10 en artikel 16 waarin kwade trouw en grove schuld uitdrukkelijk gelijk worden gesteld."

Whether it is desirable to distinguish between the two kinds of protection given a holder is not really relevant to South African law, in which the holder in due course, a unique figure, embodies both freedom from defences and the acquisition of ownership a non domino. There seems to be little merit in making any distinction: in the final analysis the same confidence is protected, viz that the transferor is entitled to the bill and the rights embodied in or evidenced by it. However, it is necessary to distinguish between the standard of good faith required in the acquisition of an instrument and that necessary in the payment of it. The holder is not obliged to purchase the instrument; the drawee, on the other hand, is bound to pay. Some differentiation is required here. The origin of our own rules and legislative provisions in this regard is outlined below.

3.2.4 *Historical aspects*

The present formulation of the good faith and notice requirements evolved from a series of English cases in the nineteenth century. Initially widely divergent views were

held. One of the early cases, *Lawson v Weston* (1801) 4 Esp 56 (170 ER 640), concerned a banker who discounted a bill for a stranger without inquiry. These circumstances, Lord Kenyon held, did not make the banker a purchaser in bad faith. To hold otherwise, in the absence of allegations of fraud or illegality would, he said, "be at once to paralyze the circulation of all the paper in the country, and with it all its commerce" (at 57). A purely subjective meaning was thus given to good faith.

However, in *Gill v Cubitt and others* (1824) 3 B & C 466 (107 ER 806) this decision was overruled. Gill involved a bill broker who failed to inquire about the person from whom he acquired the instrument. The good faith concept was explained in this way: "I consider it was parcel of the bona fides whether the plaintiff had asked all those questions which, in the ordinary and proper manner in which trade is conducted, a party ought to ask." Suspicious circumstances calling for inquiry were thus sufficient to denote bad faith. It is significant that the instruction to the jury was that they should consider the plaintiff's case in the light of a man with the following notice in front of his office: "Bills discounted for strangers, if they have good names on them, without any questions being asked" (at 473). It is not difficult to imagine the jury's reaction.

A reaction against *Gill* soon set in and it was held that nothing less than gross negligence would make defences or claims available against the purchaser *(Crook v Jadis* (1834) 5 B & Ald 910 (110 ER 1028)). This was departed from, and *Goodman v Harvey and others* (1836) 4 Ad & E 870 (111 ER 1011) reduced gross negligence to mere evidence of bad faith. The subjective approach was thus restored. A similar development took place in the United States to be laid to rest only by the adoption of the Negotiable Instruments Law (sections 52 and 56; see Britton 246). For the evolution of the good faith concept, see Rightmire "The Doctrine of Bad Faith in the Law of Negotiable Instruments" (1920) 18 *Michigan Law Review* 355; Fagan "The Concept of Good Faith in Negotiable Instruments Law" (1956) 32 *Indiana Law Journal* 8; Greene "Personal Defenses under the Geneva Uniform Law on Bills of Exchange and Promissory Notes: A Comparison" (1962-3) 46 *Marquette Law Review* 281 and Wussow "Zur Lehre vom gutgläubigen Rechtserwerbs im Englischen und Amerikanischen Wechselrecht" (1930-31) 46 *Zeitschrift für vergleichende Rechtswissenschaft* 151.

The English concepts of notice and good faith came to be somewhat better defined. Good faith was equated in the Bills of Exchange Act 1882 with honesty (section 90 BEA) and, "'notice and knowledge' means not merely express notice, but

knowledge, or the means of knowledge to which the party willfully shuts his eyes - a suspicion in the mind of the party, and the means of knowledge in his power willfully disregarded" (*Raphael and another v Governor and Company of the Bank of England* (1855) 17 CB 160 at 174, (139 ER 1030). See also *Jones v Gordon* 1877 2 AC 616 628 (HL); *May v Chapman & Gurney* (1847) 16 M & W 355 361 (153 ER 1225)).

3.2.5 *South African Perspectives*

Very soon the South African courts adopted the views that had developed in English law. A holder who knows that certain defences could be raised against prior parties cannot be a holder in due course. An entire subjective meaning is given to the concepts of good faith and notice.

> "It is trite law that the test of good faith is a subjective one and the question is not whether the plaintiff ought to have known that the cheque had been negotiated for the purpose of paying a gambling debt. The question is whether he in fact knew or suspected it and refrained from making inquiries ..." (*Nathan v Graham* 1970 2 SA 450 (0) 451-2 and also Malan 160 and authorities cited).

The holder who should have known of claims and defences is not in bad faith: actual knowledge is required.

In this respect the doctrine of constructive knowledge is expressly rejected. This rule implies that a purchaser of property "who possesses knowledge of certain facts, is put on inquiry and charged with knowledge of such additional facts as a reasonable inquiry would disclose" (Britton 279). The doctrine, which applies, inter alia, to purchases of land, where "title is everything, and it can be leisurely investigated", is out of place in commercial matters where "possession is everything, and there is not time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of country" (*Manchester Trust v Furness* 1895 2 QBD 539 545 and see *Shuter v Coates and Hosken* (1913) 34 NLR 539 542; *Liquidators of Cape of Good Hope Building Society v Bank of Africa* (1900) 17 SC 480 497; *John Bell & Co Ltd v Esselen* 1954 1 SA 147 (A) 151-2; *Industrial Finance and Trust Co (Pty) Ltd v Heitner and another* 1961 1 SA 516 (W) 522; *Campbell v Blue Lime Association Ltd* 1918 TPD 309 313).

For these reasons a holder can qualify as holder in due course even if his ignorance of defences and claims is the result of carelessness, negligence or foolishness (*Jones v Gordon* 1877 2 App Ca 616 628; *Baker v Barclays Bank* 1955 1 WLR 822 835; 1955 2 All ER 571). But, on the other hand, to be charged with notice it is not required that the holder have specific knowledge of a defence or claim; it is sufficient to show that the holder "was affected with notice that there was something wrong about it when he took [the instrument]" (*Jones v Gordon* 1877 2 App Ca 616 628).

The words "good faith" and "without notice" are often used interchangeably. A holder without notice is said to be in good faith; one with notice is in bad faith. In addition, "notice" refers not only to actual notice but also to a suspicion and the means of knowledge wilfully disregarded. Lord Denning explained the latter aspect recently:

> "If he [the holder], in his own mind, realised that there was something wrong with the cheque and shuts his eyes to it, he would be taken to have notice, but not otherwise" (*Nelson and others v Larholt* 1948 1 KB 339 344).

Although the notice and the good faith requirements overlap, it should be noted that they also serve different purposes. "Good faith" is a much wider concept than absence of notice, and sets a certain standard of conduct, that of the honest man. In this respect the reference to negligence in section 94 SABEA seems out of place: "negligence", it seems, refers primarily to carelessness in not having knowledge of certain claims or defences. In this respect, section 1-201 (19) UCC provides quite simply that "good faith" means "honesty in fact in the conduct or transaction concerned". This approach commends itself. (On earlier drafts of the UCC, see, for some of the views proposed, Britton "Holder in Due Course - A Comparison of the Provision of the Negotiable Instruments Law with those of Article 3 of the Proposed Commercial Code" (1955) 72 *Banking Law Journal* 305 321-4; Fagan "Notice and Good Faith in Article 3 of the UCC" (1956) 17 *University of Pittsburgh Law Review* 176; Beutel "Comparison of the Proposed Commercial Code, Article 3, and the Negotiable Instruments Law" (1951) 30 *Nebraska Law Review* 531 546.)

The Revised UCC in section 3-103(a)(4), however, goes further and is more specific and defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing". In the Official Comment paragraph 4 this concept is explained: "Although fair dealing is a broad term that must be explained in

context, it is clear that it is concerned with the fairness of conduct rather than the care with which an act is performed".

The difference between "good faith" and "notice" becomes apparent in the context of set-off or compensatio. In our law, set-off operates automatically and without the debtor needing to invoke it. See *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and another* 1980 4 SA 669 (SWA) 676; *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and another* 1984 2 SA 693 (C) 696 and Geva "Equities as to Liability on Bills and Notes: Rights of a Holder not in Due Course" (1980-81) 5 *Canadian Business Law Journal* 53 68ff. Where set-off has taken place between two immediate parties, eg between the drawer and the payee, the holder's rights on the instrument are extinguished, and the drawer, when sued by a subsequent party who is not a holder in due course, will have a defence in rem against the latter. See *Walker v Syffret NO* 1911 AD 141; Cowen 271-2; Malan "Good Faith, Compensation and Bills of Exchange" 1974) 91 *SALJ* 173 and *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and another* 1984 2 SA 693 (C) 695-8. Thus, when the person acquiring the instrument has notice of the set-off, he cannot be a holder in due course, set-off in this regard being the equivalent of a defect in his predecessor's title.

However, for set-off to operate the two debts must be capable of being set off against each other; inter alia they must be liquidated. Thus, where the drawer has an unliquidated claim against the holder, knowledge of this will not prevent a subsequent acquirer from becoming a holder in due course; an unliquidated counterclaim is neither a "defence" nor a defect in title. It may nevertheless, in these circumstances, be *dishonest* to take the instrument, particularly if the purpose of the negotiation is to deprive the defendant of the opportunity of raising his counterclaim against the transferor (see *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and another* 1984 2 SA 693 (C) 698-9). It is submitted that the transferor cannot be a holder in due course in such circumstances. (See, for the case of a cession in fraudem debitoris, *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A).) For this reason, it is necessary to require that a holder in due course obtain the instrument not only without notice but also in good faith.

Whether a party has "notice" of a fact is perhaps not as simple as it should be, and the law as it is at present is not entirely satisfactory.

First, the so-called "doctrine of forgotten notice" can be cited. Section 27(1)(b) SABEA requires a holder in due course to have been in good faith and without notice

"at the time the bill was negotiated to him". It follows that, mala fides superveniens non nocet. The problem, however, is: a holder who had notice of a defect in title "forgets" it at the time of acquisition. Can he be a holder in due course? English law appears to be consistent: provided he is without notice at the time of negotiation to him, the purchaser can become a holder in due course (*Raphael and another v Governor and Company of the Bank of England* (1855) 17 CB 161 (139 ER 1030) and see *Venables v Baring Bros & Co* (1892) 3 Ch 527 542). Britton 269 states authoritatively:

> "Knowledge of an equity or defence acquired by a person at some time prior to his purchase of the instrument, as a matter of law, is not notice of such defence or equity at the time of purchase. Whether the purchaser, at the time he purchased, took in good faith is a question of fact."

This kind of problem is usually encountered in cases of bonds and other capital market instruments, less so in matters concerning bills and notes. In a leading United States case, *First National Bank v Fazzari* (1961) 10 NY 2d 394, 179 NE 2d 493, 223 NYS 2d 483; 13 App Div 2d 582, 212 NYS 2d 380 (3d Dep't 1961) (cited by Farnsworth *Cases and Materials on Commercial Paper* (1968) 41) the court of appeal was reluctant to reject the "doctrine of forgotten notice" summarily

> "and to hold that once notice is given it is fixed and immutable for all time as to negotiable instruments, particularly in the case where a blanket notice is broadcast with relation to stolen bonds and other securities ... . But we also think that the doctrine should be applied with great caution in the case where a simple promissory note is involved. A lapse of memory is too easily pleaded and too difficult to controvert to permit tbe doctrine to be applied automatically irrespective of the circumstances surrounding each transaction and the relationship of the parties. Under the peculiar facts of this case a strict application of the doctrine would be unrealistic and not in the interest of substantial justice. As we have heretofore said, something more than the naked fact of notice is involved here. The defendant was practically assured that his notice would be honoured and that the note would not be discounted by the plaintiff bank. Under such circumstances, the bank should be precluded from invoking the doctrine of 'forgotten notice'".

Very often the only way in which the owner of an instrument can safeguard his rights is by giving notice of its theft or loss. When the notification is addressed to a corporation like a bank the question arises when the corporation can be said to have notice. In *North-Western National Bank of Milwaukee v Madison & Kedzie State Bank* 1926, 242 Ill App 2 cited by Britton 70 it was said: "The notice having been received by the proper agent of the bank to receive, open and acknowledge its mail in line of his duties, we think the bank is estopped from claiming that it did not have

actual knowledge of the defect in the title to the bonds it subsequently received." It is suggested that it is more equitable to attribute notice to a holder in such a case. To insist on an entirely subjective approach to notice in this regard is to put a premium on foolishness, ignorance and unreasonableness.

The second aspect concerns the use of the words "suspicion", "suspicious circumstances" and "putting on enquiry". As has been said, the holder who in his own mind suspects that something is wrong, is not in good faith. Nor is he in good faith should he refrain from making inquiries in circumstances that warrant them. In *Jaffer v Nell* 1958 3 SA 497 (C) 502 it was, for instance, said that, "it was the duty of the plaintiff to make proper inquiry before it can be held that he acted in good faith", and in *Smith v Theatre Cafe* 1949 4 SA 519 (T) 522 it was remarked that, "[t]he circumstances called for such inquiry, and failure to inquire amounts to knowledge". See also *Auchteroni and Company v Midland Bank Limited* 1928 2 KB 294 302; *London Joint Stock Bank v Simmons* 1892 AC 201 221.

The use of the expression "putting on enquiry" is not entirely satisfactory. The holder who does not know of specific defects of title but is either suspicious or knows other facts is said to be "on enquiry". If he does not make the enquiry called for, he is attributed knowledge of the defects in title. Why then, one may ask, is it necessary to "put him on enquiry" at all: the point is simply that in some circumstances he will be taken to have knowledge of defects in title or other facts, although he does not have specific knowledge of them. See Rightmire "The Doctrine of Bad Faith in the Law of Negotiable Instruments" (1920) 18 *Michigan Law Review* 355. In this regard the use of the terms "suspicious" or "suspicious circumstances" is not wholly suitable, for a suspicion can be founded on certain facts from which a definite conclusion can be drawn or it can be founded on nothing at all. Although some objective basis for the suspicion is apparently required (Falconbridge (1969) 630-1), it is suggested that it would be better to distinguish between "good faith" and "notice" and to provide specifically for a person who has (or is deemed to have) notice of a certain fact. The approach of Maasdorp J in *Liquidators of Cape of Good Hope Building Society v Bank of Africa* (1900) 17 SC 480 499 commends itself:

> "I think the result of all the authorities is that notice is either actual knowledge of defect in title, or knowledge of facts from which it might reasonably be inferred that the title is defective. In the latter case, if it should turn out that the title in consequence of the known facts was in reality defective, such knowledge would be taken as notice. Such knowledge is said to put the

> transferee of a negotiable instrument upon inquiry, and if he does not inquire he is taken to have wilfully shut his eye to facts he might have ascertained."

3.2.6 *The Uniform Commercial Code*

The UCC requires a holder in due course to have taken the instrument without notice of the fact that it is overdue or has been dishonoured or of any defence against or claim to the instrument (section 3-302 (1)(c) UCC). Section 1-201 (25) UCC sets out the circumstances in which a person has notice of a fact, ie when

> "(a) he has actual knowledge of it, or (b) he has received a notice or notification of it, or (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exits."

The crucial phrase is "has reason to know". One commentator remarked: "Of course, the test of 'reason to know' is an objective one. The issue becomes one of would a person in the position of this person have had reason to know the crucial facts? Obviously a professional is to be judged by professional standards and an amateur by amateur standards..." (Mentschikoff "Highlights of the Uniform Commercial Code" (1964) 27 *Modern Law Review* 167 169). See further Nordstrom and Clovis *Problems and Materials on Commercial Paper* (1972) 170; Farnsworth "General Survey of Article 3 and an Examination of Two Aspects of Codification" (1966) 44 *Texas Law Review* 645 651 and, in particular, Cosway (1965) 40 *Washington Law Review* 297ff.

The UCC does not require a holder in due course to have taken a "complete and regular" instrument. This requirement is, as it had been historically, treated as part of the good faith requirement. (Britton "Holder in Due Course. A Comparison of the Provisions of the Negotiable Instruments Law with those of the Proposed Commercial Code" (1955) 72 *Banking Law Journal* 305 at 321). Consequently, a holder has notice of a claim or defence when the instrument is so incomplete or bears such evidence of forgery or alteration or is so irregular that its validity, terms or ownership is called into question (section 3-304 (1)(a) UCC). This is not really an improvement as basically the same question would have had to be solved had completeness and regularity been separate requirements (Cosway (1965) 40 *Washington Law Review* 302). It is further provided that a holder has notice of a claim or defence if he knows that the obligation of a party is voidable or that all parties have been discharged

(section 3-304 (1)(b) UCC). An example of a purchaser being attributed notice of a claim occurs when he has notice of an improper negotiation by a fiduciary (section 3-304 (2) UCC).

In view of the complex provisions of the UCC relating to overdue instruments, acceleration and series of instruments (sections 3-106, 3-109, section 3-304 (3)) contains specific provisions attributing notice to the purchaser that the instrument is overdue. The provisions of clauses 2 and 6 of this draft render it unnecessary to provide specifically for similar cases.

3.2.7 *The Uncitral Convention*

The "notice" requirement in the Uncitral Convention has been amended several times. This no doubt is the result of the wide difference of opinion on this very issue. For instance, article 16 of the 1972 Draft provided: "For the purpose of this Law, a person is considered to have 'knowledge' of a fact if he has actual knowledge thereof [or if the absence of knowledge thereof is due to [gross] negligence on his part] [or if he has been informed thereof or if the fact appears from the face of the bill]." The commentary to this provision states that the alternatives provided for were occasioned by the differences between the various legal systems. Two distinct problems were referred to:

> "(a) cases in which a person in the past had knowledge about a fact but had forgotten this fact so that he did not have actual knowledge of the fact at the time he took or transferred the bill, and (b) cases in which the absence of actual knowledge may be attributed to negligence (or gross negligence)".

Article 5 of the 1982 Draft attempted another approach and provided that 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". In the commentary knowledge in the latter sense was equated with constructive knowledge. However, it was reported in 1986 that a provision making it clear that, "the courts should also have the power to deduce from the circumstances of the case that a person, despite his denial, had actual knowledge of a fact and that, without covering negligence it should allow imparting knowledge to a person who did not have actual knowledge because he had wilfully disregarded relevant facts" had been requested. It was quite rightly decided that a court, in any event, had this power under the original formulation. A few interesting variants were, however, proposed (*Report of the Working Group on International*

Negotiable Instruments on the Work of its Fourteenth Session A/CN/9/273 28 1 1986 paragraph 30) all stating that a person is considered to have knowledge of a fact A "if he deliberately disregarded facts or circumstances known to him which, but for such disregard, would have given him actual knowledge B "if there exist facts or circumstances which would have given him actual knowledge had he not deliberately disregarded them C "if he does not have actual knowledge because he wilfully disregarded facts or circumstances known to him".

Another proposal added to the original article 3 the following words: "or he has deliberately disregarded other facts known to him which would have given him knowledge of that fact, unless such disregard was commercially reasonable".

Article 6 of the final convention provides: "For 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 aware of its existence". See Schütz *Die Uncitral Konvention über Internationale Gezogene Wechsel und Internationale Eigenwechsel vom 9. Dezember 1988* (1992) 87ff.

3.2.8 *The proposed draft*

Very few satisfactory conclusions can be drawn from the above review. Opinions on what the good faith and notice requirements are or should be fluctuate from entirely subjective standards to those that admit some objective elements. The so-called doctrine of constructive notice appears to have been rejected by a majority of commentators and it is not suggested that this doctrine should be introduced. However, it seems desirable to give a more precise definition of the "notice" requirement as developed by the courts and to avoid terms such as "suspicion", "putting on inquiry", etc. Moreover, in some respects, an entirely subjective approach ("white heart empty head") appears to be outmoded. Hence it is proposed that the "doctrine of forgotten notice" be rejected and that the suggestion of Maasdorp J in *Liquidators of Cape of Good Hope Building Society v Bank of Africa* (1900) 17 SC 480 499 be followed so that a person is attributed notice of a fact if, even though he does not know the fact in question, he knows other facts and circumstances from which the existence of that fact might be inferred.

4 "Before it is overdue"

Generally, it can be determined from the face of the instrument when it is overdue. A demand instrument is overdue one year after its date (clause 7(2) of this draft). It is thus possible to ascertain with reference to objective factors whether an instrument is overdue. Although persuasive arguments calling for a differentiation between equities of ownership and equities of defence in overdue paper have been raised (Chafee "Rights in Overdue Paper" (1918) 31 *Harvard Law Review* 1104) the present position has been part of South African law for some time, so that no change is proposed. Indeed there appears to be no pressing reason to change.

In view of the provisions of clause 7(2) no special provision with respect to overdue notes payable on demand is made (see in this regard, Kadirgamar "The Problem Promissory Note: A Question of Estoppel" (1959) 22 *Modern Law Review* 146).

In view of the provisions of clause 17, it is not necessary to re-enact section 34(2) SABEA.

5 "Of any dishonour"

This provision corresponds with section 27(1)(a) SABEA and does not require comment. The provisions of clause 17 of this draft make it unnecessary to re-enact section 34(5) SABEA.

6 "Any claim to the instrument or any defence"

Section 27(1)(b) SABEA requires a holder in due course to have taken the instrument without notice of any "defect in the title of the person who negotiated it". The words in inverted commas have been replaced by references to "defence" and "claim". The matter is discussed under clause 30.

7 The payee as a holder in due course

7.1 The payee of a bill or note drawn or made payable to order cannot be a holder in due course. The reason for this is section 27(1)(b) SABEA (also section 29(1)(b) BEA and section 52(4) NIL) which stipulates that a holder in due course had no notice of certain facts at the time *the bill was negotiated to him.* The words in italics have been construed in a way that requires the holder in due course to have obtained the

instrument by negotiation. In a submission to the House of Lords in *Jones Limited v Waring and Gillow Limited* 1926 AC 670 680, it was unequivocally stated that,

> "a 'holder in due course' is a person to whom a bill has been 'negotiated', and from section 31 [it appears] that a bill is negotiated by being transferred from one person to another and (if payable to order) by indorsement and delivery. In view of these definitions it is difficult to see how the original payee of a cheque can be a 'holder in due course' within the meaning of the Act".

This case was followed in England *(Ayres v Moore* 1940 1 KB 278 and *Arab Bank Limited v Rose* 1952 2 QB 216 and see also *Lewis v Clay* (1897) 67 LJ QB 224 and the judgment of the Court of Appeal in *Jones* 1925 2 KB 612 (CA)) and South Africa (*Moti and Co v Cassim's Trustee* 1924 AD 720; *Karabus Motors (1959) Ltd v Van Eck* 1962 1 SA 451 (C); *Viljoen v SIK Investment Corporation (Pty) Ltd* 1969 3 SA 582 (T); *De Clerq v Steyn* 1930 TPD 747; *Golden Prism v But-Shor Investments & Distributors (Pty) Ltd* 1978 1 SA 512 (D); *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A)).

There is consequently no doubt that in our law the payee of an instrument drawn or made payable to order cannot be a holder in due course. This construction of section 27(1)(b) SABEA has often been criticised (see eg Malan "Die Nemer as Reëlmatige Houer" (1973) 36 *THRHR* 1; Tager "The Payee as a Holder in Due Course?" (1980) 97 *SALJ* 24; Van der Merwe "Enkele Probleme wat uit ons Wisselwetgewing Voortspruit" (1959) 22 *THRHR* 275). It is accordingly proposed that the Act be amended to allow the payee to qualify as a holder in due course. It is suggested that there is no reason, particularly where dealings between more than two parties are concerned, to distinguish between the protection given a special indorsee and that afforded the payee; both rely on the appearance created by the drawing or making of the instrument. Allowing the payee to become a holder in due course does not, of course, mean that he takes the instrument free from defences based on his relationship with the drawer or maker; he remains liable to be met by defences based on this relationship, the causa of the undertaking on the instrument. Nothing is gained by calling the payee a holder in due course in such circumstances. See Malan 154ff and literature cited and, for German law, Hagemeister "Leistungsverweigerungsrechte des ersten Nehmers gegenüber Wechsel- und Scheckforderungen?" (1983) 12 *ZIP* 1427 and, for "Anglo-American" law, Geva "Equities as to Liability on Bills and Notes: Rights of a Holder not in Due Course" 1980-81) 5 *Canadian Business Law Journal* 53 72ff.

The proposed amendment is given effect to by retaining the requirement that the instrument be "negotiated" to a holder in due course and equating the first delivery of an order instrument to the payee with a "negotiation". This will also ensure that a holder in due course acquires by "negotiation," ie, by delivery in such a way that he becomes holder, and not, for example, by finding. See section 50(1)(a) of the Cheques and Payment Orders Act 1986.

7.2 The consequences of allowing the payee to become a holder in due course are not as important as they may seem. A few examples, some of which are based on the comment on section 3-302 UCC, will suffice: (See also the incisive comment on section 3-302 Revised UCC paragraph 4.)

7.2.1 D draws a bill in favour of P and delivers it to him in payment of his, D's debt. P takes the instrument in good faith and without notice and qualifies as a holder in due course. His claim can nevertheless be met by defences based on the underlying obligation between him and D.

7.2.2 D draws a cheque payable to P and gives it to his employee, X, to deliver to P. X hands the cheque over to P in payment of his, X's, own debt. P is in good faith and takes the instrument without notice. He qualifies as a holder in due course and can enforce payment against D without being subject to the defence that X misappropriates the cheque.

7.2.3 X, a remitter, buys goods from P and obtains a bill drawn and accepted by a bank in favour of P. X delivers the bills to P in payment of his debt. P is a holder in due course and can enforce payment against the bank without being subject to defences based on the underlying agreement of sale between X and P.

7.2.4 M1 and M2 sign a note as co-makers, M1 delivers the note without M2's authority to P. P is a holder in due course and can enforce payment against M2 without being subject to the defence that M1 acted without authority.

7.2.5 D signs a bill payable to P. The bill is stolen by X and delivered by him to P in payment of X's own debt to P. P is a holder in due course and able to enforce payment free from the defence of non-delivery.

7.2.6 D draws a cheque payable to P but leaves the amount in blank. X, D's employee, fills in an excessive amount and delivers the instrument to P. P, as a holder in due course, can recover payment from D without being liable to the defence of unauthorised completion.

7.2.7 By fraud, X induces M to pay an amount to him. However, at M's request, M makes a note for this amount payable, not to X, but to P. X gives the note to P in payment of his own debt. P is a holder in due course and takes the instrument free from the defence of fraud. It is submitted that the result would have been the same had there been a "direct delivery" of the instrument to P.

8 *"Complete and regular on the face of it"*

Section 27(1) SABEA requires a holder in due course to have taken a bill "complete and regular on the face of it". In the Afrikaans text this is rendered as "'n voltooide en oënskynlik reëlmatige wissel". The word "face" in the text refers, of course, to both the front and back of the instrument (*Arab Bank Ltd v Ross* 1952 1 All ER 709 (CA) 715; *Mourgelas v Maidanos* 1973 4 SA 297 (T) 298).

To determine whether an instrument is irregular within the meaning of this section, it is asked "whether the irregularity is suspicious or of such a character as to suggest that there may have been something wrongful or improper or out of the order in previous dealing with the instrument" (Millner 1956 *Annual Survey of the South African Law* 325). To determine whether the indorsement of the payee is irregular, the question is asked whether there is a reasonable doubt as to the single identity of the payee and indorser *Arab Bank Ltd v Ross* 1952 1 All ER 709 (CA) 716). In *Mourgelas v Maidanos* 1973 4 SA 297 (T) 298 an indorsement was said to be regular "[a]s long as there is no reasonable doubt as to the single identity of the payee and the indorser". (See also *Silcan Estate and Finance Co (Pty) Ltd v Astra Café* 1973 3 SA 7 (N) 9).

However, it is not clear whether one or two requirements, viz those of completeness and regularity, are set by the subsection. If an instrument lacks any of the essential requirements, it is not a bill or note, and there cannot be a holder, let alone a holder in due course, of it. On the other hand, it is difficult to imagine that every omission of a non-essential element would disqualify a holder from holding in due course. See Anon "When is a Negotiable Instrument Complete and Regular upon

its Face?" (1922) 22 *Columbia Law Review* 159; Britton 283ff and Malan 163-5. Perhaps the best formulation is that of section 3-304 (1)(a) UCC, which attributes notice of a claim or defence to a holder if "the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay".

Although this provision is helpful, it is suggested that the proper construction of the phrase "complete and regular on the face of it" is a matter that can and should be left to the courts. No specific formulation of the requirement is thus proposed.

29 Presumption of holding in due course

Every holder is presumed to be a holder in due course until the contrary is proved: Provided that if it is admitted or proved that the acceptance, issue or subsequent negotiation, of the instrument is affected with fraud 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 instrument.

Comparative legislation

Sec 28 SABEA
Sec 30 BEA
Sec 59 NIL
Sec 3-307 UCC
Art 32 Uncitral Convention
Sec 51 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

28. *Presumption as to value and good faith.*

(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.
(2) Every holder of a bill is prima facie deemed to be a holder in due course: Provided that 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 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.

Commentary

1 Section 28(2) SABEA is based on section 30(2) BEA which, in turn, codifies the developments in case law.

The first part of section 28(2) SABEA was no doubt, inspired by the dictum of Lord Ellenborough in *King v Milson* (1809) 2 Camp 5 at 7 (170 ER 1062):

> "There is a distinction between negotiable instruments and common chattels. With respect to the former, possession is prima facie evidence of property. I must presume, that the defendant, when possessed of this note, was a bona fide holder for a valuable consideration. It lies upon you to impeach his title."

The proviso to section 28(2) SABEA also derives from the early cases. In *Hogg v Skeen and Vincent* (1865) 18 CB (NS) 426 at 433 (144 ER 510) Willes J quoted with approval the following statement of Byles:

> "As soon as it appears to the jury by the defendant's evidence that the bill was originally infected with fraud or illegality, then it is plain that the original holder's title being destroyed, the title of every subsequent holder which reposes on that foundation and no other, falls with it. Hence, it appears that the plaintiff, the transferee, can then have no title till he shews that he or some other holder under whom he claims gave value for the bill."

See also *Hall v Featherstone* 1858) 3 H&N 284 (157 ER 478); *Berry v Alderman* (1853 14 CB 95 139 ER 40).

The reason for this rule is the suspicion "that the person who had been guilty of the illegality would dispose of [the instrument], and would place it in the hands of another person to sue upon it" (*Bailey v Bidwell* (1844) 13 M & W 73 at 76 (153 ER 30)). However, if this is the reason for the rule, it is clear that only an onus to adduce further evidence and not a true onus is involved. Most of the older cases refer to a burden of proof in the true sense (*Mather v Maidstone* (1856) 1 CB (NS) 273 at 285-6 (140 ER 114); *Jones v Gordon* 1877 2 App Cas 616 627-8) but in *Fitch v Jones* (1855) 5 El & Bl 238 at 245 (119 ER 470) Lord Campbell LJ, correctly, it is submitted, stated:

> "It is not properly that the burthen of proof as to there being consideration is shifted, but that the defendant, on whom the burthen of proof that there was no consideration lies, has by proving fraud or illegality in the former holder raised a prima facie presumption that the plaintiff is agent for that holder, and has therefore, unless that presumption be rebutted, proved that there was no consideration."

If, as is submitted, only an onus to adduce further evidence is involved after proof of fraud or illegality, it is not a matter that need be regulated by statute.

2 Section 28(2) SABEA does not use the words "prima facie" and "burden of proof" clearly. Usually, the words "prima facie" are used to mean that in the absence of some evidence to the contrary the fact in issue is taken as proved: they do not usually place the burden of proof on a party disputing that fact (see Hoffmann and Zeffertt *South African Law of Evidence* (1981) 2ed 441-2). But the use of the words "burden of proof" in the proviso to section 28(2) probably indicates that a true burden is imposed by the words "prima facie" in the first part of the sub-section. This is, in any event, the way in which section 28(2) is construed. See *Ganie v Parekh* 1962 4 SA 618 (N) 620; *Joseph v Hein* 1975 3 SA 175 (W) 178; *Nelson v Marich* 1952 3 SA 140 (A) 148; *Mamojee v Pillay* 1948 1 SA 212 (N) 214. The same applies, it may be added, to section 28(1) SABEA, but the use of the words "prima facie" initially caused considerable confusion in this respect. See *Nelson v Marich* 1952 3 SA 140 (A) 146; *Brooks v Lyric Theatre* 1946 TPD 398 400; *Asmal v Stanger Motor Centre (Pty) Ltd* 1973 3 SA 642 (D) 645; Cowen 98-101; Malan 79-80; Falconbridge (1969) 634-5; Klapka 51; Jacobs 7; Holden *History* 133-9 168; Britton 242-4 but see *Estate Weiner v Weisholtz* 1939 AD 95 96-7.

The use of the words "prima facie" in section 28 SABEA stands in sharp contrast to the precise provisions of section 19(3) and (4), which distinguish between a conclusive presumption and a rebuttable presumption of delivery. There can be no doubt that the rebuttable presumption created by section 19(4) requires the person who denies that a delivery has taken place to prove his defence on a balance of probabilities. Section 18(1) and (2), on the other hand, refer to a "prima facie authority". Only a duty to adduce evidence would be expected here, but in a Scottish case it was said: "But the statute does not throw upon the holder the burden of proving this. If it did, what would be the value of the prima facie presumption of authority?" (*Anderson v Somerville, Murray & Co* (1898) 1 F 90 at 95 (Scottish Session Cases) cited by Cowen 191, and see on this very controversial matter *Metropolitan Timber Co (Pty) Ltd v Pieterse* 1953 4 SA 568 (O); *Galaun v Newton* 1961 1 SA 405 (D); *Mijlof t/a Cape Building Ceramics v Jackson* 1980 3 SA 13 (C)); *Braz v De Atougnia* WLD 25-6 1987 Case 8182/87.

It is suggested that a uniform approach to the different defences (incompleteness, alteration, "want of value" etc) that may be raised by a signatory is

desirable. This result can best be achieved by presuming every holder to be a holder in due course until the contrary is proved. This proposal is based on article 32 of the Uncitral Convention ("Every holder is presumed to be a protected holder unless the contrary is proved") which is simpler than section 3-307(3) UCC ("After it is shown that a defence exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course" (see also section 59 NIL)). See on section 3-307(3) UCC, Cosway (1965) 40 *Washington Law Review* 321; Kinyon "Actions on Commercial Paper: Holder's Procedural Advantages under Article Three" (1967) 65 *Michigan Law Review* 1441 1456-7 and, on previous drafts, Britton "Holder in Due Course - A Comparison of the Provisions of the Negotiable Instruments Law with those of Article 3 of the Proposed Commercial Code" (1955) 72 *Banking Law Journal* 305 399ff. Since this proposal could prejudice the defendant the Commission has decided to retain the provisions of section 28(2) SABEA.

3 It is uncertain whether section 28(2) SABEA applies to the payee of a bill or note. The few cases dealing with the matter hold that the section does not apply to the payee as he cannot be a holder in due course (*Standard Bank of SA Ltd v Sweet* 1924 OPD 30 32; *Talbot v Von Boris and wife* 1911 1 KB 854). Since this draft makes it possible for the payee to become a holder in due course, clause 29 applies to all holders, including the payee of an order instrument.

30 Rights of a holder in due course

A holder in due course

(a) holds the instrument free from any claim to the instrument or any defence available to prior parties;

(b) may enforce payment of the instrument against all parties liable on it.

Comparative legislation

Sec 36 SABEA
Sec 38 BEA
Sec 51, 57 and 58 NIL
Sec 3-305 and 306 UCC
Art 30 and 31 Uncitral Convention

Sec 49 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

36. *Rights and powers of the holder.*

The rights and powers of the holder of a bill are as follows, namely --
(a) he may sue on the bill in his own name;
(b) if he is a holder in due course, he holds the bill free from any defect in the title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;
(c) if the title is defective and --
(i) he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; or
(ii) he obtains payment of the bill in due course the person who made such payment gets a valid discharge of the bill.

Commentary

1 A holder in due course "holds the bill free from any defect in the title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties on the bill" (section 36(b) SABEA). This provision expresses the principle of the unavailability of defences, viz the principle by virtue of which a holder in due course takes the instrument free from defences available to prior parties to the instrument. Another provision ensures that he obtains ownership in the instrument even when he acquires from a non dominus: section 36(c) SABEA states that even where the title to the instrument is defective the holder "obtains a good and complete title to it".

The unavailability of defences found its first expression in the law of procedure. The claim of the holder was described as a ius paratae executionis entitling him to payment without delay and execution to the person and property of the debtor (Stanz *Böser Glaube im Wechselrecht* (1950) 8ff). This ius paratae executionis implied that the defendant could raise no or very limited defences in the cambial process. Some took the view that the law was so strict that the exceptio non numeratae pecuniae could not be raised at all (Lochau *Verhandeling over de Feilen en Gebreken in den Wisselhandel* in Heineccius *Grondbeginselen van het Wisselrecht* 1774 translated by Reitz 2.22). Others allowed this defence only if it could be proved without delay (Heineccius 3.8). In the early ordinances on bills of exchange specific provisions

governing the admissibility of this defence were often found. See the collection of these ordinances by Le Long *Vervolg van de Wissel-styl tot Amsterdam* 1729.

The first comprehensive formulation of the unavailability of defences is found in the Allgemeine Deutsche Wechselordnung of 1848. (Dabin *Fondements du Droit Cambiaire Allemand* (1959) 76ff.) In terms of paragraph 82 of this enactment the debtor could rely only on those defences founded on the law of bills of exchange ("aus dem Wechselrecht") or which he had directly against the plaintiff ("ihm unmittelbar gegen den jedesmaligen Kläger zustehen"). The different formulations of the unavailability of defences in European countries culminated in article 17 of the Geneva Uniform Law on Bills of Exchange. This article has been discussed in the commentary on clause 28 above.

The provisions of section 36 SABEA referred to above are based on section 38 BEA, which also formed the basis for section 57 NIL. See on this latter section, Britton "Defenses, Claims of Ownership and Equities. A Comparison of the Provisions of the Negotiable Instruments Law with Corresponding Provisions of Article 3 of the Proposed Commercial Code" (1955) 7 *Hastings Law Journal* 1. The NIL also provided for the rights of a holder other than a holder in due course. The relevant sections are:

> 57 "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable hereon.
> 58 "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

2 The Uniform Commercial Code discarded the terms "title" and "defects in title" used in previous legislation, and formulates precisely the rights of both a holder in due course and a holder not in due course:

> 3-305 "*Rights of a Holder in Due Course.* To the extent that a holder is a holder in due course he takes the instrument free from
> (1) all claims to it on the part of any person; and
> (2) all defences of any party to the instrument with whom the holder has not dealt except
> (a) infancy, to the extent that it is a defence to a simple contract; and
> (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
(d) discharge in insolvency proceedings; and
(e) any other discharge of which the holder has notice when he takes the instrument.

3-306 "*Rights of One not Holder in Due Course.* Unless he has the rights of a holder in due course any person takes the instrument subject to
(a) all valid claims to it on the part of any person, and
(b) all defenses of any party which would be available in an action on a simple contract; and
(c) the defenses of want or failure of consideration, nonperformance of any condition precedent, non-delivery, or delivery for a special purpose ... and
(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of a third party to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party."

For commentary on these provisions see Cosway (1965) 40 *Washington Law Review* 310ff; Hart and Willier chapters 11 and 12 and section 3-305 Revised UCC. The Uncitral Convention follows the same pattern as the UCC and distinguishes between defences available against a protected holder and those available against an ordinary holder.

The precise formulation of the available and the unavailable defences is a complex matter. The differences between the UCC and the Uncitral Convention are evidence of this. See inter alia the *Report of the Working Group on International Negotiable Instruments on the Work of its Fourteenth Session* 9-20 December 1985 United Nations General Assembly A/CN9/273 paragraphs 10-20; Klapper 84ff and Schütz 173ff.

4.1 In terms of section 36(b) SABEA a holder in due course "holds the bill free from any defect in the title of prior parties, as well as from mere personal defences available to prior parties among themselves, and [he] may enforce payment against all parties liable on the bill". A holder in due course must acquire the instrument without notice of any defect in the title of the person who negotiated the instrument to him (section 27(1)(b) SABEA). The Act does not define "defect in title" but states in section 27(2):

"In particular the title of a person who negotiates a bill is defective within the meaning of this Act if he obtained the bill, or the acceptance thereof, by fraud or other unlawful means, or for an illegal consideration, and is deemed to have been so defective if he negotiates the bill in breach of faith, or under such circumstances as amount to fraud."

While the Act contains this positive statement on the rights of a holder in due course, little is said of the rights of a party not holding in due course. Section 34(2) SABEA provides that an overdue bill "can only be negotiated subject to any defect of title affecting it at its maturity, and no person who takes it can acquire or give a better title than that which the person from whom he took it had". Likewise, any person who takes a bill with notice of the fact that it has been dishonoured "takes it subject to any defect of title attaching thereto at the time of dishonour" (section 34(5) SABEA).

The Act contains no definition of "title" or of "defects of title". "[M]ere personal defences" are not elaborated upon; nor the rights of a holder not holding in due course.

4.2 The term "defects of title" was introduced into the BEA as the equivalent of the common-law expression "equities attaching to the bill" (Chalmers & Guest 277; *Alcock v Smith* (1892) 1 Ch 238 (CA) 263; Geva "Equities as to Liability on Bills and Notes: Rights of a Holder not in Due Course" (1980-81) 5 *Canadian Business Law Journal* 53 61ff and his "Reflections on the Need to Revise the Bills of Exchange Act - some Doctrinal Aspects" (1981-2) 6 *Canadian Business Law Journal* 269 280). In section 27(2) some defects of title are enumerated, but it is clear that the list is not comprehensive (Cowen 270 n22; Byles 221ff; Riley 93) and indeed leaves out the most important defect, viz breach of contract (Geva "Equities" 63). For the pre-code cases, see *Re Overend Gurney & Co* (1868) LR 6 Eq 344 359-60; *Holmes v Kidd* (1858) 3 H & N 891 893-4 (157 ER 729); *Oulds v Harrison* (1854) 10 Exch 572 578 (156 ER 566).

It would, however, be wrong to limit defects of title to defences available against a holder's claim. As Geva "Equities" 64 states: "What constitutes 'defect of title' is a function of the nature of the title to bills and notes" (see Malan 162-3; Cowen 85ff). He refers to Chafee "Rights in Overdue Paper" (1917-8) 31 *Harvard Law Review* 1104 1109 who says of a bill: "Its ownership involves not only the right to possess a thing but the right to sue several persons - maker, drawer and acceptor, indorsers. The promises and the chattel are inseparable. The right to hold the paper and the right to enforce the obligation are in the same person." (See, somewhat differently, Trebilcock "Rights on a Bill of Exchange" (1966) 2 *Tasmania University Law Review* 270 271 who, at 273, says that a holder in due course obtains by negotiation "an entitlement to some rights of action on the bill", and, at 274, submits

that "'title to a bill of exchange' means title to the primary liability arising on the bill". Although this view is not wrong, it seems to neglect the "property" aspect of a bill). The "title" of a holder to an instrument thus involves both his right to possess it (viz ownership) as well as his personal rights on it. So "defects of title" refer both to claims to the instrument and defences available against the holder. It is suggested that, if this is the position, it is preferable to refer to "claims" and "defences" by name rather than to use a concept that has little relevance in South African law and which needs to be specifically construed.

4.3 A holder in due course holds the instrument also free "from mere personal defences available to prior parties among themselves" (section 36(b) SABEA), viz free from what was known as the "equities of the parties" or "collateral matters [such] as the statutory right of set-off" or "a right of set-off ... which is merely a personal right not affecting the bill" (*Re Overend Gurney & Co* (1868) LR 6 Eq 344 360-1, cited by Geva 66 and see Cowen 271-3). "Mere personal defences" are not defences against the claim on the instrument or those arising from the underlying transaction. There are very few of them and Cowen 272 cites incapacity on the part of a cedent to sue the debtor (eg because he is an enemy alien) and a counterclaim for unliquidated damages. In our law there is no suggestion that a remote party or a cessionary is subject to any of these "mere personal defences". They are based on separate causes of action and operate only between the parties to them. See Geva "Equities" 67 and, on an unliquidated counterclaim in our law, *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A). It is suggested, therefore, that there is no specific reason to provide for them in this draft.

4.4 After providing that a holder in due course holds the bill free from any defect in the title of prior parties and from mere personal defences, section 36(b) SABEA continues: he "may enforce payment against all parties liable on the bill". This provision clearly presupposes that some parties or apparent parties are not liable on the instrument at all (Malan 172-3). The "defences" that can be raised against a holder in due course are traditionally referred to as the "absolute defences" and include non est factum, non-delivery of an incomplete instrument, vis absoluta, lack of capacity, forged and unauthorised signature, material alteration and unauthorised representation (Cowen 268ff). The "defences" of non-delivery and material alteration are discussed elsewhere. About these "defences", the observation of Byles 214 that, in those cases,

"the instrument is not drawer's bill at all" is correct. They do not involve defences (ie defences in rem or defects of title), but concern the very question whether the defendant signed the instrument and so incurred liability as drawer, acceptor or indorser. Clearly, in cases of vis absoluta, forged and unauthorised signature and unauthorised representation there can usually be no question of liability. Non est factum is perhaps more problematical, particularly in view of recent English decisions (*Gallie v Lee* (1969) 1 All ER 1062 (CA) and on appeal sub nom *Saunders v Anglia Building Society* 1971 AC 1004 (HL) and see Geva "Reflections on the Need to Revise the Bills of Exchange Act" (1981-2) 6 *Canadian Business Law Journal* 269 281). Both the UCC and the Uncitral Convention make special provision for the availability of this defence against a holder in due course. Although there is merit in specifically enumerating the "defences" available against a holder in due course, it is suggested that this matter should be left to judicial construction and reform (particularly in the case of non est factum - see Scott (1981-2) 6 *Canadian Business Law Journal* 331 at 332) and that the present formulation ("against all parties liable on the bill") be retained.

4.5 No specific enumeration of the defences available against a party who is not a holder in due course is proposed. Where the parties are immediate, the availability of defences is a matter suitably governed by the common law, where they are remote clause 17 of this draft provides that the transferee of an instrument acquires all the rights of his transferor. It follows that defences available against the latter would also be available against a remote party who is not a holder in due course. No specific provision to this effect is necessary. See generally, Cowen 268ff and Geva "Equities as to Liability on Bills and Notes: Rights of a Holder not in Due Course" (1980-81) 5 *Canadian Business Law Journal* 53.

31 Rights of pledgee

Where the holder holds an instrument in pledge

(a) he may exercise all the rights of a holder on the instrument;

(b) he shall, provided all the requirements of section 28 are met, be deemed to be a holder in due course only to the extent of the debt secured.

Comparative legislation

Sec 25(3) SABEA
Sec 27(3) BEA
Sec 27 NIL
Sec 3-303 UCC
Sec 38 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

> 25. *Value and holder for value.*
>
> ...
>
> (3) If the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

Commentary

1 Section 25(3) is a very controversial provision. It applies to the pledge of an instrument (*National Bank of SA Ltd v Nel* 1916 CPD 148 152; *Volkskas Beperk v Esmail* 1950 2 SA 74 (T) 77; Malan 135ff but see Cowen 94 n71) and is valid only when the instrument is delivered by way of pledge to the holder: one does not have a lien on one's own property. Therefore, this section cannot apply when an instrument is transferred in ownership to the holder, albeit for purposes of security. When the instrument is pledged ownership in it is not transferred and, in terms of clause 17, the pledgor remains entitled to the rights evidenced by it. But because he is holder, he can sue on the instrument in his own name (see section 36(a) SABEA). However, his rights as a holder in due course are limited. Klapka 45 summarises them as follows (see also Riley 87; Britton 234):

> "If he receives a bill for £150, he can sue the pledgor only for the amount of the debt owing, ie £100. But if, as a holder for value ... he sues another party to the bill and recovers the full amount, £150, he is the trustee for the pledgor for £50. Even if the title of the pledgor be defective the pledgee can recover the amount of his advance, provided he took the bill without notice of the defect."

In summary, a pledgee is a holder in due course to the extent of the secured debt only, ie to the extent of his own interest; for the balance he exercises the rights of the

pledgor. (See De Wet & Yeats 362 on the validity of a ius paratae executionis in respect of movables, which, it is submitted, is implied in the case of a pledge of bills or notes.)

2 A negotiable instrument can be used as security in different ways, inter alia, as a pledge in the true sense of the word, or by way of a fiduciary transfer in ownership. If the instrument is transferred in ownership as security the relationship between the parties is similar to the case in which a collecting bank becomes a holder "for value" in respect of uncleared effects: the bank is obliged to collect payment of the instrument deposited and to credit the balance, if any, to the account of the depositor. But, because the bank is owner of the instruments so deposited, it is also entitled to all the rights flowing from the instrument (see clause 17). This is, of course, not so in the case of a pledge. However, the terminology used in this respect is not always accurate. In *Haynes Industries (Pty) Ltd v North Coast Plastic and Packaging Industry (Pty) Ltd* 1978 1 SA 1087 (D) certain notes were negotiated to a bank (1089) "in return for which [the bank] agreed to allow [the depositor] overdraft facilities to the extent of 80 per cent of the face value". It is submitted that the rights of the depositor in the notes were indeed transferred to the bank in this case. Section 25(3) therefore, did not apply. In *North Coast Plastic and Packaging Industry (Pty) Ltd v Haynes Industries (Pty) Ltd* 1981 1 SA 913 (A) (a different case) notes were negotiated to a bank in terms of a "deed of cession and pledge". The two words "cession" and "pledge" appear to be mutually exclusive: a cession transfers rights, a pledge entitles the pledgee to hold as security the object pledged. The court referred to the transaction as a pledge, but ignored the provisions of section 25(3). However, it is submitted that the true nature of the transaction in this case was that of a transfer of the instrument in ownership for purposes of security.

3 Article 19 of the GULB does not limit the pledqee's rights of recourse to the amount of the secured debt. However, should the question arise whether he takes the instrument free from defences available against prior parties, the doctrine appears to be unanimous in limiting his rights: he takes the instrument free from defences only to the extent of the secured debt. See, eg, 1 Ronse 209; Baumbach-Hefermehl 260ff.

4 Although bills and notes are relatively seldom given in pledge as security but rather transferred in ownership, it is desirable to specify the rights of the pledgee and to

place some limitation on the rights of the pledgee where the amount of the secured debt is less than that of the instrument. Hence clause 31 is proposed.

5 Professor Oelofse suggested that the rule set out in clause 31(b) and in clause 30(b) of the proposed Cheques Act be extended to also refer to transfers of the instrument for purposes of security so that it would not be restricted to pledges only. He has later expanded this view in "Pledging and Security Transfer of Bills of Exchange and Cheques in German and South African Law" (1989) 1 *South African Mercantile LJ* 23.

It is submitted that there is merit in Professor Oelofse's view and it can be accommodated in the draft by providing as follows: "Where the holder holds an instrument in pledge or where it is negotiated to him for purposes of security ...".

However, despite the advantages of this proposal, the present formulation is retained: it is true that the economic effect of both a pledge and a transfer for the purposes of security is the same. Where the parties, on the other hand, have decided to use a specific legal mechanism to achieve this result, they should be bound by the legal consequences. In addition, the problem raised by Professor Oelofse is only one of a series where the value or consideration given for the instrument is less than its face value. This matter was indeed considered and for the reasons referred to above, the suggested approach was adopted.

CHAPTER 4

LIABILITY OF THE PARTIES

32 Joint and several liability

Subject to the provisions of this Act, all the parties liable on an instrument are liable on it jointly and severally.

Comparative legislation

Sec 85 BEA
Sec 89 SABEA
Art 69 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

89. *Joint or joint and several liability on notes.*

(1) A note may be made by two or more persons and they may be liable thereon jointly, or jointly and severally, according to its tenor.
(2) If a note runs "I promise to pay", and is signed by two or more persons it is deemed to be their joint and several note, and any note signed by two or more persons is deemed to be their joint and several note in the absence of a contrary intention appearing upon the face of it.

Commentary

Two or more persons may sign an instrument as co-drawers, co-makers, co-acceptors, co-signers of aval or as co-indorsers. Section 89(1) SABEA applies to notes only, and there is no comparable section in the Act that applies to the other parties to the instrument. Clause 3(1) of this draft intends to rectify this omission. Section 89(2) SABEA provides for a rule of construction that, again, applies only to notes. However, since 1844 it has been clear that co-drawers, co-acceptors and indorsers are liable on the instrument jointly and severally unless a contrary intention appears from the instrument itself (*Kidson v Campbell and Jooste* (1844) 2 Menz 279; *Moon & Co Ltd v Eureka Stores (Pty) Ltd* 1949 4 SA 40 (T) 45; *Roelou Barry (Edms) Bpk v Bosch* 1967 1 SA (C) 57-8, but see *Opperman v Nel* 1955 1 SA 687 (T) with regard to other documents). Clause 33 of this draft allows a party to limit or restrict his liability on the instrument.

33 Exclusion and limitation of liability

(1) The drawer or any indorser or the signer of an aval may insert in the instrument an express stipulation-

(a) excluding or limiting his own liability to the holder;

(b) waiving any or all of the holder's duties.

(2) Unless a contrary intention appears from the instrument, a waiver operates in favour of all holders, and a waiver contained in the instrument as drawn or made binds all subsequent parties.

Comparative legislation

Sec 14 SABEA
Sec 16 BEA
Sec 3-112(1)(e), 3-413(2), 3-414(1) and 3-511(2)(a) and (6) UCC
Art 9, 15, 26 and 46 GULB
Art 38(2) and 39(2) Uncitral Convention.

The relevant provisions in the Bills of Exchange Act 1964 are:

14. *Optional stipulations by drawer or indorser.*

The drawer and any indorser of a bill may insert therein an express stipulation --
(a) negativing or limiting his own liability to the holder;
(b) waiving as regards himself some or all of the holder's duties.

Commentary

1 The usual way in which the drawer or an indorser excludes or limits his liability is by adding the words "without recourse" or "sans recours" to his signature *Pillimer v Israelstam and Shartin* 1911 WLD 158 and 1911 TPD 781; *Barclays Bank (DC and O) v SA Paper Processing Ltd* 1956 2 SA 349 (T); *Volkskas Bpk v Johnson* 1979 4 SA 775 (C)). The effect is that the particular party is not at all or only partially liable on dishonour of the instrument. Sections 3-413(2) and 3-414(1) UCC also allow the drawer or an indorser to exclude or limit his liability. This is also the position in terms of articles 34(2) and 40(2) of the Uncitral Convention.

According to article 9 GULB, however, the drawer may not exclude his liability for dishonour by non-payment, although he may exclude his liability for dishonour by

non-acceptance. An attempt to exclude liability of the first kind is regarded as pro non scripto, with the result that he remains liable for dishonour by non-payment. This rule is usually referred to in support of the view that the drawer's liability is not based on contract (Hueck-Canaris 73-4). The effect of such exclusion would be to render the bill worthless unless it is not accepted. Whatever the true rationale for the rule of the GULB, it is submitted that there is no reason for holding the drawer of a bill liable contrary to his clearly expressed intention. On the Uncitral Convention article 38(2), see Hermann "Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes" (1988) 10 *University of Pennsylvania Journal of International Business Law* 517 537-8.

2 Neither this draft nor any of the legislation referred to deals specifically with an exclusion or limitation of liability by the acceptor. The reason is clear: where he limits his liability, his acceptance is qualified and the rules concerning qualified acceptances apply to it (section 17 SABEA and clause 42 of this draft). If he purports to accept, but at the same time excludes liability completely, he dishonours the bill (De Wet & Yeats 762 n146).

While an exclusion of liability by the acceptor is tantamount to a dishonour by non-acceptance, the position is somewhat different where the maker of a note adds words to the note excluding his liability. It is submitted that such document is not a note, since the promise is negated by the words excluding liability. However, where a specific amount is promised but liability limited to a smaller amount, a promise is constituted to pay the smaller amount. Only the Uncitral Convention deals with the exclusion or limitation of liability by the maker of a note. Article 39 provides: "The maker may not exclude or limit his own liability by a stipulation on the note. Any such stipulation is ineffective." In paragraph 3 of the commentary to the previous article 35 it is said that the maker, since his liability is primary, may not exclude or limit his liability by a stipulation on the note. "If, nevertheless, such a stipulation is made, it does not affect the validity of the note and is without effect." If this is the rationale of article 35(2), it is difficult to understand why similar provision is not made for the acceptor. On the contrary, article 43(1) of the Uncitral Convention expressly provides for a qualified (including a partial) acceptance. The effect of this provision (article 35) is to impose on a person liability that he clearly did not intend to incur. It is submitted that a promise to pay coupled with an exclusion of liability is

not a promise, and that a promise to pay a certain amount, coupled with a stipulation limiting liability to a smaller amount is a promise to pay the smaller amount (see Baumbach-Hefermehl 361-2). It is thus not desirable to change the existing position.

3 Clause 33(1)(b) of this draft is based on section 14(b) SABEA (section 16(2) BEA). The wording has to some extent been changed, since section 14(b) SABEA does not contain express provision for a waiver of only one of the holder's duties; section 14(b) SABEA and section 16(2) BEA allow a waiver of "some or all" of the holder's duties. The GULB provides for a waiver of protest only (article 46), while the Uncitral Convention provides for a waiver of presentment for payment (article 52(2)(a)), protest (article 58(2)(a)) and notice of dishonour (article 63(2)(b)), but not for a waiver of presentment for acceptance. Section 14(b) SABEA allows for a waiver of some or all of the holder's duties, but section 39(2) (unlike section 44(2)(e) dealing with waiver of presentment for payment) does not state that presentment for acceptance is excused where it has been waived. As there is no reason why presentment for acceptance cannot be waived and consequently excused, clause 59(1) of this draft dispenses with presentment for acceptance where it has been waived.

4 There is no provision in section 14(b) SABEA that a waiver on the instrument operates in favour of subsequent holders. This question was left open in *Competent Distributors (Pty) Ltd v Monarch Cabinet Works (Pty) Ltd and another* 1958 1 SA 161 (D) (see also *Bedit Properties (Pty) Ltd v Charchat* 1962 2 SA 118 (E). Both cases were concerned with a waiver dehors the instrument). Cowen 304 and Malan 218 are of the opinion that a waiver operates in favour of all holders, whether the waiver appears on the instrument or not. Tager paragraph 58 n3 and paragraph 86 n5 takes the view that a waiver operates in favour of all holders, at least where the waiver appears on the instrument itself. According to article 52(2)(a)(i) and (ii), article 58(2)(a)(i) and (ii) and article 63(2)(b)(i) and (ii) of the Uncitral Convention, a waiver appearing on the instrument operates in favour of all holders. It is submitted that this is a sound principle, and it is accordingly incorporated in clause 33(2) of this draft.

5 In terms of section 14(b) SABEA a waiver operates only against the party waiving (Cowen 304; De Wet & Yeats 789 n372). According to article 46 GULB, however, a

waiver on the instrument by the drawer of a bill binds subsequent parties as well. As it is put in the Uncitral Convention, the waiver "runs with the instrument". Although there is merit in the idea that a waiver of the holder's duties can "run" with the instrument, the waiver must in each case be construed. For example, where the drawer adds the words, "I waive notice of dishonour" to his signature, they can hardly mean that a subsequent indorser also dispenses with notice of dishonour with regard to himself.

Section 3-511(6) UCC does not go as far as the GULB and provides that a waiver "embodied in the instrument" is binding upon all parties. This provision is a re-enactment of section 110 NIL. The problem with this formulation is the meaning of the words "embodied in the instrument". According to Britton 570, a clause on the face of the instrument is embodied in it, although it may be so worded that it does not apply to certain parties. The phrase "in the body of it" is used in section 91(1)(a) SABEA and has acquired a rather technical meaning (Malan 219-22; *Veritas International Promotions (Pty) Ltd v Trustees Langad Trust* 1985 3 SA 945 (C)). To use the same expression in clause 33(2) of this draft, would be to run the risk of a similar, very technical, construction. It is suggested that the expression "a waiver contained in the instrument as drawn or made" be used to make it clear that it applies to waivers forming part of the instrument as created by the drawer or maker. It is true that the maker is not entitled to presentment or notice of dishonour (section 91, 50(3) and 93 SABEA), but by inserting this clause he is able to dispense with presentment or notice of dishonour as regards other parties, ie, the waiver "runs" with the instrument.

SIGNATURE

34 Signature as requirement for liability

(1) No person is liable on an instrument if he has not signed it as a party: Provided that

(a) where a person signs an instrument as a party in a name other than his own he is liable on it as if he has signed it in his own name;

(b) the signature in the name of a partnership is equivalent to the signature by the person so signing of the names of all persons liable as partners of that partnership;

(c) where a person adopts or confirms a forged or unauthorised signature as his own he shall be liable as if he has made it himself or as if it has been authorised.

(2) A party need not sign an instrument with his own hand and his signature may be written or placed on it by his authority.

(3) A signature may be made in handwriting or typescript or by way of sealing, stamping, symbol, facsimile, perforation or other means.

Comparative legislation

Sec 21 and 95 SABEA
Sec 23 and 91 BEA
Sec 3-401 and 3-404 UCC
Art 1 GULB
Art 36 Uncitral Convention
Sec 18 NIL
Sec 10(1)(b) and 31 Cheques and Payment Orders Act 1986
Sec 3-401 and 3-402 Revised UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

21. *Signature as requirement for liability.*

No person is liable as drawer, acceptor or indorser of a bill if he has not signed it as such: Provided that-
(a) if a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name; and
(b) the signature of the name of a firm is equivalent to the signature, by the person so signing, of the names of all persons liable as partners of that firm.

95. *Signature.*
(1) If by this Act, any instrument or writing is required to be signed by any person it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person, by or under his authority, and the authorised sealing with a seal of a corporation shall be sufficient and be deemed to be equivalent to the signing or indorsement of any such instrument or writing.
(2) For the purpose of subsection (1) the printing by a computer of the name of an authorised signatory of a warrant-voucher or a Post Office cheque on a warrant-voucher or Post Office cheque shall be sufficient, and shall be deemed to be the signing thereof.

Commentary

1 The first part of clause 34(1) stipulates that a signature is essential for liability on an instrument. As "party" is defined in clause 1, this term is used here instead of the names of the individual parties, as in section 21 SABEA. Although the Act does not define it, "signature" is given a wide meaning in South African law, and includes stamps, facsimiles and indeed any mark placed on the instrument with the intention of identifying the signatory (Malan 86-7; Cowen 130-32; *Philips v Mroqoza* (1905) 22 SC 49; *Meyer v Roberts* 1971 1 SA 328 (O); *Northend v Ulbrick* 1972 1 SA 737 (D); *Ganie v Parekh* 1962 4 SA 618 (N) 622). The fact that provisional sentence cannot be obtained on a document signed with a mark (see *Carstens v Hendriks* (1836) 1 Menz 64; Malan et al *Provisional Sentence* 54-5 Cowen 130 n11; Malan 87 n43), does not detract from this view, since the requirements for provisional sentence are not the same as those for bills and notes.

This interpretation of "signature" was also followed in the NIL (Britton 22) but the position in English law seems less certain (Byles 12-3). In the GULB the traditional wisdom is that "signature" implies a conscious writing of a name by a natural person with his own hand (see Liesecke 1971 *Wertpapier Mitteilungen* 294 at 296; Kapfer *Wechselgesetz und Scheckgesetz* (1981) 37-8 on the position in Austria). The rationale being that forgeries should as far as possible be prevented, it follows that marks bearing no resemblance to letters cannot be "signatures" (contrast OLG Nürnberg 1961 *NJW* 1777 and BGHZ 52, 181 with BGH 1978 *Wertpapier Mitteilungen* 136). Accordingly, stamps and other facsimiles are not suitable as "signatures" (Baumbach-Hefermehl 107; Zöllner 68). Section 1085 of the Swiss Obligationenrecht expressly disqualify all mechanically reproduced copies and all marks (Jäggi Druey and Von Greyerz 152). However, in France legislation was passed in 1966 to allow "mechanical" signatures to a limited extent (Loi 66-8 of 16.6.1966; article 110(8) Code de Commerce. Roblot 119ff; Von Caemmerer *Internationale Rechtsprechung zum Genfer Einheitlichen Wechsel- und Scheckrecht* volume 3 (1976) xvi). This law has been criticised as being an impermissible deviation from article 2 of the Reservations to the Geneva Convention (see Pleyer and Stecher "Erfordernisse und Möglichkeiten einer internationalen Vereinheitlichung des Wechselrechts" *Sonderbeilage* 4 to 1977 *Wertpapier Mitteilungen* at 11).

Although it is incontrovertible that forgery should be discouraged, this consideration is not sufficient to reject signatures other than those made by the signatory in his own hand. It is therefore advisable that the South African position be confirmed by the insertion of clause 34(3). Similar provisions are found in section

1-201(39), read with section 3-401 UCC and in article 4(10), read with article 36 of the Uncitral Convention. Clause 34 (3) sets out what is a signature for the purposes of this legislation. Whether the drawee has a duty towards the drawer to pay a bill signed by means of a mark or a stamp depends on the agreement between them (see *Burnett v Westminister Bank Ltd* 1965 3 All ER 81).

2 Clause 34(2) is based on section 95(1) SABEA, but differs from it in that the reference to sealing is omitted, as the latter is covered by paragraph (3). The proposed subsection provides that a person's signature may be written "or placed" on the instrument by another person acting on his authority. In view of the wide definition of "writing" in section 3 of the Interpretation Act 33 of 1957 and of clause 34(3), it is not necessary to add the words "or placed". They nevertheless exclude any uncertainty on the question how an agent may append his principal's signature.

Reference to the new section 95(2) SABEA, which has been inserted by section 6 of the Finance Act 77 of 1986 is necessary. It provides:

> "For the purpose of subsection (1) the printing by a computer of the name of an authorised signatory of a warrant-voucher or a Post Office cheque on a warrant-voucher or Post Office cheque shall be sufficient, and shall be deemed to be the signing thereof."

A warrant-voucher is defined as a bill drawn on the Secretary to the Treasury against the Paymaster-General's Account, and a Post Office cheque as a bill drawn on the South African Reserve Bank against the Post Office Account (see the new definitions inserted in section 1 SABEA by section 5 of the Finance Act 77 of 1986). Section 95(2) does not refer to the "authorised" printing of an authorised signatory's name. Construed literally, it means that the unauthorised printing of the name would also constitute a valid signature by the authorised signatory. Such an interpretation could not have been intended by the legislature (see *Union Government v National Bank of South Africa Ltd* 1921 AD 121 on the unauthorised use of a post office stamp on a postal order). The reason for this provision is probably that the legislature has not been sure that a "computer signature" qualifies as a "signature". To put the issue beyond doubt, but only with respect to two narrowly defined instruments, section 95(2) has been enacted. Unfortunately, this casts doubt on the validity of "computer signatures" on other instruments (see Pretorius 1986 *Annual Survey of the South African Law* 334-5; Malan et al *Provisional Sentence* 54 n125).

Clauses 34(2) and (3) eliminate the problems created by section 95(2) SABEA and put the validity of a "computer signature" beyond doubt. Clause 34(3) applies also to the case in which the authorised signatory's own signature is used to indicate his representative capacity.

3 Clauses 34(1)(a) and (b) correspond with section 21(a) and (b) SABEA. On section 21(a) and (b) SABEA and its English counterpart (section 23(1) and (2) BEA) see Malan 87 and 92-3; Cowen 132 and 136; Chalmers & Guest 149-164; Byles 68-70.

4 Clause 34(1)(c) replaces the proviso to section 22 SABEA (section 24 BEA). This proviso implies that an unauthorised, but not a forged, signature, may be ratified. Chalmers & Guest 199 explain: (see Cowen 139-40): "A forger does not act, and does not purport to act, on behalf of the person whose name he forges. There is, therefore, nothing on which ratification can be grounded." This is correct but the result is very artificial, since the difference between a forgery and an unauthorised signature often lies only in the intention of the signatory. Section 3-404 UCC read with section 1-201(43) UCC, takes the pragmatic step of putting unauthorised signatures and forgeries on a par for the purposes of ratification. Section 1-201(43) defines "unauthorised signature" to include a forgery, and section 3-404(2) UCC states that any unauthorised signature may be ratified for the purposes of the article. This is proposed in clause 34(1)(c). Article 35 of the Uncitral Convention deals as well with the situation in which a person mistakenly represents a forgery as his own signature, but it is submitted that this should be governed by the general principles of estoppel.

35 Signature by agent

(1) An instrument may be signed by an agent.
(2) A person signs an instrument as an agent where it appears from the instrument that he signs it for or on behalf of a named principal or as the agent or representative of such principal: Provided that where a signature consists of the name of a firm or a juristic person and the signature or signatures of an individual or individuals the latter shall be presumed, until the contrary is proved, to have signed the instrument as agent or agents.

(3) Where a person is authorised to sign, and does and sign, an instrument as an agent, he is not liable on the instrument.
(4) Except as against a party with notice, a person who signs an instrument as an agent without the authority of the person named as principal or who signs an instrument in the name of another person without his authority, shall be deemed to be a party to the instrument and personally liable on it.
(5) Except as against a party with notice, an authorised agent who signs an instrument as a party is personally liable on it.

Comparative legislation

Sec 23 and 24 SABEA
Sec 25 and 16 BEA
Sec 3-403 and 3-404(1) UCC
Art 8 GULB
Art 36 Uncitral Convention
Sec 3-402 Revised UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

23. *Procuration signature.*

A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

24. *Signature as agent or in representative capacity.*
(1) If a person signs a bill as drawer, acceptor or indorser and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not personally liable thereon: Provided that if such person had in fact no authority to sign for or on behalf of the person indicated as principal, or in a representative capacity, he shall be personally liable on the said bill.
(2) In determining whether a signature on a bill is that of a principal or that of the agent by whom it was written, the construction most favourable to the validity of the instrument shall be adopted.

Commentary

1 Clause 35(1) is based on section 95(1) SABEA, which repeats the provisions of section 91 BEA. It also corresponds to article 32(1) of the Uncitral Convention and

the first part of section 3-403(1) UCC. Although there can be no doubt today that an agent may sign an instrument for a principal, the original section 91 BEA was introduced to clarify a historical point, and it is repealed in this amended form ex abundanti cautela.

2.1 Clause 35 is intended to replace section 24 SABEA. The first step in applying section 24 is to determine whether a person signed as agent. This has often been discussed, but the different views need not be repeated. See Malan 102; Cowen 157-73; De Wet & Yeats 759-60; the notes by Murray and Hepple in (1958) 75 *SALJ* 189, (1961) 78 *SALJ* 42 and (1961) 78 *SALJ* 293. Generally, our courts have interpreted section 24(1) strictly. It has been held that section 23(1) requires an agent to "add words" to his signature to escape personal liability on the document (*De Beer v Diesel and Electrical Engineering Co* 1960 3 SA 89 (T) 93; *Natridge Finance (Pty) Ltd v Pillay* 1971 4 SA 412 (D); *Trust Bank of Africa Ltd v Dugmore* 1972 3 SA 926 (D) 932; *Hamdulay v Smith NO* 1984 3 SA 308 (C) 313). Section 24(1) is not clear on the question whether the omission of "words of agency" necessarily leads to personal liability as the section provides merely that a signatory is not liable if these words are added. However, the converse is covered by *Leadbitter v Farrow* (1816) 4 Esp 226 (170 ER 700); *De Beer v Diesel & Electrical Engineering Co* 1960 3 SA 89 (T) 92. *Dickinson v South African General Electric Co (Pty) Ltd* 1973 2 SA 620 (A) 629 and *Chamani v St Ives Trading Co (Pty) Ltd* 1982 2 SA 638 (D) 646 left this question open, but *Akasia Finance v Da Souza* 1993 2 SA 337 (W) confirmed the traditional view. See further Malan "Composite Signatures, Personal Liability and Rectification" 1985 *TSAR* 347 349-50.

Questions remain concerning the so-called "company instruments", viz cheques or other instruments containing the company's pre-printed name and the unqualified signature of one or more company officials. Following the approach favoured by Nicholas J in the court a quo in *Dickinson*, the court in *Chamani* obiter expressed the view that the company name and official's signature together constitute the composite signature of the company (but see Malan 1985 *TSAR* 347; *Akasia Finance v Da Souza* 1993 2 SA 337 (W)). Were this the case, the official would be assumed not liable, since a "composite signature" is the signature of the company alone, and the official's signature is only a part of it. It is therefore unlikely that the court in *Chamani* was correct in contemplating, on this finding, the possibility of personal liability on the part of the official (at 646). In *Marshall v Bull Quip (Pty) Ltd* 1983 1 SA 23 (A) the

Appellate Division left open the question whether a "composite signature" was constituted in a similar case. The court made it clear that a composite signature implies the exclusion of personal liability (at 28).

A company's name is often pre-printed on cheque forms supplied by its bank, and an official or director thus has to add "something" to the cheque form before the cheque can be said to be "signed". Arguing in this manner, Meiring "Handtekeninge namens Maatskappye op Verhandelbare Dokumente" 1986 *Modern Business Law* 48 concludes that it is clear that the human signatory is a mere agent, whether or not he qualifies his signature. Although this argument has its attractions, it is doubtful whether it can survive the provisions of section 24(1) or *Leadbitter v Farrow* (1816) 4 Esp 226 (170 ER 700). See *Akasia Finance v Da Souza* 1993 2 SA 337 (W).

2.2 Section 24(1) SABEA is based on section 26(1) BEA, which codifies the famous dictum of Lord Ellenborough in *Leadbitter v Farrow* (1816) 4 Esp 226 (105 ER 1077). The principle stated in this case is that a man who puts his name on a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another or by procuration of another. Although the English provision also requires that "words" be added to the signature and this case so implies, the Court of Appeal has recently departed from this rule. In *Bondina Ltd v Rollaway Shower Blinds Ltd* [1986] 1 All ER 564 (CA) it was held that the unqualified signature of a company director on a "company cheque" is intended to operate as an agency signature and does not render the director personally liable. The same approach was followed in Canada in *Allprint Co Ltd v Erwin* (1982) 136 DLR (3d) 587 (Ontario CA). Both cases involved a pre-printed cheque form containing details of the customer. No serious attempt was made to overcome the "added words" requirement, which also appears in the Canadian legislation. An even stronger case favouring the agent who has failed to add words of agency is *JDF Builders Ltd v Albert Pearl (Management) Ltd* 49 DLR (3d) 422. This concerned a promissory note that was signed by means of a company stamp followed by an unqualified signature directly below the stamp. Although this was not the only relevant factor, the court was clearly prepared to accept that it was sufficiently clear that the human signatory had signed as an agent (see at 428 where the close proximity between stamp and signature is stressed).

The proviso to section 26(1) BEA, which does not appear in the SABEA, deserves mention. It states that the mere addition of words describing the signatory as an agent does not absolve his personal liability. The implication seems to be that personal liability ensues when the name of the principal is not stated, although clear "words of agency" are used. It is submitted that this is not, and should not be, our law. Although it is possible to contract for an unnamed principal (De Wet "Agency and Representation" 1 *LAWSA* paragraph 112), a signature as agent on behalf of an unnamed principal on a bill or note is meaningless and should not form the basis of liability. The English view is, however, also reflected in section 3-403(2)(b) UCC and article 36(3) of the Uncitral Convention. It is submitted that, in terms of clause 34(1) of this draft, such an agent would not be liable, since he has not signed "as a party".

2.3 The Uniform Commercial Code contributes little to the question under which circumstances a signature is representative. Section 3-403(2)(a) provides for the obvious, viz that, if the instrument neither names the person represented nor shows any representative capacity, the signatory is personally liable. Section 3-403(2)(a) could well be superfluous, since section 3-403(2)(b) imposes personal liability where only one of the factors required by section 3-403(2)(a) is present. Section 3-403(3) states that the name of an organisation preceded or followed by the name and office of an authorised individual is a signature in a representative capacity. This kind of signature is known as a "composite signature" in our law (*GATX-Fuller (Pty) Ltd v Trade and Project Management Service (Pty) Ltd* 1984 3 SA 38 (W) 45). In some cases the courts have held that the unqualified signature of a company official on a "company cheque" does not render him personally liable (White and Summers 494-5; Norwood "The Liability of Agents for Signatures on Corporate Checks" (1984) 89 *Commercial Law Journal* 329).

2.4 Article 36(2) of the Uncitral Convention deals with two kinds of signature by an agent, viz the principal's signature appended by the agent and the agent's signature showing his representative capacity. The article goes on to provide that the resulting liability is that of the principal and not of the agent. What is important is that in the second case the provision requires the instrument to "show" the representative capacity. "Words of agency" are not expressly required (Schütz 47-8).

2.5 According to section 33(1) of the Australian Cheques and Payment Orders Act, 1986 an agent is not personally liable if the following requirements are met: (a) he must sign the cheque for or on behalf of a principal or in a representative capacity; (b) he must add words to the signature indicting that he signs for or on behalf of a principal or in a representative capacity and (c) the principal must be named or otherwise indicated with reasonable certainty in the cheque. Section 3(2) makes it clear that the agent will be personally liable unless all three requirements are met. It follows that the Australian Act retains the principle that words of agency must be used to exclude personal liability. It also imposes liability on the agent for an unnamed principal.

2.6 The GULB contains no express provision dealing with the way in which an agent should sign in order to exclude personal liability. It is nevertheless clear that an authorised agent may sign either by writing the principal's name or by signing his own name with an indication of his representative capacity (Baumbach-Hefermehl 107ff; Hueck-Canaris 57; Zöllner 62-3; Guhl *Das Schweizerische Obligationenrecht* (1980) 831; Jäggi Druey and Von Greyerz 152; Roblot 1O1ff). A far as the latter kind of signature is concerned, the German courts take a flexible approach. The Bundesgerichtshof has held that when an agent signs a bill under the stamped name of a juristic person or partnership the signature is in principle an agency signature, even in the absence of words of agency (BGH 1975 *NJW* 1166, discussed in 1975 *NJW* 1511; BGH 1973 *Wertpapier Mitteilungen* 1400; BGH 1967 *NJW* 1322). The principle applied by the German courts is that one should have regard to "generally accepted mercantile usage" in order to decide whether a signature added to a company or firm name should be regarded as an authentication of the company or firm name or as a separate signature founding separate liability. In accordance with this general approach it has been held that two or more agents who do not add words of agency should place their signatures next to each other, and not below each other, to exclude the personal liability of the second and subsequent signatories (BGH 1976 *Wertpapier Mitteilungen* 1244; OLG Düsseldorf 1978 *Wertpapier Mitteilungen* 21; OLG Hamburg 1985 *Wertpapier Mitteilungen* 1506).

2.7 The report of the Hong Kong Law Reform Commission of 29 October 1982 also deals with unqualified signatures by company officers on cheques that they have drawn on behalf of their companies. The relevant Hong Kong provision is the same as

section 26 BEA. The Commission came to the conclusion that the following new section should be inserted in the Hong Kong Bills of Exchange Ordinance:

> "Where a bill appears to be made, accepted or indorsed by or on behalf of a limited company by a person acting under the authority of that company and, on a proper construction of the bill as a whole, that making, acceptance or indorsement is a making, acceptance or indorsement by that company, the person so acting is not without more personally liable on that bill."

(See Law Reform Commission of Hong Kong *Report on Bills of Exchange Topic 6* (1982) paragraph 8.1-4 for their recommendation.)

This suggestion does not contribute towards a satisfactory solution of the problem. First, it loses sight of the fact that agency signatures are not confined to "company cheques". Secondly, and what is more important, the suggested provision gives no indication how one should determine whether a signature is made in a representative capacity. It assumes, in fact, the answer to the very question it addresses.

2.8 There is little doubt that the present legal position in South Africa does not accord with the expectations of ordinary businessmen. This emerges from the cases. *Anglo-American Factors (Pty) Ltd v Cuppusamy* 1974 3 SA 399 (D) is a good example: although the two directors had signed a "company cheque" without qualification, the drawee bank regarded the cheque as having been drawn by the company alone (see at 401). In *Sadler v Nebraska (Pty) Ltd* 1980 4 SA 718 (W) 726 Goldstone J regarded it as unusual and unbusinesslike that a company director would intend to be personally liable for a company debt on a "company cheque". That a company debt was paid is an indication that both parties intended liability for the company only, and this common intention can form the basis for an action for rectification.

One of the ways in which the law can be reformed is by prescribing in detail when a signature not qualified by "words" of agency may qualify as an agency signature. This is the solution proposed by Murray "Company Signature on Negotiable Instruments" (1960) 77 *SALJ* 1 (see also section 3-403 UCC), but it is questionable whether this is the answer: it is difficult to describe in detail each case in which there would be sufficient indication of an intention to sign as agent only. This is best left to the courts, an approach that has worked well in Germany.

It is accordingly proposed in clause 35(2) that the "words of agency" requirement of section 24 SABEA be abolished. Clause 35(3) sets out the

consequences of a signature by an authorised agent. Specific rules of construction are not incorporated in this clause. The construction of a signature is a matter for the courts, which have made considerable progress in this respect (see *Natridge Finance (Pty) Ltd v Pillay and others* 1971 4 SA 412 (D) 415) and can be guided by the general rules of interpretation of contracts.

2.9 Section 3-402 Revised UCC contain provisions similar to the ones proposed here. Although subsection (a) departs from the rule that an undisclosed principal cannot incur liability, subsection (b) is instructive:

> "If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules shall apply:
>
> (1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.
>
> (2) Subject to subsection (c), if (i) the form of the signature does not show unambiguously that the signature is made in a representative capacity or (ii) the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.
>
> (c) If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person".

In the Official Comment paragraph 3 subsection (c) is justified as follows:

> "Virtually all checks used today are in personalized form which identify the person on whose account the check is drawn. ... [N]obody is deceived in into thinking that the person signing the check is meant to be liable".

3 The signatory is personally liable on a signature that does not qualify as an agency signature. This is implied by section 24(1) SABEA and has been confirmed in a long line of cases (for example *Associated Engineers Co Ltd v Goldblatt* 1938 WLD 139; *Moon and Co (Pty) Ltd v Eureka Stores (Pty) Ltd* 1949 4 SA 40 (T); *Hein v Hofmeyr* 1958 1 SA 29 (W); *Industrial Finance and Trust Co (Pty) Ltd v Heitner* 1961 1 SA 516 (W); *Arthur Littleton (Pty) Ltd v Botes* 1962 4 SA 569 (T) 570; *Marshall v Bull Quip (Pty) Ltd* 1983 1 SA 23 (A) 27-8). The only way in which the agent can escape personal liability is by relying on the defence of rectification.

In *Marshall and another v Bull Quip (Pty) Ltd* 1983 1 SA 23 (A) Corbett JA at 29-30 referred to this defence and said:

> "The defence based on rectification postulates that by signing in the way she did appellant [the official] did not complete a composite signature, but affixed her signature to the cheque without qualification or indication that she was signing in a representative capacity and thus, prima facie, incurred liability on the cheque as drawer. (I say prima facie because, as between immediate parties, such a signatory may, in appropriate circumstances, raise the defence of rectification and on that issue extrinsic evidence is admissible.) In dealing with the rectification defence I must, therefore, assume the correctness of the above mentioned postulate.
> "If the cheque in question was issued on the common understanding between the parties that it was [the company's] cheque and that appellant, in signing it, was merely doing so on behalf of the company and was not undertaking personal liability as drawer and, if the cheque, as drawn, were to be regarded in law as appellant's cheque because she failed to qualify her signature, then it would mean that the cheque, owing to an error which would have been common to both parties at the time of issue, did not reflect their common understanding. Under those circumstances the cheque would be susceptible of rectification at the instance of the appellant in such a way as to indicate that appellant signed merely on behalf of the company and thus reflects correctly the common understanding of the parties."

However, the remedy of rectification has its own defects. First, it is apparently not enough to show that the document does not reflect the real agreement between the parties. In addition, it is required that the conflict between the real agreement and the document be the result of a "common or mutual error" (*Meyer v Merchant's Trust Ltd* 1942 AD 244 253-4; *Von Ziegler and another v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (T) 410-11; *Van Aswegen v Fourie* 1964 3 SA 94 (O) 100). Strict insistence on this requirement leads to inequitable results, particularly where one party knows that the document does not correctly reflect the agreement, but the other does not. Furthermore, the case in which the taker of the instrument knows that the signatory has not duly qualified his signature and does not intend to be personally liable, seems to fall outside the scope of rectification. As there is no question of a common understanding or agreement that conflicts with the document, it has been held that the signatory has no defence (*Rosenfeld v Teakland Sawmills (Pvt) Ltd* 1962 3 SA 919 (FC)) - an unjust result; *Burger v I Lopis and Sons (Pty) Ltd* 1973 2 SA 37 (RAD)). Nor has the question to what extent rectification is available against remote parties been clearly answered (*I Lopis and Sons (Pty) Ltd v Burger* 1972 2 SA 381 (R) 382; *Industrial Finance and Trust Co (Pty) Ltd v Heitner* 1961 1 SA 516 (W) 521-2; *Akasia Finance v Da Souza* 1993 2 SA 337 (W); De Wet & Yeats 759-60; Malan 183).

Secondly, rectification is based on the premise of the existence of a valid and enforceable contract that must be corrected. As it has been said in *Marshall* 29, the defence of rectification "postulates that by signing in the way she [the official] did appellant did not complete a composite signature, but affixed her signature to the

cheque without qualification or indication that she was signing in a representative capacity and thus, prima facie, incurred liability on the cheque as drawer". In other words, to escape liability, the "prima facie liability" on the instrument is admitted but subsequently destroyed by invoking rectification (Malan 1985 *TSAR* 352). This detour is unnecessary: it would be simpler to admit evidence of the representative capacity of the signatory between immediate and remote parties with notice (see section 3-403(2)(b) UCC) - his signature alone does and should not found liability. The "stringent, well nigh inflexible rule designed to give currency to negotiable instruments" (*Glatt v Pitt* (1973) 34 DLR (3d) 295 304-5), which imposes personal liability on the signatory would be just as effective, but much more equitable, were it to operate only in favour of a holder without notice. Hence clause 35(5) is proposed.

4 According to the proviso to section 24(1) SABEA, a person who indicates that he signs as agent, but who lacks authority, is personally liable on the instrument as if he has signed it in his personal capacity. This deviates from general principles in that the "agent" is liable, not for damages based on an implied warranty of authority or misrepresentation (*Blower v Van Noorden* 1909 TS 890; *Claude Neon Lights (SA) Ltd v Daniel* 1976 4 SA 403 (A)), but for the amount of the instrument. This approach is followed in clause 35(4). Similar provisions are found in article 36(2) of the Uncitral Convention, section 3-404(1) UCC and article 8 GULB.

The proviso to section 24(1) SABEA deals only with the case of an unauthorised agent who adds to the instrument his own signature indicating a representative capacity, and does not apply where an unauthorised person appends another person's signature to the instrument. The same solution is called for in both cases. Cowen 132 n30, De Wet & Yeats 756-7 and Tager paragraph 38 n4 apply the proviso to section 24(1) by way of analogy. Cowen also relies on section 21(a) SABEA to reach the same result, but it is doubtful whether that subsection covers a forged or unauthorised signature in the name of another (see Tager paragraph 38 n4). Malan 178 n39, on the other hand, relies on the common law regarding unauthorised representation in the case of an "agent" signing the principal's name.

The same problem has arisen in connection with article 8 GULB, which provides: "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 a party to the bill ... ". The majority view is that article 8 should also be applied by way of analogy where the

unauthorised "agent" signs the name of the "principal" (Baumbach-Hefermehl 133; Hueck-Canaris 59; Zöllner 63; Jacobi 245-6; for the opposite view see Stranz *Wechselgesetz* (1952) 72-3).

The second phrase of clause 35(4) refers specifically to the person who signs the name of another without the latter's authority. Liability is incurred only against a party without notice. The latter qualification, which is in accordance with the rationale of the common-law liability of an unauthorised agent (see the remarks of Miller JA in *Claude Neon Lights (SA) Ltd v Daniel* 1976 4 SA 403 (A) 408-9), does not appear in section 24(1) SABEA. Nor does article 8 GULB require it, but the German Bundesgericht has stated that it would be an abuse of right for the holder of a bill to rely on article 8 if he has knowledge of the lack of authority (BGHZ 59, 179 187). Section 3-404(1) UCC limits the liability of the unauthorised signatory to persons who act in good faith. It contains the further limitation that the taker of the instrument must have given value before he can rely on this provision. The BEA contains no provision comparable to the proviso to section 24(1) SABEA. It follows that the unauthorised "agent" in English law can be liable only on the basis of breach of warranty of authority or misrepresentation (Chalmers & Guest 193 and 196-7; Byles 71).

5 Section 24(2) SABEA (section 26(2) BEA) provides:

> "In determining whether a signature on a bill is that of a principal or that of the agent by whom it was written, the construction most favourable to the validity of the instrument shall be adopted."

It is submitted that this subsection is unnecessary, since the matter is already provided for by the *ut res magis valeat quam pereat* rule. Section 24(2) contributes nothing to it. In addition, it has correctly been held by our courts that this provision cannot be used to force upon a signature a construction that it does not have in order to uphold the validity of an acceptance *(Nicolaides v Henwood, Son, Soutter and Company* 1938 TPD 390; *Joseph Bond and Jeans Ltd v National Implement Co (Pty) Ltd* 1949 2 SA 659 (W)).

6 It is submitted that section 23 SABEA should be deleted. It is based on section 25 BEA that was also adopted in section 34 of the Australian Cheques and Payment Orders Act, 1986, but not by the UCC. Section 23 provides as follows:

> "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."

Section 23 originated from

> "an ancient law growing out of the uses and customs of merchants in dealing with negotiable instruments when executed by one person for another, whose authority is presumed to rest upon some written instrument, to act as the agent for another, and whose signature to the instrument is followed by the words 'per procurationem' or 'by procuration', or by abbreviations thereof. This method of signing is archaic and, in this modern day, is not in current use". (*Buffalo Trust Co v Producer's Exchange* No 148, California. Mo 1930, 224 Mo App t99 L3 SW 2d 644; cited by Britton 493 n15).

Section 23 concerns a representative signature which shows that it is based on some special authority as opposed to a general authority (*Rand Advance (Pty) Ltd v Scala Café* 1974 1 SA 786 (D) 791). But it is not clear how a special authority must be indicated. See De Wet & Yeats 757; Tager paragraph 35; Cowen 143-4. The words "per procuration" or "by special power of attorney" are words indicating a "special" authority. But these words, it should be noted, are also used in cases of a signature because of a general authority; a fine distinction is not always drawn.

In our law it has been held that section 23 SABEA does not apply to signatures on behalf of companies by directors or other officers of such companies, since they do not sign by virtue of a special authority, but under a general authority conferred by the articles of association (*Insurance Trust and Investments (Pty) Ltd v Mudaliar* 1943 NPD 45 53; *Rosenbach and Co (Pty) Ltd v Star King Properties (Pty) Ltd* 1961 4 SA 786 (N) 788-9). The same reasoning should also apply to other juristic persons and to partnerships. The authority of functionaries of other juristic persons is, in principle, also of a general nature. See section 46(a) and (b) and 54(1) of the Close Corporations Act 69 of 1984 with respect to members of a close corporation; De Wet & Yeats 400-1 and *Forder, Ritch and Eriksson v Engar's Heirs* 1973 1 SA 719 (N) 728 with respect to partners. Where the section does apply, its effect is to exclude reliance on ostensible authority or estoppel (*Mahomed v Padayachy* 1948 1 SA 772 (A) 777; Cowen 143; Tager paragraph 35; De Wet & Yeats 757).

It is proposed that section 23 be deleted. It is submitted that it is inequitable to allow a principal to escape liability based on the ostensible authority of an agent merely because the agent used a special form of signature. Moreover, it is doubtful

whether a signature "by procuration" is generally understood in the sense set out in section 23. The expression "by procuration" is not at all clear: if it means some limited or special authority it is not particularly convincing since every authority is limited (by its terms) and special. The form in which the authority given is immaterial. In view of the uncertainty surrounding the provision and its apparently narrow field of operation, it is submitted that section 23 SABEA should not be retained.

36 Forged and unauthorised signatures

Subject to the provisions of this Act, a forged or unauthorised signature shall not operate as that of the person whose name is signed: Provided that a person who by his negligence contributed to the making of a forged or unratified unauthorised signature on an instrument shall be precluded from setting up the forgery or want of authority against a person who in good faith and without notice pays or takes it for value.

Comparative legislation

Sec 22 SABEA
Sec 24 BEA
Sec 3-404(1) UCC
Art 16 and 40(3) GULB
Art 15(1) and 72 Uncitral Convention
Sec 32 Cheques and Payment Orders Act 1986.

The relevant provisions in the Bills of Exchange Act 1964 are:

22. *Forged and unauthorised signatures.*

Subject to the provisions of this Act, if a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority: Provided that nothing in this section contained shall affect the ratification of an unauthorised signature not amounting to forgery.

Commentary

1 Section 22 SABEA (section 24 BEA) is the source of one of the major differences between the Anglo-American and the Geneva systems. In terms of section 22 a forged or unauthorised signature is wholly inoperative, with the result that nobody can acquire title through a forged indorsement. Nor can the instrument be discharged by payment to a person who has acquired through a forged or unauthorised indorsement, since a discharge requires a payment to the holder (section 57(1) and the definition of "payment in due course" in section 1). Section 22 thus precludes a person from becoming a holder via a forged indorsement. The same results flow from section 3-404(1) UCC and section 32 of the Australian Cheques and Payment Orders Act 1986.

The GULB differs in this respect. Article 16 allows the good faith acquisition of the rights to and on the instrument through a forged indorsement. Article 40(3) allows the discharge of the instrument by payment in good faith and without gross negligence to the person who proves his title through an apparently regular indorsement or series of indorsements. This is also the approach taken in the Uncitral Convention.

2 The correct approach to be followed requires a policy decision. The GULB-Uncitral approach promotes the free circulation of bills. It secures far-reaching protection for the purchaser and payor of the instrument, which necessarily implies a concomitant curtailment of the rights of the true owner. Anglo-American systems give less protection to the purchaser and payor, with consequently a less severe curtailment of the true owner's rights. Cogent arguments exist in favour of both approaches. However, to adopt the Geneva rule in South Africa would have far-reaching consequences for businessmen and bankers and would involve changes in banking and business practice. Since no conclusive reason has been advanced for the adoption of the Geneva rule (for a contrary view, see Malan 1978 *TSAR* 107 201 at 210ff), it is proposed that section 22 SABEA be retained. Clause 36 shortens the original section 22 and leaves out its proviso. The reference in the draft to the person whose name is signed is derived from section 3-404(1) UCC and section 32 of the Australian Cheques and Payment Orders Act 1986. See on this important issue Schütz 121ff; Klapper 22ff.

3 The proviso to clause 36 is based on section 3-406 UCC and corresponds with clause 14 that deals with material alterations.

4 Clause 36 deals with forged and unauthorised indorsements and the Clearing Bankers Association, while endorsing the proposed clause, suggested that a proviso be added to the effect that every signature on an instrument be deemed true and authorised until the contrary is proved.

The proposed proviso cannot be accepted: it not only involves a reversal of the ordinary rules of evidence but is also unfair towards the person whose signature is forged or unauthorised.

37 Forged or unauthorised indorsement in name of payee

(1) A forged or unauthorised indorsement in the name of the payee is effective in favour of a holder in due course or a person who pays the in instrument in good faith and without notice, if

(a) the drawer or maker or any person who signs as or on behalf of the drawer or maker intends the person named as payee to have no interest in the instrument; or

(b) the name of the payee has been supplied directly or indirectly to the drawer or maker, or any person signing on behalf of the drawer or maker, by an agent or employee of the drawer or maker, or of the person so signing, who intends the payee to have no interest in the instrument.

(2) Nothing in this section shall impose any liability on the person whose indorsement has been forged or on whose behalf the instrument has been indorsed without his authority.

Comparative legislation

Sec 7(3) BEA
Sec 5(3) SABEA
Sec 21(5) Canadian BEA
Sec 6(3) Zimbabwe BEA
Sec 3-405(1) Uniform Commercial Code
Sec 3-404 Revised UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

> 5. *Requirements as to payee.*
>
> (1) If a bill is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty therein.
> (2) A bill may be drawn payable --
> (a) to two or more payees jointly;
> (b) to one of two, or one or some of several, payees, in the alternative; or
> (c) to the holder of an office.
> (3) If the payee is a fictitious person, or a person not having capacity to contract the bill may be treated as payable to bearer.

Commentary

1 Section 5(3) SABEA provides that where the payee is fictitious or is a person without capacity to contract, "the bill may be treated as payable to bearer". In addition, the corresponding sections in the Cape (Act 19 of 1893), the Orange Free State (Ordinance 28 of 1902) and the Transvaal (Proclamation 11 of 1902), contained references to a "non-existing person". Section 6(3) of the Natal Law 8 of 1887 omitted all reference to a "person not having capacity to contract". These colonial statutes were all based on section 7(3) BEA, which allows an instrument payable both to a fictitious and a non-existing person to be treated as payable to bearer, but which omits all reference to a person without capacity to contract. These provisions are deceptively simple and conceal their history and background. In South Africa the debate surrounding their construction has centred on the question whether "non-existing" was intended by the legislature to be included in the term "fictitious". Cowen (1966) 66ff at 67 expressed the view that

> "the new Act will be construed as having made no change in the law, that is to say, it is desirable that the term 'fictitious' be now construed as being sufficiently wide to cover non-existing: for unless this interpretation is adopted the courts will be thrown back upon an extremely doubtful common-law position".

(See Sinclair "Fictitious and Non-existing Payees. The English Heritage" (1973) 90 *SALJ* 369 373; Malan 50ff). The controversy surrounding section 5(3) has, for this reason, become unrealistic, and little attention has been given to a consideration of the interests of the parties involved. Chalmers "Vagliano's Case" (1891) 7 *Law Quarterly Review* 216 rightly said that the fictitious payee "affords a good illustration of the uncertainty of law, and of the kaleidoscopic nature of the judicial mind". In an

oft-cited passage, Paget (1972) at 231 pointed out that the terms "fictitious" and "non-existing" are

> "suitable rather for a philosophic treatise than an Act dealing with mercantile instruments; interpretation is complicated by ante-thesis necessitating differentiation of meaning; and, not unnaturally, judgments dealing with the question exhibit refinements, if not inconsistencies, which render it almost impossible to formulate the general effect of the subsection".

2 Some historical background is appropriate here. The law relating to the fictitious or non-existing payee developed in England in the eighteenth century. In order to finance their speculations in the money market, commercial concerns agreed with their financiers that the latter would draw or accept bills payable to fictitious payees. The commercial concerns indorsed these instruments in the names of the fictitious payees and discounted them. When the instruments were dishonoured and the financiers sued, either as drawers or as acceptors, they resisted payment on the ground that the indorsements through which the plaintiffs acquired title had been forged. To this the plaintiff replied that the financiers (ie the drawers or acceptors) knew that the payees were fictitious. See Anonymous "The Fictitious Payee and the UCC - The Demise of a Ghost" (1951) 18 *University of Chicago Law Review* 281; Malan 51. Kulp "The Fictitious Payee" (1920) 8 *Michigan Law Review* 296 asks why anyone would wish to make a bill payable to a fictitious person:

> "Two motives suggest themselves: first, in order to defraud someone by inducing another to part with his money on the strength of the supposed credit of the payee, particularly where the payee is the name of some person known to the other party; second, to assume another name in which to conduct the business."

Apparently, the doctrine of the fictitious payee had its origin in a series of cases concerning bills drawn by Livesy & Co, bankrupts, negotiated by Gibson and Co, but which were payable to fictitious persons (see Kulp 301 and the note to *Bennett v Farnell* 1 Camp 130 (170 ER 902 at 903). The first case was *Tatlock and another v Harris* (1789) 3 TR 174 (100 ER 517) in which it was held that the bona fide holder for a consideration of a bill drawn payable to a fictitious person and indorsed in that name by the drawer could recover since all the parties knew of the arrangement, which the court considered "as an agreement between all the parties to appropriate so much property to be carried to the account of the holder of the bill" (at 182). In *Vere and others v Lewis and another* (1789) 3 TR 182 (100 ER 522) the court, in similar

circumstances, allowed the holder to recover on the basis that the bill had been payable to bearer. In *Gibson and Johnson v Minet and Fector* (1791) 1 H Bl 569 (126 ER 326) the House of Lords left no doubt about the status of these instruments; they could be treated as payable to bearer by a bona fide holder as against the acceptor provided he knew the instrument had been payable to a fictitious person. Baron Hotham at 586 said:

> "The great principle that I go upon is, that parties to a bill shall not any more than parties to any deed or instrument, take advantage of their own fraud. In truth what is the end and effect of acceptance but a liability to pay? The acceptors having given this bill a currency when they knew that it never could be paid to the order of White, the law will presume that they intended that formality should be waived. If it be waived, what does it remain but a bill payable to bearer."

At 589 Baron Perryn said:

> "Every person whose real name and signature appears on a bill of exchange, is responsible to the extent of the credit he gives to it in the negotiation of it ... . The intent of the drawers and acceptors of the bill seems to be, to have made a negotiable instrument, and if for any defect, it cannot be made so by indorsement, it is reasonable it should be made valid in any way in which that effect can be produced ... . If a bill be made payable to a person not existing, it operates as a bill payable to bearer."

See also at 595, 597 603 and 605. Lord Chief Baron Eyre at 610-1 regarded the instruments as nullities and based his judgment partly on estoppel: "I am ready to admit that beyond the strict legal estoppels by deed and in pais, we have received into the law of England a sort of moral estoppel. We say, no man shall be heard to allege his own crime or turpitude in his defence." See further *Bennett v Farnell* 1 Camp 130 (170 ER 902); *Collis and others v Emett* (1790) 1 HBl 313 at 321 (126 ER 185); *Hunter v Jeffery* Peake Add Cas 146 (170 ER 225). All these dicta indicate that the defendants were held liable because blameworthiness of some kind could be attributed to them: they were either fraudulent or, at least, knew of the fictitiousness of the payee.

3 Section 7(3) BEA left out all reference to the knowledge of the party against whom the bill may be treated as being payable to bearer. It provides that, "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer". Section 9 of the NIL, on the other hand, is historically more correct in providing that a bill is payable to bearer, "[w]hen it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable".

However, an amendment by the American Bankers Association was subsequently adopted in twenty four states to the effect that an instrument is payable to bearer where it is payable to the order of a "fictitious or non-existing or living person" who is not intended to have any interest in the document, which fact was known to the person making it so payable or to his employee or to another agent who supplied the name of the payee (Britton 425ff; Kulp 303ff).

4 Soon after its enactment, section 7(3) BEA had to be interpreted. The authoritative case before the House of Lords *The Governor and Company of the Bank of England v Vagliano Brothers* 1891 AC 107 (HL), involved bills on which one Glyka, an employee of the acceptor, forged the signature of the drawer, Vucina, and which were payable to one Petridi. The bills were payable at the acceptor's bank, the Bank of England. Both Vucina and Petridi were existing persons with whom Vagliano regularly did business. Glyka forged the payee's indorsement and obtained payment of the bills from the Bank of England. The case thus concerned the question whether the Bank of England had been entitled to debit the acceptor's account with the amount of these bills. The majority of the House held the bank entitled to recover on the basis that the bills could be treated as payable to bearer. Other law lords based their decisions on the conduct of the parties. A minority rejected the claim on the ground that the bank could not debit a customer where payment had been made to someone without a right of action against the acceptor. (See the discussion of this case by Crawford and Falconbridge paragraph 4902.3 and Abel "The Impostor Payee: or Rhode Island was Right" (1940) *Wisconsin Law Review* 161 165).

In his judgment, Lord Herschell stated that the correct way to construe the Bills of Exchange Act was to "examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law" (at 144). He concluded that the payee is fictitious where his name is inserted "by way of pretense merely, without any intention that payment shall only be made in conformity therewith" (at 153). He rejected the notion that the instrument could be treated as payable to bearer only as against a party with knowledge of the payee's fictitiousness: "I have difficulty in seeing how a payee, who is in fact a 'fictitious' person ... can be otherwise than fictitious as regards all the world" (at 146).

The judgment has, despite its uncertain ratio, been followed; Byles 29-30 summarises the position:

> "The result of the case appears to be that in determining whether a payee is fictitious or not, the intention of the drawer of the bill is decisive. If he inserted the name as a mere pretense, to give colour to the instrument, the payee is fictitious, notwithstanding that he in fact exists ... . If, on the other hand, the drawer intended his named payee to receive his money, the payee is not fictitious, notwithstanding the fact that the drawer was deceived into drawing the instrument by a third person who intended to misappropriate the instrument, and to further his intention fraudulently presented to the drawer, contrary to the fact, that the payee was entitled to the sum specified in the instrument. Though the transaction is in fact fictitious, the drawer believes it to be real....
> "In the case of a non-existing person the intention of the drawer is immaterial. If the payee is in fact not a real person, the subsection applies even though the drawer believed him to be a real person and intended him to receive payment under the instrument."

See, on this distinction, Chalmers "Vagliano's Case" (1891) 7 *LQR* 216 *Vinden v Hughes* (1905) 1 KB 795; *North and South Wales Bank Ltd v MacBeth* 1908 AC 137; *Clutton v Attenborough and Son* 1897 AC 90 and *Royal Bank of Canada v Concrete Column Clamps (1961) Ltd* (1977) 74 DLR (3rd) 26); *Fok Cheong Shing Investments Co Ltd v Bank of Nova Scotia* (1981) 123 DLR (3d) 416 (Ont CA); 146 DLR (3d) 617 (SCC). (One may add here *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 2 SA 703 (C) which dealt with section 6(3) of the Zimbabwe Act (which uses both "fictitious" and "non-existing"). Goldin J at 706 E-F said: "The name of Henriques as payee was factually that of a fictitious person but not in the sense that he does not exist, because a person by that name may be in existence." This approach renders it unlikely a case in which the payee would be non-existing). The whole question of "fictitiousness" then involves a "delving" into the mind of the drawer (see *Vagliano* 121 per Lord Halsbury LC) Crawford and Falconbridge paragraph 4902.3 at 1256 remark: "[i]ronically, the very test of intention that the House of Lords sought to destroy has become controlling".

Vagliano has been followed consistently, but very little attention has been given to other possible grounds on which this and other cases could have been resolved. Geva "The Fictitious Payee and Payroll Padding: Royal Bank of Canada v Concrete Column Clamps (1961) Ltd" (1978) 2 *Canadian Business Law Journal* 418 425-6 puts forward this interpretation of *Vagliano:*

> "The pre-Act rationale of the rule of the fictitious payee was understood to be estoppel against a party with knowledge of the fraud. This rationale was inapplicable to the facts of *Vagliano.* They involved purported bills of exchange on which a clerk of the acceptor forged the drawer's signature, obtained the acceptor's signature by fraud, and then, by forging also the payee's signature, obtained payment at the acceptor's bank. In the House of Lords the negligence of each party was strongly relied on ... [the acceptor-customer] not discovering that bills to a huge amount, which represented no commercial transactions, were being drawn on him, and the bank having paid these sums across the counter to a stranger! Thus, by extending the rule of the

> fictitious payee also to the case of a negligent party without knowledge of the fraud, the *Vagliano* majority rejected the pre-Act estoppel rationale of the rule, and displaced it with the broader principle of negligence. Negligence of the customer was either read into the language of the fictitious payee section, or superimposed on it as one of '[t]he rules of common law ... [that] continue to apply'."

(See also the judgment of Laskin CJC in *Royal Bank of Canada v Concrete Column Clamps (1961) Ltd* (1977) 74 DLR (3d) 26 30.)

5 The question whether the payee of an instrument is fictitious is important in two cases: first, where the question is whether the purchaser of the instrument qualifies as holder entitled to enforce payment against prior parties, and secondly, within the bank and customer relationship when it must be determined whether the bank is entitled to debit the account of the customer with the amount of an instrument paid.

Nedbank Ltd v Window Press (Pty) Ltd 1987 3 SA 761 (SEC) is an example of the first case. The facts were presented to the court by way of a stated case and involved a cheque drawn by the defendant at the instance of one M on Volkskas in favour of Radarm (Pty) Ltd or order. The payee did not exist, but the defendant was unaware of that fact, but believed that it did and intended it to receive payment. M knew of the non-existence of the payee and indorsed the cheque, purporting to act on its behalf, to E, who deposited it with the plaintiff. The plaintiff in good faith credited the account of E but the cheque was dishonoured by non-payment. The question that the court had to decide was whether the term "fictitious" in section 5(3) SABEA included a reference to "non-existing", so that the cheque could be treated as being payable to bearer. The court answered in the negative and gave the accepted interpretation to the word "fictitious" (see paragraph 4 above) and held that the omission of "non-existing" in the section did not affect the meaning of "fictitious" (at 765). See, however, Gering "The Case of a Non-existing Person" (1992) 109 *SALJ* 505 and Matzukis (1987) 17 *Businessman's Law* 93.

No reported judgments involving the second kind of case exist in South Africa. The duty of a bank paying an instrument is to effect a discharge of it, ie it must make payment in such a way that the customer is discharged from liability on it (Malan et al *Provisional Sentence* 144 n124). Where an indorsement on the instrument is forged and payment is made to someone holding through that forged indorsement, no discharge of the drawer or of the other parties is effected. Section 8 SABEA, of

course, is an exception to this, as are the provisions relating to crossings (sections 75ff). Because of sections 58 and 79 very few problems concerning the fictitious payee have arisen in South Africa. The position is quite different for example, in Canada, which does not have these provisions in its legislation (see Crawford and Falconbridge 1256-7 and Geva "The Fictitious Payee and Payroll Padding: Royal Bank of Canada v Concrete Column Clamps (1961) Ltd" (1978) 2 *Canadian Business Law Journal* 418 429). These provisions, in addition, made it unnecessary for the courts to develop the customer's duty of care towards his banker. The duty of a customer towards his bank is said to be limited: "Save in respect of drawing documents to be presented to the bank and in warning of known or suspected forgeries he has no duty to the bank to supervise his employees, to run his business carefully, or to detect fraud" (*Big Dutchman (SA) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) at 283 and see Pretorius 1985 *Annual Survey of the South African Law* 342 344-5).

In a minority judgment in Canada, *Royal Bank of Canada v Concrete Column Clamps (1961) Ltd* (1976) 74 DLR (3d) 26, Laskin LJC made an attempt to introduce more equitable rules into the whole issue of the fictitious payee. The facts were (at 27):

> "A payroll clerk, whose normal duty it is to prepare wage or salary cheques for employees of a company, perpetrates a fraud by including among the cheques presented to the authorised signing officer of the company a number of cheques payable to persons who were not owed any wages, some being former employees and the other such payees having names which may or may not be those of existing persons. The fraudulent clerk abstracts these cheques, forges the endorsements and obtains payment from the company's bank that debits the company's account accordingly. Who, as between the company and the bank should bear the loss?"

The majority of the court held that the payees, who were former employees, could not be described as fictitious or non-existing; their indorsements were forged and the bank could consequently not debit the customer with the amounts of those cheques. The majority judgment thus followed the traditional view that the payee who is a real person is neither fictitious nor non-existing even though the drawer had been induced by the fraud of another person to make the instrument so payable (see at 47 of the judgment). It is submitted that this approach does not lead to a just result, for the conduct or neglect of the customer is the same in both cases (viz, both where the payees were former employees and where they were not). More acceptable is the judgment of Laskin LJC who at 32 says:

> "In short, in the fictitious or non-existent payee cases, I see no basis for treating them in different ways according to objective fact, discovered after the event, if the central question is, as I believe it to be, whether the drawer or signing officer of the drawer intended ... to have the cheques (issued as a result of a payroll clerk's fraud) take effect according to their tenor."

He accordingly held that the former employees were also fictitious persons in terms of section 21(5) of the Canadian Act and that the intention of the dishonest clerk should be attributed to the company (at 38-43). In effect, he accepted the contention that, as a matter of policy, "the risk of loss from payroll-padding [should be] upon the employer as a risk of the business" (at 32 and see the headnote). Spence J also dissented and took the view that the court should "adopt the principle of putting the risk of loss from payroll padding upon the drawer of the cheque". He continued "that it would have been quite easy in proper office management to have designed sufficient methods of checking and verifying to have defeated [the dishonest employee's] scheme" (at 46).

However, as has been said, in view of the provisions of sections 58 and 79 SABEA, our courts have seldom had the opportunity to decide cases involving fictitious or non-existing payees. Nor has it been necessary to consider an extension of the duty of care a customer owes his bank to cases involving fictitious or non-existing payees. In clause 62 of the proposed Cheques Act proposals are made which increase the duties of a customer and make it possible for the courts to adjudicate cases involving fictitious payees by invoking the concept of negligence. In addition, the provisions of sections 58 and 79 SABEA appear, albeit in a somewhat different form, in clause 54 of the proposed Cheques Act. There is thus no pressing need, insofar as the bank and customer relationship is concerned, to re-enact section 5(3) SABEA. However, where the rights of a person who acquires the instrument are concerned, the position is different.

6 It is submitted that the words "fictitious" and "non-existing" defy precise definition. Nor is it always clear whose intention must be taken into account in determining whether the payee of a particular instrument is "fictitious": is it the drawer's or the "real" drawer's (eg Glyka in *Vagliano;* see Cowen 68). A better approach seems to be to define the circumstances in which the risk of a forged indorsement is increased and to give efficacy to it vis-á-vis prior parties in those circumstances. This approach would protect a bona fide purchaser, but only in those circumstances in which the defendant has increased the risk of forgery. It would also, in addition to the measures

set out above, give protection to a bank whose customer has increased the risk of forgery.

7 Section 5(3) SABEA refers to "a person not having capacity to contract" which phrase had been incorporated into the Transvaal, Free State and Cape predecessors of section 5(3), but not in section 7(3) BEA. The reasons for this provision are not clear. If the true rationale of section 5(3) is protection against forged indorsements in cases where the risk of forgery is increased, this part of section 5(3) is inappropriate: it is submitted that the payee's lack of capacity is not a factor that increases the risk of a forged indorsement. Section 2(2) in any case provides that the indorsement of a minor or corporation with limited contractual capacity is effective for purposes of negotiation. The section probably applies to any person with limited or no contractual capacity (Malan 189 n10; Tager paragraph 15; Cowen 46-7; De Wet & Yeats 771-2). Clause 16 of this draft also recognise the efficacy of a negotiation by a person having no or limited capacity. It is submitted that there is no justification for the above mentioned extension of section 5(3).

8 Section 5(3) SABEA also differs from its English and colonial counterparts in that it omits reference to a "non-existing" payee. English law draws a clear distinction between the concepts "non-existing" and "fictitious" (see paragraph 1, 2 and 3 above), and the omission of the words "or non-existing" in our legislation has created a problem of construction. It has, of course, recently been held in *Nedbank v Window Press (Pty) Ltd* 1987 3 SA 761 (SEC) that section 5(3) does not apply to a non-existing person, but this is a single judgment, and legislative intervention is preferable.

9 Section 5(3) SABEA sets out that an instrument to which it applies "may by treated as payable to bearer". Where the instrument has been indorsed in blank in the name of the payee the provision is just, since the instrument has the appearance of a bearer instrument. However, the section goes further, and does not require, in addition, that the instrument have the appearance of a bearer instrument.

This was one of the points that arose in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 2 SA 703 (R), which concerned section 6(3) of the Zimbabwe Bills of Exchange Act. P was an employee of the plaintiff. Together with a director of the plaintiff, he had authority to draw cheques on behalf of the plaintiff. A number of

blank cheques, already signed by the director, were handed to P so that he could complete and sign them and hand them to creditors of the plaintiff when required. P completed a certain cheque and made it payable to "MA Henriques" with the intention of misappropriating its proceeds. "Henriques" was apparently a figment of P's imagination. Two points are important. First, the cheque contained the words "a/c payee only" together with a "not negotiable" crossing. Secondly, P did not indorse the cheque in the name of Henriques. He simply deposited it in his personal account with the defendant. The defendant collected payment for P's account, although the cheque was according to its tenor payable to Henriques. One of the questions was whether the Zimbabwe counterpart of section 5(3) applied. Goldin J followed the view of Snyman J in *Dungarvin Trust (Pty) Ltd v Import Refrigeration Co (Pty) Ltd and another* 1971 4 SA 300 (W) that the words "a/c payee only" rendered the cheque non-transferable. This view has since been rejected both in South Africa and Zimbabwe (*Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) and *Philsam Investments (Pvt) Ltd v Beverley Building Society and another* 1977 2 SA 546 (R) at 550D-E), but for present purposes it may be accepted that the cheque was non-transferable. The court concluded: (at 710D):

> "Accordingly, when he is faced with words which constitute a prohibition against transfer and render the cheque payable into the banking account of the payee only, the banker cannot invoke the provision of section 6(3) to set up the defence that he was justified in ignoring the existence and clear meaning of such words."

At 710F the court said:

> "A cheque cannot be non-transferable and payable 'to A only' and at the same time in the alternative be made or treated as payable to bearer."

Sinclair (1973) 90 *SALJ* 379-81 accepts this conclusion, although she admits that the subsection on its face allows any instrument, including a non-transferable one, to be treated as payable to bearer. She concludes (at 380-81):

> "[I]t can be seen that the rule was only designed to protect holders who take an instrument in good faith and subsequently discover that they have no right to retain or enforce payment because the instrument contains a forgery. The fictitious payee provisions render a forgery superfluous, since bearer instruments require no endorsement. Clearly, where the instrument is drawn payable to the payee only, no holder other than the payee can exist, so that the whole rationale for treating the instrument as a bearer one falls away."

It is submitted that the same argument applies where the instrument has not been indorsed in the name of the payee. This also occurred in *Rhostar* since P did not complete his fraud by forging the indorsement of Henriques. Construed literally, the subsection applies to the situation (Sinclair (1973) 90 *SALJ* at 381-2). It is submitted that protection should be given only where either the instrument appears to be payable to bearer, or the "holder" is special "indorsee". In other words, an apparently regular chain of indorsements should be required. In this respect the approach of the Uniform Commercial Code should be followed.

10 Section 3-405(1) UCC provides:

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

The phrase "fictitious or non-existing person" has been discarded as misleading (see paragraph 1 of the Official Code Comment). This provision could apply where the payee is neither fictitious nor non-existing in the English sense (see *Twellman v Lindell Trust Co* 534 SW 2d 83 at 92). Section 3-405(1)(c) could, for example, also apply where the drawer knew the payee and intended him to receive payment (see the remarks in *Merrill Lynch Pierce Fenner and Smith Inc v Chemical Bank* 440 NYS 2d 643 at 646).

Section 3-405(1) UCC does not deem the instrument to be payable to bearer, but requires an apparently regular chain of indorsements (see Official Code Comment paragraph 1 and Bailey 25-32). Therefore, if an indorsement does not purport to be that of the payee, the section does not apply (*Travco Corp v Citizens Federal Savings and Loan Association of Port Huron* 201 NW 2d 675; *Twellman v Lindell Trust Company* 534 SW 2d 83; Bailey 25-35 to 25-36).

The situation becomes complex where the instrument has to be signed by two signatories. The view is that section 3-405(1) applies if only one of the signatories falls within the provisions of the section (Bailey 25-6; Official Code Comment paragraph 3 examples (f) and (g); note also the use of "a person" in section 3-405(1)(b) instead of "the person"). This problem also arose in *Rhostar:* (see

paragraph 9 above). The court held (707H-709E) that the intention of the director should be regarded and not the intention of Paterson. On this basis the Zimbabwe section 6(3) did not apply. However it can be argued that the subsection should have applied, since neither the director nor Paterson intended the payee to receive payment (Sinclair (1973) 90 *SALJ* 376-8). (On the position under the NIL, see Warren "Fictitious Payees on Checks Requiring Dual Signatures" 1961 *Wisconsin Law Review* 439.)

Section 3-405(1)(c) UCC applies where the name of the payee has been supplied by an *employee or agent* of the drawer or maker (see Bailey 25-30 and 25-32 to 25-33). In the Official Comment (4) the view is taken that "the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee". It is also applicable where the drawer or maker knew the payee and intended him to obtain payment.

Section 3-405(1)(c) UCC requires the "supply" of the payee's name, and it is acknowledged that the name is often supplied through intermediaries and that the section should also apply in those circumstances (*Merrill Lynch, Pierce, Fenner and Smith Inc v Chemical Bank* 440 NYS 2d 643 at 646).

Section 3-405(1)(a) UCC provides for the case in which a person pretends to be someone else and in this way induces the maker or drawer to issue him an instrument payable in the name of that other person (see Bailey 25-32 for an example, and the annotation in 92 ALR 3d 608 for the relevant case law). It is suggested that no special provision should be made for this case, since many of the situations contemplated by this provision would fall under clause 37(b).

11 Clause 37(2) seems necessary in view of the provision in clause 37(1) that a forged or unauthorised indorsement is "effective".

DELIVERY

38 Delivery as requirement for contract on instrument

No contract of any party to an instrument shall be complete and irrevocable until delivery of the instrument by such party to conclude the contract: Provided that if an acceptance or an aval is written on an instrument and the acceptor or

signer of the aval gives notice to the person entitled to the instrument that he has accepted it or signed the aval, the acceptance or the aval becomes complete and irrevocable; and provided further that such delivery or notice shall not be necessary to make any party liable to a holder in due course.

Comparative legislation

Sec 19 SABEA
Sec 21 BEA
Sec 16 NIL
Sec 3-305 and 3-306 UCC
Sec 25 to 29 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

19. *Delivery as requirement for contract on a bill.*

(1) No contract on a bill, whether it be a drawer's, the acceptor's, or an indorser's, shall be complete and irrevocable, until delivery of the instrument in question in order to conclude such a contract: Provided that if an acceptance is written on a bill and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.
(2) As between immediate parties, and as regards a remote party other than a holder in due course the delivery of a bill --
(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing the bill, as the case may be;
(b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the ownership in the bill.
(3) If a bill is in the hands of a holder in due course a valid delivery of such bill by all parties prior to him, so as to make them liable to him, is conclusively presumed.
(4) If a bill is no longer in the possession of a party who has signed it as drawer, acceptor or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Commentary

1 Clause 38 is based on section 19 SABEA that corresponds with section 21 BEA and section 16 NIL. By requiring delivery to conclude the contracts of the parties to the instrument, the contractual nature of their obligations is emphasised: delivery is but the outward manifestation of an agreement to be bound. Delivery to conclude these contracts must therefore be made animo contrahendi (*Saambou Nasionale*

Bouvereniging v Friedman 1979 SA 978 (A) 1000; Malan 65-6). Whether a contract on the instrument is in fact concluded depends on whether the parties have reached agreement not only with regard to the giving and taking of the instrument and their consequent rights and liabilities, but also with regard to the purpose or causa for which it is given (*Saambou* at 992 G-H).

2 One of the uncertainties in the SABEA concerns the meaning of "value" and "valuable consideration". "Value" is defined in section 1 as "valuable consideration within the meaning of section twenty-five". Section 25 contributes little to clarity for subsection (1) sets out that "valuable consideration" for an instrument may be constituted by (a) "any cause sufficient to support an action founded on contract or agreement" and (b) "an antecedent debt or liability, irrespective of whether the bill is payable on demand or at a future time". Section 25(2) compounds the uncertainties by providing that "[i]f value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became such parties prior to such time". Subsection (3) deems a holder who has a lien on the instrument "to be a holder for value to the extent of the sum for which he has a lien". Section 26 deals with accommodation bills or parties and holds, in subsection (2), an accommodation party liable to a holder for value. Section 27 defines a holder in due course and requires that he must have taken the instrument "for value" (section 27(1)(b)). Section 28(1) deems every party whose signature appears on the instrument to have become a party to it "for value". (Other sections also use the expression "for value"; eg section 56(3).)

These provisions have been the subject of much comment and the historical considerations leading to their indiscriminate adoption have been pointed out (see eg Cowen 82ff; Malan 69ff and his "Evolusie van die Wisselreg" 1976 *TSAR* 1). It is not necessary to refer to these matters in any detail, and it is sufficient to quote extensively from Cowen's introduction to his chapter on 'value'. He says (at 82):

> "The terms 'value' and 'valuable consideration' are to be found in the Act in eight different sections. Unfortunately, however, the manner in which they are used is very confusing, and tends to darken rather than illumine the topics and problems with which the relevant sections deal. In the first place, the English statutory provisions on the subject which were closely followed as a model, were drafted against a fundamentally different common-law background, and were intended to cope with difficulties which do not present themselves in South African law. The rationale for their inclusion in the English Statute did not exist in the South African counterpart yet the very fact of their inclusion might perhaps carry with it some of their English connotation. Secondly, despite the presence in the Act of a seemingly comprehensive definition clause, which provides that, subject to the context, 'value means valuable consideration ...', it

> seems plain ... that the term 'value' does not bear exactly the same meaning in each of the various sections and subsections in which it appears. Thirdly, in several instances there is doubt as to precisely what the term does mean. For example, even for so basic a purpose as that of qualifying as a holder in due course, doubt still exists in South Africa as to the true interpretation of 'value'. In the result, not only was the extensive repetition of the English statutory provisions in the South African Act largely unnecessary and inelegant, but as one might have expected, it has also proved to be a serious source of obscurity and confusion."

In this draft, no attempt is made to define the term causa or iusta causa. "Value" is referred to only in connection with holding in due course in clauses 1(3) and 28. It is suggested that there is no need to use the term causa or iusta causa in our legislation: whether a causa is needed for a contract is a matter determined by the law of contract, and clause 34 emphasises the contractual nature of the obligations of the parties. It also follows that it is neither necessary nor desirable to deal specifically with the liability of accommodation parties (on which see, Cowen 95-6 and Malan "Die Aanspreeklikheid van die Akkommodasieparty" 1976 *TSAR* 214).

This matter is illustrated by the judgment in *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) (see the discussion in Malan et al *Provisional Sentence* 130ff on which this part is based. The judgment of the court a quo is reported in 1977 3 SA 268 (W)). The facts are: F gave W a cheque for R14 000 made out in favour of the appellant society or order to invest with the latter in paid-up shares in the name of F's wife. An application form, duly signed by his wife, was given to W with the cheque. W was instructed to deliver the cheque and the application form to the appellant. Because he received neither a receipt nor the paid-up share certificates, F stopped payment of his cheque. It transpired that W had given the cheque and application form to an unknown person X, to hand over to the appellant. X did indeed give the cheque to the appellant, but pretended to be F, and requested an investment in the name of other persons. Certificates were subsequently issued to these beneficiaries. Against the appellant's action for provisional sentence, F raised the following defence: "The [appellant] gave no value or valuable consideration to [F] in respect of the said cheque, and the defendant did not become a party to the cheque for any cause which could found an action on contract or agreement" (at 988). Clearly, this defence was based on section 25(1)(a) of the Act. It was further common cause that the appellant, being the payee of an order instrument, could not have been a holder in due course. To determine the validity of the defence raised the court consequently had to interpret the concept of value referred to in section 25(1)(a). In the past (in *Froman v Robertson* 1971 1 SA 115 (A)) it was held that, "[being a contract, a cheque ... drawn and issued must be founded upon justa causa debendi, or

reasonable cause, in order to be valid and enforceable" (at 120G), and "(i) that the requirement of justa causa or reasonable cause is sufficiently satisfied if the promise is made seriously and deliberately and with the intention that a lawful obligation should be established ... and (ii) that in determining whether a promise is founded upon justa causa or a reasonable cause the ground or reason for the promise should be examined" (at 121D-E). Where the liability of a party to a cheque is concerned this meant that the transaction which gave rise to the instrument had to be investigated as well. "[A]ny investigation as to the existence or validity of the causa for the engagement of the drawer must necessarily embrace this underlying transaction." In cases between immediate parties "it is no answer for the party suing to contend that the cheque, viewed in isolation, ie without reference to the underlying transaction, is supported by justa causa in that it was drawn and issued seriously and deliberately and with a view to establishing a lawful obligation thereon" (at 121H-122B).

Jansen JA in *Saambou* divorced the "serious and deliberate intention to be bound", or animus contrahendi, from the notion of iusta causa, and limited the meaning of the latter to the main agreement (for instance, the underlying debt) forming the causa of the auxiliary agreement, viz the contract on the instrument:

> "Gelukkig hoef daar nie nou op hierdie ingewikkeldhede [ie, those relating to the meaning of causa] ingegaan te word nie en kan vir die doeleindes van die onderhawige geval ... die hoofooreenkoms as die oogmerk van die hulpooreenkoms aangemerk word, in dié sin dat sonder eersgenoemde die hulpooreenkoms nie geldig sal wees nie. Om konsekwent te wees sou dan ook aanvaar moet word dat wanneer bv die trekker sy tjek aan 'n skuldeiser van 'n ander ter delging van die ander se skuld uitreik, die skuld van die ander die oorsaak van die trekker se wisselkontrak is" (at 992).

It follows that the contract on an instrument is concluded only when the parties have reached agreement, not only with regard to the giving and taking of the instrument, but also with regard to the purpose for which it is given.

> "Dit skyn duidelik genoeg te wees dat slegs deur ooreenkoms van die partye tot die hulpooreenkoms 'n verband tussen hulpooreenkoms en hoofooreenkoms gelê kan word en aldus die moontlikheid van die aanwesigheid van redelike oorsaak vir die hulpooreenkoms geskep word. ... [V]ir doeleindes van die onderhawige geval kan ons ons bepaal by die wisselkontrak wat ontstaan as die trekker van 'n tjek dit aan die nemer lewer. Nemer en trekker sal dit eens moet wees oor dit waaraan die opbrengs van die tjek bestee moet word alvorens daar sprake van redelike oorsaak kan wees. Deur hierdie ooreenkoms word die band tussen wisselkontrak en die onderliggende verhouding gelê" (at 992).

Thus, where the drawer intends to pay debt X and the payee accepts it in payment of debt Y, there is no consensus between them and consequently no contract on the instrument. Again, if both drawer and payee agree that the cheque is given in payment of a certain, but non-existent debt, no contract comes into existence because the purported contract on the instrument lacks a causa or, in other words, the condition precedent remains unfulfilled. On the facts of the case, Jansen JA had no difficulty in finding that no contract between the parties had been concluded. He also rejected the appellant's reliance on estoppel. It is quite true that the same conclusion could have been reached without invoking the notion of causa at all (Viljoen "'Waarde' in die Suid-Afrikaanse Wisselreg" *EM Hamman-Gedenkbundel* (1984) 1 at 9-10). The court could simply have relied, as it did at 1000, on section 19(1):

> "As between immediate parties ... the delivery of a bill (a) in order to be effectual must be made either by or under the authority of the party drawing ...".

Where an instrument is given in payment of a debt - and it can also be given for the debt of a third party, the drawer, when sued on the instrument, can raise defences based on this underlying obligation. For example, he may, where a cheque has been given in payment of goods, raise the defence that the goods were defective or that he was induced to enter into the underlying agreement by fraud, misrepresentation or illegal means. Generally, defences that can be raised against a claim on the underlying obligation can be relied on against a claim based on the instrument given for it. The few exceptions to this fall within the ambit of the so-called "parol evidence rule" that, as Hoffmann and Zeffertt at 228 state, "shares with the Holy Roman Empire the distinction of being misleading in all three of its component parts". The "parol evidence rule" is applied to the contracts embodied in bills and notes *Von Ziegler and another v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (T), and its applicability is justified in *Stiglingh v Theron* 1907 TS 998 1002:

> "The principle may, and no doubt does, operate harshly in some cases. But on the whole it is sound; and, whether sound or not, it is an undoubted principle of our law. It tends to ensure finality in commercial dealings; and if it were disregarded because sometimes it worked hardly the result would be very far-reaching, would cause the greatest insecurity in business matters, and would, in my opinion, lead to greater hardship than can possibly result from the application of the rule."

It is true that there is a need for certainty and finality in commercial dealings, but care should be taken not to overemphasise this as a requirement for legal rules. No particular interest of commerce is threatened if evidence of a "contradictory" agreement is allowed as against an immediate party or a remote party with notice. In this respect a distinction is made by our colonial and other courts between evidence of an agreement suspending liability on the instrument and evidence of an agreement subjecting liability to a resolutive condition. Evidence of a suspensive condition, it is said, does not "contradict" the terms of the instrument. But evidence of a resolutive condition does (*Stiglingh* 1002 and see Malan et al *Provisional Sentence* 133 n56). The distinction between the two conditions is not always easy to draw (Cosway (1965) 40 *Washington Law Review* 315-6). But even if it can be made, the point remains that both conditions flow from an agreement in terms of which the bill is delivered. In both cases the terms of the agreement "contradict" the unconditional instrument. No particular interest of the creditor seems to be involved in making the distinction and there appears to be very little other justification for the rule between immediate parties and as against a remote party with notice. Perhaps justice would be better served by giving effect to the agreement between the parties. In this regard the conclusion of the Law Commission is significant:

> "[W]e have come to the conclusion that the parol evidence rule, in so far as any such rule of law can be said to have an independent existence, does not have the effect of excluding evidence which ought to be admitted if justice is to be done between the parties. Those authorities which, it may be argued, support the existence of a rule which would have that effect would, in our view, be distinguished by a court today and not followed. Evidence will only be excluded when its reception would be inconsistent with the intention of the parties. While a wider parol evidence rule seems to have existed at one time, no such wider rule could, in our view, properly be said to exist in English law today." (The Law Commission (Law Com No 154) *Law of Contract The Parole Evidence Rule* London January 1986 Cmnd 9700 at 27.)

Zeffertt and Paizes *Parol Evidence with particular reference to Contract* (1986) have recommended legislation that would have the effect of abolishing the "parol evidence rule". Their recommendation is supported: it is suggested that the admission of evidence between immediate parties and remote parties with notice of defences based on the causa, thus also evidence of so-called resolutive conditions, would be equitable and just. Specific proposals for the admission of evidence relating to the signature of parties have been made (see paragraph 3 of the commentary on clause 35) to remove some of the inequities of the "parol evidence rule" in this regard.

3 Clause 38 does not repeat the presumptions contained in section 19(3) and (4) SABEA. It is not necessary to re-enact section 19(3) since the irrebuttable presumption of delivery provided for is nothing but a material rule of law (Britton 204). The same result is now achieved in the proviso in the first part of clause 34 and in clause 30(a) of this draft, which set out that a holder in due course holds the instrument free from any claim to and defence against the instrument. Section 19(4) provides for a rebuttable presumption of delivery: in view of clause 29, which deems every holder to be a holder in due course, this subsection would no longer be required.

4 Nor is it necessary to repeat section 19(2)(a) and (b) SABEA since clause 17(1) vests in the transferee the rights of the transferor. It follows that, if the instrument has not been delivered to the latter "by or under the authority of the party drawing, accepting, or indorsing", the defendant would be able to raise this as a defence against an immediate party and against a remote party other than a holder in due course.

5 This draft envisages the possibility of the payee becoming a holder in due course (see clause 28). It is thus possible for the payee to hold the drawer or maker liable without the latter having delivered the instrument. This is due, not to any change in the wording of section 19 SABEA, but to the provisions of clause 28, which treat the payee like any other holder.

THE PARTIES

39 Liability of the drawee

The drawee is not liable on the instrument until he accepts it as required by this Act.

Comparative legislation

Sec 51 SABEA

Sec 53 BEA
Sec 127 NIL
Sec 3-409 UCC
Art 33(1) Uncitral Convention
Sec 88 Cheques and Payment Orders Act 1986
Art 28 GULB

The relevant provisions in the Bills of Exchange Act 1964 are:

> 51. *Liability of drawee.*
>
> A bill, of itself, does not operate as an assignment of funds in the hands of the drawee and available for the payment thereof, and the drawee of a bill who does not accept as required by this Act, is not liable on the instrument.

Commentary

1 Clause 39 contains the basic principle of section 51 SABEA (which, in turn, is based on section 53 BEA), that the drawee is not liable on the instrument until he accepts. This principle is in accordance with our common law (Heineccius 6.6; Pothier 1.3.14 and is also in accordance with most legal systems in the Anglo-American "family" section 88 of the Australian Cheques and Payment Orders Act, 1986; section 3-409 UCC; section 127 NIL)). Clause 39 is also in harmony with clause 34 of this draft, which provides that no person is liable on the instrument if he has not signed it as a party. Clause 41 further provides that an acceptance must be written on the bill and may consist in the signature of the drawee alone.

2 Clause 39 differs from section 51 SABEA, section 53 BEA and section 3-409 UCC in that it does not contain any reference to the question whether a bill can, in itself, operate "as an assignment of funds in the hands of the drawee." Aigler "Rights of Holder of Bill of Exchange against the Drawee" (1925) 38 *Harvard Law Review* 855 compares a bill of exchange and the assignment of funds in the following manner at 859:

> "A bill of exchange and an assignment would seem to be two essentially and fundamentally different things. The former, as its terms indicate, is an *order* directed to a party to pay a sum of

> money; the latter operates to vest in the assignee ownership, legal or equitable, of a fund, or part thereof, in the hands of another."

Britton points out that section 127 NIL was necessary to codify the prevailing common-law rule since some courts had held that the issuing of a cheque was in itself an assignment pro tanto of the funds to the credit of the drawer (Britton 501 and see Aigler 860ff).

The rule in English law was that the drawee of a bill, as such, incurred no liability to the holder of the bill since there was no privity of contract between them (Chalmers *A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities* (1909) 198). In English common law a bill did not in itself operate as an assignment of funds:

> "It is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears, can amount to an equitable assignment of a debt. The note might have been endorsed to any individual, or any number of people who might have indorsed it in succession. A mercantile instrument it is in its origin, and in that shape it remains and has no other vitality or effect and to call it an assignment of a debt would be to call it out of its right name." (per Bacon VC in *Shand v Du Boisson* (1874) LR 18 Eq 283 and see Baxter "The Bill of Exchange as an Assignment of Funds: A Comparative Study" (1953) 31 *Canadian Bar Review* 1131 at 1142ff).

Chalmers, however, points out that in France, as in Scotland, when the drawee has funds available, the drawing of a bill does operate as an assignment of funds in that it creates a privity between the holder and the drawee (Chalmers 198 and see article 28 GULB; Ronse I paragraph 792; Baxter 1133). Baxter points out:

> "[I]n Continental and Scottish law, the combined effect of assignment and intimation was really to vest in the assignee alone the right to sue for the debt. After intimation, what had been a debt for which only the assignor could sue, and so a personal right of the assignor against the debtor, became transferred into a general right of the assignee against the debtor" (Baxter 1133).

Section 53(1) BEA was therefore necessary to codify the English common law and it is indeed noteworthy that section 53(2) BEA expressly provides:

> "In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it was drawn in favour of the holder, from the time when the bill is presented to the drawee."

In South African law there is no suggestion that a bill of exchange, in itself, would operate as an assignment of funds in the hands of the drawee available for

payment thereof. It is submitted that to provide expressly that a bill does not operate "as an assignment of funds" would serve no purpose.

It is therefore submitted that a simple statement as that contained in clause 39 of this draft would suffice to codify the common-law position of the drawee on a bill of exchange.

40 Liability of the acceptor

The acceptor of a bill by accepting it -

> **(a) engages that he will pay the holder, or the drawer or an indorser who has paid the bill, the amount recoverable in terms of section 47 according to the tenor of his acceptance;**
>
> **(b) is precluded from denying to a holder in due course --**
>
> > **(i) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill**
> >
> > **(ii) the existence of the payee and his then capacity to indorse.**

Comparative legislation

Sec 52 SABEA
Sec 54 BEA
Sec 62 NIL
Sec 3-413 UCC
Art 40-43 Uncitral Convention
Art 28 GULB

The relevant provisions in the Bills of Exchange Act 1964 are:

> 52. *Liability of acceptor.*
>
> The acceptor of a bill, by accepting it --
> (a) engages that he will pay it according to the tenor of his acceptance;
> (b) is precluded from denying to a holder in due course --
> (i) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;
> (ii) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or the validity of his indorsement;

(iii) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or the validity of his indorsement.

Commentary

1 Clause 40 of this draft simplifies section 52 SABEA and combines it with some provisions of section 55 SABEA. Section 52 SABEA is based on section 54 BEA. Clause 40(a) corresponds with article 40(2) of the Uncitral Convention, which simplifies section 54 BEA. Since clause 40 does not in any way alter any of the underlying principles relating to the liability of the acceptor, the comments in this regard are confined to explaining departures from the wording of the present section 52 SABEA. The two subclauses are dealt with in turn.

2 Clause 40(a) of this draft now expressly provides that the acceptor of a bill, by accepting it, engages that he will pay the *holder* thereof (or the drawer or an indorser who has paid it) according to the tenor of his acceptance. Although section 52 SABEA does not stipulate that the acceptor of a bill by accepting it undertakes that he will pay the *holder,* this is implied in the definition of an acceptance as the assent of the drawee to the order of the drawer. His undertaking to pay the drawer or an indorser is expressed in section 55(1) SABEA, and clause 40(a) follows article 40(2) of the Uncitral Convention which states that he egages to pay the holder "or a party who takes up and pays the bill."

3 Clause 40(b) is based on and incorporates the underlying principles of section 52(b) SABEA, and simplifies its provisions. Section 52(b) is based on section 54(2) BEA.

The underlying principle of both section 52(b) SABEA and section 54(2) BEA is an estoppel (Chalmers (1909) 203-4; Spencer Bower *The Law Relating to Estoppel by Representation* (1923) 295ff and Malan 195ff). Spencer Bower 295 explains:

"The introduction of instruments of exchange for the facilitation of commerce necessarily involved the gradual building up of a system of estoppels in favour of, and against, parties to such instruments which otherwise could no have obtained the desired utility and effect. This system, the work of the mercantile community, after being absorbed by degrees in the common law, was finally reduced to the form of a code by the Bills of Exchange Act ...".

In the light of the prevailing uncertainties surrounding the requirements of an estoppel in the South African law it is submitted that it is necessary to codify the relevant estoppels that apply in the case of an acceptance of a bill (see 9 *LAWSA* par 369-70).

4 Clause 40(b)(i) of this draft repeats the provisions of section 52(b)(i) SABEA.

5 Section 52(b)(ii) SABEA provides for those cases in which a bill is drawn payable to the drawer's order. In terms of this section, the acceptor by accepting a bill is precluded from denying to a holder in due course in the case of the bill payable to the drawer's order, the then capacity of the drawer to indorse, but not the genuineness or the validity of his indorsement. Section 52(b)(iii) deals with the bill drawn payable to the order of a third person: the acceptor by accepting a bill is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement. The common denominator of these subsections is that the acceptor by accepting a bill is precluded from denying to a holder in due course the existence or the capacity of the payee to indorse (but not the genuineness of his indorsement) even if the bill is made payable to the drawer's order or to the order of some third person. In other words, it makes no difference in principle whether the bill was made payable to the drawer's order or to the order of some third person; the acceptor is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

The reason why section 54(2)(b) BEA provides specifically for instances in which the bill is made payable to the drawer's order and those in which the bill is made payable to the order of some third person can be traced to a number of old English decisions.

See: *Robinson v Yarrow* (1817) 7 Taunt 455 (129 ER 183), in which it was held that the acceptor of a bill drawn by procuration, though estopped from denying to a holder in due course that the drawer had procuration to draw, was not estopped from denying that he had procuration to indorse; *Cooper v Meyer* (1830) 10 B&C 488 (109 ER 525), in which Lord Tenterden CJ at 471 acknowledged that, when the drawer is a real person, the acceptor is not precluded from disputing his indorsement; *Beeman v Duck* ((1843) 11 M&W 251 (152 ER 796), an action on a bill purporting to have been drawn by a firm of B&W upon, and accepted by the defendant, and indorsed by B&W

to the plaintiff, to which the defendant pleaded, amongst other pleas, that B&W (i) did no draw, (ii) did not indorse the bill, and, it being proved at the trial that B&W were real persons but that their names on the bill, both as drawer and as indorsers, had been forged, it was held by the Court of Exchequer that, though the defendant was precluded from denying that B&W or some person with their authority had drawn the bill, he was not precluded from setting up that neither that firm, nor any person with their authority had indorsed it; in *Garland v Jacomb* (1873) LR 8 Ex 26 (Ex Ch) a member of a firm of attorneys had drawn up and indorsed to the plaintiff a bill in the name of his firm, without its express or (since it is no part of an attorney's business to draw or indorse bills) its implied authority; it was held that the acceptor, though estopped, as against the plaintiff, from denying that the drawing of the bill was authorised by the firm, was at liberty to deny that the indorsement was so authorised. (See also Spencer Bower 297ff).

The provisions of section 54(2) and (c) were therefore needed to spell out that it makes no difference whether the bill is made payable to the drawer's order or to the order of some third person; the acceptor of a bill, by accepting it, is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. These provisions were also necessary to clarify uncertainties that arose at English common law relating to the very basis of the acceptor's estoppel as such (see Spencer Bower 298).

It is submitted that clause 40(b)(ii) consolidates and simplifies the provisions of section 52(b)(ii) and (iii) SABEA but leave the underlying principle of the section intact: the acceptor is precluded from denying to a holder in due course the existence of the payee (whether the bill is payable to the drawer's order or to the order of some third party) and his then capacity to indorse. It is not necessary to provide separately for the situation in which the bill is payable to the drawer's order or the order of some third party.

41 Form of acceptance

(1) An acceptance must be written on the bill and may consist in

(a) the signature of the drawee accompanied by the word "accepted" or any other word or expression indicating his assent to the order of the drawer;

(b) the signature of the drawee alone;

(2) A bill may be accepted before it is signed by the drawer, or while it is otherwise incomplete, or when it is overdue, or after it has been dishonoured.

(3) Where a bill drawn payable a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder is entitled, unless otherwise agreed, to have the acceptance dated as of the date of first presentment thereof to the drawee for acceptance.

(4) If a bill drawn payable a fixed period after sight is accepted and the acceptor fails to date the acceptance, the drawer or any holder may insert the date of acceptance.

Comparative legislation

Secs 15 and 16 SABEA
Secs 17 and 18 SABEA
Secs 132, 134 and 137 NIL
Sec 3-410 UCC
Arts 40-43 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

16. *Time for acceptance.*

(1) A bill may be accepted --
(a) before it has been signed by the drawer, or while otherwise incomplete;
(b) when it is overdue, or after it has already been dishonoured by non-acceptance or non-payment.
(2) If a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder is, in the absence of any different agreement, entitled to have the bill accepted as from the date of first presentment thereof to the drawee for acceptance.
17. *General and qualified acceptances.*
(1) An acceptance is either --
(a) general; or
(b) qualified.

(2) (a) A general acceptance assents without qualification to the order of the drawer.
(b) An acceptance to pay at a particular place shall be deemed to be a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.
(3) (a) A qualified acceptance in express terms varies the effect of the bill as drawn.
(b) In particular an acceptance is qualified if it --
(i) is a conditional acceptance, that is to say, if it makes payment by the acceptor dependent on the fulfilment of a condition therein stated;
(ii) is a partial acceptance, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
(iii) is an acceptance to pay only at a particular specified place and not elsewhere;
(iv) qualifies the time of payment;
(v) is the acceptance of one or more of the drawees but not of all.

Commentary

1 Clause 41 combines sections 15 and 16 SABEA. Sections 15 and 16 are, in turn, based on sections 17 and 18 BEA.

2 Since clause 41(1)(b) merely restates the provisions of section 15(1)(a) SABEA no comment is called for. Clause 41(1)(b) of this draft is based on article 37 of the Uncitral Convention, which is, in turn, based on article 25 GULB. Ronse explains that words that accompany the drawee's signature to indicate his assent to the drawer's order are usually added as a "verweermiddel van misbruik van blanco ondertekening tegen degene die de wissel te kwade trouw heeft verkregen" (Ronse I 249). It is common practice for drawees to add words to their signatures to indicate their acceptance (*Joseph Bond and Jeans Ltd v National Implement Co (Pty) Ltd* 1949 2 SA 659 (W)). Because this clause merely clarifies and does not alter in any way the acceptance by means of a signature alone, no further comment is made.

3 Clause 41(2) of the draft simplifies the provisions of section 16(1)(a) and (b) SABEA. The principle that a bill can be accepted at any time is embodied in this clause.

4 Clause 41(3) restates and simplifies section 16(2) SABEA.

5 Clause 41(4) corresponds with section 3-410(3) UCC. The last sentence of section 138 NIL provided that where "a bill payable after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of

any different agreement, is entitled to have the bill accepted as of date of the first presentment". Paragraph 6 of the Official Comment to section 3-410 UCC explains the necessity of subsection 3 (which corresponds with clause 41(4) of this draft):

> "The purpose of the provision is to provide a definite date of payment where none appears on the instrument. An undated acceptance of a draft payable 'thirty days after sight' is incomplete: and unless the acceptor himself writes in a different date the holder is authorised to complete the acceptance according to the terms of the draft supplying a date of presentment. Any date that the holder chooses to write in is effective providing his choice of date is in good faith. Any different agreement not written on the draft is not effective, and parol evidence is not admissible to show it."

The proposed clause 41(4) to some extent amends section 10(a) SABEA: where an incorrect date is inserted the provision of clauses 9 and 13 dealing with incomplete instruments apply.

42 Qualified acceptance

(1) An acceptance must be unqualified.
(2) An acceptance is qualified if it in any way varies the effect of the bill as drawn.
(3) An acceptance to pay at particular place or by a particular agent shall be deemed to be a general acceptance, unless it expressly states that the bill is payable at that place or by that agent only.
(4) The holder may refuse to take a qualified acceptance and treat the bill as dishonoured by non-acceptance.
(5) If the holder takes a qualified acceptance
(a) the drawer or any indorser who does not assent to it is discharged;
(b) the acceptor is liable according to the tenor of his qualified acceptance.

Comparative legislation

Secs 17 and 42 SABEA
Secs 19 and 44 BEA
Secs 139-142 NIL
Sec 3-412 UCC
Art 40-43 Uncitral Convention

Art 26 GULB

The relevant provisions in the Bills of Exchange Act 1964 are:

17. *General and qualified acceptances.*

(1) An acceptance is either --
(a) general; or
(b) qualified.
(2) (a) A general acceptance assents without qualification to the order of the drawer.
(b) An acceptance to pay at a particular place shall be deemed to be a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.
(3) (a) A qualified acceptance in express terms varies the effect of the bill as drawn.
(b) In particular an acceptance is qualified if it --
(i) is a conditional acceptance, that is to say, if it makes payment by the acceptor dependent on the fulfilment of a condition therein stated;
(ii) is a partial acceptance, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
(iii) is an acceptance to pay only at a particular specified place and not elsewhere;
(iv) qualifies the time of payment;
(v) is the acceptance of one or more of the drawees but not of all.

42. *Duties as to and consequences of qualified acceptance.*

(1) The holder of a bill may refuse to take a qualified acceptance, and, if he does not obtain an unqualified acceptance, may treat the bill as dishonoured by non-acceptance.
(2) If a qualified acceptance is taken and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, the drawer or such indorser is discharged from his liability on the bill: Provided that the provisions of this sub-section do not apply to a partial acceptance whereof due notice has been given.
(3) If the drawer or an indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

Commentary

1 Clause 42 combines sections 17 and 42 SABEA. Sections 17 and 42 are, in turn, based on sections 19 and 44 BEA. Clause 42 seeks to simplify the existing provisions of the SABEA without altering the underlying principles.

2 Clause 42(1) states the correct point of departure, viz that an acceptance must be unqualified. An unqualified acceptance creates certainty in the sense that the parties would be aware of their respective rights and obligations. Clause 42(1) is based on article 43(1) of the Uncitral Convention, and rewords section 17(1) SABEA.

3 Clause 42(2) is also based on article 43(1) of the Uncitral Convention and simplifies section 17(2)(a) SABEA. That the drawee signs the bill in terms of clause 41 is, in itself, an "assent" to the order of the drawer and it is submitted that it would be superfluous to repeat the concept of assent. The principle in section 17(2)(a) is reiterated in positive terms. Since no change in the existing law is contemplated, no further comments are needed.

4 Clause 42(3) restates the provisions of section 17(2)(b) SABEA. See Byles 101-2 for a discussion of the background to section 19(2)(c) BEA. Clause 42(3) is reworded in such a manner that it is unnecessary to work with the rather obscure deeming provisions of the SABEA. The inclusion of the reference to the "particular agent" is based on article 43(4) of the Uncitral Convention.

5 Clause 42(4) and (5) retains the holder's election either to take the qualified acceptance or to treat the qualified acceptance as dishonour. Section 42(1) SABEA contains a similar option. Section 42(2) SABEA also regulates the position in which a drawer or an indorser who does not assent to the taking of the qualified acceptance shall be discharged. It is submitted that it is unnecessary to legislate that an indorser or drawer who does not assent to the taking of a qualified acceptance shall be deemed to have done so after a reasonable time. The holder of a bill has the option of taking the qualified acceptance or to treat the bill as dishonoured. Should he treat the bill as dishonoured he would, in any event, be able to hold the drawer or the indorsers liable.

43 Liability of the maker

The maker of a note by making it --

> **(a) engages that he will pay the holder, or an indorser who has paid the note, the amount recoverable in terms of section 47 according to the tenor of the note;**
>
> **(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.**

Comparative legislation

Sec 92 SABEA
Sec 88 BEA
Sec 60 NIL
Sec 3-413 UCC
Art 78 GULB
Art 39 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

92. *Liability of maker.*

The maker of a note by making it --
(a) engages that he will pay it according to its tenor;
(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

Commentary

1 The provisions of clause 43(a) constitute a slight departure from the existing section 92(a) SABEA and are based on article 39(1) of the Uncitral Convention. The comments made in respect of clause 40(a) regarding the liability of the acceptor apply mutatis mutandis in respect of the liability of the maker of a note.

2 Clause 43(b) repeats the provisions of section 92(2) SABEA, which is based on section 88(2) BEA. No change in the existing law is contemplated in this regard, and further comment is unnecessary.

44 Liability of the drawer

The drawer of a bill by drawing it --

(a) engages that upon dishonour of the bill and any necessary notice of dishonour he will pay the holder, or an indorser who has paid the bill, the amount recoverable in terms of section 47;

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

Comparative legislation

Sec 53 SABEA
Sec 55 BEA
Sec 61 NIL
Sec 3-413(2) UCC
Art 38 Uncitral Convention
Sec 71 & 72 Cheques and Payment Orders Act 1986
Art 9 GULB

The relevant provisions in the Bills of Exchange Act 1964 are:

53. *Liability of drawer and of indorser.*

(1) The drawer of a bill by drawing it --
(a) engages that, on due presentment, it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder, or an indorser who is compelled to pay it, provided the requisite proceedings on dishonour are duly taken;
(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.
(2) The indorser of a bill by indorsing it --
(a) engages that, on due presentment, it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder, or a subsequent indorser who is compelled to pay it, provided the requisite proceedings on dishonour are duly taken;
(b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
(c) is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

Commentary

1 Clause 44(a) is based on section 3-413(2) UCC but closely resembles article 34 of the Uncitral Convention. Clause 44(d) contains the underlying principles of section 53(1)(a) SABEA (and section 55(1) SABEA) which is, in turn, based on section 55(1)(a) BEA. The Official Comment to section 3-413(2) UCC clearly states that no change in substance from the provision of the previous Act (section 61 NIL) was intended. It is submitted that the language used in clause 44(a) of this draft clarifies the drawer's undertaking in that he undertakes a conditional personal liability on the bill, viz that upon dishonour of the bill he will pay the holder or any subsequent party who was compelled to pay it. The essential characteristic of the drawer's undertaking is to *pay* (contra section 53(1)(a) that requires the drawer to "compensate").

2 Clause 44(b) repeats the provisions of section 53(1)(b) SABEA, which is based on section 55(1)(b) BEA. No change in the legal position is contemplated. The estoppel that operates against the drawer of a bill in this regard has its foundations in English common law. Spencer Bower 298 explains:

> "At common law, it was never doubted that the drawer is estopped from setting up that the payee named by him is fictitious or non-existing, for the obvious reason that if a drawer being in the best position to know that the payee is fictitious or non-existent, deliberately chooses to represent the contrary by his naming of him as payee, he cannot be permitted to controvert the representation so made, or set up the fiction of which he was the sole author as the truth."

Further comment is dispensed with as no change in the law is envisaged.

45 Liability of the indorser

The indorser of an instrument by indorsing it -

(a) engages that upon dishonour of the instrument and any necessary notice of dishonour, he will pay the holder, or a subsequent indorser who has paid the instrument, the amount recoverable in terms of section 47;

(b) is precluded from denying to a person who takes the instrument in good faith and without notice for value

(i) the genuineness and regularity in all respects of the drawer's or maker's signature and all previous indorsements and avals:

(ii) that the instrument was at the time of his indorsement valid and subsisting.

Comparative legislation

Sec 53 and 56 SABEA
Sec 55 and 58 BEA
Sec 65, 66 and 67 NIL
Art 44 and 45 Uncitral Convention
Sec 3-417 and 418 UCC
Art 14 GULB
Sec 3-416 Revised UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

53. *Liability of drawer and of indorser.*

(1) The drawer of a bill by drawing it --
(a) engages that, on due presentment, it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder, or an indorser who is compelled to pay it, provided the requisite proceedings on dishonour are duly taken;
(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.
(2) The indorser of a bill by indorsing it --
(a) engages that, on due presentment, it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder, or a subsequent indorser who is compelled to pay it, provided the requisite proceedings on dishonour are duly taken;
(b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
(c) is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.
56. *Liability of transferor by delivery.*
(1) If the holder of a bill payable to bearer negotiates such bill by delivery without indorsing it, he is called a transferor by delivery.
(2) A transferor by delivery is not liable on the instrument in question.
(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee, if the latter is a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that, at the time of transfer, he is not aware of any fact which renders it valueless.

Commentary

1.1 Clause 45(a) is based on article 44(1) of the Uncitral Convention but clause 45(b) contains elements of section 53(2) SABEA. Section 53(2) SABEA sets forth the liability of an indorser. This subsection is based on section 55(2) BEA and provides:

> "The indorser of a bill by indorsing it -
> (a) engages that, on due presentment, it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder, or a subsequent indorser who is compelled to pay it, provided the requisite proceedings on dishonour are duly taken;
> (b) is precluded from denying to a holder in due course the genuiness and regularity in all respects of the drawer's signature and all previous indorsements;
> (c) is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and existing bill, and that he had then a good title thereto."

1.2 Section 53(2)a codifies the liability of an indorser as it evolved in common-law cases. In *Suse and others v Pompe and another* (1860) 8 CB (NS) 538 563 (141 ER 1276) Byles J characterised the contract of an indorser as "an engagement ... that, if the drawee shall not at maturity pay the bill, he, the indorser, will, on due notice, pay the holder the sum which the drawee ought to have paid, together with such damages

as the law prescribes or allows as an indemnity". See also *Morley v Culverwell* (1840) 7 M & W 174 181 (151 ER 727); *Walker Barker and another v MacDonald* (1848) 2 Ex 527 532 (154 ER 600). Clause 45(a) of this draft characterises the engagement of the indorser as one to pay the instrument on dishonour, and not as one to *compensate*. It follows section 3-414(1) UCC and article 44 of the Uncitral Convention in this respect.

1.3 In paragraphs (b) and (c) of section 53(2) certain estoppels are set out. These provisions are also based on early cases that, generally, precluded or estopped an indorser from denying certain facts. In *Ex parte Clarke* (1791) 3 Bro CC 238 (29 ER 511), for example, an indorser was held liable although the instrument was payable to a fictitious person:

> "It is clear that, as against the indorser, it does not signify what the bill is. The indorsee may come against the indorser, though the bill is a mere nullity in other respects."

The indorser thus "admits" the signature of the payee (*Thicknesse and another v Bromilow* (1832) 2 C&J 425 (149 ER 180)) and is estopped from denying that the amount of the bill filled in is correct (*Russel v Langstaffe* (1780) 2 Dougl 514 (99 ER 328)). Nor can he dispute the validity of previous indorsements. In *MacGregor v Rhodes Lane and Rhodes* (1856) 6 El & Bl 266 269-70 (119 ER 863) Lord Campbell CJ said about a bill payable to the order of the drawee:

> "The declaration alleges that Pinkney drew a bill payable to his order and indorsed it to the defendants, and that the defendants indorsed it to the plaintiff, and that it was presented and dishonoured. The plea admits all these allegations except the allegation of the indorsement by Pinkney to the defendants. Are the defendants who admit that they indorsed to the Plaintiff, at liberty to deny that Pinkney indorsed to them? The issue would be idle: Whether Pinkney indorsed to the defendants in blank or specially, the fact of the indorsement by the defendants would at the trial be conclusive evidence of Pinkney's indorsement to them, and would estop them from shewing that what purported to be Pinkney's indorsement as a forgery. The request is to pay to the order of the payee: When a man indorses such a bill he undertakes that if the party requested do not pay, he will, and he cannot deny that the payee has made the order. ... The defendants, having, when they handed the bill to the plaintiff, represented the title as a just one, cannot now deny that it is so."

The "estoppels" effective against an indorser resemble to some extent the warranties given by the vendor of bills and notes in terms of section 56 SABEA.

2.1 Section 58 BEA, on which section 56 SABEA is based, codifies the rules relating to the sale of bearer paper, particularly the duties of the vendor. These rules evolved in the English courts over the past centuries. The vendor or transferor by delivery is not liable on the instrument because he has not signed it (*Ex parte Shuttleworth* (1797) 3 Ves Jun 368 (30 ER 1057); *Bank of England v Newman* (1700) 1 Ld Raym 442 (91 ER 1193) and section 56(2) SABEA, section 58 (2) BEA). He does, however, give the following warranties (section 56(3)):

> "[T]hat the bill is what it purports to be, that he has a right to transfer it, and that, at the time of transfer, he is not aware of any fact which renders it valueless."

These warranties are incidents of the contract of sale (Riley 150ff; Byles 206ff; Britton 618ff) that accord with the reasonable expectations of a purchaser. See Nagel "Endossant en Oordraggewer deur Lewering" 1984 *De Rebus* 34. In *Hamilton Finance Company Ltd v Coverley Westray Walbaum & Tosetti Ltd and Portland Finance Company Ltd* 1969 1 Lloyd's Rep 53 at 67 Mocatta J said:

> "In the ordinary case of the purchase of a bill of exchange the purchaser in my judgment expects to receive an instrument which then and there gives him a right to recover against the acceptor thereof on the due date of payment and, failing payment by the acceptor on the due date, a right to recover against prior indorsers or the drawer. He is not to be left in a state of uncertainty as to his legal rights depending upon the generosity of the paying banker and its customer."

2.2 The vendor warrants that the instrument is what it purports to be. Thus, he warrants that the instrument and the signatures on it are genuine. In *Hamilton Finance Company Ltd v Coverley Westray Walbaum & Tosetti Ltd and Portland Finance Company Ltd* 1969 1 Lloyd's Rep 53 at 66 Mocatta J had no difficulty in holding "that the discounter or purchaser of a bill of exchange which proves to be forged may recover the money he paid upon it". In *Jones and other v Ryde and another* (1814) 5 Taunt 488 493 (128 ER 779) it was said:

> "Upon its afterwards turning out that this bill was to a certain extent a forgery, we think he who took the money ought to refund it to he extent to which the bill is invalid. The ground of the Defendants' resistance is, that the bill is not indorsed; and that whensoever instruments are transferred without indorsement, the negotiator professes not to be answerable for their validity.... [I]t is true to a certain extent, viz that in the case of a bill, note, or other instrument of the like nature, which passes by indorsement, if he who negotiates it does not indorse it, he does not subject himself to that responsibility which the instrument would bring on him, viz to an action to be brought against him as indorser; but his declining to indorse the bill does not rid

> him of that responsibility which attaches on him for putting off an instrument as of a certain description, which turns out not to be such as he represents it. The Defendant has in the present case put off this instrument as a navy bill of a certain description: it turns out not to be a navy bill of that amount, and therefore the money must be recovered back."

See also *Fuller and others v Smith and others* (1824) Ry & Mood 49 (174 ER 939). This duty is concisely formulated in *Gurney and others v Womersley and Burr* (1854) 4 El & Bl 133 141 (119 ER 51): "The vendor of a specific chattel ... is responsible if the article be not a genuine article of that kind of which the seller represents it to be." Thus, the vendor will be liable if the acceptance on the bill sold is forged.

On the other hand, the vendor guarantees that the instrument is what it purports to be, but not the solvency of the parties. In *Gurney* at 854-5 Coleridge J said that,

> "the vendor was not bound to see that he sold a bill of good quality, as to answer for the insolvency of the parties; but the vender is still entitled to have an article answering the description of that which he bought".

Further *Fydell v Clark et al* (1796) 1 Esp 447 (170 ER 415); *Camidge v Allenby* (1827) 6 B & C 373 382.

2.3 There appears to be no decided case on the vendor's warranty that he is entitled to transfer the instrument (Riley 151; Chalmers & Guest 478-9).

2.4 The vendor also warrants that he is not aware of any fact that renders the bill valueless. In *Fenn and another v Harrison and others* (1790) 3 TR 757 (100 ER 842) Lord Kenyon CJ at 759 said:

> "It is extremely clear that, if the holder of a bill of exchange sends it to market without indorsing his name upon it neither morality nor the laws of this country will compel him to refund the money, for which he has sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter into circulation to impose upon the world, instead of the current coin. In this case therefore if the defendants had known the bill to be bad, there is no doubt but that they would have been obliged to refund money."

2.5 The warranties imposed on the vendor arise only where he sells the instrument. Where he gives it in payment of a pre-existing debt, the position is different. In *Ex parte Blackburne* (1804) 10 Vesey 204 206 (7 ER 389) it was accepted as settled law, "that, if there is an antecedent debt, and a bill is taken, without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may

be resorted to". This principle has been confirmed in many cases: *Van Wart v Woolley and others* (1824) 3 B & C 439 845-6 (107 ER 797); *Camidge v Allenby* (1827) 6 B & C 373 382-3 (108 ER 489); *Evens v Whyle* (1829) 5 Bing 485 (130 ER 1148); *Timmins v Gibbins* (1852) 18 QB 722 726 (118 ER 273); *Ward v Evans* (1703) 2 Ld Raym 929 (92 ER 120); *Lichfield Union v Greene* (1857) 1 H & N 884 (156 ER 1459); *Clerk v Mundal* (1698) Holt KB 115 (90 ER 962).

3 Very similar warranties are provided for by the Negotiable Instruments Law, section 65 of which reads:

> "Every person negotiating an instrument by delivery or by a qualified indorsement, warrants -
> 1 That the instrument is genuine and in all respects what it purports to be;
> 2 That he has a good title to it;
> 3 That all prior parties had capacity to contract;
> 4 That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.
> But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.
> The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes."

In his discussion of this section, Britton 618ff submits that the vendor warrants that the signatures of prior parties are genuine, and against the defences of non est factum, material alteration, non-delivery, incapacity, illegality and invalidity and also against personal defences. In terms of the section these warranties are given by both the transferor by delivery and by the qualified indorser, the former's are made to his immediate transferee and the latter's to subsequent holders as well. The unqualified indorser gives the same warranties as the transferor by delivery (section 66 NIL) and, in addition, warrants that the instrument is "at the time of his indorsement valid and subsisting" (section 66(2) NIL). Furthermore, the indorser engages to pay the instrument subject to certain conditions (section 66 NIL). Britton's discussion of the differences between the two parties is instructive. He says at 634-6:

> "An unqualified indorser on negotiable paper is under two forms of liability to subsequent holders for value. He is liable as a vendor and also on his special contract of indorsement. As a vendor his liability is of the same nature as that of the qualified indorser and the transferor by delivery. The latter party's liability was worked out at common law on a theory of implied warranty against defenses and equities of prior parties. This theory was continued in Section 65 of the Negotiable Instruments Law. The liability of the unqualified indorser as a vendor might

likewise have been so developed but the idea of estoppel was used to accomplish, substantially, the same results.
At common law, the cases that involved the liability of an unqualified indorser were few, probably for the reason that the liability of the unqualified indorser, on his special contract of indorsement, as distinguished from his liability as a vendor, was sufficient to protect the holder. Having entered into a special contract, there was rarely any occasion for resort to a different theory of liability, narrower in scope and somewhat overshadowed if not concealed by the special engagement. Nevertheless, at common law, the liability of the unqualified indorser as a vendor was substantially the same as that of the qualified indorser and transferor by delivery. The only difference was that the one used the idea of estoppel to produce the results, the other, the theory of warranty.
The difference between the two forms of liability is important. An action on the indorser's special contract of indorsement is conditioned on presentment, notice and protest; his liability for breach of warranty is not so conditioned. Again, the action on the special engagement cannot be brought until maturity of the instrument while the action for breach of warranty, occurring as it does at the time of transfer, may be brought at any time.
The implied warranties of a qualified indorser, of a transferor by delivery and of an unqualified indorser should be identical, because the liability of each party arises from the fact, common to each, of a transfer for value. But under Section 66 the liability of an unqualified indorser as a warrantor is somewhat different from that of the qualified indorser and transferor by delivery under Section 65".

Section 65 NIL limits the warranty of the transferor by delivery to the immediate transferor. The qualified indorser, however, is liable to subsequent holders as well. In terms of section 66 the unqualified indorser "warrants to all subsequent holders in due course". Britton 636 submits that "holders in due course" in this section means "purchasers for value who had no knowledge of the facts constituting the breach of warranty" to give effect to the common-law rule that a holder with notice could not rely on the warranties or estoppels.

4 Article 45 of the Uncitral Convention regulates this matter specifically. Article 45 provides:

"(1) Unless otherwise agreed, a person who transfers an instrument, by endorsement and delivery or by mere delivery, represents to the holder to whom he transfers the instrument that:
(a) the instrument does bear any forged or unauthorized signature;
(b) the instrument has not been materially altered;
(c) at the time of transfer he has no knowledge of any fact which would impair the right of the transferee to payment of the instrument against the acceptor of a bill or, in the case of an unaccepted bill, the drawer or against the maker of a note.
(2) Liability of the transferor under paragraph (1) of this article is incurred only if the transferee took the instrument without knowledge of the matter giving rise to such liability.
(3) If the transferor is liable under paragraph (1) of this article, the transferee may recover, even before maturity, the amount paid by him to the tranferor with interest calculated in accordance with article 70, against return of the instrument."

5 Section 3-417 UCC greatly expands the original sections 65 and 66 NIL. It deals with the so-called "warranties" given on presentment or transfer. Both the transferor by delivery and the qualified and unqualified indorser are treated in the same manner. The section further deals specifically with warranties given in respect of altered instruments and codifies, with section 3-418, the body of rules that developed around the controversial decision in *Price v Neal* (1762) 3 Burr 1354 (97 ER 871). It is to be noted that the elaborate section 3-417 UCC has been considerably shortened by the Revised UCC.

Section 3-417 provides:

> "3-417 Warranties on Presentment and Transfer. (1) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that
> (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and
> (b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith
> (i) to a maker with respect to the maker's own signature; or (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
> (iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and
> (c) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith
> (i) to the maker of a note; or
> (ii) to the drawer of a draft whether or not the drawer is also the drawee; or
> (iii) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided 'payable as originally drawn' or equivalent terms; or
> (iv) to the acceptor of a draft with respect to an alteration made after the acceptance.
> (2) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that
> (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
> (b) all signatures are genuine or authorized; and
> (c) the instrument has not been materially altered and
> (d) no defense of any party is good against him; and
> (e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.
> (3) By transferring 'without recourse' the transferor limits the obligation stated in subsection (2)(d) to a warranty that he has no knowledge of such a defense.
> (4) A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority.
> 3-418 *Finality of Payment or Acceptance.* Except for recovery of bank payments as provided in the Article on Bank Deposits and Collections (Article 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument

> is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment."

In a much simpler section 3-416 Revised UCC it is provided as follows:

> "(a) A person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that:
> (1) the warrantor is a person entitled to enforce the instrument;
> (2) all signatures on the instrument are authentic and authorized;
> (3) the instrument has not been altered;
> (4) the instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor; and
> (5) the warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.
> (b) A person to whom the warranties under subsection (a) are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach."

6 The warranties given by section 56(3) SABEA are those implied in the sale of bills and notes. As has been shown, they originated in English case law (paragraph 2 above). Britton 634ff has pointed out that some of the "estoppels" available against an indorser in terms of the act arose from the fact that the indorser sells the instrument to his indorsee. He correctly points out that,

> "[t]he implied warranties of a qualified indorser, of a transferor by delivery and of an unqualified indorser should be identical, because the liability of each party arises from the fact, common to each, of a transfer for value" (at 635).

However, whether all these warranties should be provided for in the Act is a different matter.

The GULB (see article 14) does not contain a provision similar to section 56 SABEA: it is accepted that the transferor by delivery does not incur liability on the instrument but that he may be liable in terms of the transaction by which he disposed of the instrument. See Baumbach-Hefermehl 169 and cf Meyer-Cording 63; Hueck-Canaris 97-8; Roblot 234-5 (but cf article 7 GULB).

7 It is submitted that there is no reason to provide specifically for the warranties set out in section 56(3) SABEA, since these matters are regulated by the principles of purchase and sale. (Hermann "Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes"

(1988) 10 *University of Pennsylvania Journal of International Business Law* 517 529-30). The warranty that "he has a right to transfer" the instrument corresponds with the warranty against eviction (on which, See De Wet & Yeats 291ff) and the warranty "that, at the time of transfer, he is not aware of any fact which renders it valueless" with the seller's liability on the actio empti (see De Wet & Yeats 296 and in particular Voet 18.4.14). Generally, the seller of a debt performs his obligation if he "produces for the purchaser a debtor in the amount or kind of thing which has been specified. He has not been put under obligation to produce a debtor who is in funds ..." (Voet 18.4.14). It is suggested that this statement of the law adequately covers the warranty "that the bill is what it purports to be", so that the vendor warrants against both personal and real defences of prior parties (see the statement in *Hamilton Finance Company Ltd v Coverley Westray Walbaum & Tosetti Ltd and Portland Finance Company Ltd* 1969 1 Lloyd's Rep 53 at 67 cited above in paragraph 2.1. On the sale of incorporeals in general see Joubert *Die Regsbetrekkinge by Kredietfaktorering* (1986) 333ff and authorities referred to by him).

It is suggested that the common-law warranties of the seller adequately regulate the sale of bills and notes. However, as far as the liability of an indorser is concerned, legislative intervention is necessary. An indorser incurs liability *on the instrument* in addition to any liability he may incur on the contract giving rise to his indorsement: he may be liable both as indorser and as vendor. This draft is concerned only with his liability on the instrument as indorser; the rules of sale regulate his liability as vendor in sufficient detail. It is thus necessary to provide for some "estoppels" against the indorser to ensure that he cannot dispute liability by relying, for example, on the fact that the plaintiff is not a holder or the instrument not a valid bill or note or not "subsisting" (ie discharged by payment or otherwise). In terms of section 53(2)(b) SABEA these "estoppels" are effective only against a "holder in due course". Although there is authority that they should operate in favour of a holder for value without notice (Britton 636), it seems better to extend them to any person who takes the instrument in good faith and for value without notice, since a forged indorsement may prevent a subsequent purchaser from being a "holder". It should be added that as against his purchaser, the vendor, whether he indorses or not, is liable in contract as well.

46 Liability of the signer of an aval

(1) The liabilities of a party to an instrument may be secured by an aval.
(2) A person signs an instrument as the signer of an aval where by words such as "as aval", "as surety" or "as guarantor" he expressly indicates that he is a surety: Provided that the unqualified signature of a person other than the drawer, maker, drawee or payee made on the back of the instrument before indorsement by the payee shall be that of the signer of an aval.
(3) The signer of an aval may specify in the instrument the party for whom he is surety, and if he does not so specify, he shall be deemed to have given his aval for the drawer or maker.
(4) The signer of an aval is liable jointly and severally with, and as surety for, the party for whom he has given his aval.
(5) Where the signer of an aval pays the instrument, he acquires the rights arising out of the instrument against the person for whom he has given his aval and against all parties liable to him.
(6) It is not necessary to give notice of dishonour to the signer of an aval.
(7) If a person signs an instrument otherwise than as a party he thereby incurs the liabilities of an indorser to a holder in due course.

Comparative legislation

Sec 54 SABEA
Sec 56 BEA
Sec 17(6), 63, 64 NIL
Sec 3-402 UCC
Art 31, 32 GULB
Art 46 Uncitral Convention
Sec 75 Cheques and Payment Orders Act 1986

The relevant provision in the Bills of Exchange Act 1964 is:

54. *Liability of stranger signing a bill.*

If a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

Commentary

1 Section 54 SABEA is based on section 56 BEA (Malan 203.4; Cowen 266; De Wet & Yeats 768). The precise import and meaning of section 54 SABEA (and section 56 BEA for that matter) is not clear (Malan et al *Provisional Sentence* 207ff; Nagel *Aspekte van Voorlopige en Summiere Vonnis in die Suid-Afrikaanse Tjekreg* (1987) 366ff). The principal shortcomings of section 54 SABEA are:

2 The main source of uncertainty is that it is not clear how to reconcile the liability created by section 54 SABEA with the South African common-law liability of aval (Malan 203ff; Malan et al *Provisional Sentence* 219; Van der Merwe "Enkele Probleme wat uit ons Wisselwetgewing Voortspruit" (1959) 22 *THRHR* 275; Rowland "Some Aspects of the Contract of Aval" (1965) 28 *THRHR* 30 31ff). The contract of aval is a contract of suretyship. The obligations of the drawer, acceptor and indorser can be secured by suretyship. A surety for the drawer, acceptor or indorser who evidences his suretyship by his signature on a negotiable instrument is known as the signer of an aval. His liability is founded not only on his signature but on his intention to be bound as well as to deliver the instrument (Malan 201-2). The liability of the signer of an aval, like that of other parties to an instrument, is founded on a real contract on the instrument.

The difficulties encountered in reconciling the liability created by section 54 SABEA and the common-law liability of the signer of an aval have been observed by many writers and need not be detailed here. In the extreme it has been suggested, somewhat harshly, that section 54 leaves no room for the institution of the aval vis-à-vis a holder in due course (Van der Merwe (1959) 2 *THRHR* 275 281 and see *National Bank of South Africa Ltd v Seligson* 1921 WLD 108 116). This view has not gained general acceptance (Malan et al *Provisional Sentence* 220ff; *Lion Mill Manufacturing Co (Pty) Ltd v New York Shipping Co (Pty) Ltd* 1974 4 SA 984 (T) 990 and see *Moti & Co v Cassim's Trustee* 1924 AD 720 744; *National Acceptance Co (Pty) Ltd v Robertson* 1938 CPD 175 179). The root of the problem is that, although section 54 SABEA is based on section 56 BEA, English law does not recognise the institution of an aval (*Steel v M'Kinlay* (1880) 5 App Cas 754 and see Malan et al *Provisional Sentence* 209ff; Byles 185; Goode 457), whereas the South African common law does recognise the institution. Although the South African Bills of Exchange Act does not specifically mention the liability of the signer of an aval,

the creative jurisprudence of our courts leaves no doubt that the giver of an aval is a distinct party to the instrument (Malan et al *Provisional Sentence* 219; Malan 202-3). The main source of the uncertainty is, however, how to reconcile the liability created by section 54 SABEA with the liability of the signer of an aval at common law. It is submitted that the point of departure in drafting amending legislation should be to restore the common-law principles relating to an aval.

3 Where the giver of an aval has expressly indicated on the instrument that he is a surety only, and not an indorser, and the instrument is subsequently negotiated to a holder in due course, certain problems in determining his liability may arise. Although it has been submitted that section 54 SABEA was "clearly intended to embrace every other person who indorsed a bill whether as holder competent to convey title, or whether as an aval or surety or accommodation party" (*National Bank of South Africa Ltd v Seligson* 1921 WLD 108 116 and see Van der Merwe (1959) 22 *THRHR* 275 279) so that an aval would be regarded as an indorser in terms of section 54 as against a holder in due course, it is suggested that the better view is that his liability must be determined by the wording expressed on the face of the instrument (Malan et al *Provisional Sentence* 220). The problem is, however, that the South African Act does not expressly refer to the liability of the signer of an aval so that the provisions of section 14(a) SABEA must be relied upon to reconcile his liability with that which is imposed in terms of section 54 SABEA (Malan et al *Provisional Sentence* 220 and see Rowland (1965) 27 *THRHR* 45). Section 14(a) SABEA does not, however, deal with the liability of an aval and by analogy, the wording of this section has to be extended to include "an indorser" in terms of section 54.

Where the person signing the instrument has not expressly indicated his aval on the instrument the position is more involved. His unqualified signature may appear ex facie the instrument as that of an ordinary holder or as that of a stranger. Although it is generally accepted that where the holder in due course knows that a defendant intended to be liable as the giver of an aval, only the latter will be liable to him and only as a surety (Malan 205; Cowen 235; Rowland (1965) 27 *THRHR* 40; De Wet & Yeats 770), it should be pointed out that this has not yet received the sanction of our courts nor does it accord with the express wording of Section 54 SABEA. It is also not clear whether the signer of an aval can indicate by implication that he is signing as

a surety only. There is some authority that an aval may be constituted by the surety by placing his signature on the instrument before negotiation or indorsement by the payee ("Now it has always been the usage in South Africa - a usage admitted and sanctioned by the South African courts - that if a stranger puts his name on a bill before negotiation, his placing of his name there is equivalent to writing on the bill that he is liable as a surety and no more" per Wessels JA in *Moti and Co v Cassim's Trustee* 1924 AD 720 at 724 and see the judgment of Centlivres J in the court a quo in *Peimer v Finbro Furnishers (Pty) Ltd* 1936 AD 177 referred to at 182-3; *Bethlehem v Zietsman* 1908 EDC 367 371; *Simon v Sacks* 1927 WLD 162 163; *National Bank of South Africa Ltd v Seligson* 1921 WLD 108 113-4; *Rood v Klaff* 1924 TPD 245 246; *Thal v Cleveland Oil Co* 1922 CPD 7 9). But it has been pointed out that no unequivocal statement on the precise content of this usage has been made (Malan et al *Provisional Sentence* 221). It should also be borne in mind that where an aval places his signature on a bill indorsed in blank a holder will not necessarily be able to determine ex facie the instrument whether it was put on the instrument by a holder and that the surety may incur the liabilities of an indorser to a holder in due course in terms of section 54 SABEA. Since the source of the liability of the signer of an aval is not his signature only (his liability is based on contract (Malan 201)), it is submitted that it is wrong to impose on him the liability of an indorser in terms of section 54 SABEA where he did not intend to be so bound. It is therefore difficult to reconcile section 54 SABEA with the institution of the aval as developed by our courts in this regard. The problem concerns, therefore, the difficulty in distinguishing the aval from the ordinary indorser.

4 The difficulties encountered in attempting to reconcile the provisions of section 54 SABEA with the common-law institution of aval also stem from the ambiguity of the wording of section 54. Although the South African Act does not provide specifically for an aval, Malan contends that he may be regarded as a party to the bill because his liability, like that of the drawer, acceptor or indorser, is founded on the bill itself, and is transferred to subsequent holders, not by cession, but by negotiation (Malan 202-3 and see *Peimer v Finbro Furnishers (Pty) Ltd* 1936 AD 177 184-5; *FJK Syndicate v Du Preez and Smit* 1943 WLD 116 120-21). Because the English law does not recognise the signer of an aval as a party to a bill (*Moti and Co v Cassim's Trustee* 1924 AD 720 728 and see Malan et al *Provisional Sentence* 204) the particular wording of section 56 BEA (on which section 54 SABEA is based), which was

intended to impose liability on the anomalous signatory (Raymond "Suretyship at 'Law Merchant'" (1916-7) 30 *Harvard Law Review* 141 145; section 3-205 Revised UCC defines an "anomalous indosement" as one "made by a person who is not a holder ...") or quasi-indorser (*Thal v Cleveland Oil Co* 1922 CPD 7 10-11), to make the "stranger" (*Moti and Co v Cassim's Trustee* 1924 AD 720 724) a party to the bill, should be viewed in the light of this difference between the English and South African law. It should also be borne in mind that whereas the giver of an aval can interpose his suretyship for the benefit of all holders, an indorser or quasi-indorser (in terms of section 56 BEA) incurs liability only to subsequent holders (Malan et al *Provisional Sentence* 209 n39 and the authorities cited). Section 56 BEA is thus simply an attempt to impose liability on the aval, known in English law as a stranger. Section 56 BEA is usually construed as imposing liability towards a holder in due course only (*Gerald McDonald and Company v Nash and Company* 1924 AC 625; *McCall Brothers Ltd v Hargreaves* 1932 2 KB 423; *Shaw and Co Limited v Holland* 1913 2 KB 15 (CA); *National Sales Corporation Limited v Bernardi* 1931 2 KB 188; *Yeoman Credit Ltd v Gregory* 1963 1 WLR 343; *Lombard Banking Ltd v Central Garage and Engineering Ltd* 1963 1 QB 220 and see *Moti and Co v Cassim's Trustee* 1924 AD 720; *Peimer v Finbro Furnishers (Pty) Ltd* 1936 AD 177; Malan 203-4). Where the plaintiff is the original payee, section 56 BEA does not apply, for the payee cannot qualify as a holder in due course (Malan et al *Provisional Sentence* 210). Thus, to found liability of the anomalous indorser towards the original payee required some ingenuity from the English courts. Chalmers explains that section 20 BEA was applied and that an unindorsed bill payable to the drawer's order was regarded as being incomplete or "wanting in any material particular" for the purposes of section 20 BEA (Chalmers & Guest 97-8 and see Malan 207-8). Such a bill is completed by the indorsement of the drawer. Section 20(2) BEA imposes liability on "any person who became a party thereto prior to its completion". The anomalous indorser was not regarded as one of the ordinary parties but by way of a fiction the bill was treated as having been indorsed to him by the drawer, and re-indorsed by him back to the drawer. By indorsing the bill the drawer converted himself into a holder in due course who could enforce payment of the bill against the anomalous indorser under the provisions of section 56 BEA (Chalmers & Guest 456-8 and see Malan 207-8).

It has been pointed out that this approach is hardly satisfactory since, if a "negotiation" to and a "renegotiation" by the anomalous indorser is assumed, he is, in fact, a regular indorser so that it is not necessary to rely on both sections 56 and

section 20 BEA (Malan et al *Provisional Sentence* 210 and Goode 458). As English law does not recognise the signer of an aval as a party to the instrument, and section 56 BEA was intended to impose liability on such anomalous indorser it would be inappropriate to adopt that section in a legal system like South Africa's, in which the institution of an aval is recognised by the common law and the aval is regarded as a party to the instrument. The particular wording of section 56 BEA was not drafted to cater for a legal system where the giver of an aval can interpose his suretyship for the benefit of all holders of the instrument (Malan et al *Provisional Sentence* 209ff). This state of affairs merely compounds the problem of reconciling section 54 SABEA with the common-law liability of an aval.

5 Quite apart from the difficulties of attempting to reconcile the liability created by section 54 SABEA with the common-law liability of aval, the fact that the Bills of Exchange Act does not specifically deal with the liability of the signer of an aval creates uncertainty about the exact nature of the rights and obligations of an aval. In a contract of suretyship it is important to determine the principal on whose behalf the suretyship was undertaken. The point is of considerable importance because there cannot be a surety if there is no principal whose obligation is secured (Malan et al *Provisional Sentence* 222). The cases, dealing mostly with an aval on behalf of the maker of a note, emphasize that notice of dishonour and protest is not necessary to found the liability of the giver of an aval (eg *Peimer v Finbro Furnishers (Pty) Ltd* 1936 AD 177 182; *Thal v Cleveland Oil Co* 1922 CPD 7; *Bethlehem v Zietsman* 1908 EDC 367). While this is correct, it is true because notice of dishonour and protest is not necessary to hold the principal, viz the maker or acceptor of the instrument, liable. If the maker or acceptor is not liable, it follows that any surety for him is not liable either. Because the Bills of Exchange Act does not deal with the position of the signer of an aval, there is no provision dealing with who the principal is in cases where the signer of an aval fails to specify on whose behalf he has undertaken his suretyship.

It is equally important that the Bills of Exchange Act should regulate the rights of the signer of an aval vis-à-vis his principal should the signer of the aval be called upon to pay the instrument. A surety who has paid the debt of a principal debtor to a creditor has a right of recourse against the debtor (Forsyth & Pretorius *Caney's The Law of Suretyship* (1992) 142ff). Since the Bills of Exchange Act does not deal with

the rights and duties of the signer of an aval, no provision is made in the Act to regulate the aval's right of recourse against the principal debtor on whose behalf he has undertaken his suretyship.

6 In the light of the above mentioned uncertainties surrounding the interpretation of section 54 SABEA, and in particular the fact that the section does not correctly reflect or deal with the common-law position of the signer of an aval, it is submitted that the correct point of departure is to restore the common-law institution of an aval in the South African Bills of Exchange Act. Since the English law, unlike the South African common law, does not recognise the signer of an aval as a party to an instrument, and since section 56 BEA is intended to make the anomalous indorser a party to the instrument, it would serve no further purpose to refer to the English law in this regard. However, guidance should be sought in those legal systems in which the institution of an aval is recognised. Section 63 and 64 NIL showed the same uncertainties with regard to the liability of the anomalous indorser (Malan et al *Provisional Sentence* 211-2; Britton 589-90). Section 75 of the Australian Cheques and Payment Orders Act, 1986 embodies a principle similar to that in section 56 BEA. It does not recognise the institution of an aval and is therefore not helpful.

7 Clause 46(1) of the proposed draft embodies the common-law principle that the liabilities of the parties to an instrument may be secured by an aval. Because the common-law term "aval" is well established in the South African law (see section 6 of the General Law Amendment Act 50 of 1956) it is not necessary to define this term. Clause 46(1) also makes it clear that the common-law institution of an aval is restored in South African law.

The provisions of sub-clause (1) read with sub-clause (2) make it clear that the proposed draft is not concerned with those instances where the contract of suretyship is concluded dehors the instrument. Where a contract of suretyship is concluded dehors the instrument it must comply with the provisions of section 6 of the General Law Amendment Act 50 of 1956. This section contains a proviso that the section does not apply to the signer of an aval (see Malan et al *Provisional Sentence* 203).

Although both article 42(2) of the Uncitral Convention and article 31(1) GULB provide for the signing of an aval on an "allonge" there does not appear to be any need to accommodate an allonge in South African law (Malan et al *Provisional Sentence* 223).

8 Subject to paragraph 9 below concerning the proviso to clause 46(2) of this draft, it will be observed that the underlying principle of clause 46(2) of this draft is that the signer of an aval should expressly indicate on the instrument that he undertakes only the liability of the signer of an aval. The underlying principle that the signer of an aval (subject to the proviso to clause 46(2) discussed in paragraph 9 below) should expressly indicate that he is signing as an aval only is also found in section 3-416 UCC, article 42(3) of the Uncitral Convention and article 31(2) GULB. Although articles 31 and 32 GULB are more flexible than section 3-416 UCC and article 42 Uncitral Convention regarding the requirement that the signer of an aval should indicate that he is signing as an aval only, it should be noted that the deeming provisions of article 31(2) GULB have led to much uncertainty (Malan et al *Provisional Sentence* 214-5; Ronse I 284; Baumbach-Hefermehl 273). It is submitted that the better view is to require the surety to indicate expressly that he is signing only as an aval. Where he fails to indicate that he is signing only as an aval he may incur liability in another capacity. This necessitates construing the instrument as a whole (see Cosway (1968) 43 *Washington Law Review* 499 500-501).

It should be noted that the possible words that might indicate the suretyship in clause 46(2) of this draft are not numerus clausus.

9 The provisions of section 3-416 UCC leave no room for the contract of aval where the signer of the aval is constituted by his signature alone. It is submitted that this approach is too inflexible (see Malan et al *Provisional Sentence* 213, 221). The proviso contained in clause 46(2) of this draft is based on the decision in *Moti and Co v Cassim's Trustee* 1924 AD 720 in which Wessels JA said, at 744:

> "Now it has always been the usage in South Africa - a usage admitted and sanctioned by the South African courts - that if a stranger puts his name on a bill before negotiation, his placing of his name there is equivalent to writing on the bill that he is liable as surety and no more."

The proviso to clause 46(2) of this draft regulates this usage.

10 In paragraph 2 above it was pointed out that there can be no contract of suretyship unless there is a principal whose obligation is secured. The intent of clause 46(1) is to

deal with this very important principle and it is submitted that the signer of the aval should be afforded the right to indicate on whose behalf he undertakes his suretyship, especially in the light of the surety's common-law right of recourse against the principal debtor. Clause 46(3) is based on article 31(4) GULB, which has a similar import. Article 31 GULB makes no provision for an aval for the account of the drawee. The drawee of a bill is, of course not liable on it before he has accepted the bill. It is submitted that, for this reason, the aval would usually be for the benefit of the drawer or maker (see article 314) GULB and see Ronse I 277-8). The aval under the Uncitral Convention of 1988 has been amended substantially. Since it seeks to reconcile different systems, its provisions are interesting but not necessarily persuasive. See Hermann "Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes" (1988) 10 *University of Pennsylvania Journal of International Business Law* 517 530ff.

11 Clause 46(4) of this draft seeks to revive the principles of our common law that the signer of an aval should be liable as a surety and a co-principal debtor. It is also submitted that it is in the interest of commerce to revive the principles of our common law, as will be explained below.

Roman-Dutch law recognised the two methods by which suretyship for the parties to a bill or note can be undertaken. The ordinary rules of suretyship applied to a suretyship concluded dehors the instrument. Such a surety was subject to the ordinary rules of suretyship and could avail himself of the ordinary benefits of suretyship, viz the *beneficia excussionis (ordinis), divisionis and cedendarum actionum*. But the giver of an aval was treated differently; he was liable as a surety who had tacitly renounced the *beneficia*. Heineccius explains:

> "Hieromtrent moet men onderscheid maken tussen een aval, en eene borgtocht buiten den wissel. In't eerste geval houden volgens 't gemeene gevoelen die voorrechten op, vermits iemand een' wissel onderteekende, daardoor stilzwygende van alle voorrechten afgaat: in't laaste moet de zaak naar 't gemeene recht beoordeeld worden" (Heineccius 6.10).

This view is echoed by most common-law writers on the subject (eg Pothier 1.4.74; Van der Keessel *Praelectiones* th 594; Schorer note 63 on Grotius 3.4.5. See also Malan et al *Provisional Sentence* 204-5). From their earliest decisions, South African courts departed from this common-law principle, holding that the signer of an aval could rely on the common law beneficia (see Malan et al *Provisional Sentence* 205-7 where the various decisions are collected). This departure is significant, for it affects

the traditional remedy for litigation on bills and notes, viz the action for provisional sentence (Malan et al *Provisional Sentence* 205ff). It is intended that clause 46(4) of this draft revive the common-law principles. By stating that the liability of the aval is jointly and severally with the party for whom he has given his aval, the latter impliedly waives the beneficia available to an ordinary surety dehors the instrument (see *Wiehahn v Wouda* 1957 4 SA 724 (W) 725). It is in the interest of commerce that provisional sentence be granted against an aval without the necessity of first excussing the principal debtor (Malan et al *Provisional Sentence* 222).

It is also important to note that the liability of an aval is "jointly and severally with and *as surety* for the party for whom he has given his aval" in terms of clause 46(4) of the proposed draft (italics supplied). The nature of the aval's liability is therefore accessory (see Pretorius "Borgkontrak of Vrywaringskontrak?" (1982) 5 *THRHR* 73 75). It follows that the provisions dealing with the liability of the signer of an aval under the GULB are unacceptable in South African law. The liability of an aval under the GULB differs considerably from that of an ordinary surety. In particular, his liability is not accessory. He undertakes an own independent and cumulative obligation (Malan et al *Provisional Sentence* 216-7). Although article 32(1) GULB provides that the giver of the aval "is bound in the same manner as the person for whom he has become guarantor" the crucial article 32(2) states that "[h]is undertaking is valid even when the liability which he has guaranteed is inoperative for any reason other than defect of form". Clause 4(4) of this draft maintains the principle of our common law that the liability of the surety depends on the liability of his principal.

12 The need to regulate the rights of the signer of an aval vis-à-vis his principal should the signer of the aval be called upon to pay was outlined in paragraph 5 above. Clause 46(5) of this draft follows the provisions of article 32(2) GULB and accords with the provisions of our common law.

13 Clause 46(6) of this draft is included ex abundanti cautela. It has always been accepted in the South African case law that it is not necessary to give notice of dishonour to the signer of an aval (Malan et al *Provisional Sentence* 222 and the authorities cited).

14 The General Bar Association states that clause 46

> "kan uitgesonder word as 'n uiters geslaagde poging om die regsposisie van die avalis op 'n suiwer regsgrondslag te plaas. Met hierdie klousule word al die onsekerhede rondom die aanspreeklikheid van die avalis in die lig van die bestaande artikel 54 uit die weg geruim. Van besondere belang is dat die avalis se gemeenregtelike regsposisie nou weer herstel word ...".

The Clearing Bankers Association proposes that subsection (2) of clauses 46 and 42 respectively be amended to insert the underlined words so that the proviso should read:

> "Provided that the unqualified signature made before indorsement by the payee on the back of an instrument payable to order of a person other than the drawer, maker, drawee or payee shall *constitute such person an aval.*"

The original wording of clause 46 is preferred because one is dealing here with a deeming provision. The same applies to clause 42 of the proposed Cheques Act.

47 Amount recoverable

(1) The holder may recover from any party liable on the instrument

(a) at maturity

(i) the amount of the instrument; and

(ii) interest, where the instrument is payable with interest;

(b) after maturity

(i) the amount of the instrument; and

(ii) interest;

(aa) where the instrument is payable with interest until maturity, at the rate stated or determined in terms of section 6 until maturity, and at the prescribed rate after maturity; or

(bb) where the instrument is payable with interest after maturity, at the rate of interest stated or determined in terms of section 6; or

(cc) where the instrument is not payable with interest, at the prescribed rate

(aaa) in the case of an instrument payable on demand, from the time of presentment for payment or, if presentment is excused, from the time the instrument is dishonoured; and

(bbb) in the case of any other instrument from the maturity of the instrument;

(iii) the expenses of notice of dishonour if notice of dishonour was required and was given;

(c) before maturity

(i) the amount of the instrument with interest, where the instrument is payable with interest, to the date of payment, subject to a discount from the date of payment to the date of maturity at the prescribed rate at the date of payment;

(ii) the expenses of notice of dishonour if notice of dishonour was required and was given.

(2) Any party who pays an instrument whether wholly or in part in terms of subsection (1) may recover from any party liable to him

(a) the amount which he was compelled to pay and paid;

(b) interest on it at the prescribed rate from the date of payment;

(c) the expenses of notice of dishonour if notice of dishonour was required and given.

Comparative legislation

Sec 55 SABEA
Sec 57 BEA
Art 70 Uncitral Convention
Sec 76 Cheques and Payment Orders Act 1986
Sec 3-107 UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

55. *Damages recoverable from parties to dishonoured bill.*

(1) Subject to the provisions of sub-sections (2) and (3), if a bill is dishonoured, the holder may recover from any party liable on the bill, and the drawer, if he has been compelled to pay the bill, may recover from the acceptor, and an indorser who has been compelled to pay the bill, may recover from the acceptor, the drawer or a prior indorser as damages, which shall be deemed to be liquidated --
(i) the amount of the bill;
(ii) interest thereon from the time of presentment for payment if the bill is payable on demand, or from the maturity of the bill in any other case;
(iii) the expenses of noting, and if protest is necessary and has been extended, the expenses of the protest.
(2) In the case of a bill which has been dishonoured abroad, in lieu of the damages stipulated in sub-section (1), the holder may recover from the drawer or an indorser, and the drawer, if he has been compelled to pay the bill, and an indorser who has been compelled to pay the bill, may

recover from any party liable to him, as damages, which shall be deemed to be liquidated, the amount of the re-exchange and, subject to the provisions of sub-section (3), interest thereon until the time of payment.
(3) If in terms of the provisions of this Act interest may be recovered as damages, such damages, if justice requires it, may be withheld wholly or in part, and if a bill is expressed to be payable with interest at a given rate, may or may not be awarded at the same rate as the rate so given.

Commentary

1.1 Section 55(1) entitles the holder to recover from the parties liable "as damages, which shall be deemed to be liquidated" in addition to the amount of the bill "(ii) interest thereon from the time of presentment for payment if the bill is payable on demand, or from the maturity of the bill in any other case".

Section 55(3) contains a further relevant provision:

> "If in terms of the provisions of this act interest may be recovered as damages, such damages, if justice requires it, may be withheld wholly or in part, and if a bill is expressed to be payable with interest at a given rate, may or may not be awarded at the same rate as the rate so given."

1.2 English law distinguishes between contractually agreed interest and interest as damages.

> "Where interest is expressly agreed to be paid, it may be considered as part of one aggregate debt; but where a specified sum only is agreed to be paid, there interest is recoverable as damages, and it may depend upon external circumstances, whether any and what interest is to be recovered" (*Cameron and others v South and others* (1819) 2 B & Ald 305 (106 ER 378); *Ledeboter and Van der Heldt's Textielhandel v Hibbert* 1947 1 KB 964 969).

Where the instrument provides for the payment of interest, interest is recoverable as part of the principal debt, and not as damages. The date from which interest runs is determined according to section 7(3) (section 9(3) BEA).

English law showed changing attitudes to the recoverability of interest - both contractual interest and interest as damages (see Thompson *Recovery of Interest Practice and Precedents* (1985) chapter 1). Interest as damages was difficult to recover because of the form of the action for debt, which excluded a claim for interest. Assumpsit, however, made possible the recovery of interest as damages arising from the debtor's wrongful withholding (see Thompson paragraph 1.04; *Robinson v Bland* (1760) 2 Burr 1077 (97 ER 717); *Ex parte Marlor* (1746) 1 At 150

(26 ER 97); *Webster v British Empire Mutual Life Assurance Co* 1880 15 ChD 169 175). In respect of bills and notes the claim for interest as damages was founded on mercantile usage (Thompson paragraph 3.04; Treitel *Contracts in General 7 International Encyclopedia of Comparative Law* 1976 paragraph 16-114ff). In *In re East of England Banking Company* (1868) Eq 6 LR 369 375 the rule was concisely formulated:

> "The law is perfectly well known and distinct, that with regard to all negotiable instruments, by the law merchant, every bill of exchange and promissory note carries interest from the date of its maturity. Where a note on demand, having no period of payment, is intended to bear interest, the usual course is to say 'I promise to pay on demand so much money with interest at a certain rate', otherwise it will carry no interest until the demand is made ...".

See also *In re Gillespie Ex parte Robarts* 1885 16 QBD 702, 1886 18 QBD 286; *Lithgow v Lyon Earle and others* (1805) G Coop 29 (35 ER 465); *Webster v British Empire Mutual Life Assurance Co* (1880) 15 ChD 169 178. The court is not bound to give interest, and if it does, the rate is within its discretion. There is no prescribed rate for interest as damages, but rules of practice developed in this regard (see Thompson paragraph 3.05).

Section 55(1) SABEA says that the interest shall be payable as "damages, which shall be deemed to be liquidated". Clearly the fact that interest is payable as damages presupposes a wrongful "withholding", viz the bill should have been dishonoured (see *Ledeboter and van der Heldt's Textielhandel v Hibbert* 1947 1 KB 964-967). The deeming provision was inserted to make it possible for the judge (and not a jury) to determine the amount payable. In *London and Universal Bank v Earl of Clancarty* (1892) 1 QB 689 Denman J at 693 said:

> "Now, the measure of damages means the amount which the jury (or perhaps in certain cases the judge) would be competent to allow beyond the amount of the bill, and I read the provisions of that section with regard to the measure of damages (which are to be deemed to be liquidated damages) in the following way: the plaintiff may recover the amount of the bill, with interest on that amount at the rate agreed upon from presentment, and there is a further provision in sub-sec 3, that where interest may be recovered as damages (that is, as liquidated damages), the interest may, if justice requires it, be withheld wholly or in part, and that interest as damages may or not be given at the same rate as interest proper. It is admitted that the object of the clause is to enable actions on bills of exchange to be easily dealt with under Order XIV, and it seems to me that the section may be worked consistently with the power of the judge under Order XIV to settle all questions between the parties without the necessity of any inquiry before a jury. ... It seems to me, too, that the interest contemplated by sub-sec 1(b), is clearly interest up to the date of judgment; that is part of the measure of damages. Under sub-sec 3 it might be possible to hold that the power to withhold interest recoverable as liquidated damages is exercisable only by

> the tribunal which *at the trial* of the action has to give judgment, but I think it is more likely that the legislature meant to leave that question to the judge who might deal with the case ...".

Smith J at 695 briefly states:

> "The provision 'which shall be deemed to be liquidated damages', has been introduced because, without it, a defendant might have said that the cause of action was a breach of contract and that the damages were unliquidated."

See also Thompson paragraph 3.05.

1.3 In South African law there is no doubt that, where interest is contractually provided for in the instrument it can be recovered (Malan 144-5; Cowen 208-9). Interest as damages or mora interest can also be recovered in the same circumstances as in English law. In *Becker v Stusser* 1910 CPD 289 at 294 it was said:

> "Where one person owes another a debt, all he can claim against the other person after a delay has taken place in the payment of the debt, is his money with interest. If the debt was due on a certain day, the payment of interest as reckoned from that day must be made. If there is not a fixed date for the payment of the debt, interest would run from the time that the action is brought. Damages for the non-payment of the debt is loss of interest which a person suffers in not obtaining his money on the due date."

See also Van der Linden *Koopmans Handboek* 1.15.3; Van Leeuwen *RHR* 4.12.8; Voet 22.1.4, 22.1.11 and *Bellairs v Hodnett and another* 1978 I SA 1109 (A) 1144ff. Thus, interest is payable from the time of payment, viz where a specific date is agreed, from that date, and, where the debt is payable on demand, from demand - ie from the time the defendant is in mora (2 Wessels paragraph 3351ff). In the case of bills, cheques and notes interest is recoverable from the time the instrument should have been paid, ie from its due date or from presentment for payment. No demand to the drawer or indorser himself is necessary. Where an instrument is payable on a certain date, interest as damages thus runs from that date, and where it is payable on demand, interest runs from the time presentment is made (*Swart v Teubes* 1916 CPD 78; *Thibart v Thibart* (1840) 3 Menz 472). Where the instrument is payable on demand and extraordinary circumstances arise, such as the insolvency of the debtor (*Natal Bank Ltd v Rood's Trustees* 1911 TPD 689) or the debtor stopping payment (*In re East of England Banking Company* (1868) LR 6 Eq 368), demand is dispensed with. (See Cowen 209; Malan 147; 2 Wessels paragraph 3357.) It is submitted that

the amount recoverable as interest should be set out specifically as is done in clause 47.

1.4 With respect to section 55(3) SABEA, it is submitted that the Prescribed Rate of Interest Act 58 of 1975 and other laws contain provisions that enable a court equitably to adjust the rate of interest payable, whether as damages or as agreed interest.

2.1 Section 55(2) SABEA provides for the damages recoverable in the case of a bill dishonoured abroad:

> "In the case of a bill which has been dishonoured abroad, in lieu of the damages stipulated in subsection (1), the holder may recover from the drawer or an indorser, and the drawer, if he has been compelled to pay the bill, and an indorser who has been compelled to pay the bill, may recover from any party liable to him, as damages, which shall be deemed to be liquidated, the amount of the re-exchange and, subject to the provisions of sub-section (3), interest thereon until the time of payment."

This section limits the liability of the drawer and an indorser of a bill dishonoured abroad to the amounts set out therein (*In re Commercial Bank of South Australia* (1887) 36 ChD 522 527). The amounts that are recoverable are interest from the date of protest, the cost of protest, commission, stamp duty and postage if a re-draft is drawn. The total amount is the re-exchange. Re-exchange is the amount for which the holder is entitled to draw a sight bill on the drawer or indorser in order to compensate him for loss suffered through the bill's being dishonoured abroad. In *Willans and others v Ayers and others* (1877) 3 App Cas 133 (PC) at 146 the "right to re-exchange" was described as follows:

> "If an ordinary bill of exchange is drawn in one country upon persons in another and distant country, the holder who has contracted for the transfer of funds from the one country to the other almost necessarily sustains damage by the dishonour of the bill. He must take other means to put himself in funds in the country where the bill was payable."

The section does not refer to the liability of the acceptor, probably because his liability must be determined according to the law of the place of dishonour (Jacobs 108-9). Nor is any provision made for a bill dishonoured, not abroad, but in South Africa. According to the common law however, the drawer who is liable for re-exchange may recover that amount as damages from the acceptor (*In re Gillespie Ex parte Robarts* (1886) 18 QBD 286 (CA) 292-3). Section 55(2) SABEA codifies the

law merchant. In *Suse and others v Pompe and another* (1860) 8 CB (NS) 538 563-5 (141 ER 1276) Byles J explained this institution:

> "The holders are entitled to receive a certain number of Austrian florins in Vienna on the day when the bill is at maturity. They have in effect bought from the indorsers so many Austrian florins, to be received in Vienna on that day. It should seem to follow, that, on non-payment by the drawee, the holders are entitled, as against the indorsers, to so much English money as would have enabled them in Vienna on that day to purchase as many Austrian florins as they ought to have received from the drawee, and, further, to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that English money is, to draw in Vienna on the indorsers in England a bill at sight for as much English money as will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonour, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called in law Latin 'recambium', in Italian 'recambio', in French 'rechange', and in English 're-exchange'. The bill itself is called in French 'retraite'. This bill for re-exchange being negotiated at Vienna puts into the pocket of the holders at the proper time and place the exact sum that they ought to have received from the drawee.
> "On this bill for the re-exchange the holders, of course, have not at Vienna the acceptance of the indorsers on whom it is drawn, but hold as their security the original bill with the indorser's indorsement thereon. If the indorsers pay the re-exchange bill they have fulfilled their engagement of indemnity: if not, the holders sue them on the original bill, and will be entitled to recover in that action what the indorsers ought to have paid, that is to say, the amount of the re-exchange bill.
> "Although in English practice the re-exchange bill is seldom drawn, yet the theory of the transaction is as we have described it, and settles the principle on which the damages are to be computed, although no re-exchange bill is in fact drawn."

2.2 Section 55(2) SABEA is based on the now repealed section 57(2) BEA. Both section 57(2) BEA and section 72(4) BEA were repealed by the Administration of Justice Act 1977. Their repeal was undoubtedly influenced by profound changes in English law concerning the granting of judgment in a foreign currency. The two sections were formulated at a time when it was not competent for an English court to give judgment sounding in a foreign currency. Judgment could be given only in sterling. This principle was confirmed as recently as 1960 by the House of Lords (*In re United Railways of Havana and Regla Warehouses Ltd* 1961 AC 1007). It was equally clear that the date of conversion of the foreign currency was the date of the wrong or breach of contract. Lord Denning MR in *Miliangos v George Frank (Textiles) Ltd* 1975 QB 416 424 asked:

> "Why have we in England insisted on judgment in sterling, and nothing instead is, I think, because of our faith in sterling. It was a stable currency which had no equal. Things are different now. Sterling floats in the wind. It changes like a weather cock with every gust that blows. So do other currencies. This change compels us to think again about our rules."

The change brought about by the English courts has been revolutionary and is described as a "remarkable piece of judicial legislation" (Mann *The Legal Aspect of Money* (1992) 381) which brought the rather insular English law "into line with the commercial realities of inflation and floating currencies" (Powles "Foreign Currency Judgments" 1979 *Lloyd's Maritime and Commercial Law Quarterly* 485). *Miliangos v George Frank (Textiles) Ltd* 1975 3 All ER 852, a decision of the House of Lords, introduced the change by holding that judgment in a foreign currency could both be claimed and awarded where the foreign currency was both the money of account (ie the currency in which the obligation is expressed) and the money of payment. In addition, the "breach-date rule" was rejected and it was held that conversion into sterling was to take place at the time of payment or execution. *Miliangos* introduced the change, the full extent of which is summarised by Mann 352-3:

> "It is now clear that English law does not require any foreign money obligation to be converted into sterling for the purpose of instituting proceedings or of the judgment; on the contrary, where the plaintiff claims a sum of foreign money, he is both entitled and bound to apply for judgment in terms of such foreign money and it is only at the stage of payment or enforcement that conversion into sterling at the rate of exchange then prevailing takes place. This is so whether the claim is for payment of a specific sum contractually due or for damages for breach of contract or tort or for a just sum due in respect of unjustified enrichment, or for restitution. Nor does it matter whether the contract sued upon is governed by English or by foreign law. Nor is it necessary to ask for specific performance rather than payment: in either case the defendant will be ordered to pay the foreign money. Moreover an award in an English arbitration may be expressed and enforced in foreign currency and a foreign award or judgment so expressed may be enforced like the English award or judgment. Certain statutory provisions are designed to ensure similar results in the fields of law covered by them. In short, in the realm of legal proceedings foreign money is being treated in almost exactly the same way as sterling."

On these matters see: Guest "Instruments Denominated in a Foreign Currency" (1979) 27 *American Journal of Comparative Law* 533; Isaacs "Foreign Currency Claims and the English Courts" 1977 *Lloyds Maritime and Commercial Law Quarterly* 356; Rickett "Contract Damages for Exchange Losses - a New Zealand Development" 1982 *Lloyd's Maritime and Commercial Law Quarterly* 566; Krahmer "Foreign Currency Instruments under the Uniform Commercial Code" (1981) 86 *Commercial Law Journal* 9; Spiro "Currency Problems in Transactions Extending beyond One Legal Unit" (1985) 18 *CILSA* 377; Malan et al *Provisional Sentence* 228-35; Goode *Payment Obligations in Commercial and Financial Transactions* (1983) 121ff; Spiro *The General Principles of the Conflict of Laws* (1982) 77ff.

One of the consequences of *Miliangos* has been the repeal of section 72(4) BEA. This was preceded by the judgment in *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* 1976 3 All ER 900 (QB) in which Mocatta J (at 904) accepted the argument that section 72(4) BEA

> "merely provided a formula to ascertain the amount of sterling which an acceptor should pay on the date of maturity in order to discharge his obligation under a bill of exchange, if he choose to pay that bill of exchange in sterling and not in the currency in which it was drawn. Accordingly, the function of the sub-section ended with the day of payment and it had no statutory effect on the sum recoverable by the endorsee when no payment had been made on the date of maturity and the endorsee subsequently sued the acceptor".

This argument takes away much of the section's effectiveness, but it is suggested that the proper course is to repeal the section altogether.

In *Miliangos* 1975 3 All ER 852 (HL) at 214-5 Lord Wilberforce said:

> "The law on this topic is judge made: it has been built up over the years from case to case. It is entirely within this House's duty, in the course of administering justice, to give the law a new direction in a particular case where, on principle and in reason, it appears right to do so. I cannot accept the suggestion that because a rule is long established only legislation can change it - that may be so when the rule is so deeply entrenched that it has infected the whole legal system, or the choice of a new rule involves more far-reaching research than courts can carry out. ... Indeed, from some experience in the matter, I am led to doubt whether legislative reform, at least prompt and comprehensive reform, in this field of foreign currency obligation, is practicable. Questions as to the recovery of debts or of damages depend so much on individual mixtures of facts and merits as to make them more suitable for progressive solutions in the courts."

This statement is applauded, but it should be noted that South African case law in this regard is relatively undeveloped.

2.3 Only recently did South African law depart from the seemingly inflexible rule that judgment could not be given in a foreign currency. In 1985 Nestadt J in *Voest Alpine Intertrading Gesellschaft MBH v Burwill and Co SA (Pty) Ltd* 1985 2 SA 149 (W) at 150 confirmed the rule that, "[n]ot only is defendant entitled to pay in Rand, but this court is obliged to give judgment only in rand, not in a foreign currency (though I have not been able to find the source of this rule)". He relied on older cases affirming this and on the "breach-date rule". See *Barry Colne & Co (Transvaal) Ltd v Jackson's Ltd* 1922 CPD 372; *Bassa Ltd v East Asiatic (SA) Co Ltd* 1932 NPD 386 390-91 and see Malan et al *Provisional Sentence* 228ff and Spiro "Currency Problems in Transactions Extending beyond One Legal Unit" (1985) 18 *CILSA* 377.

However, in *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 4 SA 671 (C) Van den Heever J distinguished *Voest* (which concerned a claim for damages) and said (673-4):

> "Any 'rule' probably has its roots in practical convenience. An unsatisfied judgment leads to process in execution and South African bidders are not going to offer yen for assets put up for sale here. A judgment compelling the debtor to pay in yen may also (however, not 'must') be unenforceable: the payment will be a criminal offence unless the necessary consent has been obtained under the exchange control regulations ... . Whether such consent will be, or has been, obtained does not appear to be vital until the execution stage ... but no matter which the trial court may be called upon to determine, depending on which of the alternative prayers plaintiff at that stage presses for. But there is no absolute bar to an order in this form ... .
> "I have already said that logically the conversion should be made when the payment is actually made not when it merely falls due. To hold otherwise would be to pave the way for a defaulting debtor to profit through his default and I find nothing in our law compelling me to 'hold otherwise'."

Although this judgment heralds a new development, it does not, nor does it pretend to, solve all the problems that may arise in currency claims. In the absence of an authoritative body of case law, the adoption of clause 67(7) is therefore proposed. (See further Malan et al *Provisional Sentence* 233-4; Guest "Instruments Denominated in a Foreign Currency" (1979) 27 *American Journal of Comparative Law* 533); and on section 3-107 UCC, Krahmer "Foreign Currency Instruments under the Uniform Commercial Code" (1981) 86 *Commercial Law Journal* 9.)

Excursus: Finality of payment

1 The warranties set out in section 3-417(1)(b) UCC and the finality of payment rule enacted in section 3-418 UCC (and see also section 4-407 UCC that, following the previous sections subrogates the bank to the rights of other parties in order to prevent unjust enrichment, and see section 3-418 Revised UCC) both follow the rule in *Price v Neal* (1762) 3 Burr 1354; 97 ER 871). In this case Lord Mansfield held that the drawee who accepts or pays a bill on which the signature of the drawer is forged is bound by his acceptance and cannot recover his payment. He remarked that the matter before him was "one of those cases that could never be made plainer by argument" (at 1357). His judgment, however, still perplexes commentators, but his ruling has been incorporated in the UCC and followed in subsequent cases (see eg *National*

Westminster Bank Ltd v Barclays Bank International Ltd and another 1974 3 All ER 834 843 in which the rule was limited to documents that are "not mere forgeries in toto but contain at least one genuine signature and which have been negotiated to at least one innocent holder"). Lord Mansfield motivated his decision as follows (at 1357):

> "It is an action upon the case, for money had and received to the plaintiff's use. In which action, the plaintiff can not recover the money, unless it be against conscience in the defendant, to retain it: and great liberality is always allowed, in this sort of action. But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had bona fide paid, without the least privity or suspicion of any forgery. Here was no fraud, no wrong. It was incumbent upon the plaintiff, to be satisfied 'that the bill drawn upon him was the drawer's hand,' before he accepted or paid it: but it was not incumbent upon the defendant, to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him: and he sends his servant to pay it and take it up. The other bill, he actually accepts; after which acceptance, the defendant innocently and bona fide discounts it. The plaintiff lies by for a considerable time after he has paid these bills; and then found out 'that they were forged': and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side.
> The defendant had actual encouragement from the plaintiff himself, in negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first: and he paid the whole value, bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another: but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant."

The rule in *Price v Neal* was accepted almost universally in the United States (Britton 375ff), and the inclusion of sections 3-417 and 3-418 UCC is justified by the desirability of ending transactions on an instrument when it is paid, rather than re-opening and upsetting a series of commercial transactions at a later date when the forgery is discovered (Official Comment on section 3-418 UCC). A factor favouring the rule is that it has a healthy cautionary effect on banks by encouraging them to compare signatures on cheques with the specimen signatures in their possession. It is also argued that the drawee has the best opportunity to insure against the risk of forgery and to distribute the cost of it among other customers. See, generally, Farnsworth "Insurance against Check Forgery" (1960) 77 *Banking Law Journal* 817 840-1; O'Malley "Common Check Frauds and the Uniform Commercial Code" (1969) 23 *Rutgers Law Review* 189, 201-9, 227-34; Kessler "Einige Betrachtungen über Indossamentsfälschung im Anglo-Amerikanischen Wechsel-und Scheckrecht" in *Festschrift Hans Lewald* (1953) 505 505-7; Malan "The Rule in Price versus Neal" 1978 *CILSA* 276 276-7; Barak "The Uniform Commercial Code - Commercial Paper. An Outsider's View" (1968 7 *Israel Law Review* 33 46; Okwechime "Bank's Right to

Recover Money Paid on Countermanded Cheques" (1986) 28 *Journal of the Indian Law Institute* 101; Goode "The Bank's Right to Recover Money Paid on a Stopped Cheque" (1981) 97 *Law Quarterly Review* 254; Eddy *The Canadian Payment System and the Computer: Issues for Law Reform* (1974) 54ff.

2 Section 50(1) of the Canadian Bills of Exchange Act partially regulates the recovery of money paid on forged signatures. It provides that where a bill bearing a forged indorsement is paid in good faith and in the ordinary course of business the payor bank "has the right to recover the amount so paid from the party to whom it was so paid or from any endorser who has endorsed the bill subsequently to the forged ... endorsement". The forgery of the drawer's signature is not specifically provided for (Baxter 91ff), nor does the section provide remedies for the recovery of payment made on a countermanded cheque or against insufficient funds. These factors have caused Geva "Reflections on the Need to Revise the Bills of Exchange Act - Some Doctrinal Aspects" (1981-2) 6 *Canadian Business Law Journal* 269 302ff to make certain specific proposals in this regard, including the adoption of a provision similar to section 3-418 UCC. A full discussion of Canadian law in this regard is beyond the scope of this commentary. However, the reply of Scott "Comment on Benjamin Geva's Paper: 'Reflections on the Need to Revise the Bills of Exchange Act - Some Doctrinal Aspects" (1981-2) 6 *Canadian Business Law Journal* 331 is instructive (at 336):

> "I preface my reflections on these three cases [*National Westminster Bank Ltd v Barclays Bank International Ltd* 1975 QB 654, 1974 3 All ER 834; *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* 1980 QB 677, 1979 3 All ER 522 and *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* 1981 1 Ch 105, 1979 3 All ER 1025] with the observation that they seem to me to be decisions with large implications for the law of property generally, implications which we are only beginning to explore. I envy, but do not share, the self-confidence of those who feel that we are now ready to make concrete proposals for law reform."

And at 343:

> "As a broad conclusion ... I agree with what I understand to be Professor Geva's position: complete rationality and consistency probably cannot, without legislative intervention, be brought to the rules of law allocating loss consequent upon forgery of bills and notes. On the other hand, how far-reaching a legislative reform should be attempted? Should it cover only mistakes arising from forgery, or should it cover others? Should it cover only payment

> connected with negotiable instruments, or other payments too? Should it attempt to cover payments beyond those in the banking system?"

3 Until quite recently, very little had been said on the rule in Price v Neal in South African law. The view was initially set forth by Cowen (1966 at 393) that Price v Neal should not be followed:

> "It would certainly be unfortunate if an English rule whose rationale has never been clear, which has been condemned as harsh, and which moreover involves illogical distinctions, should be incorporated as part of South African law, unless the courts were compelled to adopt the rule in the light of clear principle or authority. And no such compulsion, it is submitted, exists."

In support of the availability of the condictio indebiti to the bank, he relied on *Natal Bank Ltd v Roorda* 1903 TH 298 where Smith J held that a bank that paid a countermanded cheque could recover, despite its negligence in paying.

With regard to the drawee's right to recover money paid on a forged indorsement, Innes CJ in *Leal & Co v Williams* 1906 TS 554 559 obiter held that the bank could recover from the recipient, but that should section 58 SABEA apply, it could not, "the bank cannot sue anybody, not being itself liable."

4 Malan "The Rule in Price v Neal" 1978 *CILSA* 276 pointed out that any condictio the drawee may have would not be the condictio indebiti but the condictio sine causa specialis. He formulated the general proposition that in enrichment in triangular cases regard should be had not only to the causa of the payment but also to the causa of the acquisition (at 287-8):

> "The rule in Price v Neal only applies to documents which contain at least one genuine signature and which have been negotiated to at least one holder in due course. The recipient, having acquired through a just title, has received what was due to him in terms of a genuine indorsement. Although payment by the bank was thus made sine causa, the acquisition by the holder was not without legal ground. In cases of enrichment in triangular situations it is not sufficient to have regard only to the ground upon which payment is made. Relevant is also the causa of the acquisition. In other words, before the confidence of the third party in the regularity of his acquisition is protected, his title to the benefit received has to be examined. If he lacks a good title no objection exists to subjecting him to an action on enrichment that has its origin in an invalid or defective relationship to which he is a stranger. The forgery of a drawer's signature on a bill or cheque has no effect on the validity of a subsequent indorsement. Acquisition of such a document does not deprive the holder of the status of a holder in due course and the protection due to him. If, on the other hand, the indorsement had been forged the basis for the protection of the recipient would fall away. A forged signature on a bill is wholly inoperative, and a purchaser who derives his title through a forged indorsement is not protected by the law of negotiable instruments. He bears the risk of forgery; he should know his indorser's hand. In these circumstances there is no ground which would justify his acquisition. He is enriched at the expense of the drawee bank - not because the bank has performed to him but because it has paid

> him. In this latter case the bank would, it is submitted, be entitled to claim restitution, by way of the condictio sine causa specialis."

5 The first point raised by Malan, viz that any condictio that the drawee may have is not the condictio indebiti but the condictio sine causa, since the drawee performs as against the drawer and not vis-à-vis the recipient, seems to have been accepted. In *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (C), which dealt with a bank's right to recover payment of a countermanded cheque, Rose-Innes J held the proper remedy to be the condictio sine causa. He said (at 398):

> "A condictio indebiti lies to recover a payment made in the mistaken relief that there was a debt owing and to be paid, but a bank paying a cheque owes no debt to the payee and knows that it is not indebted to the payee. A bank is not indebted or liable to the payee on the cheque nor on the transaction underlying the cheque. The indebtedness on a cheque, or on the underlying cause of a cheque, is that of the drawer, not the bank upon whom the cheque is drawn. ... (at 399). The claim of a plaintiff bank is thus not a claim for recovery of a payment under a mistaken belief that the payment was owing upon a debt, whereas there was no debt, so that the cardinal ground for relief by way of a condictio indebiti appears to be lacking ... (at 401). The claim seems more readily to fit the scope of a condictio sine causa. Plaintiff is in fact saying that it has paid the cheque to the payee from the bank's own funds, which is the true position, and has done so for no justifiable cause, since the cheque was stopped and there was no order on the bank and no authority to make the payment, and ... there was no debt, promise or obligation upon the bank to pay the money to the payee, so that the payment was without cause. The claim appears, thus, to be a claim for recovery of money which has come into the hands of the defendant for no justifiable cause."

See also Cowen "A Bank's Right to Recover Payments made by Mistake: Price v Neal Revisited" 1983 *CILSA* 1 10 17ff; Stassen and Oelofse "Terugvordering van Foutiewe Wisselbetalings: Geen Verrykingsaanspreeklikheid sonder Verryking nie" 1983 *Modern Business Law* 137; Oelofse "Die Toepassing van die Reël in Price v Neal in Suid-Afrika" 1981 *Modern Business Law* 120; Stassen "Countermanded Cheques and Enrichment - Some Clarity, Some Confusion" 1985 *Modern Business Law* 15; Scholtens 1984 *Annual Survey of the South African Law* 204 205-6; Sinclair and Visser 1984 *Annual Survey of the South African Law* 387 354-5, Malan "Price v Neal Revisited" 1992 *Acta Juridica* 131 and *First National Bank Ltd v B & H Engineering* 1993 2 SA 41 (T) but see *Natal Bank Ltd v Roorda* 1903 TH 298.

6 The second submission made by Malan, viz that in enrichment questions in "triangular situations" both the causa of the payment and the causa of the acquisition

should be taken into account has given rise to controversy. Although Cowen 1983 *CILSA* 1 18 for purposes of his article accepts the correctness of the proposition, Oelofse 1983 *Modern Business Law* 137 accepts the availability of the condictio sine causa specialis but rejects the "two causae" proposition (at 123):

> "Myns insiens kan die causa vir die betaling ook nie van die causa vir verkryging geskei word nie. Die bank wat 'n tjek uitbetaal, beoog daardeur om sy kliënt se opdrag uit te voer. Dit bly die bank se oogmerk al is die tjek later deur die nemer verder verhandel. 'n Causa vir die verkryging van iets is in 'n sekere sin 'n relatiewe begrip."

He then justifies the availability of the condictio sine causa: (at 124):

> "'n Klassieke voorbeeld van die toepassing van die condictio sine causa specialis is die geval waar A aan B iets lewer in die veronderstelling dat 'n bepaalde toedrag van sake bestaan en B onderworpe hieraan aanvaar. Indien die veronderstelling nou vals blyk te wees, is die condictio sine causa specialis vir A beskikbaar. Indien 'n bank nou 'n tjek aan iemand uitbetaal dan doen hy dit klaarblyklik in die veronderstelling dat hy 'n geldige opdrag van sy kliënt het om dit te doen. Die persoon wat die tjek aanbied vir betaling weet ook dat dit die geval is. Daar is dus wilsoorstemming (hoewel stilswyend) oor hierdie veronderstelling. Indien die veronderstelling nou vals blyk te wees, behoort die condictio sine causa specialis vir die bank beskikbaar te wees."

He thus favours the availability of the same condictio both in the case where the drawer's signature is forged or the cheque countermanded, and opines that the bank's right of recovery should not be influenced by the question whether there is a valid indorsement on the document. (See also, in this respect, Stassen and Oelofse 1983 *Modern Business Law* 137.) The protection of the bona fide recipient against an enrichment claim from the drawee bank thus requires legislation.

However, the condictio sine causa specialis is also used in circumstances other than those in which payment is made under a supposition that a certain fact exists. In *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (C) particular reliance was placed on the following passage from Grotius 3.30.18:

> "The fourth case: a claim for recovery of anything which has otherwise come to someone without gift, payment, or promise, from the property of another person without lawful cause: for example, someone thought to receive money from a third person, and my money is counted out to him. Here there is no agreement of loan, because error prevents it; nevertheless, it is reasonable that I be compensated for that by which another has been enriched from what is mine."

Controversy haunts this passage: does Grotius formulate the principle that enrichment is a general source of obligations or merely the requirements of the condictio sine

causa specialis? De Vos *Verrykingsaanpreeklikheid in die Suid-Afrikaanse Reg* (1987) 71ff favours the second view (see also *Govender* 396) but the more authoritative approach seems to be that Grotius indeed recognised enrichment as a general source of obligations (see Scholtens "The General Enrichment Action that was" (1966) 83 *SALJ* 391 393-5 and Feenstra "De Betekenis van De Groot en Huber voor de Ontwikkeling van een Algemene Actie uit Ongerechtvaardigde Verrijking" *Opstellen Verdam* (1971) 137).

This debate, however, is somewhat sterile in view of the decision in *Nortje en 'n ander v Pool NO* 1966 3 SA 96 (A) that South African law does not recognise enrichment as a general source of obligations (but see now *Rulten NO v Herald Industries (Pty) Ltd* 1982 3 SA 600 (D) 606-7 and Van Zyl "The General Enrichment Action is Alive and Well" 1992 *Acta Juridica* 115).

7 An entirely different approach to the problem is that of Cowen "A Bank's Right to Recover Payments made by Mistake: Price v Neal Revisited" 1983 *CILSA* 1, who justifies the rule in Price v Neal as follows (at 28-9):

> It is submitted ... that the soundest rationale is that to promote the currency of negotiable instruments as a substitute for money, protection is given *to a holder in due course* even against an unjust enrichment action (just as the law favours such a holder even against an owner seeking to vindicate his own property). On this basis, there would be no reason, as against a holder in due course, to distinguish between mistaken payments resulting from a forgery of the drawer's signature, or from over-looking a countermand, or because of a raised amount. However, when the recipient claims through a forged indorsement, he would not in our law qualify as a holder in due course (or even as a holder).
> "As a matter of the lex ferenda, at one extreme it would be impossible to 'justify' the application of the law of unjust enrichment unqualified by any version of Price v Neal. At the other extreme, it would also be possible to 'justify' a 'finality of bank payments rule', irrespective of the status of the recipient as a holder in due course. A compromise whereby recovery under the law of unjust enrichment is excluded *in favour of a holder in due course* is not unreasonable, and is probably the law as it is."

8 Stassen and Oelofse "Terugvordering van Foutiewe Wisselbetalings: Geen Verrykingsaanspreeklikheid sonder Verryking nie" 1983 *Modern Business Law* 137 brought a new perspective to the problem: Price v Neal concerns liability for unjust enrichment and there can be no such liability if the recipient is not enriched by the payment. Where the recipient obtained payment in discharge of an existing debt owed to him, he is not enriched but merely acquires what was owing to him; although the condictio sine cause specialis applies in principle (for payment is made and received on the supposition that the signatures etc are valid), its availability is excluded where

the recipient is not enriched. The drawee who pays an instrument does not intend or purport to pay a debt by making payment: the drawee pays, not as a representative of the drawer, but as a mere (purported) mandatary. The parties, ie the drawer (or forger) and the recipient, determine the purpose of the payment. Where they intend to pay an existing debt, that debt is extinguished on the instrument being honoured on presentation. The enrichment resulting from the receipt of payment is neutralised or set off by the corresponding extinguishing of the recipient's claim on the underlying obligation for which the instrument was given. This result follows both where the drawer's signature is forged and where he has countermanded payment. Stassen "Countermanded Cheques and Enrichment - Some Clarity, some Confusion" 1985 *Modern Business Law* 15 17 formulates the point:

> "Payment by the bank had the result of discharging the underlying debt between drawer and payee. This happened ... because the drawer and payee agreed that their obligation will be extinguished when the bank pays the cheque. Since payment by the bank simultaneously brings the amount of the cheque into the payee's estate and removes his contractual claim for the same amount against the drawer from his estate, his receipt of the money cannot enrich him at all. His estate is no better off than it was before the payment took place. ... What must be balanced against his receipt of the money is his loss of a contractual claim, not what he gave or did to obtain that contractual claim."

(The last sentence is a criticism of *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (C) 406 E-H, in which Rose-Innes J held that the recipient is not enriched by payment "since the payment prima facie is balanced out by his performance".)

Stassen's view is that the value of the recipient's performance should be considered only where no debt is discharged by the payment (at 17ff).

These views have also given rise to controversy. They differ from that of Cowen 1983 *CILSA* at 24 on whether the underlying debt is discharged by payment of the forged cheque. Cowen says that where no valid order to pay exists there can be no fulfilment of the condition on which the cheque was taken. Sinclair and Visser 1984 *Annual Survey of the South African Law* 377 at 385 seem to agree:

> "That the issue of a cheque by a drawer to a payee is a conditional payment that becomes final on payment by the bank is true, but only, it is submitted, if the payment is made in terms of the mandate. In the face of a countermand, the payment by the bank and receipt of it by the payee should be regarded as being without just cause and not a discharge of the underlying obligation."

This view was followed in *First National Bank Ltd v B & H Engineering* 1993 2 SA 41 (T).

This latter view is not convincing, but perhaps enough has been said on *Price v Neal* and related questions. What has emerged is that *Price v Neal* raises involved questions of enrichment liability. These questions are not relevant to bills and cheques only; they concern all kinds of payment instruments and the entire field of enrichment liability. They cannot be solved in an act that deals only with bills and notes. Enrichment is not a general source of obligations in South African law. Perhaps our law is on the threshold of recognising a general enrichment action. This indeed seems inevitable, but it entails an appreciation of the interests and policy considerations underlying the enrichment remedies. This is hardly a time for Begriffsjurisprudenz, with which too much of this debate was concerned. (See Zimmermann "A Road through the Enrichment-forest? Experiences with a General Enrichment Action" 1985 *CILSA* 1 and Zimmermann & Du Plessis "Grondtrekke en Kernprobleme van die Duitse Verrykingsreg" 1992 *Acta Juridica* 57). It is submitted that the law of unjustified enrichment constitutes the proper forum for the solution of the rule in Price v Neal and related questions. *Govender's* case is an invaluable starting point. The adoption of a "finality of payment" rule and measures comparable to those in sections 4-407, 3-417 and 3-418 UCC are accordingly not recommended.

9 The Clearing Bankers Association proposed that the words "subject to ... is payable" in clause 47(1)(c)(i) be deleted since there is no "customary rate of interest" applicable in a case of dishonour before maturity. This suggestion is accepted and the section is amended as set out above.

The Clearing Bankers Association also proposed that paragraph (d) be added to clause 47(2) to provide that costs be recoverable and that they be recoverable on an attorney and client basis. The first part of their proposal is clearly superfluous and the second part an unwarranted interference in the discretion of the courts. It is accordingly submitted that neither can be given effect to.

In addition, the Commission has made some minor amendments to clause 47 following the definition of "prescribed rate" in clause 1.

CHAPTER 5

DUTIES OF THE HOLDER

PRESENTMENT FOR ACCEPTANCE

48 Necessity for presentment for acceptance

(1) A bill may be presented for acceptance.

(2) A bill must be presented for acceptance:

(a) where it is payable after sight,

(b) where it stipulates that it shall be presented for acceptance.

Comparative legislation

Sec 37 SABEA
Sec 39 BEA
Sec 3-501(1)(a) UCC
Art 21, 22 and 23 GULB
Art 49 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

37. *When presentment for acceptance is necessary, and delay in such presentment.*

(1) If a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of such bill.
(2) If a bill expressly stipulates that it shall be presented for acceptance, or if a bill is drawn payable elsewhere than at the place of residence or business of the drawee, it must be presented for acceptance before it can be presented for payment.
(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.
(4) If the holder of a bill, drawn payable elsewhere than at the place of residence or business of the drawee, has no time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay, caused by presenting the bill for acceptance before presenting it for payment, is excused and does not discharge the drawer and indorsers.

Commentary

1 Clause 48(1) is based on article 49(1) of the Uncitral Convention, which states that any bill may be presented for acceptance. Clause 48(1) applies to all bills, including bills payable on demand. Section 3-501(1)(a) UCC, after defining three cases in

which presentment for acceptance is mandatory, provides: "The holder may at his option present for acceptance any other draft payable at a stated date." It follows that a demand bill cannot be validly presented for acceptance except where presentment for acceptance is necessary in terms of section 3-501(1)(a) UCC. Paragraph 3 of the Official Comment on this provision states:

> "The last sentence of the subsection states the rule of the decisions both at common law and under the original Act, that the holder may at his option present at any time a draft for acceptance ... . There is no similar right to present for acceptance a draft payable on demand, since a demand draft entitles the holder to immediate payment but not to acceptance."

Article 21 GULB provides generally that a bill may be presented for acceptance. This would include demand bills, but according to Quassowski-Albrecht 164-5 and Baumbach-Hefermehl 270 presentment for acceptance of a demand bill is not possible. The basis for this view is paragraph 1 of article 34 GULB, which provides that a bill payable at sight matures on presentment. Since presentment for acceptance can be made only until such time as the bill matures (article 21 GULB), it follows that presentment for acceptance is impossible. The flaw in the argument seems to be the view that "presentment" in article 34 paragraph 1 includes presentment for acceptance as well as presentment for payment. According to Stranz 164, a demand bill can be presented for acceptance, but where it is refused, the bill should not be protested for non-acceptance, but the drawee should be called upon to pay and, if he refuses, the bill should be protested for non-payment. In effect, this view disallows a valid presentment for acceptance of a demand bill. The highest German court has also considered the matter (see BGH *Wertpapier-Mitteilungen* 61, 242), and has held that a demand bill may be validly presented for acceptance. If acceptance is refused, it should be protested for non-payment. Although the report is not explicit, the implication is that the drawee can avoid dishonour either by accepting or paying.

Although presentment for acceptance of a demand bill is a rare occurrence, there is no persuasive reason why it should not be allowed. The drawee refusing to accept can avoid dishonour by paying. If he neither pays nor accepts, it should be possible to take recourse on the basis of dishonour by non-acceptance. Clause 48(1) is therefore framed in general terms without individual exceptions.

Article 50 of the Uncitral Convention and article 22 paragraph 2 and 3 GULB qualify the general right to present for acceptance. There are some differences between the Uncitral Convention and the GULB, but both provide for the insertion of

a phrase in the bill prohibiting presentment for acceptance or such presentment before a certain date. The Uncitral Convention regulates presentment for acceptance contrary to such stipulation: if the bill is accepted, the acceptance is valid (article 50(3); if acceptance is refused, the drawer and indorsers and their avals are not liable for dishonour by non-acceptance (article 50(2)).

It is widely accepted that this is also the position under the GULB (see, for example, Hueck-Canaris 75 and Ulmer 205 for German law; Jäggi Druey and Von Greyerz 175 for Swiss law; Stranz 67 for Austrian law). The relevant provisions of the GULB were inserted at the instance of France and Austria (see Hueck-Canaris 75-6). The argument was that the drawee would be prepared to pay the bill on due date, but not to bind himself to the holder before that date. The drawer, on the other hand, may prefer to negotiate the bill before due date, but without exposing himself to the risk of liability for dishonour by non-acceptance. Moreover, it may be in the interest of the drawer that the bill not be accepted before a certain date or the occurrence of a specified event. These arguments are valid, but this does not mean that a specific provision for a stipulation prohibiting presentment for acceptance is necessary. Since the effect of the provisions of the GULB and the Uncitral Convention is to exclude liability for dishonour by non-acceptance, the desired result can be achieved by inserting in the bill a clause excluding liability for non-acceptance (Baumbach-Hefermehl 271; Hueck-Canaris 75; Zöllner 79). It is, in any event, arguable that a prohibition on presentment for acceptance amounts to an exclusion of liability for dishonour by non-acceptance (Baumbach-Hefermehl 271).

2 Clause 48(2) identifies two cases in which a bill *must* be presented for acceptance. These two cases are self-evident and provision for them is also made in section 37(1) and (2) SABEA, section 39(1) and (2) BEA, section 3-501(1)(a) UCC, articles 22 paragraph 1 and 23 paragraph 1 GULB, and article 49(2)(a) and (b) of the Uncitral Convention. A third case of mandatory presentment for acceptance is provided for in section 37(2) SABEA, section 39(2) BEA, section 3-501(1)(a) UCC and article 45(2)(c) of the Uncitral Convention. This is the so-called "domiciled" bill (Chalmers & Guest 347) or "Domizilwechsel" (Baumbach-Hefermehl 104), ie a bill drawn payable elsewhere than at the place of residence or business of the drawee. The traditional rationale for the rule that a domiciled bill must be presented for acceptance is that the drawee should be forewarned (by means of presentment for acceptance) that he will be expected to make payment at a place where he is not usually present

(Cowen 294; De Wet & Yeats 787 n345; Malan et al *Provisional Sentence* 96 n20). Section 37(4) SABEA and section 39(4) BEA, unlike the legislation referred to, also excuse a delay in making presentment for payment caused by presentment for acceptance of a domiciled bill (see the explanation of Chalmers & Guest 347).

With the notable exception of the Uncitral Convention, the legislation referred to does not distinguish between domiciled bills payable on demand and those not so payable. It must accordingly be accepted that a domiciled bill payable *on demand* must also be presented for acceptance. It follows that such a bill must be presented for acceptance before it can be presented for payment (Anderson paragraph 5 on section 3-501 UCC). As far as the UCC is concerned, this conclusion is confirmed by section 3-503(1)(e) (Weber 179). This does not seem fair to the holder, who is, in terms of the wording of the instrument, entitled to immediate payment. Article 45(2)(c) of the Uncitral Convention accordingly excepts demand bills from the general rule that domiciled bills have to be presented for acceptance before they can be presented for payment.

The GULB does not expressly provide for the mandatory presentment for acceptance of a domiciled bill, and very limited support for it exists in the GULB. Article 22 paragraph 2 provides, inter alia, that the drawer may not prohibit presentment for acceptance of a domiciled bill. This provision means, in effect, that the drawer may not prevent the holder from giving the drawee advance notice of the place of payment by presenting for acceptance. No *duty* is cast on the holder to present such a bill for acceptance. The ruling of the GULB illustrates that presentment for acceptance of a domiciled bill is not essential. Without this rule, the onus would be on the drawer to notify the drawee that a domiciled bill has been drawn on him. This is not unreasonable, since the drawer usually draws on the drawee because of some underlying relationship between them. Another practical consideration militates against the present rule, viz that it would not always or necessarily be apparent to the holder that the bill is a domiciled one. In the result it is submitted that neither section 37(2) SABEA, in so far as it requires presentment for acceptance of domiciled bills, nor section 37(4) SABEA, should be re-enacted.

49 Rules for presentment for acceptance

A bill must be presented for acceptance

(a) by or on behalf of the holder;

(b) to the drawee or to a person authorised to accept or refuse acceptance on his behalf;

(c) where the bill is addressed to two or more drawees, to any one of them or to a person authorised to accept or refuse acceptance on behalf of any one of them, unless the bill provides otherwise;

(d) at a reasonable hour on a business day;

(e) before it is overdue;

(f) where it is a bill payable at a fixed period after sight, within one year of its date.

Comparative legislation

Sec 38 and 39(1) SABEA
Sec 40 and 41(1) BEA
Sec 3-503, 3-504, 3-505 and 3-507(4) UCC
Art 21, 23 and 24 GULB
Art 52, 53 and 57 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

38. *Time for presenting for acceptance bill payable after sight.*

(1) (a) Subject to the provisions of this Act, if a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time within the meaning of sub-section (2).
(b) If the holder does not do so, the drawer and all indorsers prior to that holder are discharged.
(2) In determining what is a reasonable time for the purposes of paragraph (a) of sub-section (1), regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.
39. *Rules as to presentment for acceptance, and excuses for non-presentment.*
(1) A bill is duly presented for acceptance if it is presented in accordance with the following rules, namely --
(a) the presentment must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is overdue, to the drawee, or to a person authorised to accept or refuse acceptance on his behalf;
(b) if a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, in which case presentment may be made to him only;
(c) if the drawee is dead, presentment may be made to his executor;
(d) if the drawee is insolvent, presentment may be made to him or his trustee;
(e) a presentment by post, if in due course, is sufficient.

Commentary

1 Section 39(1)(a) SABEA, section 41(1)(a) BEA and section 3-504(1) UCC all require presentment for acceptance to be made by or on behalf of the holder. According to article 21 GULB presentment for acceptance may validly be made by the holder "or by a person who is merely in possession of the bill". It follows that it need not be the holder himself who must present for acceptance (see Quassowski-Albrecht 163; Stranz 161; Langen 41-3; Hupka 64).

Paragraphs (b), (d) and (e) follow section 39(1)(a) SABEA but it should be noted that in terms of clause 7(2) of this draft, a demand instrument is overdue one year after its date (see also clause 2(3), which requires a demand instrument to be dated).

It may be asked whether provision should be made for a place of presentment for acceptance, as is done in section 21 GULB and section 3-504(2)(c) UCC. In English and South African law the conventional wisdom is that presentment for payment is "local", but that presentment for acceptance is "personal" (Chalmers & Guest 346; Cowen 296; Malan 215 and *Kempff NO and others v Visse and others* 1960 1 SA 307 (T)). This is also the approach adopted in the Uncitral Convention (see section 51(b)). As Chalmers & Guest 346 point out, presentment for acceptance is not "date bound". The holder will usually have a period of time available (which can be fairly long) within which to present for acceptance. It is unreasonable to expect the drawee to be available at that place every business day during that period. Like the SABEA and the BEA, this draft accordingly prescribes no place for presentment for acceptance. The holder is thus expected to take reasonable steps to find the drawee in order to present for acceptance (see Holden 1 *Law and Practice* 293ff).

2 According to section 39(1)(b) SABEA, where a bill is addressed to two or more drawees who are not partners, presentment must be made to all of them, unless one has authority to accept for all (section 41(1)(b) BEA). Where presentment for acceptance is mandatory, additional duties are thus, in such a case, cast on the holder. This is not justified, particularly in view of the fact that co-drawers, co-makers, co-acceptors and co-indorsers are liable jointly and severally in the absence of a contrary stipulation (see section 89(2) SABEA; *Kidson v Campbell and Jooste* (1844) 2 Menz 279; *Moon and Co v Eureka Stores (Pty) Ltd* 1949 4 SA 40 (T) 45; *Roelou Barry (Edms) Bpk v Bosch* 1967 1 SA 54 (C) 57-8).

The GULB does not provide expressly for multiple drawees, although it is accepted that a bill may be validly drawn on two or more drawees (Zöllner 67; Jacobi

394), as long as the order is not given in the alternative or in succession, or the amount split up into parts (RGZ 446, 133). It appears that presentment to one of the drawees is sufficient in those cases where presentment for acceptance is necessary. But clearly dishonour by any one of several drawees is sufficient to entitle the holder to take recourse - the fact that any of the others may accept or already have accepted, is irrelevant (RGZ 46, 133 140; Jacobi 395; Stranz 161).

Section 3-504(3)(a) UCC expressly states that presentment for acceptance may be made to any one of two or more drawees. This reverses the position under section 145(1) NIL, which was to the same effect as the BEA and the SABEA (see Britton 547). Paragraph 3 of the Official Comment on section 3-504 UCC states:

> "The holder is entitled to expect that any one of the named parties will ... accept, and should not be required to go to the trouble and expense of making separate presentment to a number of them."

3 Clause 49(f) must be contrasted with section 38 SABEA (section 40 BEA). Section 38(1)(a) SABEA provides:

> "Subject to the provisions of this Act, if a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time within the meaning of sub-section (2)."

According to section 38(2), a "reasonable time" must be determined with reference to "the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case". It is submitted that section 38 SABEA is unsatisfactory in a number of respects. First, it seems that the provision does not apply at all to the payee of an order bill or a non-transferable bill (Cowen 297; Malan 213 n21; Tager paragraph 119 n1). The reason for this conclusion is that the provision applies only where a bill payable after sight is "negotiated". Since the judgment in *Moti and Co v Cassim's Trustee* 1924 AD 720 it is established law that the delivery of an order bill (and a non-transferable bill) to the payee is not negotiation, it is merely issue. As the purpose of section 38 SABEA is to prevent the holder from postponing presentment until the drawee has become impecunious, so prejudicing other parties (see Cowen 297; Malan 213 n21), there is no reason to exempt the *payee* from this section. This specific objection to section 38 SABEA will be eliminated by clause 15 of this draft, but there are also other reasons for redrafting the provision.

Secondly, it seems that determination of the due date of a bill payable after sight can be postponed indefinitely by keeping the bill in circulation (Cowen 297). The only requirement is that the holder should not keep it for an unreasonably long time before again negotiating it. This creates uncertainty, since the taker would often be unable to ascertain whether his predecessors have negotiated it within a reasonable time after acquisition.

Thirdly, the definition of a "reasonable time" in section 38(2) SABEA hardly contributes to certainty. The examples from English case law cited by Chalmers & Guest 348 make it clear that it cannot be predicted with an acceptable degree of certainty what would be regarded as a "reasonable time" in any given case. Byles 88 n6 correctly remarks that "the doctrine of reasonable time in reference to negotiable instruments is quite unknown outside English and American law". In the UCC, the "reasonable time" yardstick for presentment for acceptance of a bill payable after sight is found in section 3-503(1)(b). Although the UCC provision eliminates the first objection raised above against section 38 SABEA, the other two objections are as valid for the UCC as they are for the BEA and the SABEA.

The American, English and South African provisions can be contrasted with article 23 GULB and article 51(d) of the Uncitral Convention. Paragraph 1 of the former provides that a bill payable at a fixed period after sight must be presented for acceptance within one year of its date. The German text of this paragraph refers to the "date of drawing" of the bill, which may create the impression that the *actual* date of drawing governs if it differs from the date as given on the bill. This would, of course, create intolerable uncertainty, and clearly the "date of drawing" means the date appearing on the bill, whether that is the actual date of drawing (see Stranz 170; Quassowski-Albrecht 170). Regarding cheques, it has been decided that the period allowed for presentment for payment (see article 29 of the German Scheckgesetz, based on article 29 GULC) is determined by the place of drawing *as indicated* on the cheque, and not by the real place of drawing, should the two differ (see OLG München 1985 567). Article 51(d) of the Uncitral Convention is to the same effect as article 23 paragraph 1 GULB, except that it also provides for presentment for acceptance of a *demand bill* within one year of its date. As far as this draft is concerned, clause 49(e) read with clause 7(2) make provision for demand bills (see also paragraph 1 of the commentary above).

Clause 49(f) follows article 23 paragraph 1 GULB and the second case covered by article 51(d) of the Uncitral Convention. The result is that the period allowed for presentment for acceptance of a bill payable after sight is determinable from the face

of the instrument, thereby creating certainty (note that clause 2(3) requires dating of a bill payable after sight).

4 Paragraphs (c), (d) and (e) of section 39(1) SABEA are omitted from this draft. Section 39(1)(c) SABEA provides that, where the drawee is dead, presentment may be made to his executor. The purpose of this provision is not clear. First, section 39(2)(a) SABEA excuses presentment for acceptance in that case. This alone does not make section 39(1)(c) SABEA meaningless, since acceptance by the drawee's executor would prevent recourse against the drawer and indorsers. Secondly, it is difficult to determine whence the executor would derive the authority to accept the bill. The relationship between the drawer and drawee of a bill is one of mandate (see Stassen "Die Regsaard van die Verhouding tussen Bank en Kliënt" 1980 *Modern Business Law* 77 79-80; Malan 270; Tager paragraph 154), in terms of which the drawee undertakes to accept and pay the bills drawn by the drawer. A contract of mandate is terminated by the death of either the mandator or the mandatary (De Wet & Yeats 343), with the rider that a mandatary may recover expenses incurred by him in ignorance of the mandator's death (Joubert and Van Zyl "Mandate and Negotiorum Gestio" 17 *LAWSA* paragraph 16 and section 73(b) SABEA specifically concerning a bank's duty and authority to pay cheques drawn by its customer). The duty of the drawee (as mandatary) to accept a bill does not pass to his estate. It follows that the executor has no duty or authority to accept bills drawn on the deceased. Consequently section 39(1)(c) SABEA is omitted from this draft.

Section 39(1)(d) SABEA provides that where the drawee is insolvent, presentment may be made to him or his trustee. Presentment for acceptance is excused by section 39(2)(a) SABEA in this case as well. Since the whole estate of an insolvent passes to his trustee, who must administer it subject to the very wide powers of instruction of the creditors (see sections 20(1)(a) and 81(3) of the Insolvency Act 24 of 1936 and De Wet & Yeats 486), it follows that the trustee, acting on the instructions of the creditors, may accept a bill drawn on the insolvent. Specific provision for presentment to the trustee seems unnecessary. It is also unnecessary to state that presentment for acceptance may be made to the insolvent drawee personally. That he has become insolvent does not mean that he is no longer drawee. Of course, if the trustee accepts the bill, he binds only the insolvent estate, but the insolvent can bind only assets falling outside the insolvent estate (eg in terms of section 23 of the Insolvency Act).

Finally, it is considered neither necessary nor advisable to provide for "presentment by post", as section 39(1)(e) SABEA does. If "presentment by post" is according to the other rules prescribed for presentment for acceptance, it is valid. It is doubtful whether presentment through the post still plays any meaningful role (but see Chalmers & Guest 353 with reference to the somewhat differently worded section 41(1)(e) BEA).

50 Dishonour by non-acceptance

(1) A bill is dishonoured by non-acceptance where

(a) it is duly presented for acceptance and

(i) acceptance as prescribed by this Act is refused; or

(ii) the bill is not accepted before the end of the business day following presentment;

(b) presentment for acceptance is excused and the bill is not accepted as prescribed by this Act.

(2) Subject to the provisions of this Act, where a bill is dishonoured by non-acceptance, a right of recourse immediately accrues to the holder against the drawer and indorsers, and no presentment for payment is necessary.

Comparative legislation

Sec 40 and 41 SABEA
Sec 42 and 43 BEA
Sec 3-506 and 3-507 UCC
Art 24 and 43(2) GULB
Art 54 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

40. *Failure to accept within customary time.*

(a) If a bill is duly presented for acceptance and it is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance.
(b) If such person does not do so, the holder shall lose his right of recourse against the drawer and indorsers.
41. *When bill is dishonoured by non-acceptance, and consequences thereof.*
(1) A bill is dishonoured by non-acceptance if --
(a) it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or

(b) presentment for acceptance is excused and the bill is not accepted.
(2) Subject to the provisions of this Act, if a bill is dishonoured by non-acceptance, a right of recourse against the drawer and indorsers immediately accrues to the holder, and no presentment for payment is necessary.

Commentary

1 Clauses 50(1)(a)(i), (1)(b) and (2) of this draft are in accordance with section 41 SABEA (save the concluding part of section 41(1)(a)) and require no further comment. See also section 43 BEA, section 3-507(1) to (3) UCC and article 50 of the Uncitral Convention.

2 According to section 40 SABEA (see section 42 BEA) a bill duly presented for acceptance must be treated as dishonoured by non-acceptance if it is not accepted "within the customary time". Section 40 SABEA thus indirectly gives the drawee some time to consider whether he should accept. If he makes his decision within the customary period, the position is clear (see Cowen 299). Section 40 SABEA deals with the situation in which the drawee allows the period to lapse without acting one way or the other. The drawee is apparently entitled to keep the bill within that period and the person making presentment must call for it thereafter (Chalmers & Guest 355-6, but see n2 at 355; Cowen 298-9). If he removes the bill before the end of the customary period without having received a refusal to accept, the bill is not dishonoured (Malan et al *Provisional Sentence* 95 n10).

The customary period is said to be twenty-four hours, but it is not clear whether this applies universally or only to trade bills (Chalmers & Guest 355; Cowen 298-9; Malan 214 note 34; Tager paragraph 122 n1; De Wet & Yeats 788 n357; Malan et al *Provisional Sentence* 95 n10). It is suggested that this uncertainty would be resolved by a specific provision fixing a period within which acceptance must be made.

According to section 3-506(1) UCC acceptance "may be deferred without dishonour until the close of the next business day following presentment". The UCC provision has the advantage that it specifies with certainty the period allowed for acceptance. This is, however, minimised by the further provision that the holder may, "in a good faith effort to obtain acceptance and without either dishonour of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day".

The Uncitral Convention does not allow for a specific time within which the bill must be accepted. Article 50(1)(a) states that a bill is dishonoured by non-acceptance

"when the drawee, upon due presentment, expressly refuses to accept the bill or acceptance cannot be obtained with reasonable diligence or when the holder cannot obtain the acceptance to which he is entitled under this Convention". This provision does not indicate at what stage acceptance cannot be obtained.

The GULB gives the drawee time to consider by providing for a "double presentment". Article 24 paragraph 1 provides:

> "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."

When such a demand is made by the drawee, article 24 paragraph 2 makes it clear that the presenter has the option either to leave the bill with the drawee and call for the accepted bill on the next day, or to take the bill away and again present it the next day. When the drawee demands a second presentment, clearly there can be no question of dishonour (and therefore recourse against other parties) unless the presenter first complies with article 24 (Hupka 65). The second sentence of article 24 paragraph 1 concerns proof of compliance or non-compliance with a request for further presentment. It favours the holder in the sense that a drawer or indorser can rely on non-compliance with the request only if the protest mentions this request. The protest will refer to the request only if the drawee declares to the protesting official that the bill has not been presented before, and that he requires a second presentment. Should the protest be waived (article 46 GULB), there would usually be no protest to which the second part of article 24 paragraph 1 GULB could apply. In such a case the debtor would have to prove non-compliance with a request for further presentment by means of other available evidence (Stranz 172). As Hupka 65 correctly points out, the second sentence of article 24(1) GULB makes good sense only if the first presentment of the bill is also made by the protesting official.

3 Clause 50(1)(a) in effect gives the drawee at least one business day in which to decide whether to accept. In cases where a longer customary period obtains, the drawee has that period of time in which to decide. If he does not accept within that period, the bill is dishonoured.

4 According to section 3-507(4) UCC a term in a draft or any indorsement may allow a stated period for re-presentment if there is dishonour by non-acceptance. The effect

of such a term is that the holder may ignore a dishonour without losing his rights of recourse against secondary parties bound by the term, and present the instrument again within the stated period. It is doubtful whether such terms have sufficient practical significance to require specific regulation. In any event, the ordinary principle relating to the exclusion or limitation of liability can give adequate effect to such a clause (see section 14 SABEA and clause 33 of this draft).

5 The words "or within any longer customary time" in clause 50(1)(a)(ii) of the earlier draft is deleted on the recommendation of the Clearing Bankers Association that has indicated that no such other customary time exists.

PRESENTMENT FOR PAYMENT

51 Necessity for presentment for payment

Subject to the provisions of this Act, an instrument must be duly presented for payment according to the provisions of section 52 or section 53.

52 Rules for presentment for payment

(1) An instrument must be presented for payment by or on behalf of the holder.

(2) An instrument must be presented for payment at a reasonable time on a business day

(a) on the day it falls due; or

(b) if it is payable on demand, before it is overdue.

(3) An instrument must be presented for payment

(a) at the place of payment specified in it; or

(b) if no place of payment is specified in it, at the address of the drawee or maker specified in it; or

(c) in any other case, wherever the drawee or maker can be found;

(4) An instrument must be presented for payment

(a) to the drawee or maker or to a person authorised to pay or refuse payment on his behalf; or

(b) if the bill is addressed to, or the note made by, two or more drawees or makers and no place of payment is specified in it, to any one of them or to

a person authorised to pay or refuse payment on behalf of any one of them, unless the instrument provides otherwise; or

(c) if the instrument designates a person as payor, to that person, or to a person authorised to pay on his behalf.

Comparative legislation

Sec 43 and 91 SABEA
Sec 45 and 87 BEA
Sec 3-501(1), 3-503, 3-504 and 3-505 UCC
Art 34 and 38 GULB
Art 56-8 Uncitral Convention
Sec 60-68 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

43. *Rules as to presentment for payment.*

(1) (a) Subject to the provisions of this Act, a bill must be duly presented for payment in accordance with the provisions of subsection (2).
(b) If it is not so presented, the drawer and indorsers shall be discharged.
(2) A bill is duly presented for payment if it is presented in accordance with the following rules, namely --
(a) if the bill is not payable on demand, presentment must be made on the day it falls due;
(b) if the bill is payable on demand, presentment must, subject to the provisions of this Act, be made within a reasonable time, within the meaning of subsection (3), after its issue, in order to render the drawer liable, and within such a reasonable time after its endorsement, in order to render the indorser liable;
(c) presentment must, subject to the provisions of sub-section (5), be made by the holder, or by some person authorised to receive payment on his behalf, at a reasonable hour on a business day, at the proper place within the meaning of sub-section (4), either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can be found there;
(d) if the bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all;
(e) if the drawee or acceptor of the bill is dead and no place of payment is specified, presentment must be made to his executor, if there is one and, with the exercise of reasonable diligence, he can be found.
(3) In determining what is a reasonable time for the purposes of paragraph (b) of sub-section (2), regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.
(4) A bill is presented at the proper place if --
(a) when a place of payment is specified in the bill, the bill is presented there;
(b) when no place of payment is specified, but the address of the drawee or acceptor is given in the bill, the bill is presented there;
(c) when no place of payment is specified, and no address is given, the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary place of residence, if known;

(d) in any other case, the bill is presented wherever the drawee or acceptor can be found, or it is presented at his last known place of business or residence.
(5) A presentment by post, if in due course, is sufficient.
91. *Presentment of note for payment.*
(1) (a) If a note is in the body of it made payable at a particular place, it must be presented for payment at that place to render the maker liable, unless the particular place mentioned is the place of business of the payee and the note remains in his hands.
(b) In no other case is presentment for payment necessary in order to render the maker liable.
(2) Presentment for payment is necessary to render the indorser of a note liable.
(3) (a) If a note is in the body of it made payable at a particular place, presentment at that place is necessary to render an indorser liable.
(b) If a place of payment is indicated by way of memorandum only, presentment at that place is necessary to render an indorser liable: Provided that presentment to the maker elsewhere, if sufficient in other respects, shall be sufficient to render an indorser liable.

Commentary

1 Subject to the change to be indicated, clause 52(1) and (2) is in accordance with section 43(1)(a), 43(2)(a) and (b) and the first part of section 43(2)(c) SABEA. The latter is based on the opening part and subsections (1), (2) and the first part of subsection (3) of section 45 BEA. The difference lies in the treatment of a demand bill as far as presentment for payment is concerned. According to section 43(2)(b) SABEA, a demand bill must be presented within a reasonable time after its issue to render the drawer liable, and within a reasonable time after its endorsement to render the indorser liable. Section 43(3) SABEA provides that a reasonable time is determined by the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. See also the provisions that apply to promissory notes payable on demand (section 90(1) and (2) SABEA).

The problems caused by the treatment of presentment for payment of demand instruments by the SABEA are similar to those occasioned by section 38 SABEA with respect to the presentment for acceptance of a bill payable after sight. (See the commentary on clause 9 of this draft with respect to the latter.) First, section 43(2)(b) creates a trap for an indorser, since he may remain liable on the instrument even though his own recourse against the drawer has lapsed. Secondly, the yardstick of a "reasonable time" introduces uncertainty where certainty should be maintained. Article 34 GULB ensures certainty by providing that a bill of exchange payable on demand must be presented for payment within a year of its date. Article 77 GULB applies this provision to promissory notes. Article 55(f) of the Uncitral Convention is to the same effect. On the other hand, section 60 of the Australian Cheques and Payment Orders Act 1986 re-enacts the traditional Anglo-American approach with respect to presentment of cheques for payment. Clause 52 (2)(b) of this draft, read

with clauses 2(3) and 7(2), follows the approach of the GULB and the Uncitral Convention, eliminating uncertainty about the time allowed for presentment. In addition, the first objection referred to is overcome. See, generally, Thomas and Orchard "The Presentment and Collection of Cheques in Canada" (1976) 33 *McGill Law Journal* 203.

2 Clause 52(4) deals with the person to whom presentment must be made. It repeats section 43(2)(c) and (e) SABEA, but distinguishes more clearly between the case in which somebody other than the drawee or maker is indicated as the payer, and in which no such other payer is indicated. It is not thought necessary to make specific provision for presentment to the executor of the maker or drawee (section 43(2)(e) SABEA), since the situation is covered by clause 52(4)(a).

According to section 43(2)(d) SABEA, if a bill is drawn on two or more drawees who are not partners, and no place of payment is specified, presentment must be made to them all. It follows that there can be no dishonour unless presentment has been made to them all (Chalmers & Guest 369, referring to section 45(6) BEA). This could create difficulties for the holder, particularly where the instrument is payable on a specific date: he would have to present the instrument to different people at different places on the same date. This problem does not arise under the Australian Cheques and Payment Orders Act 1986, since section 13(1) allows only one drawee bank, nor does it arise under the GULB, since a bill must contain a specified place of payment (even if only by way of a place specified next to the drawee's name), and there can be only *one* such place (articles 1 and 2 GULB and Baumbach-Hefermehl 98). It follows that the insertion of different places next to the names of two or more drawees on a bill that does not otherwise contain a place of payment would result in the invalidity of the instrument.

The best solution seems to be that adopted in article 55(b) of the Uncitral Convention. It states that presentment may be made to any one of two or more makers, unless the instrument indicates otherwise. Section 3-504(3)(a) UCC is to the same effect, except that it does not state that the instrument may provide otherwise. Clause 52(4)(b) adopts this principle.

3 Clause 52(3) and (5) deals with the place where presentment must be made. Clause 52(3) repeats the rules regarding the place of presentment for payment found in section 43(4) SABEA. The rules proposed in this draft are, however, somewhat simpler. The proposed rules give effect to the idea that, where no place of payment or

address is specified in the instrument the holder should make presentment to the payor or take reasonable steps to find him. Presentment at the drawee's or maker's last known place of business or residence would usually suffice. No specific provision is made for presentment by post (see paragraph 4 of the commentary on clause 49 regarding the rules for presentment for acceptance). It is accordingly not proposed that section 43(3) SABEA be repeated.

In terms of section 91 SABEA it is important to determine whether a note is "in the body of it" made payable at a specific place. Where it is, the cause of action against the maker is not complete until presentment has been made at that place. Moreover, presentment at that place is necessary to render an indorser liable. On the other hand, where the place of payment is indicated "by way of memorandum" only, presentment at that place is not essential to hold an indorser liable. On a number of occasions the courts have had to construe the expression "body of the note", resulting in some fairly fine distinctions (see *Breitenbach v Immelman's Konstruksie (Edms) Bpk* 1970 3 SA 507 (T) and *Schnehage v Bezuidenhout* 1977 1 SA 362 (O) with *Competent Distributors (Pty) Ltd v Monarch Cabinet Works (Pty) Ltd* 1958 1 SA 161 (D) and *Veritas International Promotions (Pty) Ltd v Trustees, Langad Trust* 1985 3 SA 945 (C); see further Malan et al *Provisional Sentence* 107-8). It is submitted that this should be simplified. Therefore no distinction is made between places of payment in the body of a note and places of payment not in the body of a note. Bills and notes are alike, and should receive like treatment in this respect. It follows that, in terms of this draft, presentment for payment is not necessary to complete the cause of action against the maker, whether the place of payment appears in the instrument. As clause 52(3)(a) shows, however, it remains possible for the maker to require presentment at the indicated place specifically. On the other hand, to hold an indorser of a note liable, it will be necessary to present at the indicated place, irrespective of where the place of payment is indicated on the instrument.

53 Presentment for payment by bank

(1) An instrument drawn on or made by or payable at a bank (in this section referred to as the "paying bank") may, provided the other requirements of section 52 are met, be presented for payment to the paying bank by a bank collecting payment (in this section referred to as the "collecting bank") in terms of any applicable clearing house rule

(a) at a place designated by any clearing house rule; or

(b) at a place of payment designated by the paying bank; or

(c) by means of data transmitted on behalf of the collecting bank to the paying bank identifying the instrument with reasonable certainty.

(2) For the purposes of paragraph (c) of subsection (1), an instrument is deemed to be identified with reasonable certainty if

(a) the sum ordered or promised to be paid by the instrument;

(b) the number of the instrument, if any;

(c) the account against which the instrument is drawn or payable; and

(d) the branch of the paying bank where the instrument is payable

are specified or are readily ascertainable by the paying bank from the data transmitted by or on behalf of the collecting bank.

(3) Where an instrument is presented for payment in terms of this section without exhibiting it to the paying bank, nothing in this section shall relieve the paying bank of any liability to which it would have been subject in relation to the instrument if it had been presented by being exhibited to the paying bank.

Comparative legislation

Sec 60-68 Cheques and Payment Orders Act 1986
Art 38 GULB
Art 31 GULC
Sec 3-504 UCC
Art 55(h) Uncitral Convention

Commentary

1 Clause 53 is new. It intends to provide for the various forms of truncation that have already been and may in future be introduced by South African banks. Although truncation is at present and will in the future be applied to the collection and payment of cheques only, its eventual application to bills and notes cannot be excluded, and provision is made in this draft for the truncation of bills and notes as well. (On the "truncation" of bills in France, see *Payment Systems in Eleven Developed Countries* (1989) 71ff and Vasseur *La Lettre de Change-Relevé* (1976); Jeantin *Droit Commercial* (1992) 43ff; Ripert-Roblot II *Traité de droit commercial* (1992) 232-3.)

2 "Truncation" refers to a truncation or shortening of the collection process. The customary route a bill or cheque takes is from drawer to payee, from payee to collecting bank, from collecting bank via a clearing house to the drawee bank, and from the drawee bank back to the drawer. "Truncation" shortens this route and immobilises the cheque somewhere in the process. Several forms of truncation are thus possible, the most elementary being drawee bank retention, ie a form of truncation in which the drawee bank retains cheques after their presentment and payment. This form of truncation is at present practised by several South African banks. Much more sophisticated is truncation at the bank of first deposit, or collecting bank truncation. This method of truncation dispenses with physical presentation of the instrument. It is based on "the principle that banks do not physically exchange the payment documents the value of which is cleared, the amounts involved being settled on the date on which the magnetic media are presented" (*Payment Systems in Eleven Developed Countries* (1980) at 15 and see Penny and Baker paragraph 2.01ff and Van Zyl *Tjekretensie in die Suid-Afrikaanse Wisselreg* (1986) 7ff; Meiring "Holder in Due Course, Truncated Cheques and Presentment for Payment: Recent Developments" (1992) 4 *SA Merc LJ* 377; Oelofse "Onlangse ontwikkelings in die tjekreg" (1991) 3 *SA Merc LJ* 364; Oelofse "The Moment of Payment of a Cheque through an Automated Clearing Bureau" 1986 *Journal of International Banking Law* 4; Visser "The Evolution of Electronic Payment Systems" (1989) 1 *SA Merc LJ* 189; Von der Crone-Schmoker *Das Scheckinkasso und die Checktruncation* (1986)).

However, between these two extremes, several other forms of truncation are possible. Truncation at a central point, such as a clearing bureau of all participating banks is one possibility. A form of "internal" truncation can also be practised: for example, a bank can retain all cheques drawn on it at a central point where the decision to pay can be made with the use of sophisticated equipment by which specimen signatures, countermand instructions and balances available can be recalled. In some cases the technical correctness of the instruments is verified at this central point and the instruments are kept there while the decision to pay is made at branch level on information electronically conveyed to the branch. Clearly, in this latter case no presentment to the branch on which the instrument is drawn is made. Where truncation takes place at a central point or by the collecting bank, physical presentation of the instrument is also no longer possible. The Act, however, envisages the physical presentation of bills, cheques and notes and does not provide for their "electronic" presentment.

3 Truncation raises many controversial questions. Some concern its "legality" under present legislation (see, inter alia, Arora "Electronic Fund Transfers and the Law" (1986) 7 *Company Lawyer* 195) and others the legislative changes and other measures necessary to introduce it. Our legislation envisages the physical presentation of bills, cheques and notes, and legislative reform to provide for truncation is essential. (See Cowen 1982 *Acta Juridica* 117 127.) But truncation involves two other aspects: one is the relationship between bank and customer and the other the inter bank relationship. The view is taken in this draft that truncation in its most sophisticated form can effectively be introduced only by amending both the applicable legislation and the bank and customer contract and by introducing a comprehensive inter bank agreement dealing with it.

4 Generally, a cheque or other instrument must be presented for payment at the branch on which it is drawn. See *Commercial Union Trade Finance v Republic Bottlers of SA (Pty) Ltd t/a Booth's Bottle Store* 1992 4 SA 728 (D) 729-30; *Navidas (Pty) Ltd v Essop* 1992 3 SA 797 (D) and *Canoa Importers (Pty) Ltd v Eddy and Henshaw* case no 10200/90 (19.4.91) where it was said:

> "In my view, therefore, the requirements of the Act that presentment be made to the proper place indicated require that it be made, in this case, at the paying brabch of the bank indicated on the cheque ... before the drawers are liable. Furthermore, it follows that if a cheque is not properly presented, then it is also not legally dishonoured; and the result is that for either or both reasons the cause of action against the drawers is incomplete."

The *obiter* statement in *Nedtravel (Pty) Ltd t/a American Express Travel Service v Moch* 1993 2 SA 38 (W) that the court in *Navidas*

> "seems not to have given consideration to the fact that the central clearing bureau in question may well have been the agent for the drawee bank for the purposes of presentment of the cheque in issue. It also does not appear whether the question of agency was ever referred to in ...*Canoa* ...".

This criticism overlooks the requirement that presentment to be valid must be made not only to an authorised person but also at the proper place (s 43(2)(c) and (4)).

Since section 45 SABEA requires "due" presentment before recourse can be taken against the drawer and indorsers who are discharged if "due" presentment is not made (section 43 (1) SABEA), some forms of truncation would make recourse by the

holder against the drawer and indorsers impossible (see Van Zyl 52-3 84-7; Arora "Electronic Fund Transfers and the Law" (1986) 7 *Company Lawyer* 195 196; Malan "The Liberation of the Cheque" 1978 *TSAR* 107 110-11; Oelofse "Enkele Regsaspekte van Ontwikkelings in die Bankwese" 1985 *Modern Business Law* 6 11). Provision for alternative means of presentment therefore becomes essential. In addition, practices in use today by which physical presentment to the branch itself is dispensed with should be sanctioned by appropriate legislative amendments. Clause 53(2) is partly based on the provisions of section 62 of the Australian Cheques and Payment Orders Act, 1986 that, together with section 63, 64, 55, 66, 67 and 68 are quoted in full:

"*Presentment by bank*
62 (1) A bank (in this section referred to as the "collecting bank") may, on behalf of a customer, another bank or otherwise, present a cheque for payment by making a demand for payment of the cheque on the drawee bank at -
(a) the proper place in relation to the cheque; or
(b) a place that is a designated place in relation to the cheque for the purposes of this subsection; at a reasonable hour on a day on which the drawee bank is open for business at the place at which the demand is made.
(2) The demand may be made by exhibiting the cheque to the drawee bank or by any other means.
(3) Where the cheque is not exhibited to the drawee bank, the demand shall-
(a) identify the cheque with reasonable certainty; and
(b) be in a form that is intelligible to, or readily decipherable by, the drawee bank.
(4) Without limiting the generality of sub-section (3), the demand shall, for the purpose of that sub-section, be taken to identify the cheque with reasonable certainty if -
(a) the sum ordered to be paid by the cheque;
(b) the cheque number;
(c) the account against which the cheque is drawn; and
(d) the proper place in relation to the cheque, are specified in the demand or are readily ascertainable by the drawee bank from the demand.
(5) Where the cheque is not exhibited to the drawee bank, the drawee bank -
(a) may request the collecting bank to furnish specified further particulars in relation to the cheque to it, or
(b) may, whether or not a request has been made by virtue of paragraph (a) request the collecting bank to exhibit the cheque or a copy of the cheque of a specified kind, to it.
(6) The request may be made to the collecting bank at a place that is a designated place in relation to that cheque for the purposes of this sub-section, by any means, at a reasonable hour on a day on which the collecting bank is open for business at the place at which the request is made.
(7) The request shall -
(a) identify the cheque with reasonable certainty and
(b) be in a form that is intelligible to, or readily decipherable by, the collecting bank.
(8) Without limiting the generality of sub-section (7), the request shall, for the purposes of that sub-section, be taken to identify the cheque with reasonable certainty if -
(a) the sum ordered to be paid by the cheque;
(b) the cheque number;
(c) the account against which the cheque is drawn; and

(d) the proper place in relation to the cheque, are specified in the request or are readily ascertainable by the collecting bank from the request.
(9) Where the drawee bank makes a request in relation to the cheque, the collecting bank may -
(a) furnish the further particulars; or
(b) exhibit the cheque or a copy of the cheque of the specified kind as the case requires, to the drawee bank at -
(c) the proper place in relation to the cheque; or
(d) a place that is a designated place in relation to the cheque for the purposes of this subsection, at a reasonable hour on a day on which the drawee bank is open for business at the place at which the particulars are furnished, or the cheque or copy exhibited, as the case may be.
(10) Where the drawee bank makes a request by virtue of paragraph (5)(a) in relation to the cheque, the further particulars may be furnished to the drawee bank by any means.
(11) In furnishing the further particulars, the collecting bank shall -
(a) identify the request with reasonable certainty; and
(b) provide the further particulars,
in a form that is intelligible to, or readily decipherable by, the drawee bank.
(12) Where a cheque is presented for payment otherwise than by exhibiting it to the drawee bank, nothing in this section shall be taken to relieve the drawee bank from any liability to which the drawee bank would have been subject in relation to the cheque if it had been presented by being exhibited to the drawee bank.

Presentment by person other than bank
63 A person other than a bank may present a cheque for payment by exhibiting the cheque, in person, to the drawee bank at the proper place in relation to the cheque at a reasonable hour on a day on which the drawee bank is open for business at the place at which the cheque is exhibited.

Proper place
64 The proper place in relation to a cheque is -
(a) in a case where there is specified in the cheque a place of business of the drawee bank - that place; or
(b) in any other case - the place of business of the branch of the drawee bank at which the account on which the cheque is drawn is maintained.

Designated places
65 (1) A bank may, by notice in the prescribed form published in the Gazette, specify a place as a designated place for the purposes of this Act.
(2) The notice shall specify -
(a) either or both of the following, namely,
(i) the cheques in relation to which the place is to be a designated place for the purposes of sub-sections 62(1) and (9);
(ii) the cheques in relation to which the place is to be a designated place for the purpose of sub-section 62(6);
(b) the days on which, and the hours during which, the bank will be open for business at the place; and
(c) the means by which communications may be made to the bank at the place.
(3) The notice has effect on and from the day on which the notice is published in the Gazette or such later days as is specified in the notice.

Deposit bank to present cheques promptly
66 (1) Subject to section 59, where the holder of a cheque lodges the cheque with a bank (in this section referred to as the "deposit bank") for collection for the holder; the deposit bank shall duly present the cheque for payment itself, or ensure that the cheque is duly presented for

payment on its behalf, as soon as is reasonably practicable and, if the deposit bank fails to do so, it is liable to the holder for any loss that the holder thereby suffers.
(2) Where the drawee bank makes a request under sub-section 62(5) in relation to the cheque, the cheque shall, for the purpose of sub-section (1), be deemed not to have been duly presented for payment unless, and until, the request is complied with.
(3) In determining, for the purposes of sub-section (1), whether the deposit bank failed to duly present the cheque for payment itself, or to ensure that the cheque was duly presented for payment on its behalf, as soon as was reasonably practicable, regard shall be had to -
(a) the fact that the instrument is a cheque and that it is reasonable to expect a cheque to be presented for payment promptly;
(b) the means that were available to it for duly presenting the cheque itself and the means that were available to it for having the cheque duly presented on its behalf;
(c) the relative speed, reliability and cost of those means;
(d) the usage of banks in relation to the presentment of cheques;
(e) in a case where a request under sub-section 62(5) was made in relation to the cheque - the following matters, namely:
(i) the making of the request;
(ii) the nature of the request;
(iii) whether the request was made to the deposit bank or to another bank acting on its behalf in relation to the presentment of the cheque;
(iv) if the request was made to another bank acting on its behalf in relation to the presentment of the cheque - whether or not the other bank had actual possession of the cheque;
(v) whether or not the request was complied with;
(vi) if the request was complied with - the time within which the request was complied with and the means by which the request was complied with;
(vii) the means that were available for complying with the request;
(viii) the relative speed, reliability and cost of those means;
(ix) the usage of banks in relation to requests under sub-section 62(5); and
(f) any other facts of the particular case, including-
(i) the nature of the cheque and, in particular, but without limiting the generality of the foregoing, the date of the cheque (if any) and the sum ordered to be paid by the cheque; and
(ii whether any delay in presenting the cheque was -
(A) caused by circumstances beyond the control of the deposit bank; and
(B) not imputable to default, misconduct or negligence on the part of the deposit bank.

Drawee bank to pay or dishonour promptly
67 (1) Where a cheque is duly presented for payment, the drawee bank shall either pay or dishonour the cheque as soon as is reasonably practicable and, if the drawee bank fails to do so, then, unless it has become aware of a defect in the holder's title or that the holder has no title to the cheque the drawee bank -
(a) may not dishonour the cheque; and
(b) is liable to pay the cheque to the holder.
(2) In determining, for the purposes of sub-section (1), whether the drawee bank failed to pay or dishonour the cheque as soon as was reasonably practicable, regard shall be had to -
(a) the fact that the instrument is a cheque and that it is reasonable to expect a cheque that has been duly presented for payment to be either paid or dishonoured promptly;
(b) the means by which, and the place at which, the cheque was presented;
(c) the means that were available to it for paying or dishonouring the cheque;
(d) the relative speed, reliability and cost of those means;
(e) the usage of banks in relation to the payment and dishonour of cheques;
(f) in a case where a request under sub-section 62(5) was made by it in relation to the cheque the following matters, namely;
(i) the making of the request;
(ii) the nature of the request;
(iii) the time within which the request was made;

(iv) the means by which the request was made;
(v) the means that were available to it for making the request;
(vi) the relative speed, reliability and cost of those means;
(vii) whether or not the request was complied with;
(viii) if the request was complied with - the time within which the request was complied with;
(ix) if the request was a request to furnish further particulars and the request was complied with - the nature of the particulars furnished to it;
(x) the usage of banks in relation to the making of requests under sub-section 62(5); and
(g) any other facts of the particular case, including -
(i) the nature of the cheque; and
(ii) whether any delay in paying or dishonouring the cheque was-
(A) caused by circumstances beyond the control of the drawee bank; and
(B) not imputable to default, misconduct or negligence on the part of the drawee bank.

How paid cheque to be dealt with
68 (1) Where -
(a) a cheque is duly presented for payment by exhibiting the cheque to the drawee bank; and
(b) the drawee bank pays the cheque
the drawee bank has, as against the person who presented the cheque, the right to possession of the cheque.
(2) Where -
(a) a cheque is duly presented for payment by a bank (in this sub-section referred to as the "collecting bank") otherwise than by exhibiting the cheque to the drawee bank,
(b) the cheque is exhibited to the drawee bank pursuant to a request under sub-section 62(5); and
(c) the drawee bank pays the cheque,
the drawee bank has, as against the collecting bank and any bank on whose behalf the collecting bank duly presented the cheque, the right to possession of the cheque.
(3) Where -
(a) a cheque is duly presented for payment by a bank (in this sub-section and sub-section (4) referred to as the "collecting bank") otherwise than by exhibiting the cheque to the drawee bank;
(b) the cheque is not exhibited to the drawee bank pursuant to request under sub-section 62(5);
(c) the drawee bank pays the cheque; and
(d) the cheque is in the actual possession of the collecting bank or another bank on whose behalf the collecting bank duly presented the cheque,
the collecting bank or other bank, as the case requires (in sub-section (4) referred to as the "relevant bank"), shall -
(e) subject to sub-section (4), retain the cheque, on behalf of the drawee bank, for such period as is prescribed; and
(f) at the expiration of that period, deal with the cheque in accordance with the regulations.
(4) The drawee bank may, at any time while the cheque is being retained by the relevant bank in accordance with sub-section (3), request the relevant bank to deliver up the cheque to it and the relevant bank shall forthwith comply with the request.
(5) Nothing in sub-section (3) shall be taken to affect a right that a person has, as against the drawee bank, to possession of the cheque.
(6) Where a cheque is paid otherwise than by the drawee bank, the person paying the cheque has, as against the person paid, the right to possession of the cheque."

5 It is a term in the bank and customer contract that where the signature of the drawer of a cheque has been forged or is unauthorised, the drawee bank paying the cheque

does so at its own risk and cannot debit the account of its customer with the amount so paid or recover it from him (*Trull v Standard Bank of South Africa Ltd* (1892) 4 SA 203 205; *Preuss and Seligmann v Prins* (1864) 1 Roscoe 198 204; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 280; *Stapelberg NO v Barclays Bank DC & O* 1963 3 SA 120 (T) 124 and Malan 272 n20). The drawee bank can, to some extent, control this risk by comparing the signature on the instrument with the specimen signature of the customer. In view of the practical difficulties involved, however, this is not always done, and some banks have adopted practices in which the verification of signatures has been abolished (see, generally, Murray "Price v Neal in the Electronic Age: An Empirical Study" 1970 *Banking Law Journal* 686 and his "Forged Bills of Exchange and Checks. A Comparison of the Anglo-American, European and Latin American Law" 1965 *Banking Law Journal* 565; Koller "Der Verzicht auf die Prüfung von Scheckunterschriften" 1985 *Wertpapier-Mitteilungen* 821). Where instruments are truncated at any time before they are presented to the drawee, the drawee bank will have no opportunity to compare the customer signatures with the specimen signatures. The risk of making payment on a forged instrument is thus somewhat increased and it is suggested that this risk can be controlled by truncating only items drawn or made for a reasonably low amount, eg Rl 000 (see American Bankers Association *Check Safekeeping. A Task Force Report on Check Truncation. A Summary of Task Force and Sub-Committee Findings* (1978) at 50). In South Africa 89 per cent of all cheques drawn in 1983 were for amounts of less than Rl 000, which accounted for 3,2 per cent of the value of all cheques processed (Clearing Bankers Association of South Africa *Cheque Truncation: Final Report and Recommendation* (1983) at 7). It is suggested that this method is preferable to one allocating all risk of forgery to the customer. Should the banks require more protection, they should consider introducing account verification agreements in the relationship with their customers.

6 Another consequence attaches to those forms of truncation that dispense with physical presentment of the instrument to the drawee. Since the instrument no longer comes into the possession of the drawee, it cannot be examined for forgeries, alterations and other irregularities. It is settled law that the drawee bank cannot rely on the customer's negligence in drawing the instrument in order to debit the customer's account with the amount of a raised or altered cheque where the bank had itself negligently failed to detect the forgery or alteration (*Burns v Forman* 1953 2 SA

226 (W) 229 AD; *Barclays Bank DCO v Straw* 1965 2 SA 93 (O); *Holzman v Standard Bank Ltd* 1985 1 SA 360 (W) 364 D). The influence of truncation on this rule is controversial (see Malan 1978 *TSAR* 107 205; Von Wrede *Das beleglose Scheckinkasso* (1977) 99-103; Von der Crone-Schmoker *Das Scheckinkasso und die Checktruncation* (1986) 116 and 120), but it is suggested that the principle be retained and the relationship between the parties regulated as if proper physical presentment had taken place. It should be added that the parties are free to conclude a contrary agreement allocating all risk in this respect to one or other of them. (See, generally, Koller "Der Verzicht auf die Prüfung von Scheckunterschriften" 1985 *Wertpapier Mitteilungen* 821 823-5.) In this respect the provisions of the Australian Cheques and Payment Orders Act 1986 merit following. Section 62 (12) provides:

> "Where a cheque is presented for payment otherwise than by exhibiting it to the drawee bank, nothing in this section shall be taken to relieve the drawee bank from any liability to which the drawee bank would have been subject in relation to the cheque if it had been presented by being exhibited to the drawee bank."

The Revised UCC, in defining "ordinary care" (section 3-103(a)(7)), adds the following to the definition which generally requires the observance of reasonable commercial standards:

> "In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage ...".

This amendment rejects a line of cases holding that a failure to examine cheques physically amounts to neglgence (see Official Comment 4 to Revised Article 4-406).

7 A third aspect of truncation involving the banks and customer relationship concerns the use of the paid instrument as evidence. Paid cheques and other instruments are frequently used as evidence of payment, both judicially and informally. Moreover, they are used to draw up books of account and are verified by the auditing and accounting professions. In some cases legislation requires a person to retain or produce paid cheques and other instruments (see, eg, sections 75(1) and (2) of the Income Tax Act, 1962; section 28(1), (4) and (5) of the Administration of Estates Act, 1965).

In this regard section 85 SABEA provides that where an unindorsed or irregularly indorsed cheque has been paid by the drawee bank "such payment shall be prima facie evidence of the receipt by the payee" of the sum mentioned in the instrument. The effect of this provision is very limited: it does not dispense with proof that the cheque has been drawn by the drawer, delivered to the payee and paid, and refers to unindorsed or irregularly indorsed cheques only. However, it has been held that an unindorsed cheque is prima facie evidence of payment of the sum mentioned in it (Chalmers & Guest 714). The fact of payment can be proved without production of the cheque itself, but other evidence of the debt for which it has been given must be adduced. Section 3 of the Cheques Act, 1957 contains a slightly different provision:

> "An unindorsed cheque which appears to have been paid by the banker on whom it is drawn is evidence of the receipt by the payee of the sum payable by the cheque."

Section 97 of the Australian Cheques and Payment Orders Act, 1986 contains a similarly worded provision. Since section 85 seems to require evidence of payment (see Cowen 451), it is desirable to extend its provisions to cheques that appear to have been paid. This is done in clause 67 of the proposed Cheques Act.

To some extent the use of a microfilm copy of a paid cheque can provide the necessary proof. In *Barclays Western Bank Ltd v Creser* 1982 2 SA 204 (T) the court had to rule on the admissibility of a microfilm copy of a hire purchase contract, the original of which had been destroyed for lack of office space. The court allowed the copy and said (at 106):

> "The best evidence rule is that no evidence is ordinarily admissible to prove the contents of a document except the original document itself. The exception to the rule is that on proof, inter alia, of the destruction of the document, the contents of the document may be proved by secondary evidence. The only significance of the fact, if fact it is, that the party deliberately destroyed a document, is that, if it appears that that was done in contemplation of legal proceedings, possibly with a fraudulent objective, the court may decline to dispense with the production of the original. There was no question of anything of that sort in the present case. Litigation was not contemplated when the original was destroyed and the destruction was done in the ordinary course of business."

(See also Hoffmann and Zeffertt 29-31.) Since it is likely that instruments will be microfilmed before they are "truncated", no legal objection to the admissibility of microfilm copies of paid cheques will exist. (This does not, of course, mean that the unavailability of the original could not create difficulties of proof with regard to

forgery and alteration. See American Bankers Association *Check Safekeeping. A Task Force Report on Check Truncation. A Summary of Task Force and Sub-Committee Findings* (1978) 57ff.)

Despite the availability of a microfilm or other copy of "truncated" items, it will be necessary to return paid instruments to certain customers. Any system of truncation must therefore provide for the retrieval of paid bills, cheques and notes. The question now arises whether it is necessary to provide by legislation for the right of the drawee to demand exhibition of the instrument before payment, as does the Australian Cheques and Payment Orders Act, 1986 (section 62(5)), or whether this matter should be regulated by inter bank agreement as is done in Germany (see the *Abkommen über das beleglose Scheckeinzugsverfahren* of March 1985 reprinted in Baumbach-Hefermehl 737ff).

Section 50(4) SABEA provides that where a person presents an instrument for payment, "he shall exhibit it to the person from whom he demands payment, and when a bill is paid, the holder shall forthwith deliver it up to the party paying it". The return of the instrument to the payor is, as Britton 647 states, not "a condition precedent to the operation of the payment as a discharge although it is the independent legal duty of the holder to surrender the instrument to the payor". The drawee bank making payment is thus entitled to demand delivery of the instrument on making payment *(Ramuz v Crowe* (1847) 1 Ex 167 174 (154 ER 70); *Hansard v Robinson* (1827) 7 B & C 90 94 (108 ER 659); *Cornes v Taylor* (1854) 10 Ex 441 442 (156 ER 509); *Q v Watts* (1850) 2 Den 14 21 (169 ER 398)), and can refuse payment unless the instrument is delivered up (*Heunis v Estate Scott* (1908) 18 CTR 948). On payment the drawer again acquires ownership in the instrument, although the drawee may retain it as a voucher or as proof of payment until his account with the drawer is settled (*Charles v Blackwell* (1877) 2 CPD 151 162 (CA)). It follows that a customer re-acquires ownership in the instrument paid on his behalf, whether the instrument is physically presented for payment, and he may thus follow it up wherever it is found. In addition, the drawee bank is contractually bound to return paid items to the customer. Consequently, any system of truncation can be introduced only with the customer's consent. Since the customer is of right entitled to the instruments paid, provision for their return to the drawee bank should be made to enable the latter to deliver them up to the customer should he so desire. This can be done competently in the inter bank agreement or clearing house rules. Since the customer is because of the provisions of clause 53(3) in the same position as if physical presentment had been made, there is no reason to give him or the drawee the right to demand physical presentment before payment.

It is suggested that the period of retention of paid cheques and their manner of retrieval be regulated in the inter bank agreements or clearing house rules. The importance of the inter bank agreements or clearing house rules and their accessibility to the public cannot be overstated. This is apparent from the judgment of Goldstone AJ (as he then was) in *Rosen v Barclays National Bank Limited* 1984 3 SA 974 (W) on the time of payment of a cheque presented for payment by another bank (on which see Oelofse "The Moment of Payment of a Cheque Cleared through an Automated Clearing Bureau" 1986 *Journal of International Banking Law* 4; Malan "Price v Neal Revisited" 1992 *Acta Juridica* 131). Generally, a customer of a clearing bank will be bound by these rules, the bank being a mandatary, provided the rules are "notorious, certain, reasonable and legal" whether the customer has knowledge of them (Roper *Stock Exchange Law in South Africa* (1940) 12; Malan *Collective Securities Depositories and the Transfer of Securities* (1985) 186ff. The effect of clearing rules is controversial, see Weaver and Craigie 335-6, 366, 373-4; Choquette (1982) 60 *Canadian Bar Review* 921; Goode "When is a Cheque Paid?" 1981 *Journal of Business Law* 164)). Clearly, since the clearing house rules may affect the rights and duties of a customer, they should be published and subject to public scrutiny. In clause 1 of this draft and of the proposed Cheques Act "clearing house rules" are defined.

8 Clause 53(1) provides for presentment for payment in terms of any applicable clearing house rule at (a) a place designated by the clearing house rules; (b) a place of payment designated as a place of payment by a paying bank and (c) by means of data transmitted to the paying bank. Clause 53(1)(c) follows a suggestion made by Cowen in 1982 *Acta Juridica* 117 at 127, and is partly based on section 62(3) of the Australian Cheques and Payment Orders Act, 1986. Clause 53(3) follows section 62(12) of the latter Act.

Clause 53(1)(b) is intended to "legalise" present practices by which presentment to the branch of the drawee on which the instrument is drawn is dispensed with and the decision to pay is made at a central point (or both there and at the branch) where the instruments are retained.

Clause 53(1)(a) provides for presentment for payment at a place designated by the clearing house rules. It is based on article 38 GULB, 31 GULC and article 51(h) of the Uncitral Convention. According to section 3-504(2)(b) UCC presentment may be made "through" a clearing house. Apparently this means only that the time within which the instrument must reach the payor is extended. The Official Comment (2) to

the section states: "'Through a clearing house' means that presentment is not made when the demand reaches the clearing house, but when it reaches the obligor" (see Bailey 13-5). Section 4-204 (3) UCC is more explicit and provides that "[p]resentment may be made by a presenting bank at a place where the payor bank has requested that presentment be made". This section authorises presentment at centralised bookkeeping centres and electronic processing centres (see the Official Comment (4) on the section and Bailey 13-17 to 13-20 and now section 4-104(4) Revised UCC and section 4-110, and 4-208 and 4-209). Article 55(h) of the Uncitral Convention provides that presentment at a clearing house is in order if the law of the place where the clearing house is located or if the rules or customs of the clearing house so provide. These cases are covered by Clause 53(1)(b).

9 No specific procedure is outlined in this draft for the drafting of and notice to the public of the clearing house rules. It is recommended that this matter be regulated in other legislation.

10 Clause 53(1)(a) provides for presentment at a place "designated by any clearing house rule" and "clearing house rules" are defined in clause 1 as "the rules of a clearing house designed to regulate the clearing of payments between members and approved by the Registrar of Banks". To these proposals the Association of Attorneys responded by making the observation that the clearing house rules should comply with certain minimum requirements some of which they have listed. Although these considerations are valid they are not decisive and the Commission has decided not to give effect to them. The reference to the approval of the Registrar in the definition of "clearing house rules" is consequently deleted.

The proposal of the Clearing Bankers Association, on the other hand, that the definitions of "clearing house" and "clearing house rules" be deleted cannot be accepted since these concepts are essential for the effectiveness of clause 53.

54 Dishonour by non-payment

(1) An instrument is dishonoured by non-payment if

(a) it is duly presented for payment and the instrument is not paid; or
(b) presentment for payment is excused and

(i) if it is an instrument payable on demand, the instrument is not paid: or

(ii) if it is an instrument payable at a definite time, the instrument is overdue and unpaid.

(2) Subject to the provisions of this Act, where an instrument is dishonoured by non-payment, a right of recourse against the drawer and indorsers immediately accrues to the holder.

Comparative legislation

Sec 45 SABEA
Sec 47 BEA
Sec 3-507 UCC
Art 43 GULB
Art 58 Uncitral Convention
Sec 69 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

45. *When bill is dishonoured by non-payment, and consequences thereof.*

(1) A bill is dishonoured by non-payment --
(a) if it is duly presented for payment and payment is refused or cannot be obtained; or
(b) if presentment is excused and the bill is overdue and unpaid.
(2) Subject to the provisions of this Act, if a bill is dishonoured by non-payment, a right of recourse against the drawer and indorsers immediately accrues to the holder.

Commentary

1 Section 45(1) SABEA defines the dishonour of an instrument and distinguishes two cases: the first where presentment is made and payment is refused or cannot be obtained, the second where presentment is excused and the bill is overdue and unpaid. Section 47(1) BEA is to the same effect. Article 58(1) of the Uncitral Convention also states that an instrument is considered to be dishonoured in these two cases, but there is a problem regarding the second case: article 58(1)(b) provides that an instrument is dishonoured by non-payment if presentment for payment is dispensed with and the instrument is unpaid at "maturity". This makes no sense with regard to demand instruments, since article 9(6) provides that the maturity of a demand instrument is the

date on which it is presented for payment. In the case postulated by article 58(1)(b) there would, of course, have been no presentment.

2 According to section 3-507(1)(a) UCC, an instrument is dishonoured if payment is refused or cannot be obtained "within the prescribed time". Reference to section 3-506(2) indicates that the "prescribed time" ends with the close of business on the day of presentment. It is submitted that it is unnecessary specifically to state that payment must be made before the close of business on the day of presentment. Section 3-507(1)(b) UCC provides that dishonour occurs if presentment is excused and the instrument is not duly paid. Differing from section 45(1)(b) SABEA, this provision does not require the instrument to be overdue, although the word "duly" probably makes it clear that instruments not payable on demand must also be overdue. This provision highlights that section 45(1)(b) SABEA does not contemplate a demand instrument, since a demand instrument cannot be overdue in terms of the SABEA (except for the limited purpose of section 34 SABEA). This is rectified in this draft.

3 The GULB does not define the concept of "dishonour", and article 43 simply states that the holder may exercise his right of recourse at maturity if payment has not been made. Article 53 makes it clear, however, that the rights of recourse can be exercised only after due presentment for payment. In the result, a "dishonour" in the terminology of section 54(1)(a) SABEA is required. Article 54 GULB excuses presentment for payment only in the case of continuing vis major. Recourse can then be taken without presentment, but again without referring to the instrument as "dishonoured".

4 Section 69 of the Cheques and Payment Orders Act, 1986 provides:

> "A cheque is dishonoured if the cheque is duly presented for payment and payment is refused by the drawee bank, being a refusal that is communicated by the drawee bank to the holder or the person who presented the cheque on the holder's behalf."

It will be noted that a "refusal" of payment is the only form of dishonour in terms of this provision. Mere failure to pay is not a dishonour. The explanation for this apparent anomaly lies in section 67(1). It states that the drawee bank must either pay or dishonour a cheque "as soon as is reasonably practicable". If it does neither, it becomes legally liable to the holder to pay the cheque. This is a drastic provision

creating in effect the liability of an acceptor for the drawee bank, which never undertook to pay the cheque.

Although section 59 of the Cheques and Payment Orders Act, 1986 lists a number of situations in which presentment is dispensed with, section 69 does not regard a cheque, presentment of which is excused, as dishonoured. Section 76 provides for what may be claimed on dishonour, and read literally it does not appear to apply to a cheque that has not been presented because presentment has been excused. It is clear from section 71 that this was not the intention of the legislature. The wording of section 76 is thus ambiguous.

5 Clause 54 repeats section 45 SABEA, with the single difference that the proposed clause distinguishes between demand and other instruments. It eliminates the impression created by section 45(1)(b) SABEA that a demand instrument that has not been presented for payment can never be dishonoured, although presentment is excused.

55 Proof of dishonour

(1) A statement on an instrument which appears to have been signed and dated by the drawee or maker or a person authorised to accept or pay or refuse acceptance or payment on his behalf, and specifying

(a) the person on whose behalf the instrument was presented for payment;

(b) the place and date of presentment;

(c) that acceptance or payment is refused

shall be prima facie proof of dishonour.

(2) A statement on an instrument, on a duplicate or on a document containing written particulars of the instrument, which has been signed and dated by a notary specifying

(a) the person at whose request the instrument is protested;

(b) the place and date of protest and the reason for protesting the instrument;

(c) the demand, whether for acceptance or payment, made and the answer given, or the fact that the drawee or maker could not be found, if such is the case,

shall be prima facie proof of dishonour.

Comparative legislation

Sec 1, 49, 50(3) and 93 SABEA
Sec 4, 51, 52(3), 83(4) and 89(4) BEA
Sec 3-501(3), 3-509 and 3-511 UCC
Art 44, 46 and 53 GULB
Art 60 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

1. *Definitions.*
In this Act, unless the context otherwise indicates --
"acceptance" means an acceptance completed by delivery or notification;
"action" includes a counter claim and a plea of set-off;
"banker" includes a body of persons, whether incorporated or not, who carry on the business of banking;
"bearer" means the person in possession of a bill which is payable to bearer;
"bill" means a bill of exchange as defined in section two;
"cheque" means a bill drawn on a banker payable on demand;
"delivery" means actual or constructive transfer of possession from one person to another;
"foreign bill" means any bill which is not an inland bill
"holder" means the payee or indorsee of a bill who is in possession of it, or the bearer thereof;
"indorsement" means an indorsement completed by delivery;
"inland bill" means a bill which is or purports to be drawn and payable in the Republic;
"issue" means the first delivery of a bill, complete in form, to a person who takes it as a holder;
"non-business day" means a day contemplated in section four of the Public Holidays Act, 1952 (Act No. 5 of 1952);
"note", used as a noun, means a promissory note as defined in section eighty-seven;
"note" used as a verb, means make a notarial minute, in the usual manner, of the circumstances of dishonour of a bill, within the time prescribed by sub-section (3) of section forty-nine, and includes present for acceptance or payment by a notary;
"payment in due course" means payment made at or after the maturity of a bill to the holder thereof in good faith and, if his title to the bill is defective, without notice thereof;
"Post Office cheque" means a bill drawn on the South African Reserve Bank against the Post Office Account;
"value" means valuable consideration within the meaning of section twenty-five;
"warrant-voucher" means a bill drawn on the Secretary to the Treasury against the Postmaster-General's Account;
49. *Protest of bill, and consequences of failure to protest.*
(1) (a) If a foreign bill has been dishonoured by non-acceptance, it must be duly protested for non-acceptance, and if such a bill which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment: Provided that if such a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance it must be protested for non-payment, and no further presentment for payment to, or demand on, the drawee is necessary.
(b) If such a bill so dishonoured is not so protested the drawer and indorsers are discharged.
(c) If such a bill has been accepted as to part, it must be so protested as to the balance.
(1A) (a) If an inland bill has been dishonoured by non-acceptance or non-payment it may be protested for non-acceptance or non-payment, as the case may be, but it shall not be necessary so to protest any such bill to hold the drawer or any indorser liable.

(b) If such a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance it may be protested for non-payment, and in such event no further presentment for payment to, or demand on, the drawee is necessary.
(2) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.
(3) (a) Subject to the provisions of this Act, if it is intended to protest a bill, it must be protested not later than on the business day next after the day on which it is dishonoured, or, if such business day is a Saturday, not later than on the business day next after that Saturday.
(b) If it is intended to protest a bill in terms of paragraph (a) of the proviso to subsection (5), it must be protested --
(a) if received during business hours, on the day of its return or, if that day is a Saturday, not later than on the business day next after that Saturday; or
(b) if not received during business hours, not later than on the next business day, not being a Saturday.
(4) If the acceptor of a bill becomes insolvent or suspends payment before the bill matures, the holder may cause it to be protested for better security against the drawer and indorsers.
(5) A bill must be protested at the place where it is dishonoured: Provided that --
(a) if a bill is presented by post and returned by post dishonoured, it may be protested at the place to which it is returned;
(b) a bill protested as is contemplated in the proviso to paragraph (a) of subsection (1) or in paragraph (b) of subsection (1A) must be protested at the place where it is expressed to be payable.
(6) A protest must contain a copy of the bill and be signed by the notary making it, and must specify --
(a) the person at whose request the bill is protested;
(b) the place and date of the protest, and the cause or reason for protesting the bill;
(c) the demand made and the answer given (if any), or the fact that the drawee or acceptor could not be found, if such is the case.
(7) If a bill is lost or destroyed or is wrongly withheld from the person entitled to hold it, the protest may be made on a copy or written particulars thereof.
(8) Protest is dispensed with by any circumstance which would dispense with notice of dishonour.
(9) Delay in protesting is excused if the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence: Provided that if the cause of delay ceases to operate, the bill must be protested, when necessary, with reasonable diligence
50. *Duties of holder towards acceptor as regards presentment for payment, protest and notice of dishonour, and towards payer on payment of bill.*
(1) If a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable.
(2) If by the terms of a qualified acceptance, presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by an omission to present the bill for payment on the day that it matures.
(3) It is not necessary, in order to render the acceptor of a bill liable, to protest such bill or to give notice of dishonour to such acceptor.
93. *Application to note of provisions relating to bill.*
(1) Subject to the provisions of this chapter, and except as by this section provided, the provisions of this Act relating to bills apply with the necessary modifications to notes.
(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.
(3) The following provisions as to bills do not apply to notes, namely, the provisions relating to --
(a) presentment for acceptance;

(b) acceptance;
(c) acceptance for honour supra protest;
(d) bills in a set.

Commentary

1 In terms of section 49(1) SABEA, a foreign bill that has been dishonoured by non-acceptance or non-payment must be duly protested for non-acceptance or non-payment, as the case may be. Failure to protest a foreign bill leads to the discharge of the drawer and indorsers. In the case of an inland bill, however, protest is optional. In other words, the holder may have it duly protested, but failure to do so does not discharge the drawer and indorsers (section 49(1A) SABEA; *Friedrich Kling GmbH v Continental Jewellery Manufacturers Guthmann and Wittenauer GmbH v Continental Jewellery Manufacturers* 1993 3 SA 76 (C)). The distinction between inland and foreign instruments, protest being required with respect to the latter only, is a common phenomenon in Anglo-American legislation. It was also made in the Natal Bills of Exchange Law 8 of 1887, but was not re-enacted in the SABEA. This distinction was again introduced in 1977 by the Bills of Exchange Amendment Act 58 of 1977. Unfortunately the definitions of "inland" and "foreign" bill are such that it is not always possible to discern from the document itself to which category it belongs. "Inland bill" is defined as a bill that is or purports to be drawn and payable in the Republic. "Foreign bill" is then defined negatively as any bill that is not an inland bill. Where neither a place of payment nor the place of drawing, or only one of these, appears on the instrument, it is not possible, unless other factors are present, to determine from the face of the instrument whether it is a foreign or inland bill. The English Act is clearer. Although section 4(1) BEA contains definitions of "foreign" and "inland" bills that are basically the same as those in the SABEA, section 4(2) states: "Unless the contrary appears on the face of the bill the holder may treat it as an inland bill."

If it is intended to retain protest as a formal requirement for the liability of the drawer and indorsers of foreign instruments, the approach of the UCC is the clearest and simplest. Section 3-501(3) provides that protest is necessary "to charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states and territories of the United States and the District of Columbia". It goes on to provide that protest of any other instrument is optional. It is noteworthy that protest of a promissory note is never required, even if it is a "foreign" note. This is also the

position in terms of section 89(4) read with section 83 (4) BEA. In terms of the SABEA, the holder may have to protest an inland bill because he may not be able to determine whether it is a foreign instrument. Should it transpire that it is an inland bill, he would probably not be awarded the cost of protest (see Cowen 210; *National Bank of South Africa v Collins and Kessler* (1905) 26 NLR 333; *Hodgson and Co v Nefdt* (1876) 6 Buch 163). This is clearly an unjust result.

2 Protest has been described as "a formal declaration ... in writing made by a notary public at the request of the holder that the bill has been refused acceptance or payment and that the holder intends to recover all the expenses to which he may be put in consequence thereof" *African Credit and Investment Corporation Ltd v Esakov* 1938 TPD 4 at 7). According to Van der Linden's translation of Pothier *Verhandeling van het Wissel-Recht* (1801) 1.5.7, the purpose of protest is "om de weigering van Acceptatie of betaaling, door den Betrokkenen gedaan, te bewijzen" (see also Van der Linden 4.7.17).

Both section 51(4) BEA and the various colonial provisions that applied in South Africa before 1964 originally required protest (or at least noting) on the day of dishonour (see, for example, section 49(3) of Cape Act 19 of 1893). It follows that due protest could in all cases be regarded as formal proof of due presentment. In England the time allowed for protest was extended by the Bills of Exchange (Time of Noting) Act of 1917. It amended section 51(4) BEA so that protest (or noting) could take place not later than the business day after the day of dishonour. The same amendment was made to the South African colonial legislation by the Bills of Exchange (Time of Noting) Act 23 of 1919 (see also Act 8 of 1921). In the case of a bill payable at a fixed or determinable future time, the result was that due protest for non-payment could no longer *directly* prove due presentment, since presentment by the notary could take place *after* (although very shortly after) the due date. Section 1 of the 1919 Act made it clear, however, that the same evidential value had still to be accorded to a protest in all cases. It provided that such noting (on the first business day after dishonour) "shall be equally legal and binding in respect of all parties to the same as if the noting had taken place on the day of dishonour".

The principles outlined above were re-enacted in the SABEA in 1964 (see section 49(3) SABEA). The Bills of Exchange Amendment Act 56 of 1977 amended section 49(3) to provide for a further extension of the period allowed for protest. If

the business day after the day of dishonour is a Saturday, the instrument may now be protested on the business day following on that Saturday. At the same time, as has already been indicated, due protest as a requirement for the liability of the drawer and indorsers of an inland bill was abolished. The trend is clearly to do away with protest as a formal requirement for the liability of the drawer and indorsers. Moreover, protest of a cheque (even of a foreign cheque) is not necessary to prevent the discharge of the drawer and the payee who indorsed it (section 74 SABEA, and see *Bell v Cook and another* 1920 CPD 125 130; *Mohamed v Karp Bros* 1938 TPD 112 114).

3 The object of protest has always been to provide authentic proof of due presentment and dishonour (Cowen 322; Byles 185ff; *Factory Investments (Pty) Ltd v Record Industries Ltd* 1957 2 SA 306 (T) 308; *Amicor Investments (Pty) Ltd v Bredenkamp* 1962 2 SA 274 (O) 275). That being so, it is difficult to appreciate why protest should, in the case of foreign instruments, be elevated to a condition on which the liability of the drawer and indorser depends (section 49(1) SABEA). There is no reason why a fact should be proved in one way only, even when it is not denied. According to Byles 185-6, the requirement of protest in the case of a foreign bill can be justified on the basis that a drawer might, as a result of his residence abroad, find it difficult to make proper inquiries into the question of due presentment and dishonour, and be compelled to rely on the representation of the holder. In the light of modern communications it is doubtful whether a "foreign" drawer is still in a materially worse position in this regard than an "inland" one.

It is submitted that protest should be confined to its purely evidential role, and that it should not be a requirement of liability. Further justification for this view can be found in the development of the South African court practice in the granting of provisional sentence on negotiable instruments (see Malan et al *Provisional Sentence* 100-103 for a review of the case law). Whereas most courts originally required proof of presentment in the form of a notarial deed of presentment, even in the absence of a denial of due presentment, it is now accepted that presentment may be proved by way of affidavit (see *Jaffer v Nell* 1958 3 SA 497 (C) 500; *Moraitis v De Canha and another* 1984 1 SA 420 (W) 423; the notice issued by the Judge President of the Orange Free State Provincial Division and published in 1981 1 SA 389; *Leon Manser (Pty) Ltd v Kajee* 1984 3 SA 883 (N)). It is also accepted practice to require proof of presentment only where it is denied (see the clear statement by Coetzee J in *Trust Bank van Afrika Bpk v Bendor Properties Ltd* 1977 2 SA 632 (T) 635). Only in the

Cape Provincial Division (where the judgment in *Jordaan v Vermeulen* 1959 4 SA 230 (C) apparently still reflects the position) is proof (by affidavit) required even in the absence of a denial.

4 It is significant that the Australian Cheques and Payment Orders Act, 1986 does not require protest as a condition of liability. On the other hand, the GULB requires protest in all cases, except in three minor instances (viz articles 44, 46 and 53 GULB). Under the GULB protest is no longer a mere evidentiary matter. An interesting aspect of the Geneva approach is found in article 8 of the second annex. In terms of this reservation, a contracting state may provide for an alternative to protest in the form of a declaration on the instrument, signed and dated by the drawee, to the effect that acceptance or payment is refused.

The Uncitral Convention (article 60) also requires protest in all cases, although it must be remembered that all instruments falling under the Uncitral Convention are, by definition, "foreign" instruments. Like the second annex to the GULB, article 60(3) of the Uncitral Convention provides for an alternative to the traditional form of protest. It provides:

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

Article 60(4) goes on to state that a declaration in accordance with paragraph (3) is deemed to be a protest.

The United Nations Commission for International Trade Law originally considered the possibility of doing away with protest as a condition of liability, unless a party expressly required it on the instrument. This idea was, however, abandoned. As recorded in 1972 *United Nations Commission for International Trade Law Yearbook* 177:

> "This solution was abandoned in view of the virtually unanimous opinion of banking and trade institutions that, owing to the legal consequences of dishonour to parties prior to the holder, some specified kind of evidence of dishonour should be required in all circumstances."

Although this statement has some validity, it is not convincing. Evidential problems are encountered in all branches of the law. It is inequitable that a person's right

should depend on specific evidence proving that right. Such an approach runs counter to the development of the court practice with respect to provisional sentence on negotiable instruments as well as to the clear trend illustrated by the development of our bills of exchange legislation itself.

5 Although this draft proposes the abolition of protest as a requirement for liability, the evidential value of a protest is undeniable. Clause 55 therefore provides for two different forms of "protest", stating the evidential weight to be attached to them. It may be said that clause 55 provides for two forms of "elective" protest. In this way the role of protest is limited to its original purpose. Other forms of proof are not excluded, and the holder does not lose his right of recourse merely because he does not make use of the provisions of this clause.

6 The proposals set out in the working paper were received favourably. The amendments set out in this Report simplifies the original proposals and amends them to ensure that the statements referred in subclauses (1) and (2) have prima facie proof only. Clause (3) is deleted since the time any of the statements are made has or should have no effect on their evidentiary value.

NOTICE OF DISHONOUR

56 Necessity for notice of dishonour

(1) Subject to the provisions of this Act and subsections (2) and (3), if an instrument has been dishonoured by non-acceptance or non-payment, notice of dishonour must be given to the drawer and each indorser.
(2) Where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill has been accepted in the meantime.
(3) Notice of dishonour operates for the benefit of any party who has a right of recourse on the instrument against the party to whom notice was given.

Comparative legislation

Sec 46 SABEA

Sec 48 BEA
Art 45 GULB
Art 64-8 Uncitral Convention
Sec 3-501(2), 3-502(1) and 3-508(8) UCC
Sec 70 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

46. *Notice of dishonour and effect of failure to give such notice.*

Subject to the provisions of this Act, if a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged: Provided that --
(a) if a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course who became such a holder subsequent to the omission, shall not be prejudiced by the omission;
(b) if a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill was accepted in the meantime.

Commentary

1 The purpose of notice of dishonour is explained in *Factory Investments (Pty) Ltd v Record Industries Ltd* 1957 2 SA 306 (T) 308: "Notice of dishonour must be given so as to inform the prior party sought to be charged that the bill or note has been dishonoured in order that he can take steps to protect himself." See also *African Credit and Investment Corporation Ltd v Klotz* 1940 TPD 26 31 and Malan 221. Although both the Anglo-American and continental systems in general require notice of dishonour to be given, the consequences of a failure to give the required notice differ appreciably (see Cowen (1985) 130-31).

In English (section 48(1) BEA) and South African (section 46(1) SABEA) law the drawer and indorser are discharged from liability by a failure to give due notice. The same is true of an *indorser* in terms of section 3-502(1)(a) UCC, but under the UCC, the *drawer* is not automatically discharged by a failure to give due notice. He is discharged only insofar as he has been prejudiced by the supervening insolvency of the drawee (section 3-501(2)(b) and 3-502(1)(b) UCC and Weber and Speidel 179-82; Miller and Harrell 136-7). In such a case the drawer has to be content with assigning to the holder his concurrent claim against the insolvent drawee to the extent of the amount of the instrument. A similar principle applies in South African law (section 72 SABEA), but only with respect to delay in presentment for payment of cheques.

Article 45 GULB provides rules for the giving of notice of dishonour to the drawer and indorsers, but specifies that failure to give due notice does not discharge the drawer or an indorser from liability. The holder (or an indorser) who has failed to give notice of dishonour as prescribed may still exercise his right of recourse, but is liable for any damage (limited to the amount of the instrument) that may have been caused by his failure to give due notice. A similar approach is followed by articles 67 and 68 of the Uncitral Convention. The damage may consist in the accumulation of interest after dishonour, which could have been prevented by the drawer or indorser, had he known of the dishonour. Damage may, for example, also flow from the fact that the drawer's or an indorser's right of recourse on the instrument against a prior party (or a drawer's right of recourse against the drawee in terms of their underlying agreement) has become valueless, a situation which could have been avoided had the drawer or indorser known of the dishonour, paid the instrument and taken immediate recourse (see in general Jacobi 824; Ronse II 622).

The calculation of the amount of damages recoverable in terms of section 45 GULB can sometimes be difficult. For this reason, and because the requirement of notice of dishonour in a sense balances the otherwise strict liability of a party to an instrument, no alteration of the consequences of a failure to give the required notice of dishonour is proposed. The drawer or indorser who does not receive the necessary notice is accordingly discharged from liability on the instrument (section 46 SABEA and clause 56).

2 Section 46(a) SABEA provides that, if a bill is dishonoured by non-acceptance and due notice of dishonour is not given, the rights of a holder in due course who becomes such after the omission shall not be affected by the omission. This constitutes an exception to the general rule that the drawer or an indorser is discharged from liability if he is not given due notice of dishonour. This general rule applied in the English common law and has subsequently been codified in the main part of section 48 BEA. The general rule applies even where an indorser has paid the bill after maturity without knowledge that he was no longer liable on the ground that he had not been given notice of a prior dishonour by non-acceptance. In *Roscow v Hardy* (1810) 12 East 434 (104 ER 170) it was held that such an indorser had no right of recourse against a previous indorser who had also been discharged because of a failure to give him notice of dishonour by non-acceptance.

The exception (subsequently codified in section 48(1) BEA) was recognised in *Dunn and another v O'Keeffe* (1816) 5 M&S 282 (105 ER 1055). Clearly a holder

who receives a bill after dishonour by non-acceptance will often be unable to ascertain from the instrument itself whether it has already been dishonoured by non-acceptance, and if so, whether notice of dishonour has been given. It is a requirement of holding in due course that the holder must be unaware of any prior dishonour. A subsequent holder who has no notice of a prior dishonour by non-acceptance would also have no notice of the fact that due notice of dishonour has not been given. In the absence of the above mentioned exception, however, the holder in due course would be met by the defence that notice of dishonour has not been given. That would expose the holder to a "hidden" defence not apparent from the document, and would be contrary to the general rule that a holder in due course is not subject to defences dehors the document. For this reason, this exception is recognised in favour of a holder in due course. In *Dunn* Lord Ellenborough CJ said:

> "Upon the whole, it appears to me, that no authority has pronounced that a bill of exchange shall be a void security, in the hand of an innocent indorsee, who has no knowledge that the bill has ever been dishonoured because a former holder has omitted to give notice to the drawer that the drawee has refused acceptance, and that such a doctrine would be destructive of the very policy and effect of this species of instrument, by rendering its credit of so precarious a nature, that no person would be found willing to trust it, especially if a number of names were indorsed upon it."

(Most writers refer to the exception without explaining its ratio (Malan 221; De Wet & Yeats 791; Tager paragraph 144; Cowen 314).)

Section 46(a) SABEA (and section 48(1) BEA) applies only to a failure to give notice of dishonour by *non-acceptance*. It is likely that the exception was not extended to a failure to give notice of dishonour by *non-payment* because a holder must take the instrument *before it is overdue* in order to qualify as a holder in due course (section 27(1)(a) SABEA). This explanation suffices for instruments payable on a specific future date, but does not apply to instruments payable on demand. Such instruments may be dishonoured by *non-payment* before they are deemed to be overdue (in terms of section 34(3)(a) SABEA, see the commentary on clause 54). Section 46(a) SABEA gives no protection to a holder in due course of a demand instrument, although the ratio for the exception applies to this case as well (see Malan et al *Provisional Sentence* 108 n129). This conclusion holds whether or not the instrument is post-dated, since a post-dated demand instrument is not "payable on" the post-date. It is payable on demand as from the post-date (*Sackstein v Zock* 1956 3 SA 552 (W) 553 and *Standard Bank of South Africa Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) 505 E).

Accordingly, it is clear that there is a casus omissus in section 46(a) SABEA and its English counterpart. This is not true of the UCC. Section 3-602 UCC provides:

> "No discharge of any party provided by this Article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument."

The provision is wide enough to cover any failure to give notice of dishonour, and consequently clause 62, dealing with the effect of a discharge on a subsequent holder in due course, is proposed. Section 46(a) SABEA is thus not repeated in this chapter of the draft.

3 Section 46(b) SABEA (section 48(2) BEA) states that, if a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill has been accepted in the meantime. Cowen 314 n6 and 323 criticises the qualification expressed by the phrase "unless the bill was accepted in the meantime". He finds it unintelligible that notice of dishonour by non-payment must be given where a bill that has already been dishonoured by non-acceptance is subsequently accepted. He points out that section 41(2) SABEA expressly states that an immediate right of recourse accrues on dishonour by non-acceptance and that no presentment for payment is necessary. If no presentment for payment is necessary, he argues, why should notice of dishonour by non-payment be required?

It is submitted that this criticism is not valid. The assumption underlying section 41(2) SABEA is that the bill has been dishonoured by non-acceptance and remains unaccepted. Clearly, where a bill dishonoured by non-acceptance is subsequently accepted, the holder's cause of action based on non-acceptance must fall away (see Malan et al *Provisional Sentence* 109 n133, and the remarks of Lord Kenyon CJ in *Campbell v French and Hobson* (1795) 6 TR 200 (101 ER 510) at 517). The qualification added to section 46(b) therefore makes perfectly good sense and is retained in clause 56(2) of this draft. This does not mean that the holder's cause of action based on non-acceptance can be nullified without his concurrence. The bill can be accepted subsequently only if the holder *allows* it to be accepted (see the remarks by Crawford and Falconbridge 1555). Section 16 SABEA (see clause 41 of this draft) also proceeds from the assumption that a cause of action based on dishonour by non-acceptance falls away if the bill is subsequently accepted.

4 Clause 56(3) is a combination of section 47(2) and (3) SABEA (section 49(3) and (4) BEA), and needs no comment. It is based on section 3-508(8) UCC.

5 Section 70 of the Cheques and Payment Orders Act, 1986 provides:

> "A person who is the drawer or an indorser of a cheque that has been dishonoured is liable on the cheque whether or not the person is given notice by any person of the dishonour."

It follows that, in respect of *cheques* notice of dishonour as a requirement of liability has been done away with in Australia. It is submitted that this approach is correct, justified by the fact that a cheque is primarily used internally. Notice of dishonour in regard to cheques as a condition of liability seems out of place, particularly in the case of the drawer: notice of dishonour has become the exception, since it is mostly excused (section 48(2)(c)(iv) and (v)). It is also redundant in the case of an indorser, who is nothing but a surety and who should be liable in the same manner (ie without notice of the principal's failure to pay).

57 Rules for notice of dishonour

(1) Notice of dishonour must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the instrument.
(2) Notice of dishonour must be given to the drawer and each indorser or to a person authorised to receive notice on his or their behalf.
(3) Notice of dishonour may be given in writing or by any other means of communication, and must be in terms that sufficiently identify the instrument and intimate that it has been dishonoured by non-acceptance or non-payment: Provided that a misdescription of the instrument shall not vitiate the notice, unless the person to whom the notice is given is in fact misled thereby.
(4) A notice of dishonour is deemed to be given if it is duly addressed and posted or transmitted through any communications facility provided by the Post Office, whether or not it is actually received.
(5) Notice of dishonour must be given or sent in terms of subsection (4) not later than on the business day, excluding a Saturday, after the instrument is dishonoured or notice given by another party is received.

(6) Where an instrument, when dishonoured, is in the hands of an agent, he may give notice of dishonour either to the party liable on the instrument or to his principal, and if he gives notice to his principal, his principal is entitled to give notice of dishonour to the drawer and each indorser within the period provided for by subsection (5) after he has received notice.
(7) Where there are two or more drawers or indorsers who are partners, notice to any one of them constitutes notice to all of them, even if the partnership is dissolved after they have drawn or indorsed the instrument.

Comparative legislation

Sec 47 SABEA
Sec 49 BEA
Sec 3-508 UCC
Art 45 GULB
Art 64-6 Uncitral Convention

The relevant provisions in the Bills of Exchange Act 1964 are:

47. *Rules as to notice of dishonour.*

(1) Notice of dishonour, in order to be valid and effectual, must be given in accordance with the following rules, namely --
(a) the notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill;
(b) the notice may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party is his principal or not;
(c) the notice may be given in writing, or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment;
(d) the return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed to be a sufficient notice of dishonour;
(e) a written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication;
(f) if notice of dishonour is required to be given to any person, it may be given either to such person himself or to a person authorised to receive such notice on his behalf;
(g) if the drawer or an indorser is dead, and the party giving notice knows it, the notice must be given to the executor, if there is one and, with the exercise of reasonable diligence, he can be found;
(h) if the drawer or an indorser is insolvent, notice may be given either to himself, or to his trustee;
(i) if there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for one or more of the others, in which case notice to the one having such authority shall be deemed to be notice to such other person or persons;

(j) the notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time within the meaning of sub-section (5);
(k) if a bill, when dishonoured, is in the hands of an agent, he may give notice either to the parties liable on the bill or to his principal, and if he gives notice to his principal, he must do so within the same period of time that would have been allowed if he were the holder.
(2) If the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.
(3) If notice is given by or on behalf of an indorser entitled to give notice by virtue of the provisions of sub-section (1), it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.
(4) A misdescription of the bill in the notice shall not vitiate the notice, unless the party to whom the notice is given is, in fact, misled thereby.
(5) In the absence of special circumstances, it is deemed that notice is not given within a reasonable time for the purposes of paragraph (j) of subsection (1), unless notice is given or the notice is posted --
(a) on the business day next after the day on which the bill is dishonoured; or
(b) if that business day is a Saturday, on the business day next after that Saturday.
(6) A principal upon receipt of notice contemplated in paragraph (k) of sub-section (1) has himself the same period of time for giving notice that he would have had if the agent had been an independent holder.
(7) If a party to a bill receives due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after dishonour.
(8) If a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour notwithstanding any miscarriage by the Post Office.

Commentary

1 Clause 57(1) follows section 47(1)(a) SABEA (section 49(1) BEA). Therefore an indorser can give valid notice of dishonour only if he himself is liable on the instrument. If he has already been discharged by the holder's failure to notify him, his notice is invalid (De Wet & Yeats 793; Cowen 317).

Section 47(1)(b) SABEA (section 49(2) BEA) contains a rather peculiar provision, viz that notice may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether or not that party is his principal. This provision is based on English cases decided before 1882. In *Woodthorpe v Lawes* (1836) 2 M & W 109 (150 ER 690) one X had the authority of the holder to give notice of dishonour and duly gave notice to a party liable on the instrument, but without stating that he was doing so on behalf of the holder. The validity of the notice was upheld. Section 49(2) BEA (section 47(1)(b) SABEA) codifies this rule and provides that notice may be given by an agent *in his own name* ie without indicating for whom he acts or that he does indeed act on another's behalf. In a South African case decided before the English or South African legislation came into existence, it

was held that a party "having no interest in the bill" could not give valid notice of dishonour (*Venning qq v Venables* (1828) 1 Menz 315). The effect of the case seems to be that notice by a third party *in his own name* would be invalid if he had, in fact, not been authorised to give notice. On the other hand, it has been held that where a third party purports to act in the name of a party entitled to give notice, the notice is good although he acted without the latter's authority (see *Harrison v Samuel Ruscoe* (1846) 15 LJ Ex 110, 15 M & W 231 (153 ER 834); *Livingston, Syers and Co v Dickson, Burnie and Co* (1841) 2 Menz 239 242). These cases probably led to the statement in section 47(1)(b) SABEA (and section 49(2) BEA) that an agent may give notice in the name of any party entitled to give notice, whether *that party is his principal or not*. Although the purpose of the provision is reasonably clear, its formulation is defective; it is not possible to be an agent without a principal (De Wet & Yeats 792 n402). To be effective, according to Cowen 317, the third party's unauthorised act of agency must first be ratified by the party in whose name the notice was given. However, this is not required by the provision and the better view seems to be that the notice is valid without ratification (Crawford and Falconbridge 1582 on section 98(1)(c) of the Canadian Bills of Exchange Act).

Apart from the fact that the formulation of section 47(1)(b) SABEA and its English predecessor lacks clarity, the subsection seems to go further than the cases on which it is based. Read literally, section 47(1)(b) appears to validate notice given by an unauthorised stranger in his own name (but see Cowen 317; Malan et al *Provisional Sentence* 110 n140).

Clause 57(1) omits section 47(1)(b) and allows notice of dishonour to be given on behalf of a party entitled to give notice. It is submitted that this covers the case in which a third party without authority gives notice in the name of the party entitled to give notice. Since the act of giving notice does not bind the party in whose name it is given nor affects him detrimentally, the third party need not have authority to give notice.

2 Clause 57(2) sets out to whom notice must be given. It incorporates section 47(1)(f) and provides that notice may also be given to a person authorised to receive notice on behalf of the party to whom notice is to be given.

Section 47(2) and (3) SABEA, which indicate in whose favour a valid notice operates, appear as one provision in clause 56(3) above.

Since clause 57(2) already provides for notice to a person authorised to receive notice on a party's behalf, it seems unnecessary to repeat section 47(1)(g) and (h)

SABEA. The remarks already made with respect to presentment for acceptance and payment in the case of a deceased or insolvent drawee or maker also apply here.

3 Section 47(1)(c), (d) and (e) and 47(4) SABEA contain detailed provisions regarding the contents of a notice of dishonour. It is submitted that some of these provisions are redundant, and that the necessary provisions can conveniently be contracted into one subsection. This is done in clause 57(3).

The basic rules (in terms of section 47(1)(c) SABEA) are that the instrument must be sufficiently identified and that it must be indicated that the instrument has been dishonoured by non-acceptance or non-payment. Notice may also be in writing or by "personal communication". It follows that notice may be given orally, that no specific wording is necessary and that a mere statement that the particular instrument has been dishonoured is sufficient (*Bell v Cook and another* 1920 CPD 125 129-30; *Standard Bank of South Africa Ltd v Winder, Baxter and Abrahams* 1920 WLD 102 109-10; *Lion Mill Manufacturing Co (Pty) Ltd and another v New York Shipping Co (Pty) Ltd* 1974 4 SA 984 (T) 990; *Pine Designs (Pty) Ltd v Abt* 1976 3 SA 795 (0) 801). These basic rules are incorporated in the main part of clause 57(3). There is only one difference: the words "any other means of communication" are substituted for the somewhat less precise and perhaps restrictive "personal communication".

Section 47(4) SABEA (see section 49(7) BEA and section 3-508 (3) UCC) states that a misdescription of the instrument in the notice shall not vitiate the notice, unless the party to whom the notice is given is, in fact, misled by the misdescription (see *New York Shipping Co (Pty) Ltd v Lion Mill Manufacturing Co (Pty) Ltd* 1972 3 SA 362 (W) 363-4 and, on appeal, 1974 4 SA 984 (T) 990). This provision is included as a proviso to clause 57(3). The question arises whether the proviso should not be given a wider field of application to include any incorrect information given in the notice, provided the receiver of the notice is not misled thereby. The case of *African Credit and Investment Corporation Ltd v Klotz* 1940 TPD 26 may be referred to in this regard. It concerned a promissory note payable on 12 April 1937, which the defendant had indorsed. The plaintiff as holder had it duly presented for payment by his bank on that date, but in the notice of dishonour to the defendant it was stated that the note had been presented on 13 April. Had it, in fact, been presented on 13 April, the defendant would have been discharged for lack of proper presentment (see section

43(1) and (2)(a) SABEA). The court held that the notice of dishonour had been defective and therefore invalid. Greenberg JP said (at 31):

> "In the absence of anything to the contrary in tbe notice, it may well be reasonably sufficient to convey to the recipient that the bill has been properly presented and dishonoured. But the position is different where the notice conveys information which, if true, would discharge the recipient from liability. The object of the notice is to enable him to pass the notice on to those on whom he is entitled to have recourse; but if the notice informs him of facts which discharge him from liability, there seems little reason why he should notify tbe others that they will have to reimburse him when there is nothing to reimburse. Such a notice therefore fails in the object which it was intended to effect."

Greenberg JP then pointed out (at 33) that due notice of dishonour is a condition precedent to the drawer's and an indorser's liability. Furthermore, the fact that the drawer or indorser obtained knowledge of the dishonour from another source is irrelevant. He is entitled to due notice from someone entitled to give notice. Since an instrument is dishonoured only if it has been *duly* presented for payment, ie on the due date (see section 43(1) and (2)(a) SABEA), a notice as that in *Klotz* is no notice of dishonour. It is accordingly clear that the proviso should not be extended. See also *Burton v Roth* 1915 TPD 76 81.

According to section 47(1)(d) SABEA the return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed to be sufficient notice of dishonour. Read literally, it means that there need be no indication of dishonour on or accompanying the instrument. This is in conflict with the remarks of Wessels J in *Burton v Roth* 1915 TPD 76 81 that the notice must clearly convey the fact that the instrument has been dishonoured. It must not cause the receiver of the notice to doubt whether the instrument has been dishonoured. Section 3-508(3) UCC and article 65(1) of the Uncitral Convention are more clearly worded. The former provides: "Sending the instrument bearing a stamp, ticket or writing stating that acceptance or payment has been refused or sending a notice of debit with respect to the instrument is sufficient." The latter provides: "The return of the dishonoured instrument is sufficient notice, provided it is accompanied by a statement indicating that it has been dishonoured." However, if it is accepted that mere return of the instrument is not enough, but that there must be some indication that the instrument has been dishonoured, the situation is already covered by section 47(1)(c) SABEA and clause 57(3) of this draft. No specific provision should therefore be made in this regard and section 47(1)(d) SABEA need not be re-enacted.

Section 47(1)(e) is clearly redundant. It states that a written notice need not be signed, and that an insufficient written notice may be supplemented and validated by

oral communication. Since section 47(1)(c) does not require a written notice to be signed and allows oral notice (see clause 57(3)), section 47(1)(e) SABEA is superfluous and need not be re-enacted.

4 Section 47(8) SABEA provides that if a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour notwithstanding any miscarriage by the Post Office. For this irrebuttable presumption of proper notice (see De Wet & Yeats 793) to apply, the notice must, of course, be addressed to the receiver's correct residential or business address (see *Mechau v Van Jaarsveld* (1847) 1 Menz 113 and *Goustyn v Van Putten* (1889) 15 SC 34). It will also apply where the notice is posted to another address, provided such address was given for the purpose of receiving notice of dishonour (*Du Plessis v Bogley* 1906 TS 367 370).

Clause 57(4) substantially repeats section 47(8) SABEA, but is expanded to take into account modern communications facilities (like telex), which cannot properly be regarded as "postage". Section 3-508 (4) UCC goes too far. It deems a written notice to have been received "when sent", apparently also when it is "sent" by means other than the postal system. The irrebuttable presumption of clause 57(4) applies only if use is made of a communications system provided by the Post Office.

5 Sections 47(1)(j) and (k) and 47(5),(6) and (7) SABEA contain detailed rules on the time within which notice of dishonour must be given in order to be effective. It is submitted that all these provisions can be condensed into two subsections, which is done in clause 57(5) and (6) of this draft. The only real difference between the provisions of the SABEA and the proposed provisions appears from section 47(5) SABEA. Section 47(5) SABEA, instead of positively stating the time within which notice must be given to be effective, negatively provides for the case when notice will not be timeous, "in the absence of special circumstances". The latter phrase was considered in *Pine Designs (Pty) Ltd v Abt* 1976 3 SA 795 (O) (see also *Norton and Co v Bain* (1844) 2 Menz 251). Steyn J said (at 801):

> "To my mind it may be said, broadly speaking, that circumstances causing a delay in the giving of notice of dishonour which are beyond the control of the person obliged to give such notice, constitute special circumstances as contemplated by sec 47(5) of the Act, provided they are not imputable to the giver's default, misconduct, or negligence."

If that is so, the exception regarding "special circumstances" is covered by section 48(1) SABEA, which deals with delay in the giving of notice of dishonour. The reference to "special circumstances" in section 47(5) SABEA is accordingly unnecessary. In this draft the question of a delay caused by special circumstances is dealt with in the general provision on delay in complying with the holder's duties (see clause 58 below).

6 Finally, reference should be made to section 47(1)(i) SABEA. It sets out that if there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for one or more of the others, in which case notice to the one having such authority shall be deemed to be notice to the other person or persons. Section 47(1)(i) raises various points that require comment.

First, the concluding part of the provision is clearly redundant. If one party has authority to receive notice on behalf of another, notice to the former is equivalent to notice to the latter. This follows from general principles, and need not be expressly stated.

Secondly, section 47(1)(i) creates the impression that if notice is not given to *all* the co-drawers (or co-indorsers), those to whom notice has been given are also discharged from liability. In this regard Cowen 318 n34 asks whether one who has received notice should not be bound. On the other hand, Byles 176 remarks: "It has been considered that, in the case of joint parties who are not partners, notice to one will not bind even him, and the Code seems to support this view."

As far as South African case law is concerned, there seems to be only the following remark by Melamet J in *Plascon Evans Paints (Tvl) Ltd v Ming and another* 1980 3 SA 378 (W) 384F:

> "It was argued, however, that, in terms of s 46 of the Bills of Exchange Act, unless dispensed with in later sections of the Act it is necessary to give each of the drawers of the cheque notice of dishonour, otherwise *such a drawer* is discharged from liability under the cheque" (italics added).

It is not clear whether the court agreed with this argument. If it did, it indicates that only a co-drawer to whom notice was not given is discharged, but not one to whom notice has been given.

It is submitted that consideration should be given to the type of co-debtorship that comes into existence when two or more drawers or indorsers sign an instrument.

The general principle is that co-drawers and co-indorsers are liable jointly and severally, unless a contrary intention appears (see section 89(2) SABEA with respect to co-makers of a promissory note; *Kidson v Campbell and Jooste* (1844) 2 Menz 279; *Moon and Co Ltd v Eureka Stores (Pty) Ltd* 1949 4 SA 40 (T) 45; *Roelou Barry (Edms) Bpk v Bosch* 1967 1 SA 54 (C) 57-8). See also clause 32 of this draft. It follows that a co-drawer or co-indorser to whom notice has been given should remain liable, even if any of the others has been discharged by a failure to give notice of dishonour. It is, of course, true that it was held in *Dwyer v Goldseller* 1906 TS 126 that the release of a co-maker of a note discharges the other maker insofar as he would have had a right of contribution against the released maker. This view has apparently been approved of in *Boyce NO v Bloem and others* 1960 3 SA 855 (T) 857 and *Prinsloo v Du Preez NO* 1965 4 SA 300 (W) 302 (see also Christie 249-50), but the matter was left open by the Appellate Division in *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 3 SA 619 (A) 635. *Dwyer* has been convincingly criticised by De Wet & Yeats 123 and 125 (but see Lotz *Obligations* 19 *LAWSA* paragraph 251 and Tager paragraph 115, who accept its correctness) on the ground that it proceeds from the wrong assumption that a release of one co-maker extinguishes the right of recourse that the other co-maker would otherwise have had against him. The right of recourse that one co-maker may have against the other is a matter that depends on their relationship inter se, and is not affected by the relationship between the creditor and each of the co-makers. But even if *Dwyer* is accepted as correct, it is authority only for the case in which a co-maker, co-drawer or co-indorser is *released* from liability and where he is discharged by reason of a failure to give notice of dishonour. It follows that, if one of two or more co-drawers or co-indorsers has received due notice, he should be fully liable, although notice has not been given to the other or others. All the more should this be the case where the co-drawers or co-indorsers have indicated that they do not wish to be bound jointly and severally for the whole amount, but pro rata only, since the whole question of a right of recourse inter se would not arise at all in this type of case. The only remaining possibility is one of joint liability, ie where the parties have indicated that the amount of the instrument can be claimed from them jointly only, and not from any one of them separately or partly from each one of them (see De Wet & Yeats 117). In this case (which would surely be the exception in practice) a failure to give due notice to any one of the co-drawers or co-indorsers would discharge all of them, since none of them can be held liable individually.

Clearly the general statement in section 47(1)(i) SABEA that notice of dishonour must be given to all co-drawers and co-indorsers is misleading. If it is intended to hold them all liable, clearly due notice must be given to all. If they are liable jointly and severally or pro rata, those who have received notice are liable according to the type of co-debtorship involved, although notice has not been given to all of them. If they are jointly liable only, all of them must receive notice, otherwise they are all discharged, unless, of course, one has authority to receive notice on behalf of the others. This follows from general principles and is reflected in clause 57(1) and (2) of this draft. It is accordingly unnecessary to make specific provision for notice of dishonour in the case of co-drawers or co-indorsers.

7 Section 47(1)(i) SABEA refers indirectly to co-drawers or co-indorsers who are partners. They are exempted from the general statement that notice of dishonour must be given to all the co-drawers or co-indorsers. The conclusion is that notice to one partner is equivalent to notice to all partners. This is readily understandable. Since, in principle, partners have a so-called "mutual mandate" to act on behalf of the other partners with respect to partnership affairs (see in general De Wet & Yeats 393-4; Henning and Delport *Partnership* (1984) paragraph 403), one of them also has authority to receive notice of dishonour on behalf of the others. The situation becomes more complicated when the authority of a partner has been limited or excluded by internal agreement or the partnership has been dissolved in the meantime. In the former case the particular partner would have no or only limited authority to act on behalf of the others, and in the latter the "mutual mandate" of the partners would lapse entirely, with the exception of an act necessary for the completion of a partnership transaction or for the liquidation of the partnership.

It is true that third parties in good faith who are not aware of any limitations on a partner's authority or who are ignorant of the dissolution of the partnership are protected, either on the basis of estoppel or an extended application of the *Turquand* rule (see De Wet & Yeats 402 and 413; Henning and Delport paragraph 415, 120 and 423; Oosthuizen "Die Turquand-reël as Reël van die Verenigingsreg" 1977 *TSAR* 210 216-9). It could also be argued that the giving of notice of dishonour of an instrument drawn or indorsed before dissolution of the partnership, but subsequently dishonoured, is an act relating to the completion of a partnership transaction or the liquidation of the partnership. There is English authority to this effect, holding that notice of dishonour given to a former partner was binding on the former partner (*Goldfarb v Bartlett and Kremer* 1920 1 KB 639).

Accordingly, it seems that notice to one partner (or even a former partner) will bind the others, even without a specific provision in this regard. However, in those cases in which the partner (or former partner) receiving notice did not have authority to receive notice on behalf of the others, the good faith or absence of knowledge of the person giving notice also becomes relevant. This could lead to protracted disputes. It is thought advisable to provide simply that notice to one partner or former partner be equivalent to notice to the others in all cases. This extension of part of section 47(1)(i) SABEA appears in clause 57(7) of this draft (see also section 3-508(5) UCC, which is to the same effect). In a sense, the principle that notice to a former partner is also notice to all the former partners also fits in with the approach of the courts to rule 14 of the Supreme Court Rules. It has been held that a summons may be issued against former partners in the partnership name, even if the partnership has been dissolved before the issue of summons, provided the summons is based on a debt in fact incurred by the partnership as such (see *Spie Batignolles Société Anonyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriële Korporasie Bpk en andere* 1980 2 SA 441 (NC); *Kirsh Industries Ltd v Vosloo and Lindeque and others* 1982 3 SA 479 (W)).

DELAYS AND EXCUSES

58 Delay in presentment or notice of dishonour

(1) Delay in presenting an instrument for acceptance or payment or in giving notice of dishonour is excused if the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence: Provided that if the cause of delay ceases to operate, presentment must be made or notice must be given with reasonable diligence.

(2) Where presentment for acceptance or payment is excused and the instrument is dishonoured for non-acceptance or non-payment, any delay in giving notice of dishonour is excused, unless the holder or an indorser obliged to give notice of dishonour has received notice of the dishonour: Provided that notice of dishonour must be given with reasonable diligence after the holder or such indorser receives notice of the dishonour of the instrument.

Comparative legislation

Sec 37(4), 44(1) and 48(1) SABEA
Sec 39(4), 46(1) and 50(1) BEA
Sec 3-511 UCC
Art 54 GULB
Art 52 and 67 Uncitral Convention
Sec 60(3) Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

37. *When presentment for acceptance is necessary, and delay in such presentment.*

(1) If a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of such bill.
(2) If a bill expressly stipulates that it shall be presented for acceptance, or if a bill is drawn payable elsewhere than at the place of residence or business of the drawee, it must be presented for acceptance before it can be presented for payment.
(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.
(4) If the holder of a bill, drawn payable elsewhere than at the place of residence or business of the drawee, has no time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay, caused by presenting the bill for acceptance before presenting it for payment, is excused and does not discharge the drawer and indorsers.
44. *When presentment for payment may be delayed or dispensed with.*
(1) Delay in making presentment for payment is excused if the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence: Provided that if the cause of delay ceases to operate, presentment must be made with reasonable diligence.
...
48. *When notice of dishonour may be delayed or dispensed with*
(1) Delay in giving notice of dishonour is excused if the delay is caused by circumstances beyond the control of the party giving notice and not imputable to his default, misconduct, or negligence: Provided that if the cause of delay ceases to operate, the notice must be given with reasonable diligence.

Commentary

1 Section 37(4) SABEA provides for only one case in which delay in presenting for acceptance is excused, viz where a bill is drawn payable elsewhere than at the place of residence or business of the drawee, and the holder has no time, even with the exercise of reasonable diligence, to present it for acceptance before presenting it for payment on its due date (see also section 39(4) BEA and Chalmers & Guest 347). Since a domiciled bill is not subject to mandatory presentment for acceptance in terms of this draft (see paragraph 2 of the comment on clause 48), section 37(4) need not be

re-enacted. That leaves the other two cases in which presentment for acceptance is mandatory, viz where the bill requires presentment for acceptance and where it is payable after sight. It is not clear why the SABEA makes no provision for the condonation of a delay in presentment in the former case. If it is necessary to provide for delay in presentment for payment (section 44(1) SABEA), it is also necessary to provide for a delay in making presentment for acceptance. Both section 3-511(1) UCC (read with section 3-501(1)(a) and section 3-503(1)(a) and (b) UCC) provide for such an eventuality, and this approach is followed in clause 58(1) of this draft.

The SABEA does not provide for a condonation of a delay in presentment for acceptance of a bill payable after sight. This can probably be explained in the light of section 38(1) SABEA, which sets no apparent time limit for presentment by the payee, and allows other holders a "reasonable" time either to present it for acceptance or to negotiate it further (see paragraph of the comment on clause 52 of this draft). In determining what is a "reasonable" time, regard must be had, inter alia, to "the facts of the particular case" (section 38(2) SABEA), which would probably include the circumstances causing the delay. Section 60(3)(c)(ii) of the Australian Cheques and Payment Orders Act, 1986 specifically includes these circumstances under "the facts of the particular case". Since clause 49(f) of this draft requires presentment of a bill payable after sight within one year of its date, it becomes necessary to make provision for a delay. Clause 58(1) of this draft accordingly applies to all bills that must be presented for acceptance.

2 Clause 58(2) also applies to a delay in making presentment for payment and giving notice of dishonour. This is according to section 44(1) and 48(1) SABEA (see also section 46(1) and 50(1) BEA, section 3-511 UCC and articles 52 and 67 of the Uncitral Convention). The situation in *Pine Designs (Pty) Ltd v Abt* 1976 3 SA 795 (O) would accordingly be covered by this provision. In this case a cheque was dishonoured on 10 September while the drawer was abroad. He returned on 21 September, and notice of dishonour was given to him on 22 September. However, as will be pointed out in the commentary to the next clause of this draft, it is proposed to dispense altogether with presentment or notice of dishonour where the impossibility continues for a certain period. Depending on the length of the delay, condonation of the *delay* may become a ground for dispensing with presentment and notice.

Article 54 GULB should be mentioned. Although it recognises that a delay in presentment or protest should sometimes be excused, the circumstances in which the

delay is condoned are much more narrowly defined than in the Anglo-American systems. Only vis major in the restricted sense of the expression, ie general calamities like war, floods or earthquakes, qualifies as a circumstance that would excuse the delay. The last paragraph of article 54 GULB clearly states:

> "Facts which are purely personal to the holder or to the person whom he has entrusted with the presentment of the bill or drawing up of the protest are not deemed to constitute cases of vis major."

(See also Baumbach-Hefermehl 343ff; Jacobi 749-53: Scheltema-Wiarda 404-6; Jäggi Druey and Von Greyerz 205.) The debate on the principle contained in article 54 GULB reveals a serious difference of opinion on its fairness and defensibility (see in detail Hupka 148-62). It seems indefensible that the holder's rights should be lost because he has suffered a sudden and serious illness or has suddenly died (see Hupka 159). See Ronse II 583-4 and Scheltema-Wiarda 405, who state the following:

> "Dat voor deze vergaande beperking van het begrip overmacht, ten gevolge waarvan de houder van den wissel in ernstige mate kan worden geschaad redelijke gronden bestaan, vermogen wij niet in te zien."

The Anglo-American approach to the question of delay in presentment and notice is accordingly preferable to that of the GULB.

3 Clause 58(2) of this draft is new and has no counterpart in the SABEA. In terms of both the SABEA (sections 39(2) and 44(2)) and this draft (see clause 59) there are a number of circumstances in which presentment for acceptance or payment is excused and the instrument is regarded as dishonoured by non-acceptance or non-payment. Unless notice of dishonour is also excused by the same circumstances, notice must be given or sent on the next business day, excluding a Saturday, after the date of dishonour, viz the date on which the excusing circumstances occur (see section 47(5) SABEA and clause 57(5) of this draft). It is quite possible for the holder to be unaware of the fact of dishonour, and not to give notice within the prescribed time. This could, for example, happen where the drawee or maker has become insolvent.

It can be argued that the holder is protected by section 48(1) SABEA (and see clause 58(1) and (2) of this draft), which condones delay in giving notice if the delay is "caused by circumstances beyond the control of the party giving notice" (see clause

58(1) of this draft for the same formulation, and cf article 63(1) of the Uncitral Convention, which states that they must be circumstances "which he could neither avoid nor overcome"). This wording does not fit the situation in which he does not have knowledge of the facts from which his duty arises. Although Crawford and Falconbridge 1581 state with conviction (but without citing authority) that the similarly worded section 105 of the Canadian Bills of Exchange Act covers the situation, it is thought advisable to make specific provision in this regard. This is done in clause 58(2). It is interesting that section 3-511(1) UCC excuses a delay in giving notice of dishonour not only "when the delay is caused by circumstances beyond his control", but also "when the party is without notice that it is due".

As far as instruments dishonoured by non-payment are concerned, the holder will in the majority of cases need the protection of clause 58(2) that requires the instrument to be payable on demand only. Where it is an instrument payable at a definite time and the holder fails to present on the due date and fails to give notice of dishonour, he cannot rely on clause 58(2) if he afterwards receives notice that presentment for payment has been excused. In this case his failure to give notice would not have been caused by his lack of knowledge of the ground on which presentment had been excused.

59 Presentment and notice of dishonour excused

(1) Subject to the provision of this Act, presentment for acceptance or payment or notice of dishonour is excused

(a) where it is delayed and the delay is caused by circumstances beyond the control of the holder or his agent and not imputable to his or his agent's default, misconduct or negligence and continues for a period of thirty days;

(b) where, after the exercise of reasonable diligence, presentment or notice of dishonour as required by this Act cannot be made or given;

(c) as against any party who has expressly or impliedly waived presentment or notice of dishonour either before or after it must be made or given;

(d) as against a party to whom the instrument was presented for acceptance or payment or from whom payment was demanded;

(e) as against a party who has countermanded payment;

(f) as against a party who is not entitled to require that the instrument be accepted or paid, or who has no reason to expect that it would be accepted or paid.

(2) Presentment for acceptance is excused where the drawee is dead, and presentment for acceptance or payment is excused where the drawee or maker is insolvent, or a fictitious person, or a person not having capacity to accept or pay, or if the drawee is a juristic person which does not exist or has ceased to exist.

Comparative legislation

Sec 39(2), 44(2) and 48(2) SABEA
Sec 41(2), 46(2) and 50(2) BEA
Sec 3-511 UCC
Art 54 GULB
Art 52 and 67 Uncitral Convention
Sec 59 Cheques and Payment Orders Act, 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

39. *Rules as to presentment for acceptance, and excuses for non-presentment.*

(1) A bill is duly presented for acceptance if it is presented in accordance with the following rules, namely --
(a) the presentment must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is overdue, to the drawee, or to a person authorised to accept or refuse acceptance on his behalf;
(b) if a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, in which case presentment may be made to him only;
(c) if the drawee is dead, presentment may be made to his executor;
(d) if the drawee is insolvent, presentment may be made to him or his trustee;
(e) a presentment by post, if in due course, is sufficient.
(2) Presentment in accordance with the provisions of sub-section (1) is excused, and a bill may be treated as dishonoured by non-acceptance --
(a) if the drawee is dead or insolvent, or is a fictitious person or a person not having capacity to contract by bill;
(b) if, after the exercise of reasonable diligence, such presentment cannot be effected; or
(c) if, when irregular presentment is made, acceptance is refused on some other ground.
44. *When presentment for payment may be delayed or dispensed with.*
(1) Delay in making presentment for payment is excused if the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence: Provided that if the cause of delay ceases to operate, presentment must be made with reasonable diligence.
(2) Presentment for payment is dispensed with --
(a) if after the exercise of reasonable diligence, presentment as required by this Act cannot be effected;
(b) if the drawee is a fictitious person;
(c) as regards the drawer, if the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;

(d) as regards an indorser, if the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill will be paid if presented;
(e) by express or implied waiver of presentment;
(f) if the drawee or acceptor is insolvent.
48. *When notice of dishonour may be delayed or dispensed with*
(1) Delay in giving notice of dishonour is excused if the delay is caused by circumstances beyond the control of the party giving notice and not imputable to his default, misconduct, or negligence: Provided that if the cause of delay ceases to operate, the notice must be given with reasonable diligence.
(2) Notice of dishonour is dispensed with --
(a) if after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be held liable;
(b) by express or implied waiver, either before the time of giving notice has arrived, or after omission to give due notice;
(c) as regards the drawer in the following cases, namely --
(i) where drawer and drawee are the same person;
(ii) where the drawee is a fictitious person or a person not having capacity to contract;
(iii) where the drawer is the person to whom the bill is presented for payment;
(iv) where the drawee or acceptor is not bound, as between himself and the drawer to accept or pay the bill;
(v) where the drawer has countermanded payment;
(d) as regards an indorser in the following cases, namely --
(i) where the drawee is a fictitious person or a person not having capacity to contract, and such indorser was aware thereof at the time he indorsed the bill;
(ii) where such indorser is the person to whom the bill is presented for payment;
(iii) where the bill was accepted or made for the accommodation of such indorser.

Commentary

1 The purpose of clause 59 is to simplify the duties of the holder and to unify the different sections dealing with them. The draft uses the word "excuse" to replace the various other terms used in the Act (see the Official Comment 1 on section 3-511 UCC).
Because special considerations apply to lost and destroyed instruments, the rules excusing presentment in these cases are found in clauses 68 and 69.

2 Clause 59(1)(a) excuses presentment for payment or acceptance and notice of dishonour where either presentment or notice is delayed and the delay continues for thirty days. This provision is proposed because it is not always possible to distinguish clearly between a delay in and an impossibility of presentment or notice. *Standard Bank of South Africa Ltd v Emergency Truck and Car Hire and another* 1983 1 PH A15 (N) illustrates this difficulty: action was instituted on a lost cheque, and it had to be considered whether section 44(1) or section 44(2)(a) SABEA applied. The first excuses a delay in making presentment and the other dispenses with presentment where it cannot be effected with reasonable diligence. Since Kumleben J found that

the cheque was lost as a result of the holder's negligence, it was unnecessary to decide which of the two provisions applied. He said:

> "Which sub-section applies may well in the first place depend upon whether a cheque is irretrievably or temporarily lost. Since in this case action was instituted more than two years after the cheques went missing and they have not been found, counsel is probably correct in his submission that sec 44(1) does not apply."

Pine Designs (Pty) Ltd v Abt 1976 3 SA 795 (O) clearly involved a delay: the drawer had been abroad at the time of dishonour, returned only eleven days later and notice was given to him the day after his return. Steyn J 802, referring to section 47(5) SABEA, said that the subsection contemplated

> "an enquiry whether the notice was nevertheless given within a reasonable time in view of the circumstances prevailing during the relevant period. Such enquiry entails a finding as to the cause of the delay and whether the giver of the notice acted with reasonable diligence after that cause ceased to operate".

See also section 48(1). He thus excused the delay but not the late giving of notice itself. The result might have been different had the drawer in this case been abroad for a longer period; notice may then have been excused altogether. One is tempted to ask: How much longer? However, no answer can be given in advance, as the circumstances causing a delay can vary infinitely. Article 54 GULB approaches the matter differently, and its fourth paragraph provides: "[i]f vis major continues to operate beyond thirty days after maturity, recourse may be exercised, and neither presentment nor the drawing up of a protest shall be necessary". The previous two paragraphs impose a duty on the holder to give notice of vis major and to comply with his duties immediately vis major ceases to operate. See the *Records of the International Conference for the Unification of Laws on Bills of Exchange, Promissory Notes and Cheques* (1930) at 253ff for the history of these provisions. Clause 59(1)(a) of this draft follows these provisions but does not require, in addition, notice of the delaying circumstances. This clause applies to both demand instruments and bills payable after sight: a "delay" in these cases can, of course, occur only if presentment is not made within the respective periods allowed for presentment for payment or acceptance.

3 Clause 59(1)(b) combines sections 39(2)(b), 44(2)(a) and 48(2) and requires no further comment. See section 3-511(2)(c) UCC.

4 Clause 59(1)(c) combines sections 44(2)(e) and 48(2)(b). This clause applies to a waiver of presentment for acceptance as well (see section 3-511(2)(a) UCC), something that is not specifically provided for by the SABEA (but see section 14). A few comments are necessary: First, it should be noted that in terms of the proposal a waiver operates only as against the party who has waived; his waiver, therefore, does not affect the rights and duties of other parties. Secondly, where presentment for acceptance is not necessary, a waiver of it would be meaningless, for the person waiving is not entitled to presentment for acceptance. Thirdly, where the bill stipulates that it must be presented for acceptance and one of the parties waives presentment for acceptance, that waiver is operative against him only. If the instrument is dishonoured for non-acceptance (see section 41(1)(b) SABEA) the result may be that he is the only person liable on the instrument. Fourthly, where the bill is payable after sight and a party has waived presentment for acceptance the result may be different. If the bill is accepted, no particular problem arises. But where it is not accepted the instrument is not valid for it lacks a time of payment and cannot be "dishonoured". A waiver of presentment for acceptance will therefore be meaningless, for the party waiving is not liable at all, since there is no valid instrument on which he can be liable.

Another question that arises is whether a waiver must be made before presentment or notice is due or whether it may also be done afterwards. Section 48(2)(b) SABEA dispenses with notice of dishonour by waiver "either before the time of giving notice has arrived, or after omission to give due notice". See sections 109 NIL and 50(2)(b) BEA. Section 3-511(2)(a) UCC extends this by providing that presentment may also be waived "either before or after it is due". That presentment may be waived after due date seems to be accepted by most authors (Chalmers & Guest 414; Cowen 304; Malan 218; Britton 532) although the cases cited in support of this view by Cowen 304 and Malan 218 are not directly in point. However, whether these duties of the holder can be waived after they should have been performed, ie after the discharge of the person waiving, is a matter of some complexity: what happens, it appears, is not that the party waives performance of the holder's duties, but rather his own discharge so that he remains liable on the instrument. The wording of the legislation referred to is thus not entirely satisfactory but, since it has become accepted to recognise a waiver of the duties of the holder - particularly where part of the amount of the instrument is paid after maturity - after the duties had to be performed and in view of the desirability of maintaining the

holder's rights of recourse on the instrument in cases of such a waiver, they are retained and extended to a waiver of presentment as well. On the construction of a waiver, see clause 33.

5 Clause 59(1)(d) excuses presentment or notice as against a party to whom the instrument was presented for acceptance or payment or from whom payment was demanded. It is based on part of section 3-511(2)(b) UCC. Such a party is not entitled to a further presentment or to notice of dishonour since he himself has already refused payment or acceptance. See section 48(2)(d)(ii) SABEA.

6 Clause 59(1)(f) provides that presentment and notice is excused, inter alia, as against a party who is not entitled to require that the instrument be accepted or paid. It is based on section 3-511(2)(b) UCC and combines section 44(2)(c) SABEA (which dispenses with presentment for payment as regards the drawer, where the drawee is not bound as between him and the drawer to accept or pay, and the drawer has no reason to expect that the bill would be paid: strangely, no similar provision excuses presentment for acceptance); section 44(2)(d) (which dispenses with presentment for payment as regards an indorser where the bill was accepted or made for the accommodation of the indorser and the holder had no reason to expect payment); and section 48(2)(c)(iv) (which dispenses with notice of dishonour vis-à-vis the drawer where the drawee is not bound as between him and the drawer to accept or pay). These subsections all deal with the case in which the drawee or payer is not bound as against the person entitled to notice or presentment to pay or accept. This will be the case when an instrument is drawn or made or accepted for the accommodation of the drawer or an indorser who fails to provide the sum necessary for payment. It also covers the case in which the drawee has, for example, cancelled the contract between him and the drawer or if the drawer has to provide the drawee with funds to effect payment. Clearly the drawer or indorser would, in all these cases, be aware of the fact that the instrument would not be accepted or paid: presentment or notice of dishonour to him would be superfluous. Section 48(2)(d)(iii) SABEA, on the other hand, unqualifiedly excuses notice of dishonour to an accommodated indorser. This provision can hardly be justified: surely, if the accommodated indorser has complied with his obligations in terms of the accommodating agreement, he should be entitled to notice of dishonour (and presentment).

A distinction is made in clauses 59(1)(e) and (f) between the case of countermand and one in which the payor is not required to pay in terms of an

agreement between him and, for instance, the drawer. In *Industrial Machinery Supplies (Pty) Ltd v Pretorius* 1960 4 SA 675 (O), it was held that a countermand of payment does not fall within the ambit of section 44(2)(c) SABEA (see also *Rovic Noordkaap v Roux* 1980 4 SA 59 (O) 62 and *Anglo-African Factors (Pty) Ltd v Cuppasamy and another* 1974 3 SA 399 (O) 404-5, but see the valid criticism of Cowen 304-5 n41; Malan et al *Provisional Sentence* 103 n81; Malan 218 n66 and see, with respect to section 48(2)(c)(iv) SABEA, *De Bruin v Munro* (1) 1971 4 SA 624 (O) 627). It is submitted that a countermand of payment is one of the instances in which the drawee would not be bound to pay. However, in view of the uncertainty in our law referred to above, separate provision is made for both cases in clause 59(1)(e) and (f).

7 Clause 59(1)(e) excuses presentment for acceptance or payment and notice of dishonour as against a party who has countermanded payment. It corresponds with section 48(2)(c)(v) SABEA, which dispenses with notice of dishonour in such a case. Unfortunately no comparable provision exists excusing presentment for payment or acceptance. Since this ground of excuse operates only as against the party countermanding payment, it is strange that it has not been extended to presentment for payment and acceptance. This is now done in clause 59(1)(e), which corresponds with part of section 3-511(2)(b) UCC.

8 Clause 59(2) provides that presentment for acceptance is excused where the drawee is dead, and that presentment for acceptance or payment is excused where the drawee or maker is insolvent or a fictitious person or a person not having capacity to accept or pay, or if the drawee is a juristic person that does not or has ceased to exist.

It should be noted that only presentment for acceptance is excused where the drawee is dead. Presentment for payment must be made to the executor. See the commentary on clause 52 above and see article 48 and 52(2)(d) of the Uncitral Convention.

With regard to the phrase "a person not having capacity to accept or pay", it should be noted that a person's lack of capacity can be supplemented, for instance, a minor can acquire capacity to contract if he is assisted by his guardian. The same applies to a woman under the marital power and to a prodigal. In some cases, a curator or guardian is able to act on behalf of the person who lacks capacity. Clearly the phrase cannot apply when the person lacking capacity is indeed assisted or when someone acts on his behalf.

Presentment for acceptance and payment is excused where the drawee is both a juristic and a natural person that lacks capacity to accept or pay the instrument. Examples of juristic persons lacking this power are those to which section 36 of the Companies Act, 61 of 1973 does not apply, for example, friendly societies (section 3(1)(a) of the act; *Oranje Benefit Society v Central Merchant Bank Ltd* 1976 4 SA 659 (A) 672H; *Volkskas Beleggingskorporasie Bpk v Oranje Benefit Society* 1978 1 SA 45 (A)) and common-law juristic persons (see *Amalgamated Society of Woodworkers of SA and another v Die 1963 Ambagsvereniging* 1967 1 SA 586 (T)). Presentment for acceptance or payment need not be made to these juristic persons. But it is submitted that, where a company has excluded the power to pay or accept bills in its memorandum of association (see section 34 of the Companies Act 61 of 1973 read with paragraph (i) of the Second Schedule) it also lacks the capacity to accept or pay (see the wording of section 36 itself) so that no presentment is necessary. This is so because the ultra vires doctrine remains in force between the company and its directors and members (Cilliers and Benade et al *Corporation Law* (1992) 174ff; De Wet & Yeats 547-51; *Henochsberg on the Companies Act* (1985) 54-6), so that there is a substantial likelihood that instruments drawn on such companies would not be accepted or paid. However, it is unnecessary to address this problem save to state that the wording of clause 59(2) is wide enough to cover the case of a company lacking the power to accept or pay bills.

9 Section 39(2)(b) SABEA excuses presentment for acceptance if, where an irregular presentment has been made, acceptance is refused on some other ground. It is submitted that there is no reason to re-enact this provision. Since the drawer and indorsers are subject to strict liability, they are entitled to "due" presentment. (The ratio of this provision is not clear; see Crawford and Falconbridge 1553.)

10 Section 39(3) SABEA provides that presentment is not excused by the fact that the holder has reason to believe that the bill will be dishonoured on presentment. There is little need for this provision, since the grounds of excuse are explicitly stated both in section 39(2) SABEA and in clause 59 of this draft. Similar considerations apply to section 44(3) SABEA.

11 It has already been explained why presentment for payment is not excused where the drawee or maker has died - the reason is that there may be an executor to whom

presentment can be made (see paragraph 8 above). The case of a juristic person is different. Where a juristic person is deregistered (section 73 of the Companies Act, 61 of 1973 and section 26 of the Close Corporations Act, 69 of 1984) or has been dissolved (section 419 of the Companies Act, 61 of 1973 and section 66 of the Close Corporations Act, 69 of 1984) the company or corporation will cease to exist so that no one will be able to represent it and all its property which has not yet been distributed at the date of deregistration or dissolution will vest in the State as bona vacantia (*Ex parte Sengal Investments (Pty) Ltd* 1982 3 SA 474 (T); *Rainbow Diamond (Edms) Bpk en andere v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A); *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W), but see Sonnekus "Enkele Opmerkings na aanleiding van die Aanspraak op Bona Vacantia as sogenaamde Regale Reg" 1985 *TSAR* 121 141-8. It follows that the registration of the company or corporation would have to be restored (section 73(6) of the Companies Act, 61 of 1973 and section 26(6) of the Close Corporation Acts, 69 of 1984) or the dissolution declared void (section 420 of the Companies Act, 61 of 1973; *Ex parte Bowman: In re International Rock Products (Pty) Ltd* 1985 1 SA 70 (W)) before there can be any question of presentment. Clause 59(2) thus excuses presentment where the juristic person does not exist or has ceased to exist (clause 59(1)(b), in any event, takes care of this situation).

12 Specific provision is not made for section 48(2)(d)(i) SABEA, which states that notice of dishonour as regards an indorser is excused if he knew at the time of indorsement that the drawee was fictitious or lacked capacity. However, clause 59(1)(f) of this draft, by dispensing with presentment and notice vis-à-vis a party who has no reason to expect that the instrument would be accepted or paid, is wide enough to cover this eventuality.

60 Non-compliance with holder's duties

(1) Subject to the provisions of this Act -

(a) where an instrument is not duly presented for acceptance or payment, the drawer and indorsers are discharged from liability on the instrument;

(b) where notice of dishonour is not duly given to the drawer and each indorser, any drawer or indorser to whom such notice is not given, is discharged from liability on the instrument.

(2) Where, in terms of a qualified acceptance or a note, presentment for payment is required, the acceptor or maker, in the absence of an express stipulation to that effect, is not discharged by an omission to present the instrument for payment on its due date or within the time allowed for such presentment.

Comparative legislation

Sec 37(2), 38(1), 43(1), 46, 49(1), 50 and 90(1) SABEA.
Sec 39(2), 40(1), 45, 48, 51(2), 52 and 86(1) BEA.
Sec 3-502(1) UCC.
Art 53 GULB.
Art 47, 63 and 58 Uncitral Convention.
Sec 60 Cheques and Payment Orders Act 1986.

The relevant provisions in the Bills of Exchange Act 1964 are:

> 37. *When presentment for acceptance is necessary, and delay in such presentment.*
>
> (1) If a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of such bill.
> (2) If a bill expressly stipulates that it shall be presented for acceptance, or if a bill is drawn payable elsewhere than at the place of residence or business of the drawee, it must be presented for acceptance before it can be presented for payment.
> 38. *Time for presenting for acceptance bill payable after sight.*
> (1) (a) Subject to the provisions of this Act, if a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time within the meaning of sub-section (2).
> (b) If the holder does not do so, the drawer and all indorsers prior to that holder are discharged.
> 43. *Rules as to presentment for payment.*
> (1) (a) Subject to the provisions of this Act, a bill must be duly presented for payment in accordance with the provisions of subsection (2).
> (b) If it is not so presented, the drawer and indorsers shall be discharged.
> 46. *Notice of dishonour and effect of failure to give such notice.*
> Subject to the provisions of this Act, if a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged: Provided that --
> (a) if a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course who became such a holder subsequent to the omission, shall not be prejudiced by the omission;
> (b) if a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill was accepted in the meantime.
> 49. *Protest of bill, and consequences of failure to protest.*
> (1) (a) If a foreign bill has been dishonoured by non-acceptance, it must be duly protested for non-acceptance, and if such a bill which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment:

Provided that if such a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance it must be protested for non-payment, and no further presentment for payment to, or demand on, the drawee is necessary.
(b) If such a bill so dishonoured is not so protested the drawer and indorsers are discharged.
(c) If such a bill has been accepted as to part, it must be so protested as to the balance.
50. *Duties of holder towards acceptor as regards presentment for payment, protest and notice of dishonour, and towards payer on payment of bill.*
(1) If a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable.
(2) If by the terms of a qualified acceptance, presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by an omission to present the bill for payment on the day that it matures.
(3) It is not necessary, in order to render the acceptor of a bill liable, to protest such bill or to give notice of dishonour to such acceptor.
(4) When a holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid, the holder shall forthwith deliver it up to the party paying it.
90. *Time of presentment for payment of note payable on demand and indorsed.*
(1) (a) If a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement within the meaning of sub-section (2).
(b) If it is not so presented, the indorser is discharged.

Commentary

1 All the legislative provisions referred to above provide for the discharge of the drawer and indorsers by reason of a failure by the holder to comply with his duties. The GULB does not contain a provision discharging the drawer or indorsers because of a failure to give notice of dishonour, since notice of dishonour is not a condition of liability under their provisions. The legislation referred to, except the Australian Cheques and Payment Orders Act, 1986, also provides for discharge by reason of a failure to protest. Protest is not a condition of liability in terms of this draft (cf article 68 Uncitral Convention).

Section 3-502(1)(b) UCC follows a very strict approach towards the *drawer*. He is discharged by a delay in presentment or notice only if he suffers damage on the ground that he is deprived of funds maintained with the drawee as a result of the drawee's intervening insolvency during the delay. Paragraph 2 of the Official Comment on this provision explains: "The purpose of the rule is to avoid hardship upon the holder through complete discharge, and unjust enrichment of the drawer ... who normally has received goods or other consideration for the issue of the instrument." The same considerations lie at the root of the so-called "cambial enrichment claim" provided for in article 89 of the German Wechselgesetz and article 58 of the German Scheckgesetz (see on these provisions Baumbach-Hefermehl 395ff;

Hueck-Canaris 156-60; and especially Canaris "Der Wechselbereicherungsanspruch" 1977 *Wertpapier-Mitteilungen* 34 and Oelofse *Die Wisselverrykingseis en die Eurotjek in die Duitse Reg* (1988) 1ff).

A provision similar to section 3-502(1)(b) UCC is section 72 SABEA, but it applies only with respect to a failure to present a *cheque* for payment (see in general Cowen 307-8; De Wet & Yeats 813; Malan 263-4; Malan et al *Provisional Sentence* 105). Whether this provision should be retained or extended to bills and notes is a value judgment: how strictly formal should liability be on a negotiable instrument? Without conclusive favouring of the one or the other, the status quo is maintained as far as bills and notes are concerned.

In the SABEA the discharge of the drawer and indorsers by reason of non-compliance by the holder with his duties is covered by different provisions with reference to each duty. They are consolidated in clause 60(1) of this draft, since they belong together.

2 Section 50(1) and (3) SABEA quite unnecessarily provide that presentment for payment, notice of dishonour and protest are unnecessary to render an acceptor liable, since the "discharge" provisions make it clear that only the drawer or an indorser is discharged by a failure to comply with the holder's duties. See also section 52 SABEA. This remark, of course, applies also to the maker of a note.

Clause 60(2) repeats section 50(2) SABEA. It also dispels the doubt raised by De Wet & Yeats 815 n591 on the question whether the maker may stipulate that he be discharged if the note is not presented on the due date. Unlike section 50(2) SABEA, clause 60(2) of this draft provides that such stipulation may be added to a *demand* instrument as well. According to the present state of the law, if the acceptor or maker has required presentment for payment, but not stipulated for his discharge in the absence thereof, the holder could avoid the running of prescription against him indefinitely simply by not presenting the instrument for payment, since the debt would not become due before presentment (*Van Gent v Venter* 1946 TPD 506; section 12(1) of the Prescription Act 68 of 1969; *Schnehage en 'n ander v Bezuidenhout* 1977 1 SA 362 (O); but see *Brakpan Produce and Livestock Agency Ltd v Dennill* 1922 TPD 150 and the comment by Malan et al *Provisional Sentence* 105 n97). This result seems contrary to the principles underlying the prescription of debts (see De Wet & Yeats 262-3) and should be remedied. The draft that preceded the Prescription Act of 1969 contained the following clause:

> "If the day on which a debt becomes due, may be unilaterally determined by the creditor, the debt shall be deemed to be due on the earliest day which the creditor was entitled to determine."

See, with regard to this clause, which unfortunately never became law, Gauntlett (editor) *Opuscula Miscellanea - Regsgeleerde Lesings en Adviese van JC de Wet* (1979) 116.

CHAPTER 6

DISCHARGE

61 Discharge of parties

(1) A party is discharged from liability on the instrument:

> **(a) by any cause by which contractual obligations are discharged; and**
>
> **(b) by payment made to the holder at or after maturity or, before maturity, upon dishonour by non-acceptance, in good faith and without notice of any fraud or illegality affecting the instrument.**

(2) Where a party is discharged wholly or partially from liability on the instrument, any party who has a right of recourse against him is also discharged.

(3) All the parties are discharged from liability on the instrument:

> **(a) where the liability of a party who has no right of recourse on the instrument is discharged; and**
>
> **(b) by payment made by the drawee, or the acceptor, or the maker to the holder at or after maturity or, before maturity, upon dishonour by non-acceptance, in good faith and without notice of any fraud or illegality affecting the instrument.**

Professor Oelofse suggested that clause 61(1)(b) and 61(3)(b) as well as clause 53(1)(b) and 54(1) of the proposed Cheques Act be amended to provide that a "payment in due course" is made where payment is made without notice of a valid delivery and or a mandate to present the instrument for payment. He suggests that, for example, where A and B enter into an illegal transaction in terms of which A undertakes to pay B R100 a "payment in due course" is made despite the drawee having knowledge of the illegality with the result that he may debit the account of A. The learned author submits that this result is unacceptable. However, the present formulation is preferred for the following reasons:

1 Although the abstract system of transfer of ownership implies that a valid transfer is effected even if the underlying agreement or causa is invalid, the agreement to transfer can itself be invalid and ineffective if it is, for example, tainted with illegality. It is submitted that this may be the case where the underlying agreement is invalid by reason of illegality. To protect the drawee who pays with notice of such illegality is unacceptable and it is submitted that he should not be entitled to debit the drawer's account in such circumstances.

2 It is submitted that the drawee's right to make a liberatory payment should also be restricted in circumstances where a valid delivery has taken place, such as where delivery of the instrument has been obtained by fraud. In this respect the proposed formulation is based on section 37(2) and (3) Bills of Exchange Act, 1964 although it is somewhat narrower.

62 Effect of discharge against holder in due course

The discharge of a party is not effective against a subsequent holder in due course.

63 Duty on payment

Except where it is otherwise agreed or where presentment for payment is made in terms of paragraph (c) of subsection (1) of section 53, where an instrument is paid, the person to whom payment is made shall deliver the instrument to the party making payment.

64 Payment by third person

(1) An instrument may be paid by any person, including a stranger to the instrument.
(2) Where an instrument is paid by a stranger:

> **(a) the person paying the instrument acquires the right of the person to whom payment was made against the party on whose behalf payment was made and against all parties liable to him; and**
> **(b) any party subsequent to the party on whose behalf payment was made is discharged.**

65 Partial payment

(1) The holder is not obliged to take a partial payment.
(2) Where the holder does not take a partial payment, the instrument is dishonoured by non-payment.
(3) Where the holder takes a partial payment from the drawee, the acceptor or the maker:

(a) all the parties are discharged from liability on the instrument to the extent of the amount paid;

(b) the instrument is dishonoured to the extent of the amount unpaid.

(4) Where the holder takes a partial payment from a party other than the drawee, the acceptor or the maker:

(a) the party making payment is discharged from liability on the instrument to the extent of the amount paid;

(b) the holder must deliver to such party a copy of the instrument.

(5) Where a partial payment is made, the party to whom payment is made shall, unless otherwise agreed, note the amount paid by indorsement on the instrument.

(6) Where the balance is paid the party to whom payment is made shall, unless otherwise agreed, deliver the instrument to the party making payment.

Comparative legislation

Bills and notes:

Sec 20(2), 22, 27(2), 28(1), 33, 36, 52, 53, 57-66, 94 SABEA
Sec 65-8 BEA
Sec 3-306, 3-601 to 606 UCC
Sec 119-125, 175 NIL
Art 40, 55, 63 GULB
Art 72-77 Uncitral Convention

Cheques:

Sec 58, 75-86 SABEA
Sec 53, 78-87 Cheques and Payment Orders Act 1986
Sec 65 Australian Bills of Exchange Act (1909-73)
Sec 60, 76-81 BEA
Sec 49 Canadian Bills of Exchange Act 1952
Art 27, 37-9 GULC
Sec 1 Cheques Act 1964
Sec 3-601 to 3-605 Revised UCC

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The relevant provisions in the Bills of Exchange Act 1964 are:

20. *Capacity of parties.*

(1) Capacity to incur liability as a party to a bill is coextensive with capacity to contract.
[Sub-s. (1) amended by s 2 of Act 57 of 1971.]
(2) If a bill is drawn or indorsed by a minor or a corporation having no capacity or power to incur liability on a bill, the drawing or indorsement of the bill entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.
22. *Forged and unauthorised signatures.*
Subject to the provisions of this Act, if a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority: Provided that nothing in this section contained shall affect the ratification of an unauthorised signature not amounting to forgery.
27. *Holder in due course.*
(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following circumstances, namely --
(a) he must have become the holder of it before it was overdue, and if it had previously been dishonoured, without notice thereof; and
(b) he must have taken the bill in good faith and for value, and at the time the bill was negotiated to him, he must have had no notice of any defect in the title of the person who negotiated it.
(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act if he obtained the bill, or the acceptance thereof, by fraud or other unlawful means, or for an illegal consideration, and is deemed to have been so defective if he negotiates the bill in breach of faith, or under such circumstances as amount to fraud.
(3) A holder, whether for value or not, who derives his title to a bill though 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.

28. *Presumption as to value and good faith.*
(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.
(2) Every holder of a bill is prima facie deemed to be a holder in due course: Provided that 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 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.
33. *Conditional indorsement.*
If 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.
36. *Rights and powers of the holder.*
The rights and powers of the holder of a bill are as follows, namely --
(a) he may sue on the bill in his own name;
(b) if he is a holder in due course, he holds the bill free from any defect in the title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;
(c) if the title is defective and --
(i) he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; or
(ii) he obtains payment of the bill in due course the person who made such payment gets a valid discharge of the bill.
52. *Liability of acceptor.*
The acceptor of a bill, by accepting it --
(a) engages that he will pay it according to the tenor of his acceptance;
(b) is precluded from denying to a holder in due course --
(i) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;
(ii) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or the validity of his indorsement;
(iii) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or the validity of his indorsement.
53. *Liability of drawer and of indorser.*
(1) The drawer of a bill by drawing it --
(a) engages that, on due presentment, it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder, or an indorser who is compelled to pay it, provided the requisite proceedings on dishonour are duly taken;
(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.
(2) The indorser of a bill by indorsing it --
(a) engages that, on due presentment, it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder, or a subsequent indorser who is compelled to pay it, provided the requisite proceedings on dishonour are duly taken;
(b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
(c) is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.
57. *Discharge by payment in due course.*
(1) A bill is discharged by payment in due course or is discharged proportionally by payment of part of the amount for which the bill is drawn, noted by indorsement on the bill, if such payment be made by or on behalf of the drawee or acceptor.
(2) Subject to the provisions of sub-sections (3), (4) and (5), a bill is not discharged if it is paid by the drawer or an indorser.

(3) If a bill payable to a third party or the order of the latter, is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.
(4) If a bill is paid by an indorser, or if a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor and antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.
(5) If an accommodation bill is paid in due course by the party accommodated, the bill is discharged.
58. *Banker paying demand draft where indorsement is forged.*
If a bill payable to order on demand is drawn on a banker, and the banker 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: Provided such indorsement does not purport to be that of a person who is a customer of the banker at the branch on which the said bill is drawn.
59. *Discharge by acceptor becoming holder.*
If the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.
60. *Discharge by waiver.*
(1) Subject to the provisions of sub-section (4), if the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor in the manner contemplated in sub-section (2), the bill is discharged.
(2) The renunciation of rights contemplated in sub-section (1) must be in writing on the bill, unless the bill is delivered up to the acceptor.
(3) Subject to the provisions of sub-section (4), the liabilities of any party to a bill may in the manner contemplated in sub-sections (1) and (2) be waived by the holder before, at, or after its maturity.
(4) Nothing in this section contained shall affect the rights of a holder in due course who had no notice of the renunciation or waiver.
61. *Discharge by cancellation of bill, and discharge of party by cancellation of his signature.*
(1) If a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.
(2) (a) Any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent.
(b) If a signature is so cancelled any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged.
(3) A cancellation made unintentionally or under a mistake or without the authority of the holder, is inoperative: Provided that if a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority.
62. *Effect of alteration of bill or acceptance.*
(1) If a bill or an acceptance is materially altered the liability of all parties who were parties to the bill at the date of alteration and who did not assent to it, must be regarded as if the alteration had not been made, but any party who has himself made, authorised or assented to the alteration, and all subsequent indorsers are liable on the bill as altered.
(2) For the purposes of sub-section (1) material alterations include any alteration of the date, the sum payable, the time of payment and the place of payment, and, if a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.
63. *Acceptance for honour supra protest, and maturity of certain bills so accepted.*
(1) If a bill has been protested for dishonour by non-acceptance or protested for better security, and is not overdue, any person, not being a party already liable thereon, may with the consent of the holder intervene and accept the bill, supra protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.
(2) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3) An acceptance for honour, supra protest, in order to be valid must --
(a) be written on the bill and indicate that it is an acceptance for honour;
(b) be signed by the acceptor for honour.
(4) If an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.
(5) If a bill payable after sight is accepted for honour, its maturity is calculated from the date of noting for non-acceptance, and not from the date of acceptance for honour.
64. *Liability of acceptor for honour.*
(1) The acceptor for honour of a bill by accepting it, engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and he receives notice of these facts.
(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.
65. *Presentment to acceptor for honour and referee in case of need.*
(1) If a dishonoured bill has been accepted for honour, supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour or the referee in case of need.
(2) If the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than on the business day next after its maturity, and if the address of the acceptor for honour is in some place other than the place where it is protested for non-payment, the bill must be posted to him or forwarded for presentment to him not later than on the business day next after its maturity.
(3) Delay in presenting or failure to present a bill for payment contemplated in subsection (1) is excused by any circumstances which, in any other case, would excuse delay in presenting, or failure to present, a bill for payment.
(4) If a bill of exchange is dishonoured by the acceptor for honour, it must be protested for non-payment by him.
66. *Payment for honour supra protest.*
(1) If a bill has been protested for nonpayment, any person, not being a party already liable thereon, may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.
(2) If two or more persons offer to pay a bill for the honour of different parties the person whose payment will discharge most parties to the bill shall have preference.
(3) Payment for honour supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it.
(4) The notarial act of honour referred to in sub-section (3) must be founded on a declaration made by the payer for honour or a person authorised by him to do so, declaring his intention to pay the bill for honour, and for whose honour he pays.
(5) If a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is substituted for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.
(6) (a) The payer for honour, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest.
(b) If the holder does not, on demand, deliver them up, he shall be liable to the payer for honour in damages.
(7) If the holder of a bill refuses to receive payment for honour supra protest, he shall lose his right of recourse against every party who would have been discharged by such payment.
75. *General and special crossings on cheques.*
(1) If a cheque bears across its face an addition of --
(a) the words "and Company", or any abbreviation thereof, between two parallel transverse lines, either with or without the words "not negotiable"; or
(b) two parallel transverse lines simply, either with or without the words "not negotiable",

that addition constitutes a crossing and the cheque is crossed generally.
(2) If a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition constitutes a crossing and the cheque is crossed specially and to that banker.
76. *Crossings by drawer, or after issue.*
(1) A cheque may be crossed generally or specially by the drawer.
(2) If a cheque is uncrossed the holder may cross it generally or specially.
(3) If a cheque is crossed generally the holder may cross it specially.
(4) If a cheque is crossed generally or specially, the holder may add the words "not negotiable".
(5) If a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.
(6) If an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.
77. *Crossing a material part of cheque.*
A crossing authorised by this Act is a material part of the cheque, and it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter such a crossing.
78. *Duties of bankers as to crossed cheques.*
(1) If a cheque is crossed generally, the banker on whom it is drawn shall not pay it to any person other than a banker.
(2) If a cheque is crossed specially, the banker on whom it is drawn shall not pay it to any person other than the banker to whom it is crossed, or the latter's agent for collection, if he is a banker.
(3) If a cheque is crossed specially to more than one banker, except when crossed to two bankers of whom the one is an agent for collection of the other, the banker on whom it is drawn shall refuse payment thereof.
(4) If the banker on whom a cheque is drawn --
(a) pays such cheque if it is crossed as is contemplated in sub-section (3);
(b) pays such cheque to any person other than a banker if it is crossed generally; or
(c) pays such cheque, if it is crossed specially, to any person other than the banker to whom it is crossed or the latter's agent for collection, if he is a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid: Provided that if a cheque is presented for payment and it does not, at the time of presentment, appear to be crossed or to have had a crossing which has been obliterated, or to have a crossing which has been added to or altered, otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned, by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made to a person other than a banker or the banker to whom the cheque is or was crossed, or the latter's agent for collection who is a banker, as the case may be.
79. *Protection to banker and drawer where cheque is crossed.*
If the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and, if crossed specially, to the banker to whom it is crossed, or the latter's agent for collection, who is a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.
80. *Effect of crossing and addition of words "not negotiable" on rights of holder.*
If a person takes a crossed cheque which bears on it the words "not negotiable", he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.
81. *True owner of stolen or lost crossed cheque marked "not negotiable" entitled to compensation from certain subsequent possessors.*
(1) If a cheque was stolen or lost while it was crossed as authorised by this Act and while it bore on it the words "not negotiable", and it was paid by the banker upon whom it was drawn, under circumstances which do not render such banker liable in terms of this Act to the true owner of

the cheque for any loss he may sustain owing to the cheque having been paid, the true owner shall, if he suffered any loss as a result of the theft or loss of the cheque, be entitled to recover from any person who was a possessor thereof after the theft or loss, and either gave a consideration therefor or took it as a donee, an amount equal to the true owner's said loss or the amount of the cheque, whichever is the lesser.

(2) If a person has after the theft or loss paid any such cheque into his account with a banker after having paid, or for the purpose of paying, the amount of the cheque or part thereof to the person from whom he received the cheque, or, on his direction, to any other person, he shall, for the purposes of sub-section (1), be deemed to have been a possessor of the cheque and to have given a consideration therefor: Provided that the foregoing provisions of this sub-section shall not apply to a collecting banker employing another banker as his agent for the collection of any such cheque.

(3) If a person took any such cheque into his possession or custody after the theft or loss, and fails to furnish the true owner or any person who has in terms of sub-section (7) the rights of a true owner, at his request, with any information at his disposal in connection with the cheque, he shall for the purposes of sub-section (1) be deemed to have been a possessor of the cheque and either to have given a consideration therefor or to have taken it as a donee.

(4) Every possessor of any such cheque shall, for the purposes of this section, and until the contrary is proved, be deemed either to have given a consideration therefor or to have taken it as a donee.

(5) For the purposes of sub-section (1), a banker who receives payment of any such cheque for a customer shall, subject to the provisions of sub-section (3), not be regarded as having given a consideration therefor, merely because he has in his own books credited his customer's account with the amount of the cheque before receiving payment thereof, or because any such payment is applied towards the reduction or settlement of any debt owed by the customer to the banker.

(6) If in any action under this section the defendant proves that when he became the possessor of the cheque, it did not appear to be crossed or to have had a crossing which had been obliterated, and to bear on it the words "not negotiable", or to have borne on it any words which might have been the words "not negotiable" and had been obliterated, he shall, subject to the provisions of sub-section (3), not be held liable under this section.

(7) (a) A person who has discharged his liability under sub-section (1) and who took the cheque in good faith and without notice of any defect in the title of the transferor, shall as against any prior possessor of the cheque, who became a possessor thereof after the theft or loss and either gave a consideration therefor or took it as a donee, have the rights conferred upon a true owner by sub-section (1).

(b) The provisions of paragraph (a) shall mutatis mutandis apply to a person who has discharged his liability under the said paragraph or under the said paragraph as applied by this paragraph.

(8) For the purposes of this section the giving of a consideration includes the receiving of any such cheque in reduction or settlement of any debt or liability.

82. *Application of sections 75 to 81 to certain documents other than cheques.*

Sections seventy-five to and including eighty-one shall also apply to any document issued by a customer of any banker and intended to enable any person to obtain payment on demand of the sum mentioned in such document from such banker (or from any banker, if the document was issued on behalf of the State), and shall so apply as if the said document were a cheque, and the said sections shall mutatis mutandis also apply to any document which --

(a) was issued on behalf of the State;

(b) is drawn upon or addressed to a servant of the State (hereafter in this section called the drawee); and

(c) is intended to enable any person to obtain payment on demand of the sum mentioned in such document from the drawee or from or through a banker, as if the said document were a cheque and as if the drawee were a banker and the State his customer: Provided that nothing in this section contained shall render any such document a negotiable instrument.

83. *Effect of payment to or crediting of accounts by bankers of amounts of unindorsed or irregularly indorsed cheques and certain other documents.*
(1) If a banker in good faith and in the ordinary course of business credits the account of a customer of his with or pays to another banker the amount of --
(a) any cheque drawn on him;
(b) any other document issued by a customer of his and intended to enable any person to obtain payment on demand of the sum mentioned in such document from him (or from any banker, if the document was issued on behalf of the State); or
(c) a draft payable on demand drawn by such firstmentioned banker upon himself, or upon his agent who is a banker, whether payable at the head office or some other office of his bank or of such agent,
he shall not incur any liability by reason only of the absence of, or irregularity in, indorsement thereof, and such cheque, document or draft shall be discharged by such crediting of the account in question or by such payment.
(2) The provisions of sub-section (1) shall mutatis mutandis also apply to any document which --
(a) was issued on behalf of the State;
(b) is drawn upon or addressed to a servant of the State (hereafter in this section called the drawee); and
(c) is intended to enable any person to obtain payment on demand of the sum mentioned in such document from the drawee or from or through a banker, as if the said document were a cheque and as if the drawee were a banker and the State his customer.
84. *Rights of bankers if unindorsed or irregularly indorsed cheques or certain other documents are delivered to them for collection.*
If a cheque, or draft or other document referred to in section eighty-three, which is payable to order, is delivered by the holder thereof to a banker for collection, and such cheque, draft or document is not indorsed or was irregularly indorsed by such holder, such banker shall have such rights, if any, as he would have had if, upon such delivery, the holder had indorsed it in blank.
85. *Evidential value of payment of unindorsed or irregularly indorsed cheques or certain other documents.*
If an unindorsed or irregularly indorsed cheque, or draft or other document referred to in section eighty-three, has been paid by the banker (including a drawee referred to in sub-section (2) of the said section) on whom it is drawn, such payment shall be prima facie evidence of the receipt by the payee of the sum mentioned in such cheque, draft or document.
86. *Negotiability of documents referred to in sections 83, 84 and 85.*
The provisions of sections eighty-three eighty-four and eighty-five shall not make negotiable any document which, apart from them, is not negotiable.
94. *Good faith.*
A thing is deemed to be done in good faith within the meaning of this Act, if it is in fact done honestly, whether it is done negligently or not.

Commentary

1 Historical aspects

1.1 The following provisions of the Act relate to discharge: section 57(1) SABEA provides that a bill is discharged by "payment in due course" or proportionately discharged by payment of part of the amount noted by indorsement on the instrument, if payment is made by the drawee or acceptor. Payment by the drawer or an indorser

does not discharge the bill, section 57(2) adds. In terms of section 57(5), an accommodation bill is discharged if it is paid in due course by the party accommodated. "Payment in due course" is defined in section 1 as "payment made at or after the maturity of the bill to the holder thereof in good faith and, if his title to the bill is defective, without notice thereof."

1.2 The Act speaks of the discharge of the instrument, but this is not accurate for it is the parties to the instrument themselves who are discharged by payment. The Official Comment (2) to section 3-601 UCC pointedly states:

> "A negotiable instrument is in itself merely a piece of paper bearing a writing, and strictly speaking is incapable of being discharged. The parties are rather discharged from liability on their contracts on the instrument."

Section 3-601 therefore refers to the discharge of the parties and this approach is also followed by the GULB that, in article 40(3), provides that "[h]e who pays at maturity is validly discharged ...".

1.3 The provisions of the Act concerning discharge are based on nineteenth century cases which viewed discharge as the performance by the various parties of their duties as drawers, acceptors and indorsers. These duties are concisely formulated in these cases as well as in the Act and in this draft. In *Morley v Culverwell* (1840) 7 M & W 174 (151 ER 727) at 181, for example, it is said that "[t]he contract of the drawer and each indorser is, that the bill shall be paid by the acceptor at its maturity". An indorser's obligation is perhaps more precisely stated in *Walker Barber and another v MacDonald* (1848) 2 Ex 527 (154 ER 600) at 532: "The promise is, that the indorser will pay to the indorsee, and those claiming under him, if the acceptor does not pay to a person entitled to call on him for payment of the bill when due." The liabilities of the drawer and indorsers are therefore conditional, but that of the acceptor absolute (*Jones and another v Broadhurst* (1850) 9 CB 173 181 (137 ER 858); *Duncan Fox and Co v North and South Wales Bank* 1880 6 AC 1 (HL) 13; *Harmer and others v Steele* (1849) 4 Ex 1 11-4 (154 ER 1100). The drawee, on the other hand, is not liable on the instrument, but payment by him (or by the acceptor) is performance of the undertakings of the drawer and indorsers (see Britton 639), on the non-fulfilment of which their liability depends.

1.4 A bill is, as Lord Ellenborough said in *Callow v Lawrence* (1814) 3 M & S 95 97 (105 ER 546), "negotiable ad infinitum until it has been paid by or discharged on

behalf of the acceptor". When it is discharged, it ceases to be a negotiable instrument, and all parties to it are freed from liability. But to discharge the instrument or all the parties to it, payment must be made by the person ultimately liable on it. Usually, this is the acceptor (*Harmer and others v Steele* 1849 3 Ex 1 13 (154 ER 1100) or the drawee (*Wilkinson v Jackson* (1838) 11 Moore 275 (12 ER 1008)), but where the instrument is drawn or made for the accommodation of another, payment by that other person discharges it. In *Lazarus v Cowie* (1842) 3 QB 459 (114 ER 583) at 465 Lord Denman CJ expounded this principle:

> "Now it cannot be denied that, if a bill be paid when due by the person ultimately liable upon it, it has done its work, and is no longer a negotiable instrument. No person could sue upon it; no person remains liable on it ...".

(See also *Jewell v Parr* (1853) 13 CB 909 917 (138 ER 1460).) Thus, where the drawer or an indorser pays the instrument, it is not discharged, for the acceptor, if any, is still liable to the drawer, and the indorser is entitled to recourse against the drawer and previous indorsers (*Williams and others v James* (1850) 15 QB 498 505 (117 ER 548)). But where payment is made by the party accommodated, whether he be drawer or indorser, the instrument is also discharged. This is so because the party accommodated is the person ultimately liable to pay. In *Jones and another v Broadhurst* (1850) 9 CB 173 176 (137 ER 8158) this was clearly expressed:

> "Suppose the drawer of an accommodation bill pays the amount to the holder: what is the reasonable intendment of the payment? If he does not make the payment in satisfaction and discharge of the holder's claim against every party on the bill, what good does he get by changing the plaintiff against him? The drawer of an accommodation bill is, in truth, the only party ultimately liable upon the bill. A person standing in that position, when he pays the bill, must be understood to make the payment in satisfaction of all claims, against any one upon the bill."

(See also *Lazarus v Cowie* (1842) 3 QB 459 (114 ER 583); *Strong v Foster* (1855) 17 CB 201 (139 ER 1047).)

1.5 To bring about the discharge of all the parties to the instrument, payment must be made at maturity. Should the drawee pay the instrument before maturity he is regarded as a purchaser (*Burridge v Manners* (1812) 3 Camp 193 (170 ER 1352); *Morley v Culverwell* (1840) 7 M & W 174 (151 ER 727)).

1.6 Further payment must be effected to someone able to give a good discharge, eg the holder (see *Bulkeley and others v Butler* (1824) 2 B & C 434 (107 ER 446)). This

is important where the right of a banker to debit a customer is in issue. *Robarts and others v Tucker* (1851) 16 QB 560 (117 ER 994) concerned a bill accepted payable at a bank. The court at 578-9 said:

> "If this were the ordinary case of an acceptance made payable at a banker's, there can be no question that making the acceptance payable there is tantamount to an order, on the part of the acceptor, to the banker to pay the bill to the person who is according to the law merchant capable of giving a good discharge for the bill. Therefore, if the bill is payable to order, it is an authority to pay the bill to any person who becomes holder by a genuine indorsement. And, if the bill is originally payable to bearer, or if there is afterwards a genuine indorsement in blank, it is an authority to pay the bill to the person who seems to be the holder. The bankers cannot charge their customer with any other payments than those made in pursuance of that authority."
> See also Holden *History* 222-3.

1.7 Apart from its provisions relating to discharge by payment, the Act also provides for the discharge of the instrument by the acceptor becoming holder at or after maturity (section 59; *Elsam and another v Denny and another* (1854) 15 CB 87 94 (139 ER 351)) - an instance of merger or confusio (Malan paragraph 304 at 248). This form of discharge is not provided for in the GULB, UCC or the Uncitral Convention, and it is suggested that the position is adequately covered by our common law.

1.8 The Act also provides for the discharge of a bill by waiver (section 60 SABEA), if the holder at or after maturity absolutely and unconditionally renounces in writing his rights on the bill or returns the bill to the acceptor. This form of discharge is specifically provided for in the BEA, since English law has developed the doctrine of consideration, and is based on older case law. In *Foster v Dawbel* (1851) 6 Exch 83 of 851 (155 ER 785) Parke J said:

> "But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts ...".

(See also *Whatley v Tricker* (1807) 1 Camp 35 (170 ER 867) and Britton 651ff). As the doctrine of consideration is not part of our law, there is no need to provide specifically for discharge by waiver.

1.9 Section 61 SABEA provides for the discharge of a bill or a party by cancellation of the instrument or of a signature. The cancellation of the bill must be intentional and

apparent on it (section 61(1) SABEA). The same applies to the cancellation of a signature (section 61(2)(a) SABEA). The liability of a party who has a right of recourse against a party whose signature is cancelled is also discharged (section 61(2)(b) SABEA). A cancellation made unintentionally or by mistake or without the authority of the holder is inoperative (section 61(3) SABEA and see *Ingham v Primrose* (1859) 7 CB (NS) 82 (141 ER 745) and *Hong Kong and Shanghai Banking Corporation v Lo Lee Shi* 1928 WN 23 noted in (1929) 3 *Cambridge Law Journal* 242). Cancellation in our law is an instance of waiver and requires no special treatment as it does in English law. The philosophy underlying cancellation as a form of discharge is set out by Britton 650:

> "Cancellation is one of the two forms of discharge which operates as such without consideration - renunciation being the other form. The sections ... codify common-law principles. The lack of the requirement of consideration is due to a fundamental conception of the nature of negotiable paper. Such instruments are regarded as something more than the evidence of a debt. In many situations a negotiable instrument is regarded as the debt itself. This conception is due, in part, to the similarity, in form and function of commercial paper to that of government currencies and bank notes. The unitary concept of a debt fused into the written evidence of it, leads readily to the further concept that destruction of the physical res itself by its owner destroys the legal relations which it induces. Consideration is thus not necessary. Cancellation then becomes a sort of constructive tearing up of the instrument. Surrender of the instrument to a primary party is similarly analogous to destruction and therefore operates as a discharge - though surrender is not technically regarded as a cancellation but rather as a renunciation."

The proviso to section 61(3) SABEA concerns the onus of proof:

> "[I]f a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority."

This proviso is sometimes relied upon to decide whether the payee, who indorsed an instrument specially for collection but to whom it had been returned with the indorsement cancelled, is a holder (eg *Georghiades v Rode* 1979 1 SA 512 (C); *Bhanabhai and Co (HK) Ltd v Wearwell Clothing Co (Pty) Ltd* 1986 4 SA 350 (D)). But this is not always the case (eg *Blackrod Holdings (Pty) Ltd v Pimhill Investments (Pty) Ltd* 1960 1 SA 820 (W)). It is suggested that, in this respect, the deletion of section 61(3) SABEA will not change the fixing of the onus. It is submitted that in these and other respects the fixing of the onus should be governed by the ordinary rules as no particular principle appears to be involved. (See *Ingham v Primrose* (1859) 7 CB (NS) 82 86 (141 ER 745).)

2 *Extension of the grounds of discharge*

2.1 *Introduction*

Besides the grounds of discharge set out in sections 57, 59, 60 and 61 SABEA, the Act contains other sections dealing with discharge, viz section 58, section 79 and section 83. These sections apply primarily to cheques, although section 58 also applies to demand bills drawn on a bank. These sections overlap and are not always easy to reconcile. They set different standards of care and so should have been consolidated into one or two simpler provisions. The origin of these divergent provisions is probably historical.

2.2 *Section 58*

2.2.1 Section 58 protects a bank paying a demand draft in the case of a forged indorsement. It reads:

> "If a bill payable to order on demand is drawn on a banker, and the banker 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: Provided such indorsement does not purport to be that of a person who is a customer of the banker at the branch on which the said bill is drawn."

2.2.2 One of the forerunners of this section is section 19 of the Stamp Act, 1853 that was enacted to enable a bank paying a cheque with a forged indorsement to debit its customer's account with the amount paid (see paragraph 1.7 above). The effect of the Stamp Act, 1853 was a lowering of stamp duty on order cheques and their consequent increased use (see Holden *History* 219ff). Section 19 was reproduced in a slightly amended form in section 60 of the Bills of Exchange Act, 1882 that forms the basis of our enactment and that of some commonwealth countries (eg section 65 Australian Bills of Exchange Act (1909-1973), see Riley 162-8) although not all (eg section 49 Canadian Bills of Exchange Act 1952; sections 119-25 NIL; 3-601 to 606 UCC).

2.2.3 In some respects section 58 overlaps the provisions relating to crossed cheques and, for this reason, has seldom been relied upon in litigation. The scope of the section is clear. It is

> "intended to cover only cases in which, but for its provisions, it would have been incumbent on the banker to show that the indorsement of the payee and the subsequent indorsements (if any) were genuine, if he wished to rely upon his payment as a discharge of his obligation. And what cases are those? Surely only cases in which the person, whom the banker paid, derived his title through the indorsement. In other words, cases in which the bill had been negotiated by indorsement. And, if that be so, the effect of the section would be to protect a banker in all cases in which he had in good faith and in the ordinary course of business paid a bill in the hands of a person whose title to it purported to be derived through a prior indorsement, whether that indorsement was genuine or not. But it would protect him in no other cases" (*National Bank v Paterson* 1909 TS 322 326).

See also *Stapelberg NO v Barclays Bank DC&O* 1963 3 SA 120 (T) 126 and *Smith v Commercial Banking Co of Sydney Ltd* 1910 11 CLR 667 cited by Riley 163. In this respect section 58 SABEA resembles article 40 GULB, the last sentence of which reads that the drawee making payment "is bound to verify the regularity of the series of endorsements, but not the signature of the indorsers". See Kessler "Forged Indorsements" (1938) 47 *Yale Law Journal* 863 869. The consequence of this interpretation is that the section does not apply to an order cheque paid to someone who purports to be the payee and who signs the payee's name by way of identification. Kahn *Contract and Mercantile Law through the Cases* (1985) 601 correctly remarks:

> "The upshot of these decisions is that if the cheat makes out that he is the payee or indorsee, the bank is not protected, for the signature of the cheat does not purport to be an indorsement but only a means of identification. But if the cheat pretends that the signature is that of the payee or indorsee, the bank can invoke the protection of s 58, for the signature purports to be an indorsement. The result is that the protection of the bank often depends on the nature of the representation made by the cheat. Why the protection of the banker should depend on the type of representation made by a forger is not known."

2.2.4 The South African section 58 contains an important proviso not found in section 60 BEA viz: "Provided such indorsement does not purport to be that of a person who is a customer of the banker at the branch on which the said bill is drawn." The rationale for his provision is hardly acceptable. In his judgment on the history of section 19 of the Stamp Act, 1853, in *Charles and another v Blackwell and others* 1877 2 CPD 151 156, Cockburn LJ said:

> "Now the purpose of the enactment we are dealing with was, when cheques payable to order were expected to become general, to protect bankers against the possibility of forged indorsements ... . Against forgery of the writing of his own customers the banker must be assumed to be capable of protecting himself. He is, or ought to make himself acquainted with the signatures of his own customers. He cannot be acquainted with the signatures of the

> multitude of payees or agents who may have to indorse cheques drawn upon him and made payable to order. It was not unreasonable, therefore, that while the customer obtained the advantage of being able to draw cheques payable to order, the possibility of forged indorsements should be, as between him and the banker, at his risk. By making a cheque payable to order, the drawer obtained the advantage that if the cheque is stolen or lost before it reaches the payee, it cannot be paid without a forged indorsement, the risk of which many persons, who would not scruple to present a cheque payable to bearer, in fraud of the true owner, and pocket the proceeds, might yet be unwilling to run. Furthermore, he obtains through the indorsement of the payee an acknowledgement of the receipt of the cheque and of its payment. Obtaining this benefit, it was but reasonable that the possibility of a forged indorsement should be at his risk, or at all events be a question between him and the payee, leaving the banker free from liability ... ".

It is submitted that the proviso to section 58 defeats the purpose of the section: it is clearly a fiction to assume that a bank knows the indorsement of its customers or that it has the opportunity to verify them before payment. If section 58 is to be retained, the proviso should be deleted. (See *Stapelberg NO v Barclays Bank DCO* 1963 3 SA 120 (T) in which the proviso was in effect ignored because the customer's name had been changed through marriage.)

2.2.5 There is relatively little authority on the meaning of "the ordinary course of business". It appears to mean "the recognised or customary course of business of the banking community at large, not of any particular bank or group of banks" (Paget 391-3 and see Arora "Electronic Fund Transfers and the Law" (7) *Company Lawyer* 195 196) but this interpretation is not the only one that can be given to the phrase and, in fact, nothing in it indicates that compliance with the ordinary course of business of a particular bank would not be sufficient. In some cases there is no general course of business, such as requiring indorsements when paying over the counter. Also banks have different practices with regard to truncation, the return of paid cheques, etc. It is submitted that the construction that requires all banks to comply with the general course of business would restrict development.

Furthermore, the standard of care required by section 58 is objectionable because it allows the possibility of a bank being negligent but still acting in the ordinary course of business (Cowen 381-2; Paget 391-3; *Stapelberg NO v Barclays Bank DC&O* 1963 3 SA 120 (T) 123). While this interpretation is correct on the wording of the Act, the conclusion is not acceptable for it is tantamount to making bankers judges in their own cause. A much more suitable criterion would be the absence of negligence, a concept that takes into account the care and skill in the defendant's particular trade. See Boberg *The Law of Delict* (1984) 346ff; Pretorius *Aanspreeklikheid van Maatskappy-Ouditeure teenoor Derdes op Grond van Wanvoorstelling in die Finansiële State* (1986) 414; Van der Walt *Delict* paragraph

43. In any event, since the purpose of section 58 is to protect the bank against indorsements that appear to be genuine but are not, it is suggested that a clause similar to article 40 GULB be introduced in the proposed Cheques Act (see paragraph 2.2.3 above). The standard of care required, is discussed in paragraph 2.5 hereunder.

Section 58 is primarily concerned with the right of the drawee bank to debit the account of its customer. There is authority for the proposition that the drawee bank must perform its mandate in making payment without negligence. (See *Selangor United Rubber Estates Ltd v Cradock (No 3)* 1968 2 All ER 1073; *Karak Rubber Co v Burden* (No 2) 1972 1 All ER 1210; 3 Halsbury paragraphs 55 and 61.) To this section 58 makes an exception but there seems to be no reason to single out a specific problem (viz that of forged indorsements) and to subject the drawee to a different standard of care in respect of it. Crossed cheques, in any event, must be paid without negligence (section 79). (The third part of article 40 GULB provides that "[h]e who pays at maturity is validly discharged, unless he has been guilty of fraud or gross negligence" (see Malan et al *Provisional Sentence* 143-4.)

The standard of care set by the "ordinary course of business" is not always realistic. Cowen 380-1 gives the following examples (see also Malan 277):

> "The bank may competently give its own cheque in payment instead of cash. On the other hand payment against an irregular indorsement would not be in the ordinary course of business. Payment should be made during business hours, but payment within a reasonable margin after the advertised closing time may nevertheless be within the ordinary course of business. Payment is not made in the ordinary course of business where a large sum of money is paid over the counter in circumstances of suspicion; or where the bank sends banknotes through the post."

If this requirement was set to ensure that some care is taken to prevent payment being made to someone not entitled to it, the examples given are not convincing. Payment against an irregular indorsement certainly indicates a lack of due care (although section 83(1) now applies), but the same cannot be said of a payment made after business hours, which may or may not be in the ordinary course of business. Circumstances of suspicion certainly show a lack of due care but not the mere fact that a large sum of money is paid over the counter, which may be perfectly acceptable in the ordinary course of business. While the sending of banknotes may be out of the ordinary course of business it does not indicate a lack of care. The "ordinary course of business" is certainly not synonymous with due or reasonable care. At most some evidentiary weight could be given to what is done in the ordinary course of business, but it is submitted that it does not set a suitable standard on which the protection of

the paying banker should depend. Section 58 has, in any event, largely been superseded by section 79 SABEA, which applies to crossed cheques only. It is clearly important to impose a uniform standard of care, if only because every cheque is usually treated alike in the collection and payment process.

2.3 *Crossed cheques*

2.3.1 The crossed cheque originated in the workings of the London Clearing House and soon developed into a generally accepted and relatively effective method of protecting the owner of a cheque against the theft or loss of cheques (see Holden *History* 229-43). By crossing a cheque, the drawer qualifies his order to the drawee and instructs him to make payment to a bank (section 78; *Carpenters Co v British Mutual Banking Co Ltd* 1937 3 All ER 811 821; *Discounting and Shipping Co v Franskraalstrand Ltd* 1962 2 SA 559 (W) 562). By requiring that payment be made through the medium of a bank, the risk of paying a wrongful possessor is reduced: the collecting bank can be expected to take reasonable steps in opening an account for a customer and in accepting cheques for collection (see Malan 291ff). However, these practical measures taken by banks acquire real value only if they are legally enforceable at the suit of the true owner. Therefore clause 59 of the draft Cheques Act is proposed.

2.3.2 The crossing of cheques is regulated by sections 75 to 81 SABEA, which are based on the corresponding sections 76 to 81 BEA. Although the crossing of cheques is of English origin, the crossed cheque is also known in Europe and is there regulated by sections 37 and 38 GULC, which are very similar to the South African provisions.

The crossed cheque is often used in France where the duty of the drawee to pay only "to a banker or to a customer of the drawee" (article 38 GULC) is seen as "une protection (assez illusoire!) contre les risques que font courir la perte et le vol du chèque: le banquier présentateur devra vérifier l'identité et le domicile du client porteur du chèque" (Rodière and Rives-Lange *Droit Bancaire* (1980) 220 and see further Vasseur and Marin *Le Chèque* (1969) 250ff; Malan "Professional Responsibility and the Payment and Collection of Cheques" (1978) 5 *De Jure* 326 342-4; Ripert-Roblot II *Traité de droit commercial* (1992) 266ff).

Although the GULC provides for the crossing of cheques, the crossed cheque is not used in Germany. The Verrechnungsscheck, or cheque payable in account, is

better known there. By drawing a Verrechnungsscheck, the drawer prohibits its payment in cash: this he does by writing transversely across the face of the cheque the words "payable in account" ("à porter en compte" or "nur zur Verrechnung"). Such a cheque can be paid by book-entry, such as credit in an account, a transfer from one account to another, set-off or clearing house settlement only (article 39 GULC). The drawee who pays a cheque in any other way is liable for possible resulting loss (article 39 GULC), and a bank collecting a Verrechnungsscheck may be subject to a delictual action if it collects payment for the account of someone not entitled to it (see Malan "Professional Responsibility and the Payment and Collection of Cheques" (1978) 5 *De Jure* 326 338ff 341-2; Zöllner 166-8; Baumbach-Hefermehl 618ff).

Both the crossed cheque and the cheque payable in account are provided for by the Uncitral Cheque Draft (articles 68-72). See Murray "Drafts, Promissory Notes and Checks: A Comparison of Civilian, Quasi-Civilian and Non-civilian Suggestions" (1983) 15 *Lawyer of the Americas* 211 252-3. The provisions of article 70 are important:

> "(1) (a) A cheque which is crossed generally is payable only to a banker or to a customer of the drawee.
> (b) A cheque which is crossed specially is payable only to the banker to whom it is crossed or, if such banker is the drawee, to his customer.
> (c) A banker may not take a crossed cheque except from his customer or from another banker who may not collect such a cheque except for such a person.
> (2) The drawee who pays, or the banker who takes or collects, a crossed cheque in violation of the provisions of paragraph (1) of this article incurs liability for any damages which a person may have suffered as a result of such violation, provided that such damages do not exceed the amount of the cheque."

It is submitted that the imposition of liability on the bank collecting payment of a crossed cheque is a necessary corollary for the prohibition of its payment in cash. The matter is more fully discussed in the commentary to clause 59 of the proposed Cheques Act.

2.3.3 Section 75 SABEA provides for both general and special crossings on cheques as does article 27 GULC.

A cheque is crossed generally when across its face have been added (a) the words "and Company", or an abbreviation of them, between two parallel transverse lines, with or without the word "not negotiable"; or (b) two transverse parallel lines, with or without the words "not negotiable" (section 75(1) SABEA). It is clear from

this description that the words "and Company" or any abbreviation of them do not add to the crossing. No particular consequences follow from a cheque so crossed. The words "and Company" are of historical origin (Holden *History* 230) and their presence on a crossed cheque is meaningless (see *Standard Bank of SA Ltd v Sham Magazines Centre* 1977 1 SA 484 (A) 504). It is submitted that there is no need to provide for them in the Act.

To provide specifically for the words "account payee" or "account payee only" added to a crossing would serve no purpose. It is submitted that these words do not necessarily give any specific or additional protection to the drawer of a cheque (*Manning Report* paragraph 68ff and, on this kind of crossing, see Murray "Crossed Cheques, Account Payee, and Non-negotiable Checks: Some Suggestions from Foreign Law" (1968) 20 *Hastings Law Journal* 273 281-2); Holden "Suggested Reform of the Law relating to Cheques" (1951) 14 *Modern Law Review* 33). Their meaning has been considered in *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) 504 in which it was said:

> "He [the drawer] may also, by established practice and custom, although not by statutory sanction, add the words 'a/c payee' or 'a/c payee only' between the parallel crossing lines. These words have no effect on the transferability of the cheque. They may operate as some safeguard if the cheque should fall into wrong hands. They are, in effect, a direction to the collecting banker that the specified payee should receive the money. These words cease to have any operation if the payee specified in the cheque transfers it (eg by special endorsement) because thereupon the specified payee parts with his right to receive the money."

See Cowen "Two Cheers (or maybe only one) for Negotiability" (1977) 40 *THRHR* 19; Gering "Crossed Cheques Inscribed 'A/c Payee' or 'Not Transferable'" (1977) 94 *SALJ* 152. Whether the safeguard referred to is a practical or a legal one, is discussed in the commentary to clause 59 of the proposed Cheques Act that deals with the liability of the collecting bank. The words "not transferable" or similar expressions prohibiting transfer prevent the negotiation of the instrument (Malan 116ff) but do not deprive the drawee of a crossed cheque from the protection given by section 79 *(Gishen v Nedbank Ltd* 1984 2 SA 378 (W), but see section 9 of the repealed Crossed Cheques Act, 1876 which applied only to cheques payable to order or to bearer (section 3 sv "cheque")).

The effect of the words "not negotiable" and "not transferable" on a bill or a cheque is discussed in the commentary to clause 26 of the proposed Bills of Exchange and Promissory Notes Act and clause 59 of the proposed Cheques Act.

2.3.4 A cheque is crossed specially when across its face has been added the name of a bank, with or without the words "not negotiable" (section 75(2) SABEA). It should be noted that it is not necessary that a specially crossed cheque bear two parallel transverse lines. The special crossing of cheques is a rare occurrence in South Africa. Some banks used to cross cheques deposited for collection specially to themselves but this is now seldom or never done. State departments and large organisations also occasionally cross cheques drawn in their favour specially to their bankers. Sometimes a reference to the payee's account is added to the crossing, but it is submitted that such a reference forms no part of the crossing itself, ie it does not prevent the drawee from relying on section 79 or the other provisions of the Act relating to crossings. (The same applies, it is suggested, where the account number of the payee is stated after his name on a crossed cheque (see the suggestion of Gering (1977) 94 *SALJ* 160) - the drawee paying in terms of section 79 can debit the drawer even if payment is not made to the stated account of the specified payee (see *Gishen v Nedbank Ltd* 1984 2 SA 378 (W).) Whether a special crossing in practice adds to the protection of the drawer is doubtful: that a cheque is crossed specially to a bank does not prevent its payment to another bank who is the agent of the former (sections 78(2) and (4), 76(5) and 79 SABEA). Apart from that, a special crossing (or any other crossing) can give effective legal protection to the drawer or true owner only if the law imposes some form of liability on the collecting bank. A special crossing cannot be particularly effective in a system comprising relatively few banks each with numerous clients. Moreover, special crossings place unnecessary and onerous duties on banks. It is therefore submitted that the proposal made in the *Manning Report* (paragraph 67) be followed: "Simplicity and standardisation ... would be achieved by providing that the only manner in which a cheque can be crossed is by the addition of two parallel transverse lines ...". Section 53 of the Australian Cheques and Payment Orders Act 1986 gives effect to this recommendation.

2.3.5 Section 79 provides that, where a crossed cheque is paid in terms of the crossing, in good faith and without negligence

> "the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof".

Holden *History* 229 refers to this section as "one of the most puzzling provisions of the Act", because the paying banker is already protected in respect of forged indorsements by section 60 BEA (section 58 SABEA). He states at 237:

> "It is doubtful whether it was necessary to insert this section in the 1876 Act: Section 19 of the Stamp Act, 1853 was still in force and applied to all drafts drawn upon bankers payable to order on demand. Possibly, it served a useful purpose by emphasising that the protection would be available only in cases where due regard had been paid to the crossing. What is quite certain is that it was most unfortunate that the draftsman of the 1882 Act re-enacted its provisions, instead of dealing with the position of the paying banker comprehensively in a single section."

This point is clearly valid but equally valid is another raised by Holden *History* 237. Referring to the last phrase in section 79 he says:

> "It was enacted that where a crossed cheque has come into the hands of the payee, the drawer shall be placed in the same position as if the cheque had been paid to the true owner. Most of the books are discreetly silent as to the significance of this provision, and it is not easy to see what useful purpose it serves. The present writer's suggestion is that the enactment was designed to modify the principle laid down in Charles v Blackwell (1877). The rule is that a debt may be extinguished by the creditor's taking a cheque in respect of it, provided (and this is the vital requirement) the payment is a good discharge of the cheque. Let it be assumed that a creditor takes a bearer cheque and loses it. Payment is made to the finder. If the creditor then sues the debtor, the latter would be entitled to say: 'I gave you an instrument which you were willing to take in satisfaction of your debt if the drawee paid its amount to the bearer, and this the drawee has done.' If an unindorsed order cheque was lost after it had been received by the creditor, then apparently this rule, in the absence of some statutory provision would not apply; and if this is correct, the creditor could maintain that the debt had not been extinguished. Thus, as shown above, the legislature intervened, and placed the drawer of a crossed cheque in a more favourable position than the drawer of an open one."

(On section 79, see Riley 202-3 207-8; Paget 395ff; Chalmers & Guest 638; Byles 304ff; Richardson 107ff; Holden 1 *Law and Practice* paragraph 7-70 to 7-81 at 232-3; Chorley 101-2; Malan 295-7; 3 Halsbury 45-6; Ellinger "Collection and Payment of Cheques" 1969 *Western Australia Law Review* 101 110-14; Tyree *New Zealand Banking Law* (1987) 216ff.)

It should be noted that the section does not state that a crossed cheque is discharged by payment in terms of section 79, although the section in effect achieves that result. This, it is submitted, follows from the provision placing the drawee bank and the drawer in the same position as if payment had been made to the true owner.

It would clearly have been much simpler to provide that a crossed cheque is discharged if paid in the circumstances envisaged by section 79. It is further proposed

that such a provision should apply to all cheques, whether crossed or not: in practice all cheques presented for payment by another bank are treated in the same manner.

It follows that if a cheque is paid in terms of this clause, the underlying debt for which it is given would also be discharged. See *Charles v Blackwell* 1877 2 CPD 151, 46 LJQB 368 370-71; Malan 243-4; Joubert "Aspekte van die Verhouding tussen die Wisselkontrak en die Onderliggende Ooreenkoms" 1986 *De Jure* 358; Oelofse "Die Posisie van die Trekker en Betrokkene Bank na Onreëlmatige Betaling van 'n Tjek" 1983 *Modern Business Law* 12. While this clause may in some measure extend the rights of drawee banks to debit the accounts of their customers with the amounts of cheques paid, the practical effect of the proposal would be negligible, for section 58 already protects the paying bank against forged or unauthorised indorsements and section 83 against unindorsed or irregularly indorsed cheques (whether crossed or not). The advantages of the proposal are that it introduces a uniform standard of care that will apply to all cheques. It also substitutes the "ordinary course of business" of section 58 with the requirement that payment be made to a bank or to a customer of the drawee by crediting his account or to a person who *appears* to be holder.

2.3.6 Section 78(4) SABEA provides that where a cheque is paid contrary to the provisions applying to crossings, the bank paying the cheque is liable to the true owner of the cheque for "any loss he may sustain owing to the cheque having been so paid".

In this respect Oelofse "Die Posisie van die Trekker en Betrokkene Bank na Onreëlmatige Betaling van 'n Tjek" 1983 *Modern Business Law* 12 20 remarks:

> "Myns insiens is daar beginselprobleme met die vordering waarvoor a 78(4) voorsiening maak, sowel as met die moontlike deliktuele aanspreeklikheid van die betrokkene bank teenoor die ware eienaar. Afgesien van die 'kortpad' wat deur die direkte aksie moontlik gemaak word, skyn daar ook nie juis sterk beleidsoorwegings te wees waarom sodanige aanspreeklikheid behoort te bestaan nie. Daar word aan die hand gedoen dat die betrokkene bank onder geen omstandighede weens onreëlmatige betaling teenoor die ware eienaar aanspreeklik behoort te wees nie. Dit noodsaak ook 'n wysiging van a 78(4) in sy huidige vorm. Myns insiens behoort a 78(4) slegs te bepaal dat 'n betaling in verontagsaming van 'n kruising nie 'n reëlmatige betaling is nie en nie die tjek aflos nie. Dit sal tot gevolg hê dat die trekker nie ingevolge a 79 bevry word nie en dat die bank nie die trekker se rekening mag debiteer nie. Selfs indien a 78(4) eenvoudig geskrap word, sal dit steeds die geval wees. Soos sake nou staan, is a 79 en 78(4) maar moeilik te versoen. Artikel 79 veronderstel nie-aflossing van die tjek en die behoud van die trekker se aanspreeklikheid indien die kruising verontagsaam word, terwyl a 78(4) veronderstel dat die ware eienaar skade ly."

This argument, it is suggested, ignores the phrase "for any loss he may sustain" in section 78(4) (see *Channon v English Scottish and Australian Bank* 1918 18 SR (NSW) 30 38; Riley 201). It is true that where a cheque is not discharged (or a crossed cheque not paid in terms of section 79) the owner's rights upon it remain unaffected, and he may vindicate it or obtain a duplicate and represent it for payment (see Oelofse 18). Only where the cheque is discharged (or paid in terms of section 79) his rights fall away. His loss, in other words occurs, when his personal rights on the instrument cease. But this is not the only way in which the owner may suffer a loss: where the drawer absconds or is insolvent, the owner's recourse against him becomes worthless, and where the credit on his account is used for payment of the cheque, his loss may be recoverable in terms of section 78(4), being loss suffered "owing to the cheque having been so [contrary to the crossing] paid".

Where the drawer is the true owner of the cheque and it is paid contrary to the crossing, the drawee cannot debit the drawer's account: this conclusion need not derive from section 78(4) but from contract (Malan 317-8; Oelofse 18-9; *Nedbank v Gishen* 1984 2 SA 378 (W); 3 Halsbury paragraph 57 at 47). In this respect reliance on section 78(4) is unnecessary. But Oelofse's submission that the remedy given by section 78(4) be deleted is valid since the mere fact that the drawer cannot, in principle, be debited with the amount of a cheque paid contrary to the provisions relating to crossings is sufficient to prevent the cash payment of crossed cheques.

2.3.7 Section 76 provides who may cross a cheque, viz the drawer or the holder, both of whom may cross it either generally or specially. In addition, the holder may add the words "not negotiable" to a crossed cheque. The bank collecting a specially crossed cheque may cross it specially to another bank for collection, and a collecting bank may cross an uncrossed or a generally crossed cheque specially to itself. In view of the proposed simplification of crossings, clause 51(2) now provides that a cheque may be crossed by the drawer, the holder or by a collecting bank.

Clause 51(3) specifically provides for the cancellation of crossings: "A crossing may be cancelled only by the drawer deleting the crossing and placing his signature next to the deletion." It is advisable to provide specifically for the cancellation of crossings, an area of some uncertainty under the Act. (See section 77 SABEA, which provides that a crossing is a material part of a cheque and section 62 SABEA on material alteration.) As Cowen 1982 *Acta Juridica* 124 remarks, "it is intolerable that a question so important to bankers and to the general business community should be left in such a confusing state."

2.3.8 Clause 51(5) of the proposed Cheques Act provides that there cannot be a holder in due course of a crossed cheque. This sub-clause is commented upon under clause 51 of the proposed Cheques Act.

2.4 *Section 83*

Section 83 SABEA extends the protection available to paying banks. In broad terms, it corresponds with the provisions of the Cheques Act of 1964, which was preceded by the *Report of the Committee on Cheque Endorsement* Cmnd 3 of 1956 (the *Mocatta Report*). It was enacted after the publication of the *Report of the Select Committee on the subject of the Bills of Exchange Amendment Bill* June 1963. The purpose of sections 83, 84, 85 and 86 SABEA is to provide for unindorsed and irregularly indorsed instruments, ie their payment, collection and evidentiary value. Generally, these provisions are retained in the proposed Cheques Act although some changes have been made. For example, the phrase "in the ordinary course of business" is omitted (see paragraph 2.2.5 above) and the reference to the discharge of the instrument in section 33 SABEA is left out (the wording of section 83 is possibly vaguer than intended; it would, for instance, on a literal interpretation, apply to a "non-transferable cheque" (this question was left open in *Gishen v Nedbank Ltd* 1984 2 SA 378 (W)).

In the case of an instrument that is not indorsed or irregularly indorsed, the person or bank to whom payment is made does not qualify as a holder. Chorley 81 maintains the view that "irregularly indorsed" in section 1(1) of the Cheques Act 1964 "is intended to cover cases where the indorsement upon the instrument does not sufficiently correspond with the designation of the payee, or special indorsee, appearing therein to satisfy the requirements of the law" so that the transferee cannot be holder and the instrument is not discharged by payment to him. The requirement that payment in order to effect a discharge be made to a holder (section 1 sv "payment in due course") is replaced in section 83 by the provision that payment be made by crediting the account of a customer or paying to another bank. This requirement is retained in clause 54(2) of the proposed Cheques Act.

Irregularities in indorsements can also attribute notice to the payor or purchaser of an instrument of claims and defences available to parties to it (see the commentary to clause 28 above). Section 83 SABEA also protects the drawee in this respect, and the essence of this protection is reproduced in clause 54(2) of the proposed Cheques

Act, which provides that the drawee shall not be attributed notice by reason only of the absence of, or irregularity in, any indorsement.

2.5 *The standard of care*

2.5.1 Section 57(1) SABEA states that a bill is discharged by payment in due course, which is defined in section 1 as payment at or after maturity to the holder and "in good faith" and without notice of any defect in the title of the holder. "Good faith" is equated with "honesty" in section 94. Both these concepts have been defined in this draft (see clause 1) and the question arises whether they set suitable criteria for the discharge of the instrument.

It should be noted, however, that the need to provide for a "payment in due course" exists because there may be circumstances where the holder is not entitled to the instrument. Should he indeed be entitled to it and to the rights flowing from it, payment to him extinguishes those rights whether or not the payor had notice of any irregularity. This follows from ordinary principles but is implicit in the definition of "payment in due course" as well: if the person to whom payment is made has a complete title to the instrument, and a holder in due course has a "good and complete" title (section 36(c)(i) SABEA), notice of defects in the title of prior parties will not invalidate the payment. Moreover, to be effective, payment need not be made with any particular state of mind: thus, a payment "in bad faith" also discharges the debt. See Van Zyl *Negotiorum Gestio in South African Law* (1985) 84ff. "Payment in due course" thus provides for the exceptional case where the holder is not the owner. Problems that arise in this regard concern not only the standard of care required but also the nature of the payor's knowledge.

A further point needs to be made: "payment in due course" concerns the discharge of the parties from liability on the instrument. Although it is a bank's duty to discharge cheques, etc, drawn by his customer, the act that an instrument is discharged does not automatically give the bank the right to debit its customer. Ellinger "Collection and Payment of Cheques" 1969 *Western Australia Law Review* 101 at 105 correctly remarks:

> "It is important to bear in mind that the relationship between the paying banker and his customer is not governed by the cheque: the banker, as drawee, is not even a party to it. Their contract is regulated by the terms agreed upon at the time of the opening of the current account. This contract requires the banker to adhere to the customer's instructions. If the banker fails to adhere to these instructions, he commits a breach of his contract even if he pays the cheque in due course. A good example is that in which a banker pays a cheque which has been countermanded by his customer. If the banker pays the cheque in the honest belief that the payee has a good

> title, then, despite the fact that the banker may have been negligent, this constitutes payment in due course. But as the banker has exceeded his mandate, he will not be entitled to debit the customer's account."

Quite apart from the example given, the bank and customer contract may impose more onerous duties of care on the bank. These duties may affect the bank's rights to debit the customer with the amount of discharged instruments, but it is also possible that the bank's duty may be alleviated by contract.

2.5.2 The third part of article 40 GULB provides that "[h]e who pays at maturity is validly discharged, unless he has been guilty of fraud or gross negligence". The interests of the drawee in this provision are taken to mean that mere knowledge of defects in the holder's title does not nullify the payment. The drawee or acceptor must know of the defects and be able to prove them.

The same approach is used to determine whether payment has been made with gross negligence: it is not enough that the drawee should have known that the holder was not entitled to the instrument, he should, in addition, have failed to realise that this could have been easily proved. Only when both requirements are met can his negligence be regarded as gross. See Baumbach-Hefermehl 309-10; Zöllner 109-10; Ronse II 501; Hueck-Canaris 130ff; Roblot 298-9. In the debates at the Geneva Conference, Percerou declared:

> "A drawee might be dealt with more liberally than a third party who had acquired the bill. The third party, before acquiring the bill, might get all the information, and in that case there was a certain delay. But the drawee to whom the bill was presented at maturity was compelled, under pain of having a protest drawn up against him, to pay immediately. For that reason, an attempt has been made to make him responsible only for a payment wrongfully made in the case where there had been unequivocable fraud on his part - that was to say, fraud conditioned by gross negligence."

(See *Records of the International Conference for the Unification of Laws on Bills of Exchange Promissory Notes and Cheques* (1930) at 392). Ronse II 497 states:

> "De schuldenaar moet de eisbare wisselschuld onverwijld betalen in handen van de houder, en beschikt uiteraard niet over de tijd om een onderzoek in te stellen nopens de geldigheid van de verkrijging van de wisselbrief, de identiteit van de houder of diens bekwaamheid. Meer nog dan de verkrijger, die zich zonder meer kan onthouden, moet de schuldenaar veilig kunnen afgaan op de schijn van recht die voortvloeit uit de formele legitimatie van de houder."

What is protected in article 40 GULB is the payer's good faith that the holder is entitled to receive payment (see Ronse II 499; Baumbach-Hefermehl 290-91). Ronse II 499 remarks:

> "Op de schijn van recht die door de formele legitimatie verschaft wordt kan de betaler dus in algemene regel veilig vertrouwen. Artikel 40, derde lid, is uiteraard geschreven voor het geval dat de formeelgelegitimeerde houder niet de werkelijk gerechtigde is, onbekwaam, of onbevoegd om betaling te ontvangen." (See further Pleyer "Die Bankgarantie im zwischenstaatlichen Handel" *Sonderbeilage* Nr 2/1973 zu Teil IV Nr 27 vom 7. Juli 1973 *Wertpapier-Mitteilungen* 18 and Malan et al *Provisional Sentence* 137ff).

2.5.3 The GULB has much to commend it: negligence is a well known concept and capable of being applied to all kinds of situations; it is flexible and dynamic and more suitable than expressions such as the "ordinary course of business" and perhaps also "notice". However, in our law it is customary to define the circumstances under which a payment is liberatory with reference to the concept of "notice", and no change is proposed. On the other hand, the Act is not quite clear on the circumstances of which the payor must be ignorant, and some changes in this respect are set out in clause 61(1)(b) and (3)(b).

2.5.4 A payment is made "in due course" if made to the holder "in good faith and, if his title to the bill is defective, without notice thereof" (section 1). Section 27(2) gives some indication of the circumstances under which a person's title is defective:

> "In particular the title of a person who negotiates a bill is defective within the meaning of this Act if he obtained the bill, or the acceptance thereof, by fraud or other unlawful means, or for an illegal consideration, and is deemed to have been so defective if he negotiates the bill in breach of faith, or under such circumstances as amount to fraud."

However, these are not the only circumstances in which a holder's title is defective: the subsection starts with the words "in particular". "Defects in title" thus include both claims for the instrument and defences in rem against the holder's claim. (See Malan paragraph 212 183ff and Cowen 273-4.) To determine to what extent defences or claims available to third parties would affect payment is a matter of some complexity, involving the question of the so-called ius tertii.

2.6 *Ius tertii*

2.6.1 A ius tertii concerns "the right of a party who has no defense of his own to set up in defence the outstanding legal or equitable right of restitution of a third party

who is not a party to the litigation" (Britton 462). The Bills of Exchange Act 1964 deals with this matter only partially, as is illustrated by the following examples.

Section 22 SABEA provides that a forged or unauthorised signature is "wholly inoperative". Where the defendant relies on a forged indorsement to resist the plaintiff's claim, he in effect raises a ius tertii, viz that some other person, the owner, is entitled to the instrument. (In this case, the plaintiff would in any event not qualify as a holder (the exceptional case covered by section 53(2)(b) SABEA aside).) Thus, where the genuineness or authority of an indorsement is in issue, a ius tertii may be invoked.

Sections 52 and 53 SABEA contain fairly detailed provisions in terms of which the acceptor, the drawer and an indorser are precluded from raising matters that would otherwise have constituted good defences to the holder's claim.

Section 33 SABEA provides that where 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". In other words, this section prevents the parties from raising the point that payment was premature and effected before fulfilment of a condition on which the holder's status depends.

Section 20(2) SABEA goes somewhat further than section 52 and 53 but is limited to minors and corporations.

2.6.2 These provisions do not cover the entire field of the ius tertii. Nor do they provide a comprehensive approach to the problem. At most they exclude reliance on certain third party rights. The definition of "payment in due course" in section 1, on the other hand, may give the impression that all kinds of third party rights can be raised.

Britton 466 refers to the argument that,

> "implications may be drawn ... to the effect that a voluntary or an involuntary payment, made not in good faith would not operate as a discharge. If a voluntary payment, made in good faith, discharges the instrument, it would seem that the implication would be that a payment made in bad faith would not be a discharge. If this be granted, the further implication seems plausible that a court would not by judgment against the defendant compel him to pay the instrument to a holder, to whom, if the payment had been made voluntarily, would not constitute a discharge.
> "In short, the implication ... is that a payment made in bad faith, that is with notice that the plaintiff's title is defective, either voluntarily or involuntarily, will not constitute a discharge".

Thus, where the payer knows that a prior party stole the instrument, payment by him to a holder (other than a holder in due course) will not be in due course, and it

follows that he will be able to raise this as a defence when sued on the instrument by such holder. But it is not so clear from the Act when a holder's title will be defective: section 27(2) is not exhaustive (see paragraph 2.5.4 above). This provision gives the impression that a holder's title will be defective only where he himself, and not a prior holder, is guilty of wrongdoing of the kind specified. But then the requirement that payment in due course be made in good faith may, some submit, give the impression that all kinds of ius tertii are permissible as defences.

Britton 468-9, however, is critical of this view:

> "There are a number of considerations which make it just to deny the defendant the right to set up the ius tertii unless its owner will be bound by the judgment obtained by plaintiff holder of the defective title. In the first place, even without action against him, a party to a bill or note who has been called upon for payment should be allowed to discharge it by payment to the holder despite the fact that the payor knows the holder has a defective title. The payor should be allowed to terminate the running of interest. His credit is adversely affected by the circulation of the instrument after maturity. Where the payor knows none of the facts which create the defective title of course his payment discharges him, though even here he may have to prove his lack of knowledge in a law suit brought against him by the owner of the equity of ownership. Where the payor knows some of the facts, but not enough to convince him that the holder has a defective title, he will pay the holder at the risk of being held to have paid in bad faith in a subsequent suit against him brought by the equity owner. The injustice to the payor is that he may be compelled to pay twice and then to sue the party to whom he first paid to recover on quasi-contract grounds the sum erroneously paid to him. If the instrument has years to run, the same problems repeat themselves with respect to periodic interest payments. The payor with some knowledge of the defective title in the holder is in no better position if he refuses to pay the holder and forces the latter to sue him. If the defendant sets up the outstanding equity of ownership and proves it, then of course the defendant wins, but the defendant may fail to prove it when, if all the evidence could be had, the existence of the equity would be established. The result would be that he must pay the plaintiff's judgment. This judgment cannot be binding upon the owner of the outstanding equity. The latter may sue the judgment debtor and be able to prove his equity. The judgment debtor must then pay again. Hence on the merits of the question, the defendant should not be allowed to set up an outstanding equity of ownership because of the possible injustice to him.
> "The interests of the owner of the outstanding equity are not always best subserved by allowing the defendant to prove it in defense. The equity owner, despite his right to obtain restitution of the instrument, may be satisfied with the bargain. Or, if he is not satisfied with the bargain, it may be to the equity owner's interest to sue the holder of the defective title in some tort action, if the facts justify it. Or, especially in the case of long term paper, the equity owner may want to get the instrument back. Of course, the primary party can't be sued before maturity but an indorser as a vendor may be sued before maturity if he has broken any of the warranties which Sections 65 or 66 have imposed upon him. All things considered, the disposition of the equity of ownership is personal to the owner and it should not be the subject of adjudication in any litigation which will not be binding upon such equity owner. This situation, along with the possible injustice to the defendant, would seem to make it highly desirable that the general principle should be that a party to a bill or note when sued thereon should not be allowed to set up in defense an outstanding equity of ownership in a third party unless such third party by some appropriate procedure, will be bound by the result."

2.6.3 The views of Britton appear to be reflected in the Uniform Commercial Code. Section 3-306 provides that a holder other than a holder in due course takes the instrument subject to

> "(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of a third party to the instrument is not otherwise available as a defense to any party liable thereon unless the third party himself defends the action for such party".

From the Official Comment (5) to this section it is clear that the motivating idea is that the holder acquires a direct right against the parties liable:

> "The contract of the obligor is to pay the holder of the instrument, and the claims of other persons against the holder are generally not his concern. He is not required to set up such a claim as a defense, since he usually will have no satisfactory evidence of his own on the issue; and the provision that he may not do so is intended as much for his protection as for that of the holder. The claimant who has lost possession of an instrument so payable or indorsed that another may become a holder has lost his rights to the instrument, which by its terms no longer runs to him. The provision includes all claims for rescission of a negotiation, whether based on incapacity, fraud, duress, mistake, illegality, breach of trust or duty or any other reason. It includes claims based on conditional delivery or delivery for a special purpose. It includes claims of legal title, lien, constructive trust or other equity against the instrument or its proceeds. The exception made in the case of theft is based on the policy which refuses to aid a proved thief to recover, and refuses to aid him indirectly by permitting his transferee to recover unless the transferee is a holder in due course."

Section 3-603 UCC is also based on the idea that the formal holder is creditor: Official Comment 2 to this section states: "His contract is to pay the holder of the instrument, and he performs it by making such payment. Except in cases of theft or restrictive indorsement there is no good reason to put him to inconvenience because of a dispute between two other parties unless he is indemnified or served with appropriate process." The section provides:

> "(1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This section does not, however, result in the discharge of the liability
> (a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or

> (b) of a party (other than an intermediary bank or a payor bank which is not a depository bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not inconsistent with the terms of such restrictive indorsement."

2.6.4 A similar approach is found in the Uncitral Convention. Article 25(3) provides that a party may not raise as a defence against a holder who is not a protected holder (holder in due course) the fact that a third person has a claim to the instrument unless "(a) such third person asserted a valid claim to the instrument; or (b) such holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft". The comment (10) justifies rule (a):

> "(a) the rule protects a party liable on the instrument since his liability will be discharged by his payment to the holder even if the party has knowledge of the claim of another person ... (b) it is not proper to allow a party to raise a defence based on a claim which the person entitled to it does not himself wish to raise. However, if such person asserts his claim the defence of ius tertii is available".

Article 68 provides for the discharge of the instrument by payment:

> "(1) A party is discharged of liability on the instrument when he pays the holder, or a party subsequent to himself who has paid the instrument and is in possession thereof, the amount due pursuant to article 66 or 67:
> (a) At or after maturity; or
> (b) Before maturity, upon dishonour by non-acceptance.
> (2) Payment before maturity other than under paragraph (1)(b) of this article does not discharge the party making payment of his liability on the instrument except in respect of the person to whom payment was made.
> (3) A party is not discharged of liability if he pays a holder who is not a protected holder and knows at the time of payment that a third person has asserted a valid claim to the instrument or that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery."

In the commentary on this article the view is taken that the decisive question, where the payor has knowledge of a claim, is whether he is under an obligation to pay (paragraph 14). The drawee who has not accepted is not obliged to pay, but presumably his position is, in this regard, the same as that of the acceptor. The rule in article 68(3) then amounts to this: "Payment to the holder who is not a protected holder discharges the payer only if he cannot raise the defence of ius tertii under article 25(3) against such holder" paragraph 15).

2.6.5 From the above it appears that an important consideration in disallowing a ius tertii is the view that every holder of the instrument is its creditor, viz beneficiary of

the personal rights arising from the instrument. This view implies that the defendant should not be allowed to raise a ius tertii or should be allowed to raise it only in very limited circumstances. Britton 471ff discusses the question whether a party is entitled to set up the defence against a remote party (other than a holder in due course) that the instrument was stolen by the plaintiff. His argument rejecting one of the reasons why the holder should not be entitled to succeed is instructive. He says 472:

> "The difficulty with this solution is that the primary assumption is wrong - wrong in the sense that the assumption that a thief of a bearer instrument does not have title causes more trouble in the law than does the assumption that the thief does have title and is the holder, and therefore is unwise to adopt."

The view that every holder, thief or not, is creditor, is taken to its extreme by Chafee "Rights in Overdue Paper" (1918) 31 *Harvard Law Review* 1104 1112-3 who states:

> "The legal title to a negotiable instrument throughout its existence belongs to the person to whom the promises run by the terms of the instrument if he has possession, no matter how that possession came to him. ... A thief has legal title to a negotiable instrument payable to bearer or indorsed in blank. It is high time to stop being squeamish about this. Other bad men are admitted to have legal title to negotiable instruments, and sometimes to chattel as well - defrauders, absconding trustees, impersonators. Of course the thief is, like them, subject to the equities of his victim, but like them he does have legal title ...".

And at 1115 he continues:

> "Some jurisdictions ... take the sounder view that the ius tertii, the right of a person who is not a party to the suit, cannot be set up as a personal defence. Even so, the thief would have no standing in court, on grounds of illegality and public policy, for no court would lend its aid to carry through a crime and enable him to cash in his plunder. Once the thief gets into the purview of justice, the criminal law cuts across the law of property and nullifies the advantages of his legal title, just as it disregards the legal title of the counterfeiter to his plates and acids and hands them over to the police."

Although these views enjoy wide support, they are not convincing. It is not correct to elevate every holder to creditor in respect of the instrument. A thief simply does not have title and there is no need to regard him as possessing any of the rights in respect of the instrument. However, what is correct is that every factual holder *appears* to be creditor and entitled to the rights flowing from the instrument. (See more fully Malan 14ff and Cowen (1985) 100ff.) The drawee or other person making

payment is entitled to rely on this appearance when discharging the instrument. Every holder is furthermore deemed to be a holder in due course (section 28(1) SABEA) so that payment to the holder is deemed, until the contrary is proved, to have been made to the true owner. In other words, the law protects the good faith of the payor when payment is made.

2.6.6 Of importance in excluding reliance on a ius tertii is the consideration that the third party entitled to the ius tertii will not be bound by the outcome of litigation between the drawee and the holder (see paragraph 2.6.2 above). The UCC, consequently, allows a ius tertii to be raised as a defence only where the third party himself defends the action (section 3-306 (1)(a) UCC). The Uncitral Convention allows a ius tertii to be raised only where the third party has asserted a claim on the instrument or where the holder has acquired the instrument by theft or forgery (article 25(3)(a) and (b)). On this view, the availability of a ius tertii depends on whether the third party *asserts* his rights.

The view that the defendant should be able to raise a ius tertii only where the third party will be bound by the outcome of the dispute between the payor and the holder is important. The Uncitral Convention, furthermore, allows a ius tertii to be raised only where the third party has asserted a claim to the instrument. However, although these considerations are valid, they are not decisive. Certainly, in appropriate cases a third party can and should be joined in the suit between the payor and the holder, in which even he will be bound by the outcome. But the main objection to the requirement that a ius tertii is permissible only where the third party asserts a claim is that the fact that his assertion of certain rights is irrelevant in determining whether he indeed holds any rights in the instrument. The relevance of the fact that the third party has asserted his rights and the evidence he has supplied lies rather in the bearing they have on the state of mind of the payor. If the third party is able to substantiate his claim and not merely assert it, the drawee may be in bad faith if he makes payment. In this respect, it is submitted, there is little difference between the holder's "own" title being defective and a predecessor's. Nothing in this paragraph is intended to mean that the drawer/payor should not in an appropriate case obtain a court order preventing payment: a court order can at best be merely declaratory, whether it should be granted is a matter of substantive law.

It is true that the drawee or person paying may not always have at his disposal sufficient evidence to show that the holder's title is defective or that a third person is

entitled to the instrument. The payor is certainly at risk, but this problem does not arise only in cases of a ius tertii. The drawee can also be in jeopardy when the holder's own title is defective. The drawee or acceptor is faced with two potentially conflicting claims: that of the holder and that of the drawer. Dishonour may, furthermore, harm his own credit worthiness, whether he is faced with a ius tertii or a defect in the holder's "own" title.

Some differentiation in the requirements for holding in due course and paying in due course is justified. The purchaser has time to decide whether to purchase, the drawee to pay promptly, often without the opportunity to investigate. No change is proposed to the present law affecting the purchaser in this regard. The drawee, on the other hand, is dealt with differently (see paragraph 2.5.2 above), and it is submitted that the circumstances of which he may not have notice be specifically stated.

2.6.7 The availability of a ius tertii touches on the very foundations of cambial liability, and in summary some observations would be appropriate. The first point is that not every holder is owner or creditor in respect of the instrument in his possession. Although it is correct that the Act imposes on the parties the duty to pay to the holder (sections 52 and 53 SABEA), there are circumstances in which the factual holder possesses no rights in respect of the instrument: rather the true creditor or holder of the rights flowing from the instrument is the owner of it. Pothier 1.6.3 remarks that for payment of an instrument to be valid, it must be made "aen den waaren schuldeischer, dat is, aan den Eigenaar van den Wissel, of aan den geen, die bevoegdheid of magt heeft, om voor hem te ontfangen". (See, in this regard, Malan 8-9 and authorities cited.) There may, however, be circumstances in which the owner of the instrument lacks any personal rights to it, as where he continues to hold it after the underlying contract between him and the drawer has been cancelled. These will be dealt with later.

It follows that a payment is valid if it is made to the owner of the instrument, whether the owner is holder and whether or not it is made in good faith or with knowledge of "irregularities" in the history of the instrument. Payment to the owner, ie the creditor, extinguishes the right. This conclusion is based, not on the Act, but follows from ordinary common-law principles. Payment to the owner may, but need not necessarily be, a payment "in due course" as defined in section 1 SABEA. Where the owner is paid, the instrument is discharged because of the provision of clause 61(1)(a) and it is not necessary to rely on clause 61(1)(b) at all.

This can be illustrated with reference to the liability of the acceptor. The obligation of the acceptor is to some extent "abstracted" from the underlying relationships, and he may not usually rely on defences based on them when he is sued on his acceptance. See *National Bank Ltd v Samjee Devshi* (1919) 40 NLR 20 23 and Malan et al *Provisional Sentence* 139ff. It follows that where the acceptor pays the payee but knows that the drawer may raise certain defences against the payee, he is validly discharged, for he is paying his own debt to his own creditor. Had he been sued by the payee, he would not have been able to rely on the drawer's defences: the acceptance is abstracted from the underlying relationship. Britton 466 rightly remarks that, "[a] court would not by judgment against the defendant compel him to pay the instrument to a holder, to whom, if the payment had been made voluntarily, would not constitute a discharge". It is submitted that the acceptor makes a valid payment even if he pays with knowledge of fraud of the payee vis-à-vis the drawer as well as of defences (including cancellation, illegality etc) based on the underlying transaction between the payee and the drawer. The acceptor, it is submitted, can resist payment only by relying on his own defences against the payee. These defences may be based upon fraud committed by the payee in inducing the acceptor to accept or pay, or be based in the underlying transaction (if any) between the acceptor and the payee. Acceptance is of a contractual nature and these defences are, therefore, essentially contractual defences.

There is another basis on which payment may be resisted: it is a principle of our law that contracts be performed in good faith (*Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652, *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 432 and Malan et al *Provisional Sentence* 139ff). This principle is of particular importance in the unilateral "abstract" contracts, the new "stipulations", such as acceptance. It is thus possible that the payee's conduct in enforcing the bill from the acceptor may be in bad faith if he knows that he is not entitled, as against the drawer, to payment. Unfortunately in this regard our law lacks sufficient precedents from which specific rules can be deduced. The development of such rules is essentially a matter of judicial construction.

A drawee who has not accepted the instrument, is, of course, under no duty vis-à-vis the payee to effect payment. He may, however, be bound to the drawer, his customer, to effect the discharge of the instrument. This he must do with the required degree of care. Generally, as a mandatary, the drawee must perform his mandate in good faith and without negligence, but the Act has to some extent modified the degree

of care required (see section 1 "payment in due course" and sections 58, 79 and 83 SABEA). Generally, however, the degree of care necessary (viz "in good faith", "in the ordinary course of business" or "without negligence") refers to knowledge (or lack of knowledge) that the holder presenting the instrument is not entitled to payment, ie is not owner or creditor. Thus, where the drawee pays the payee knowing that the latter stole the instrument or obtained it by fraud or theft or failed to perform his contract with the drawer (even though the payee is owner of the bill), his payment will not be in terms of his mandate and he will not be entitled to debit his customer. Nor will the instrument be discharged by such a payment. If he should have known these facts (see the definition of "notice" in clause 1 of this draft) and have been able to substantiate them (see the discussion in paragraph 2.5.2 above) his payment would be equally ineffective.

Negotiation of the instrument by the payee to the indorsee complicates the situation. Assume that the payee is entitled to payment both from the acceptor and the drawer: no defect attaches to his rights of action. What is the position in the following two cases: (a) the instrument has been obtained by the indorsee by fraud; and (b) the instrument has been obtained by the indorsee as a result of an illegal ("ongeoorloofde") transaction.

(a) Ownership in an instrument obtained by fraud usually passes to the transferee and the rights flowing from the instrument would thus also be transferred to him. See Scholtens "Iusta Causa Traditionis and Contracts Induced by Fraud" (1957) 74 *SALJ* 280; *Cornelissen NO v Universal Caravan Sales (Pty) Ltd* 1971 3 SA 158 (A).

(b) A different situation arises when the indorsee acquires the instrument through illegality (as opposed to a merely unenforceable transaction, on which see *Yannakou v Apollo Club* 1974 1 SA 614 (A)). A negotiation is a juristic act similar in nature to a cession and the transfer of property. A cession is "a bilateral juristic act (agreement) whereby the cedent transfers his right of action to the cessionary, the latter taking the place of the former as creditor" (*LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A) 762). Being an agreement, a cession can be void for illegality. Nienaber 2 *LAWSA* paragraph 353 submits that:

> "Cession, being in its nature a form of agreement is affected by any circumstance which would inhibit an agreement in general. So, eg, a cession to an enemy alien during wartime, cession made for an unlawful purpose, or a cession which is contra bonos mores would be contrary to law and consequently void."

Elsewhere (paragraph 344), he emphasises the abstract nature of a cession, ie that it is not dependent upon the underlying transaction, but that the agreement to transfer the right suffices:

> "The attendant obligationary agreement may thus be void for lack of consent or illegality, or be liable to be set aside for fraud, duress, undue influence or for some other reason and yet the cession will subsist. But where the act of cession is itself tainted by the fraud or duress or undue influence the cession is itself liable to be set aside."

He continues: "The cession will also be without effect if the conclusion thereof is prohibited, or if it was inspired by an improper or illegal motive." See *Rabinowitz and another v De Beers Consolidated Mines Ltd and another* 1958 3 SA 619 (A) 637 and *Yannakou v Apollo Club* 1974 1 SA 614 (A) 626D-E. This, of course, does not mean that the cession is thereby converted into a causal transaction, merely that the agreement affecting the cession can be void for any of the reasons an ordinary contract can be, and if it is void, no rights are transferred by it.
To return to the example where the indorsee acquired the instrument through illegality. The effect of the illegality may be such that the negotiation is nevertheless valid (see the cases on the condictio ob turpem vel iniustam causam discussed by De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987) 160ff). Where the transfer is valid, the transferee acquires the rights of his transferor (see clause 17 of this draft). If the latter had been owner and creditor these rights pass to the indorsee and payment to him discharges the instrument, being payment made to the owner and creditor. No reliance on clause 61(1)(b) is thus necessary. But where the effect of the illegality is such that the whole negotiation is invalid, no rights are transferred to the indorsee. In order to make an effective payment, the acceptor must then pay "in due course"; and reliance on clause 61(1)(b) is necessary.

3 *Payment by third party*

3.1 Sections 63, 64, 65 and 66 SABEA regulate acceptance and payment for honour supra protest. These institutions originated because dishonour by the acceptor, particularly for non-acceptance, tended to operate to the disadvantage of the drawer and indorsers who usually expect the instrument to be paid at maturity. Britton 607 adds another reason: "[I]n the case of bills dishonoured in a foreign country, the credit standing of secondary parties in the country where the bill was executed will be

adversely affected if the bill is not promptly taken up." It thus came about that persons interested in the parties to the bill (a colleague or associate, for example) intervened and accepted or paid the instrument for the honour of any of the parties to it. Often the drawer, because of the risk of the funds not reaching the drawee in time, or for other reasons, inserted in the bill the name of a "referee in case of need" to whom the holder could take recourse. These institutions were known in Roman-Dutch law (See eg Van der Keessel *Praelectiones* th 607ff and Pothier *Verhandeling van het Wisselrecht* (1801) 1.4.63-5 (translated by Van der Linden)), and the older English cases were codified in sections 65 to 68 BEA on which sections 63 to 66 SABEA are based. Articles 55ff GULB regulate these institutions.

3.2 These two ancient institutions have fallen into disuse. Britton 607 explains:

> "The development of international banking, the use of the letter of credit, the use of cable transfer, the development of highly specialized and perfected financing procedures for the transmission of funds abroad in the settlement of international balances, have done much to render unnecessary, if not obsolete, the older practice of accepting and paying bills supra protest."

Similarly, the official comment (2) to section 3-603 UCC states:

> "The practice originated at a time when communications were slow and difficult, and in overseas transactions there might be a delay of several months before the drawer could act upon any dishonour. It provided a method by which a third party might intervene to protect the credit of the drawer and at the same time preserve his own rights. Cable, telegraph and telephone have made the practice obsolete for nearly a century, and it is today almost entirely unknown. It has been replaced by the cable transfer, the letter of credit and numerous other devices by which a substitute arrangement is promptly made."

Section 3-603(2) UCC, therefore, provides simply that an instrument may be paid by any person:

> "Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee."

3.3 Our common-law writers founded the liability of the acceptor for honour on common-law grounds (see Van der Keessel th 611, who finds the basis of liability in a constitutio). The English courts, on the other hand, based liability on the custom of

merchants (Britton 609; *Hoare and others v Cazenove and another* (1812) 16 East 391 (104 ER 1137); *Geralopulo v Wieler* (1851) 10 CB 690 (108 ER 272)). Our law allows a stranger to pay the debt of another even without the consent of both the creditor and the debtor (De Wet & Yeats 233). English law is different: where a third party pays a debt "the debt is not discharged unless the payment is made by the third person as agent for and on account of the debtor, and with his prior authority or subsequent ratification" (I *Chitty on Contracts* (1983) 1409 and see Birks and Beatson "Unrequested Payment of Another's Debt" (1976) 92 *LQR* 188). In our law there is therefore no difficulty in allowing the payor recourse against the debtor for his expenses in this regard. Pothier 1.4.65 explains the basis as follows:

> "Hij, die een Wisselbrief ter eere van den Trekker, of van een der Endossanten betaalt, moet, om den geen, ten wiens eere hij denzelven voldoet, door de actio negotiorum gestorum aan zig te verbinden, den wissel door den Houder laaten protesteeren, alvorens hij dien betaalt ... . De reden is, om dat, de Trekker en Endossanten geene schuldenaars van den Wissel wordende, dan door het daat van gedaane Protest, dit Protest gedaan moet zijn, op dat hij, die den Wissel betaald heeft, kan aantonen hen daar door bevrijd te hebben, en gevolglijk tegen hun de actio negotiorum gestorum te hebben.
> "De vreemdeling, die eenen geprotesteerden Wissel betaalt, heeft niet alleen de actio negotiorum gestorum tegen den geen, ter eere van wien hij de Acceptatie gedaan heeft, maar de Ordonnanti van 1673. Tit.5. Art. 3. draagt aan hem ook over alle de actiën, welken de eigenaar van den betaalden Wissel had tegen allen de geenen, die daar in betrokken waren. Dit Art. brengt mede: 'Door de gedaane betaaling treedt hij in alle de rechten van den Houder des briefs, schoon hij daar van geene overdragt, in plaatstelling, of ordre heeft.'
> "Het is derhalven onnoodig, om bij het doen der betaaling eenige overdragt te vorderen."

(See generally Van Zyl *Negotiorum Gestio in South African Law* (1985) 67ff.)

3.4 Despite this very clear exposition of the law, there is a need to formalise the rights of a stranger paying an instrument, and particularly to clarify the effect of his payment on the liability of the parties to it. In *In re Overend Gurney & Co Ex parte Swan* 1868 LR 6 Eq 344 367 it was held,

> "that the person who takes up a bill supra protest for the honour of a particular party to the bill, succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honour he takes it up, and that he cannot himself indorse it over".

See also section 66(5) SABEA; 68(5) BEA; 175 NIL and article 63 GULB (on which, see Baumbach-Hefermehl 353ff; Zöllner 121; Hueck-Canaris 152). It is proposed that

the principles inherent in this statement, and which are incorporated in section 66(5), be adopted in the draft. The abolition of the institutions of acceptance and payment for honour would in no way affect the practice, occasionally followed today, of inserting in a bill the name of a referee in case of need.

4 Protection of the holder in due course

Section 3-602 UCC provides: "[n]o discharge of any party provided by this Article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument". See section 82(2) Australian Cheques and Payment Orders Act 1986. No comparable provision appears in either the SABEA, the BEA or the NIL, and clause 62 is designed to remove any uncertainty that may exist under the present legislation, particularly in the case of instruments payable on demand, where an instrument is not withdrawn from circulation after payment. See Chalmers & Guest 490 n30 but Kadirgamar "The Problem Promissory Note: A Question of Estoppel" (1959) 22 *Modern Law Review* 146 and *Glasscock v Balls* 1889 24 QBD 13 at 5. Clause 62, however, differs from section 3-602 UCC in that it presupposes that notice of a prior payment would disqualify the holder as a holder in due course: it is indeed notice of a defence available against a prior party. See further clause 56 of this draft.

5 Part payment

5.1 Section 57(1) SABEA contains a brief reference to a partial payment of the amount of the instrument. It provides that a bill be discharged by payment in due course "or is proportionately discharged by payment of part of the amount for which the bill is drawn, noted by indorsement on the bill" if the payment is made by the drawee or acceptor. No comparable provision existed in the BEA, but clearly in English law a part payment operates as a discharge pro tanto (*Graves v Key* (1832) 3 B & Ald 313 (110 ER 117); Chalmers & Guest 487). The holder is not obliged to take a part payment. This is also the general rule in our law (De Wet & Yeats 167). The proposed clause 65 is based on article 73 of the Uncitral Convention.

5.2 Section 57(1) SABEA provides for only the partial discharge of all the parties to the instrument, not for the discharge of the individual parties; nor does it explicitly

state whether the instrument is dishonoured as to the balance. Where a partial payment is made, the holder is entitled to retain the instrument, since he requires it to obtain payment of the balance. Only on payment in full is he obliged to deliver up the instrument. This is provided for in sub-clauses (5) and (6). Where payment is made by a party other than the drawee or maker, that party requires a copy of the instrument to exercise his right of recourse. This matter is regulated in paragraph (b) of sub-clause 4.

6 *Commentary on the Proposals*

6.1 In clause 61(1)(a) the general rule is set out: the liability of parties on an instrument is discharged in the same manner in which contractual obligations are terminated. Thus, all methods or causes of discharge are included: eg merger, waiver, cancellation, novation, compensation etc. Clause 61(1)(b) adds to the methods by which an instrument can be discharged: it is discharged not only by payment, etc, to the owner or creditor as provided for by paragraph (a) but also by payment to the holder in good faith and without notice. "Payment" in this paragraph includes all kinds of discharge, like those referred to above.

6.2 Clause 61(2) follows article 73(1) of the Uncitral Convention. The discharge of a party also affects parties subsequent to him to whom he is liable. If his liability is discharged it follows that the liability of those having a right of recourse against him should also be discharged.

6.3 Clause 61(3) states the obvious: where a party without a right of recourse is discharged, so are all the parties. Clause (3)(b) is not strictly necessary, for the drawer, acceptor or maker does not have rights of recourse on the instrument. This paragraph is included to re-enact the old "payment in due course".

6.4 Clauses 62 to 65 have been commented upon.

CHAPTER 7

MISCELLANEOUS PROVISIONS

BILL IN A SET

66 Rules for a bill in a set

(1) Where a bill is drawn in a set, each part of which is numbered and contains a reference to the other parts, the whole of the parts constitutes one bill.
(2) Where a holder of a set indorses two or more parts to different persons, he is liable on every such part, and each subsequent indorser is liable on the part he himself has indorsed, as if the said parts were separate bills.
(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed to be the true owner of the bill: Provided that nothing in this subsection shall affect the rights of a person who in due course accepts or pays the part first presented to him.
(4) (a) The acceptance of a bill drawn in a set may be written on any part of the set, and must be written on one part only.
(b) If the drawee accepts more than one part, and such accepted parts fall into the hands of different holders in due course, he is liable on every part as if it were a separate bill.
(5) Where the acceptor of a bill drawn in a set pays it without requiring that the part bearing his acceptance be delivered to him, and that part at maturity is outstanding and in the hands of a holder in due course, he is liable to the holder.
(6) Subject to the provisions of subsections (2), (3), (4) and (5), where all the parties to one part of a bill drawn in a set are discharged by payment or otherwise, all the parties to the bill are discharged.

Comparative legislation

Sec 71 BEA
Sec 178-183 NIL
Sec 3-801 UCC
Art 64 GULB

The relevant provisions in the Bills of Exchange Act 1964 are:

69. Rules as to a bill in a set.

(1) If a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.
(2) If a holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if the said parts were separate bills.
(3) If two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed to be the true owner of the bill: Provided that nothing in this sub-section contained shall affect the rights of a person who in due course accepts or pays the part first presented to him.
(4) (a) The acceptance of a bill drawn in a set may be written on any part thereof, and it must be written on one such part only.
(b) If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.
(5) If the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding and in the hands of a holder in due course, he is liable to the holder thereof.
(6) Subject to the provisions of sub-sections (2), (3), (4) and (5), if any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Commentary

Although the rules as to a bill in a set can be improved upon, the present section 69 SABEA is adequate and no amendment, except for minor grammatical changes and an amendment to clause 66(6) to bring it into conformity with clause 61, is proposed.

CONFLICT OF LAWS

67 Rules applicable

(1) Where an instrument drawn or made in one country is negotiated, accepted or payable in another country, the law governing the rights, duties and liabilities of the parties to it shall be determined in accordance with the provisions of this section.
(2) The capacity of a person to bind himself by an instrument shall be determined in accordance with the law of the place where the contract is made:

Provided that if a person lacks capacity according to the law of the place where the contract is made he shall nevertheless be bound if he has contractual capacity according to the law of the Republic, or of his domicile at the time of contracting, or of the place where the contract is to be performed.

(3) The validity of the instrument as regards requisites in form is determined by the law of the place where the instrument is issued, and the validity, as regards requisites in form, of every supervening contract such as acceptance, indorsement or aval is determined by the law of the place where the contract is made: Provided that --

(a) an instrument first delivered outside the Republic is not invalid by reason only that it is not stamped in accordance with the law of the place of issue, and

(b) an instrument first delivered outside the Republic which conforms, as regards requisites in form, to the law of the Republic may, for purposes of enforcing payment, be treated as valid as between all persons who negotiate or hold or become parties to it in the Republic.

(4) The interpretation and legal effect of the contract of the drawer, indorser, acceptor, maker, or the signer of an aval is determined by the law of the place where such contract is to be performed: Provided that, where an instrument payable in the Republic is indorsed outside the Republic, the indorsement shall as regards the payer be interpreted and have legal effect according to the law of the Republic.

(5) The law of the place where an instrument is payable shall determine -

(a) the necessity for and sufficiency of presentment for acceptance or payment of the instrument;

(b) the necessity for and sufficiency of a protest or notice of dishonour of the instrument;

(c) the due date of the instrument.

(6) The validity and effect of a discharge from liability under an instrument shall be determined by the law of the place with which the particular contract has its closest and most real connection.

(7) Where an instrument is drawn outside but is payable in the Republic and the sum payable is not expressed in the currency of the Republic, the court may give judgment in that foreign currency: Provided that the debtor shall be entitled to comply with the judgment by paying in South African currency, in which case the conversion to South African currency shall be made on the date of the actual payment.

Comparative legislation

Sec 72 BEA
Sec 101 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

70. *Rules if laws conflict.*

If a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows, namely --
(a) the validity of the bill as regards requisites in form is determined by the law of the place of issue, and the validity, as regards requisites in form, of every supervening contract, such as acceptance, indorsement or acceptance for honour supra protest, is determined by the law of the place where such contract was made, but --
(i) a bill issued outside the Republic is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; and
(ii) a bill issued outside the Republic which conforms, as regards requisites in form, to the law of the Republic, may for purposes of enforcing payment thereof be treated as valid as between all persons who negotiate, hold or become parties to it in the Republic;
(b) subject to the provisions of this Act, the interpretation of the contract of the drawer, indorser, acceptor, or acceptor for honour supra protest, of a bill is determined by the law of the place where such contract is made: Provided that if an inland bill is indorsed outside the Republic, the indorsement shall as regards the payer be interpreted according to the law of the Republic;
(c) the duties of the holder with respect to presentment for acceptance or payment, and the necessity for, or sufficiency of, a protest or notice of dishonour or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured;
(d) if a bill is drawn outside but payable in the Republic, and the sum payable is not expressed in currency of the Republic, the amount shall, in the absence of an express stipulation to the contrary, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable;
(e) if a bill is drawn in one country and is payable in another the due date thereof is determined according to the law of the place where it is payable.

Commentary

1.1 Bills of exchange fulfill an important function in international trade. The optimal utilisation of these instruments is however, hampered by the diversity of laws governing their use that apply in different states. It is therefore not surprising that much attention on international and regional levels has been given to achieving uniformity in this area of the law. It has been suggested, quite rightly it is submitted,

that uniform laws regulating bills of exchange have two purposes, namely (a) to achieve unification of the substantive law pertaining to these instruments, or, failing this, (b) to unify the rules in the area of conflicts of laws that determine which of a number of national laws has to be applied in a given situation (*Encyclopedia of Public International Law* vol 8 48).

1.2 Prompted by proposals by the International Law Association in 1876, two conferences were convened at the Hague in 1910 and 1912 that produced a convention on the uniform regulation of bills of exchange and promissory notes. Although signed by 17 European and 10 Central and South American states, it was never ratified.

Following the First World War, the League of Nations championed the unification cause. Eventually, on 7 June 1930, three conventions were adopted in Geneva under the auspices of the League, namely the Convention on the Unification of the Law Relating to Bills of Exchange and Promissory Notes, the Convention for the Settlement of Certain Conflict of Laws in Connection with Bills of Exchange and Promissory Notes, and the Convention on Stamp Laws in Connection with Bills of Exchange and Promissory Notes.

In 1931 three conventions on cheques, which followed the pattern adopted for bills of exchange, were also adopted at Geneva (see paragraph 5 of the *General Introduction* above).

A number of countries ratified the three Bills of Exchange Conventions. Greece ratified only the first two, while Australia, Ireland and the United Kingdom ratified only the convention on stamp laws. A number of countries adopted the Convention on the Unification of Laws Relating to Bills of Exchange and Promissory Notes without ever ratifying it (for details see *Encyclopedia of Public International Law* vol 8 49).

1.3 The Geneva conventions were essentially a unification of French and German law provisions and failed to attract the support of Britain and other common-law countries whose laws closely followed the English Bills of Exchange Act 1882, which is also the source of article 3 of the Uniform Commercial Code in the United States of America.

Although the Anglo-American approach and the Geneva conventions on bills of exchange adhere to certain common fundamental principles (in both systems a bill of exchange is a written document signed by the maker or drawer, which contains an

unconditional promise or order to pay a certain sum of money on demand or at a specified time), there are notable differences.

For example, in Anglo-American law cheques are regarded as bills of exchange, albeit of a special kind. In the civil law countries, on the other hand, cheques are regarded as instruments of payment and not (as bills of exchange are) as credit instruments. Furthermore, in the civil law systems greater emphasis is placed upon the vigorous application of formal requirements. Thus the Geneva conventions require that the term "bill of exchange", "promissory note", or "cheque" must be inserted in the body of the instrument and expressed in the language used. No such requirement is found in Anglo-American law. The respective systems also offer different solutions to the problems of defects in title and of defences (*Encyclopedia of Public International Law* vol 8 50-51).

1.4 The apparently unbridgeable differences between the Geneva conventions and the common-law approach to bills of exchange led a subcommittee of the International Institute for the Unification of Private Law (Unidroit) to recommend in 1955 that, instead of trying to effect an acceptable unification of the two systems, efforts should be made to establish a united body of rules for negotiable instruments in international commerce.

The United Nations Commission on International Trade Law (Uncitral), which was established in 1966, gave effect to this suggestion by affording the topic priority in its programme concerning the law of international payments. A series of draft conventions on the subject culminated in Uncitral's Draft Convention on International Bills of Exchange and International Promissory Notes 1982 and Draft Convention on International Cheques 1982 (see paragraph 6 of the *General Introduction* above).

The conventions are intended to apply only to international bills of exchange (promissory notes or cheques, as the case may be) which must specifically be designated as such and, inter alia, show that at least two of the following places are situated in different states:

(i) The place where the bill is drawn;

(ii) The place indicated next to the signature of the drawer;

(iii) The place indicated next to the name of the drawee;

(iv) The place indicated next to the name of the payee;

(v) The place of payment.

Since the conventions are intended to replace the existing national arrangements pertaining to international bills (promissory notes or cheques), they deal comprehensively with the rights, duties and liabilities of the relevant parties.

1.5 In the area of regional attempts at unification of bills of exchange and cheques, it is of interest that in Latin America the emphasis has fallen on uniform conflict of law provisions.
The First Inter-American Specialized Conference on Private International Law held in Panama in January 1975 approved six treaties, including the Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes and Invoices, and the Inter-American Convention on Conflict of Laws concerning Cheques. In 1979 the Second Inter-American Specialized Conference on Private International Law endorsed, inter alia, the Inter-American Convention on Conflict of Laws concerning Cheques, which differs in a number of respects from its 1975 predecessor (see, in general, Parra-Aranguren "Recent Developments of Conflict of Laws Conventions in Latin America" (1979 III) 164 *RD* C 59).

1.6 Conflict of law issues pertaining to negotiable instruments have also been addressed by the legislator in Australia (Cheques and Payment Orders Act 1986 section 101) and by the Indian Government's Banking Laws Committee (*Report on Negotiable Instruments Law* (1975)). Some of their solutions and recommendations as well as provisions in the above mentioned conventions will be referred to later.

2 Section 70 SABEA sets out the rules that apply where a bill drawn in one country is negotiated, accepted or payable in another. They are: The formal validity ("requisites in form") of a bill is determined by the law of the place of issue, ie, the place of first delivery of the bill, complete in form, to a person who takes it as holder. Since delivery is a bilateral act that is completed on receipt of the bill, the place of delivery is the place where the bill is received (Malan 236). The formal validity of supervening contracts on the bill (eg, acceptance or indorsement) is determined by the law of the place where the contract was made.

The fact that a bill is not stamped in accordance with the law of the place of issue has no bearing on its validity. Moreover, where a bill issued outside the Republic conforms, as regards requisites in form, to South African law, it will, for the purpose of enforcing payment, be treated as valid as between persons who negotiate, hold or become parties to it in South Africa.

The interpretation of the contract of the drawer, indorser or acceptor of a bill is determined by the law of the place where such contracts are made. However, if an inland bill is endorsed outside South Africa, the indorsement will, as regards the payer, be interpreted according to South African law.

With regard to presentment for acceptance or payment and the necessity for, or sufficiency of, a protest or notice of dishonour, the duties of the holder of a bill are determined by the law of the place where the act is done or the bill is dishonoured.

The due date of a bill drawn in one country and payable in another is determined by the law of the place where it is payable.

If a bill is drawn outside but is payable in South Africa and the relevant amount is not expressed in South African rands, then, in the absence of an express stipulation to the contrary, it must be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

3 Section 70 SABEA is essentially a re-enactment in this country of the provisions of the English Bills of Exchange Act 1882. The conflict of law rules in the latter Act were intended to be a codification of the relevant common-law principles that had evolved up to then. However, not all aspects are covered by section 72 and issues such as the capacity of a person to bind himself by a bill of exchange and the validity and effect of a discharge from liability under a bill have still to be resolved by the common law.

A further feature of section 72 (and hence of its South African counterpart) is that it follows, with a number of important exceptions, what has been termed a "several laws" or a "many laws" approach (Dicey and Morris *The Conflict of Laws* 10 ed (1980) vol 2 881; Forsyth *Private International Law* (1990) 303ff), ie, it allows different legal systems to govern various aspects pertaining to a bill of exchange.

An important difference between the respective English and South African sections is that the provisions, dealing with the calculation that has to be made when the sum payable is not expressed in the currency of the country in which the bill is payable, have been retained in South Africa but deleted from the English Act.

4 There are a number of factors which render it essential for South Africa to have adequate conflict of law rules in the field of negotiable instruments including (i) the diverse arrangements pertaining to bills of exchange found in the various legal

systems, (ii) the exigencies of international trade, (iii) the fact that a bill of exchange is "a congeries of contracts dependent on one original contract" (Dicey and Morris 881), and (iv) the improbability of any large-scale adoption of internationally accepted uniform measures relating to bills of exchange in the foreseeable future.

Although it is possible that a careful analysis of the situation may reveal that our common-law conflict of law principles would be adequate for resolving the numerous potential problems that could arise in respect of bills of exchange, it seems that legal certainty is best served by a comprehensive, if not exhaustive, codification of the applicable rules. Practical consideration, militate against allowing parties the right to circumvent statutorily encapsulated conflict of law rules by contracting on a different basis.

5.1 The specific conflict of law rules that appear to require attention are the following:

5.2 *Capacity*

Section 70 is silent on which legal system should govern a person's capacity to enter into an obligation by means of a bill of exchange. Moreover, as Malan 235 points out, there is no clear rule on this matter in Roman-Dutch law and no clear principle can be deduced from the cases. He suggests that capacity to contract will probably be judged by the lex loci contractus, but in certain cases the proper law or the lex loci domicilii could prevail. Forsyth 300 believes capacity to incur liability on an instrument will be governed by the lex loci contractus.

The 1930 Geneva Convention for the Settlement of Certain Conflict of Laws in connection with Bills of Exchange and Promissory Notes provides that the capacity of a person to bind himself by a bill of exchange shall be determined by his national law. If this national law provides that the law of another country is competent in the latter, the latter law shall be applied. This arrangement is qualified by the provision that if a person lacks capacity according to the law of the aforementioned countries he would still be bound as if he had the requisite capacity according to the lex loci contractus (article 2).

Both the Inter-American Convention on Conflict of Laws concerning Bills of Exchange and the Inter-American Convention on Conflict of Laws concerning Cheques state that capacity in the respective instances is governed by the lex loci

contractus. Both also provide that, in the event of a person not having capacity under the lex loci contractus, the obligation would still be valid if the aforesaid person had the necessary capacity in terms of the lex fori (article 1 of the respective conventions).

In Australia the Cheques and Payment Orders Act 1986 states that capacity is determined in accordance with the law of the place where the contract is made (section 101(9)) - a solution favoured by the Indian Banking Laws Committee in their Report on Negotiable Instruments Law at 131. In addition, the Committee recommended that if a person lacks capacity according to the lex loci contractus he should nevertheless be bound if, according to the lex loci domicilii, he does not lack capacity.

It is submitted that provision should be made for a conflict of law rule in respect of the capacity of a party to a bill of exchange. The lex loci contractus should apply to capacity. Should policy considerations dictate that more of the potential validity of a bill of exchange ought to be sought than that which exclusive reliance on the lex loci contractus could provide, then one or more of the national laws of the parties involved, the lex loci domicilii, the lex loci solutionis and the lex fori could determine an individual's contractual capacity.

5.3 *Formal validity*

It is submitted that regarding the formal validity ("requisites in form") of a bill of exchange the provisions of section 70(a) should be retained. In other words, formal validity is, firstly, determined by the law of the place of issue of the bill.

Supervening contracts are governed by the law of the place where the particular contract was made. The exceptions for which the section provides have been referred to in paragraph 10 (see Dicey and Morris 887 for comment on them).

This approach is followed in the Australian Cheques and Payment Orders Act 1986 (section 101(2)(4)(6)(7)). Article 2 of the Inter-American Convention states that the form of the drawing, endorsement, guaranty, intervention, acceptance or protest of a bill of exchange shall be governed by the law of the place in which each of these acts is performed.

5.4 *Interpretation and legal effect*

As already mentioned, section 70(b) states that the interpretation of the contract of the drawer, indorser or acceptor for honour supra protest of a bill is determined by the

law of the place where the contract is made. Dicey and Morris 890 point out that the draftsman of the equivalent provision in English law intended to say that the law governing interpretation should be the law of the place where the contract is to be performed. The opportunity to rectify the matter which now presents itself should therefore be utilised to make the appropriate change as, indeed, Australia has done in the Cheques and Payment Orders Act 1986 (section 101(10)).

The proviso in section 70(b) is an exception to the rule that each endorsement is subject to its own law (Dicey and Morris 891) and should be retained.

Section 70 SABEA does not indicate which legal system governs the legal effect of a contract contained in a bill. It has been suggested (Dicey and Morris 892) that to arrive at a result that meets the requirements of commerce, the law of the place where the contract is to be performed should apply. It is submitted that such a provision should be included in the new Bills of Exchange Act.

5.5 *Discharge*

The Bills of Exchange Act 1964 does not designate which law applies in determining the validity and effect of a discharge from liability under a bill or note. Accordingly this matter is regulated by the common law.

In *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 at 185, the Appellate Division held that where the parties fail to indicate which law governs their particular contract (ie, including the discharge thereof), an intention to choose a governing law may be imputed to the parties. In this process the subject matter of the contract, the contract itself and the surrounding circumstances are taken into account.

This approach is open to criticism (Forsyth (1987) 105 *SALJ* 4 15), and our courts, while understandably careful not to refute the *Efroiken* case, have recently indicated a readiness to adopt an objective approach and to assign to the contract the law with which the contract has the "closest and most real connection" (*Improvair (Cape) Ltd v Establissements Neu* 1983 2 SA 138 (C) 146-7; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D) 526).

It is a moot point whether it would be preferable in conflict of law situations to allow the discharge of a bill to continue to be governed by the common law (which needs to be developed by the Appellate Division) or to regulate the matter in the new Act. The latter approach is advocated and it is submitted that the law of the place with which the contract has the "closest and most real connection" should apply.

5.6 *Transfer*

The property aspects of a bill can be distinguished from its contractual aspects. The Bills of Exchange Act 1964 does not deal expressly with the former. Under South African law it is clear that the lex situs determines whether property in a bill passes to the transferee (Malan 239), and it would appear that no provision in this regard need be made in the new Act (see section 101(8) of the Australian Cheques and Payment Orders Act 1986 which states that the effects of a transfer of a cheque by negotiation shall be determined in accordance with the law of the place where the cheque is transferred by negotiation).

5.7 *Necessity for and sufficiency of presentment for acceptance, payment, protest or notice of dishonour*

These aspects are regulated in section 70(e) of the Act, which indicates as the applicable law the law of the place where the act is done or the bill is dishonoured.

It is submitted that the section could be improved by making the applicable law that of the place where the instrument is payable - a solution recommended by the Indian Banking Laws Committee in their Report at 243 and followed in Australia (section 101(12)(13) of the Cheques and Payment Orders Act 1986).

5.8 *Due date*

The provisions of section 70(e) are included in the draft.

5.9 *Currency*

Section 70(d) SABEA is based on the premise that a South African court cannot give judgment in a foreign currency (Malan et al *Provisional Sentence* 232). It has been argued that this view is out of step with commercial realities and runs counter to international trends, and that the situation could be remedied by allowing a South African court to grant judgment in a foreign currency where the debt is expressed in that foreign currency, and continuing to afford the debtor the option of paying in South African currency, in which case the conversion to South African currency should be made on the date of actual payment (Malan et al *Provisional Sentence* 231).

Section 55(2) SABEA, which applies to instruments dishonoured abroad, is also based on the above premise.

The English law counterparts of sections 70(d) and 55(2) SABEA were repealed by the Administration of Justice Act 1977. At the time of the repeal the House of Lords had already delivered judgment in *Miliangos v George Frank (Textiles) Ltd* 1975 3 All ER 801 (HL), in which it departed from the position in English law that prevailed at the time and held that an English court could give judgment in a foreign currency on a contractual debt expressed in that foreign currency. Furthermore, the law lords reaffirmed the rule that the local debtor could pay the debt in British currency and held that no conversion into sterling was necessary until the time of the enforcement of the judgment.

The South African courts have come a long way towards accepting the "*Miliangos* rule" (*Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 4 SA 671 (C); *Mediterranean Shipping Co Ltd v Speedwell Shipping Co Ltd* 1989 1 SA 164 (D); *Mailang v MV "Honda Pearl"* 1986 3 SA 960 (A); *Elgin Brown and Hammer (Pty) Ltd v Dampskibsselskabet Trom Ltd* 1988 4 SA 671 (N); *Barclays Bank of Swaziland Ltd v Mnyeketi* 1992 3 SA 425 (W)) but in the interests of certainty clause 67(7) is proposed. See further the commentary on clause 47 (paragraph 2.1ff).

LOST INSTRUMENTS

68 Right to obtain duplicate

(1) Where an instrument is lost before it is overdue, whether by destruction, theft or any other cause, the owner is entitled to

(a) request the drawer or maker to deliver to him a duplicate instrument of the same tenor;

(b) request any other party to sign the duplicate instrument according to the tenor of the lost instrument;

provided he gives security, if required, to indemnify him or them against all claims by any person upon the lost instrument.

(2) Any request in terms of subsection (1) must be made in writing and must contain

(a) in the case of a request in terms of paragraph (a) of subsection (1), sufficient particulars to enable the drawer or maker to identify the lost instrument and to draw or make a duplicate of the same tenor; and

(b) in the case of a request in terms of paragraph (b) of subsection (1), a duplicate of the lost instrument signed by the drawer or maker.

(3) The drawer or maker shall within 14 days of a request in terms of paragraph (a) of subsection (1) or, if security in terms of subsection (1) is required, within 14 days after such security is given, draw or make and deliver to the person who made the request the duplicate instrument.

(4) Any party other than the drawer or maker, shall within 14 days of a request in terms of paragraph (b) of subsection (1) or, if security in terms of subsection (1) is required, within 14 days after such security is given, sign and deliver to the person who made the request, the duplicate instrument.

(5) Subject to the provisions of this section --

(a) the holder of a duplicate instrument and all the parties to it shall have all the rights and duties they would have had if the holder had been in possession of the lost instrument;

(b) any delay in presenting the duplicate instrument for acceptance or payment caused by the loss of the lost instrument or by the obtaining of a duplicate instrument or the signature of any party to it shall be excused, provided that the owner of the lost instrument has demanded acceptance or payment from the drawee or maker or other party liable to him with reasonable diligence and within a reasonable time after acquiring notice of the loss of the instrument.

(6) The holder shall be entitled to the same rights to negotiate the duplicate instrument as he enjoyed in respect of the lost instrument.

69 Action upon lost instrument

Where an instrument is lost, whether by destruction, theft or any other cause, or cannot be produced -

(a) the owner or any person who has paid it, is entitled to institute or maintain any action, counterclaim or other proceeding, other than an action for provisional sentence, upon the instrument against any party to it; provided --

(i) he gives security, if required, to indemnify such party against all claims by any person upon the instrument; and

(ii) he proves that, if he had been in possession of the instrument, he would have had a right to payment against such party.

(b) any failure to present the lost instrument for payment shall be excused provided the person who was the holder or the owner or any person who has paid it has demanded payment from the drawee or maker or other party liable to him with reasonable diligence and within a reasonable time after acquiring notice of the loss of the instrument.

Comparative legislation

Sec 67 and 68 SABEA
Sec 69 and 70 BEA
Sec 3-804 UCC
Sec 78-83 Uncitral Convention
Sec 99 and 100 Cheques and Payment Orders Act 1986
Act 90 Wechselgesetz
Act 1072 Swiss OR

The relevant provisions in the Bills of Exchange Act 1964 are:

67. *Holder's rights if bill is lost.*

(1) If a bill is lost before it is overdue, the person who was the holder of it may request the drawer to give him another bill of the same tenor, giving adequate security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost is found again.
(2) If the drawer on such request refuses to give such bill he may be compelled to do so.
68. *Action upon lost bill.*
In any action or proceeding upon a bill, other than a proceeding for provisional sentence, the court may order that the loss or non-production of the instrument shall not be set up by way of defence, provided an indemnity be given to the satisfaction of the court against the claims of any other person upon the instrument in question.

Commentary

1 Sections 67 and 68 SABEA do not affect the rights of a person who became a holder in due course of an instrument after it was lost or destroyed (see Malan 140ff and 150ff; Byles 401; Ronse I 352). Nor is provision made in these sections for the rights of the finder of a lost or destroyed instrument. These matters are adequately

provided for elsewhere. The finder of a lost order instrument cannot qualify as a holder in due course because of the requirement that the instrument must be *negotiated* to him (see sec 27(b) SABEA; Malan 154). Nor can he be the owner of the instrument or the holder of the personal rights incorporated in it. However, the finder of a lost bearer instrument can be holder of the instrument (section 1 "holder" SABEA). He is therefore empowered to negotiate the instrument and payment in due course can be made to him (section 1 "payment in due course" SABEA). The person to whom a lost bearer instrument is negotiated by the finder may, in certain circumstances, (section 27 SABEA) qualify as holder in due course, but the person to whom a lost order instrument is transferred cannot be a holder nor a holder in due course, because the finder is not empowered to negotiate the instrument to him (section 29(3) SABEA). At most, the transferee can have the rights of the "holder in due course" of section 53(2)(b) SABEA. (See generally Joubert "Enkele Probleme by Verlore Verhandelbare Dokumente" 1987 *De Jure* 141.)

2 The legal position of a person who loses an instrument must be seen against the background outlined above. It is generally accepted that loss of an instrument does not per se deprive the erstwhile holder of the instrument of the rights incorporated in it (see section 68 SABEA; section 70 BEA; section 100 Australian Cheques and Payment Orders Act; article 90 Wechselgesetz; section 3-804 UCC; section 78-83 of the Uncitral Convention; *Pulford v Star Assurance Society Ltd* 1918 CPD 243 245). Clauses 68 and 69 are based on this assumption. Any other view would be grossly inequitable to the person who loses the instrument and would result in the unjust enrichment of debtors on the instrument (see Malan 140ff; Oelofse et al 1983 *Modern Business Law* 73; Hueck-Canaris 160ff; Jäggi Druey and Von Greyerz 73ff). However, this does not mean that the erstwhile holder is relieved of all duties of diligence: in terms of the proposed clause he must *demand* payment with reasonable diligence after notice of the loss.

The rights of the person who loses the instrument must therefore be qualified by the interests of signatories and the rights of a subsequent holder in due course. Concerning the latter, it seems to be accepted that the person who loses the instrument also loses his rights to it when it is acquired by a holder in due course (Malan 140; Ronse I 351; Zöllner 42). Generally, it is only possible to acquire a lost bearer instrument in due course. In countries where the GULB is followed, it is also possible to acquire an order instrument in good faith (article 16 GULB) even though it might bear a forged indorsement.

3 Concerning the interests of the drawee and the signatories to the instrument, the risk is that they may be called upon to pay a second time. Most legal systems provide for the enforcement of the rights incorporated in the lost instrument by the person who lost it. There are divergent approaches to the requirements and procedures for such claims. The fundamental question is whether recognition of the right of the person who loses the instrument to enforce the rights incorporated in it should be accompanied by limitations on the rights of those who subsequently acquire it. Two approaches can be distinguished, viz the amortisation approach and the English approach.

According to the amortisation approach, which is followed in, for example, German and Swiss law, a lost instrument must be declared void before a claim by the person who lost it can be entertained. It is not possible to hold such an instrument "in due course" after its amortisation. However, no provision is made in the GULB for lost instruments, but at the Geneva Conference it was understood that each country adopting the GULB would be entitled to make its own rules. (See paragraph 182 of the Report of the Drafting Committee in *Records* 154.)

According to the English approach, which is followed in Anglo-American legislation and in the Uncitral Convention, the rights of a person who acquires a lost instrument as a holder in due course (or as a "protected holder") are not affected by the rights of the person who lost the document. The rights of the person who lost the instrument are subordinate to the rights of a subsequent holder in due course. This approach entails that the person who was the holder of the instrument be authorised to claim on it, provided security against a second payment is given.

In Germany, amortisation of a lost instrument is authorised by article 90 of the Wechselgesetz, and the actual procedure to be followed in this respect is provided for in article 1003 of the Zivilprozessordnung (See, in general, with regard to amortisation, Baumbach-Hefermehl 406ff; Hueck-Canaris 160ff; Zöllner 42ff; Ronse I 350ff; Asser *De Scandinavische Wisselwet van 1880 vergeleken met het Duitsche het Nederlandsche en het Belgische Wisselregt* (1880) 49; Jäggi Druey and Von Greyerz 73ff.) This procedure requires an application by the owner of the lost document for a declaration that it is void ("Kraftloserklärung im Aufgebotsverfahren"). Public notice of the fact that the document has been lost must be given before the court will make the order.

In the notice persons who acquired the instrument after its loss are called upon to claim on the document within six months of its maturity. The *Kraftloserklärung*

will be made if no one comes forward within this period. If the person who lost the instrument desires to claim on it pending the *Kraftloserklärung*, he may be required to give security.

The declaration of voidness (*Ausschlussurteil*) takes the place of the instrument that is declared void. The *Ausschlussurteil* formally legitimatise the former holder to enforce the rights that were incorporated in the instrument. The *Ausschlussurteil* has "einerseits legitimationsverschaffende Kraft für den Aufbieter und andererseits legimationszerstörende Kraft gegenüber dem etwaigen Inhaber einer verlorenen Urkunde" (Zöllner 43).

After the *Ausschlussurteil* has been granted, it is not possible to acquire the lost instrument in terms of Article 16 GULB. This is, however, possible before the *Ausschlussurteil*, but after application was made for it.

A liberatory payment in terms of article 40 GULB can be made by the drawee to the holder of the *Ausschlussurteil*, since the Urteil formally legitimates him as creditor. The *Ausschlussurteil* does not, however, involve material legitimation: the holder of the *Ausschlussurteil* has only those rights that he had before the instrument was lost. If he was not the true owner or lost his rights pending the *Ausschlussurteil*, he is obliged to hand the *Ausschlussurteil* to the true owner.

Both the amortisation and the English approach protect the drawee against a double payment. The difference between them lies in the rights of the person who lost the instrument and subsequent holders of the lost instrument. Ultimately, the amortisation approach limits the rights of subsequent holders in favour of the person who loses the instrument. The amortisation approach was primarily created in the interests of the person who loses the instrument as it gives him, within a determinable period of time, rights that are certain. In the process the rights of subsequent holders are limited, but these limitations are justified in the light of the requirement that public notice must be given before amortisation is possible.

It should be kept in mind that the amortisation approach evolved in legal systems in which forgery of an indorsement does not prevent a subsequent holder from qualifying as such. This is, of course, not possible in Anglo-American systems, and there is therefore less need for amortisation in our law than in other systems. In South African law amortisation can be meaningful only with regard to bearer instruments. But even if it is limited to bearer instruments, it is still a cumbersome and expensive procedure. It is submitted that the uncomplicated and inexpensive English approach is preferable.

4 Once an action on a lost instrument has been instituted, compliance with the holder's duties may be impossible. (See in general Oelofse Stassen and Du Plessis "Hersiening van die Wisselwet" 1983 *Modern Business Law* 67 73; White "Some Petty Complaints about Article 3" (1967) 65 *Michigan Law Review* 1315 1333ff.) It is a usual requirement that an instrument be presented for payment and acceptance (Malan 211ff). Where the instrument is lost before these duties can be complied with, the question arises how these steps can be taken in the absence of the instrument. White submits that special provision for the presentment and acceptance of lost documents must be made. He proposes:

> "(1) Subject to subsections (2) and (3), the owner of an instrument which is lost, whether by destruction, theft or otherwise; may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.
> (2) Any party who is ordinarily not liable without presentment, dishonor, protest, notice of protest, notice of dishonor, or a combination of the foregoing, shall nevertheless be deemed liable for the purpose of subsection (1) when the owner has:
> (a) made a written demand for payment on the person to whom he would have presented the instrument for payment if he had possession of it; and
> (b) such demand has been refused.
> (3) Notwithstanding the owner's compliance with subsection (2), no party whose liability was discharged under Section 3-502 because of delay prior to theft or loss of the instrument shall be liable under subsection (1)."

Where a duplicate is obtained, it can of course be presented for acceptance and payment. Any delay is excused provided the holder acts with reasonable diligence. Thus, negligence in the loss or destruction of the instrument does not lead to a loss of the holder's rights provided he acts, as other holders are required to do, with reasonable diligence after he receives notice of the loss. Where the person who had been holder or the owner desires to proceed in terms of section 68 SABEA without claiming a duplicate, some provision relating to presentment for payment seems to be necessary. Clearly loss of the instrument does not entail loss of the personal rights flowing from the instrument. However, the holder of a negotiable instrument is bound to observe strict formal duties before he is entitled to succeed against prior parties. Loss of the instrument should not relieve the holder or erstwhile holder of these duties. There is therefore merit in White's suggestion that the erstwhile holder or owner be required to demand payment with reasonable diligence and within a reasonable time after he has notice of the loss. See Scheltema-Wiarda 323.

5 Although provisions for the issue of duplicate instruments are made in most legal systems, it is not always clear what the function of a duplicate is (Ronse I 359). On the one hand, it is said that possession of the duplicate does not qualify the possessor as a holder. The function of the duplicate is merely to assist the possessor in proving his claim to facilitate presentment for payment or acceptance (Ronse I 358-9). This approach means that the possessor of the duplicate is not entitled to negotiate it (he is not a holder) and that a liberatory payment cannot be made to him. The acceptor who paid the possessor of the duplicate will thus remain indebted to a subsequent holder of the lost instrument. On the other hand, it must be taken into account that recognition of the possessor of the duplicate as a holder does not necessarily mean that payment to him would discharge the cambial debt. Payment of a debt is not a mere mechanical legal act. It is made in terms of an agreement to discharge the debt "skulddelgende ooreenkoms" (see De Wet & Yeats 236). It can be argued that the agreement between the debtor and the holder of the duplicate implies that discharge of the cambial debt be suspended until it is clear that there are no subsequent holders in due course of the lost instrument. Should such a holder come forward, the suspensive condition cannot be fulfilled. Under these circumstances the holder of the duplicate will have to make restitution of the payment that he received. Security against this eventuality is thus necessary.

It is submitted that there are no compelling reasons why the holder of a duplicate should not be entitled to negotiate it. Were negotiation not allowed, his rights would be unnecessarily limited. Allowing the negotiation of a lost instrument renders possible its subsequent acquisition in due course. It is thus possible that the debtor be called upon to pay by two holders in due course - one who holds the lost instrument as such and one who acquired the duplicate. However, it is submitted that the parties would be sufficiently protected by the security given.

Although the courts seem to accept that a duplicate can be negotiated (see *Phillips v Wobbe* 1916 CPD 359 364; Malan 141), it is nevertheless proposed that the negotiation of a duplicate be expressly authorised.

6 Section 67 SABEA provides that a duplicate may be claimed from the drawer of the lost instrument. This section can therefore not be invoked to obtain a duplicate promissory note from the maker (Oelofse, Stassen and Du Plessis 1983 *Modern Business Law* 73). Nor does section 67 provide that the other parties be compelled to sign the duplicate (see Oelofse 73). It is submitted that there is no reason why the

maker of a note should be exempted from the provisions of section 67 SABEA or why the other parties should not be compelled to sign a lost instrument. Clause 68 rectifies the position.

7 The last question that arises is: who is entitled to apply for a duplicate? The Act and the legislation in most countries provide that the person who was the holder of the instrument before it was lost may apply for a duplicate (see section 67 SABEA; section 69 BEA; article 67 Wechselgesetz). However, it is submitted that this approach does not take into account the interests of the owner of the lost instrument who was not the holder.

In some cases it will be in the owner's interest to have a right himself to obtain the duplicate. The erstwhile holder may have been a mere agent for collection. Where the owner (the principal) desires to withdraw his agent's authority and collect the instrument himself, he must be given the right to obtain a duplicate himself. If the right to claim a duplicate is afforded only the erstwhile holder, the owner is, in effect, compelled to maintain his agent's authority. Clause 68(1) recognises the need to give the owner the right to apply for a duplicate.

8 Sections 67 and 68 SABEA refer to "lost" instruments only. Although it can be argued that "lost" also includes "destroyed", clauses 68 and 69 provide specifically for destroyed instruments.

9 In the previous draft clause 68 gave the right to obtain a duplicate to not only the owner, but also the holder or an agent for collection. Clause 69 allowed the owner, the holder or a person who has paid the instrument to institute or maintain an action on a lost instrument. Since there could be a conflict of interest between the different parties involved, section 68 has been simplified and the right to a duplicate is given the owner only. He, of course, is entitled to authorise an agent to exercise his rights under this clause but no legislation to this effect is necessary. Similarly, clause 69 is amended by the deletion of the reference to "holder" and the rights under the clause are given to the "owner" (or the person who has paid the instrument), who, in any event, is the person entitled to them.

70 Repeal of laws

(1) Subject to the provisions of subsection (2), the Bills of Exchange Act, No 34 of 1964 is hereby repealed.
(2) Notwithstanding such repeal, the provisions of the said Act relating to bills and notes shall remain applicable to, and govern, any instrument drawn or made prior to the date of repeal.

71 Short title

This Act shall be called the Bills of Exchange and Promissory Notes Act, 199*, and shall come into operation on a date fixed by the State President by Proclamation in the Gazette.

PART III

CHEQUES ACT

Act to amend the laws relating to cheques

1 Definitions

(1) In this Act, unless the context otherwise indicates --

"bank" means the Reserve Bank or a bank as defined in section 1 of the Banks Act, 1990 (Act No 94 of 1990);

"bearer" means the person in possession of a cheque which is payable to bearer;

"cheque" means a cheque as defined in section 2;

"clearing house" means an association of banks:

"clearing house rules" means the rules of a clearing house designed to regulate the clearing of payments between members;

"collecting bank" means a bank, or a mutual bank, or the Post Office Savings Bank collecting payment of a cheque;

"drawee" means the bank on which a cheque is drawn;

"holder" means the payee or indorsee of a cheque who is in possession of it, or the bearer of it;

"issue" means the first delivery of a cheque to a holder;

"mutual band" means a mutual bank as defined in section 1 of the Bank Act. 1993 (Act no 114 of 1993);

"party" means the drawer, indorser, the drawee who certifies a cheque or the signer of an aval;

"payee" means the person in whose favour the drawer directs payment to be made;

"Post Office Savings Bank" means the Post Office Savings Bank as defined in section 1 of the Post Office Act, 1958 (Act No 44 of 1958);

"prescribed rate" means the rate of interest prescribed under the Prescribed Rate of Interest Act, No 55 of 1975, and which is applicable at the time when, in terms of this Act, interest begins to run;

"Registrar" means the Registrar of Banks as defined in section 1 of the Banks Act, 1990 (Act No 94 of 1990);

"Reserve Bank" means the South African Reserve Bank as defined in section 1 of the South African Reserve Bank Act, 1989 (Act No 90 of 1989);

(2) For the purposes of this Act, a person has notice of a fact if he

(a) has actual knowledge of it;

(b) has received a notification of it

(c) has knowledge of other facts and circumstances giving rise to the likely inference that such fact exists.

(3) For the purposes of this Act, a person takes or pays a cheque in good faith if he takes or pays it honestly.

(4) For the purposes of this Act, a person takes an instrument for value if he acquires it under onerous title.

CHAPTER 1

REQUIREMENTS OF FORM

FORM AND INTERPRETATION

2 Definition of cheque

A cheque is a written document containing the word "cheque", signed by the drawer, which is dated and contains an unconditional order whereby the drawer directs the drawee to pay a sum certain in money on demand to the payee or to his order, or to bearer.

3 The drawer

(1) A cheque may be drawn by a person having no or limited capacity to contract.

(2) A cheque may be drawn by two or more drawers.

Both the General Bar Council and the Clearing Bankers Association noted that clause 3(2) that provides that a cheque may be drawn by two or more drawers is not in accordance with present banking practice in terms of which cheques are drawn by one person or entity only. Although this is correct, it is nonetheless submitted that the deletion of clause 3(2) may lead to difficulties of interpretation especially where the signatures of agents are to be considered. It is therefore prudent to retain the provision.

4 The drawee

(1) The drawee of a cheque must be a bank entitled to accept deposits of money withdrawable by cheque.
(2) The drawee must be named or otherwise indicated with reasonable certainty in the cheque.
(3) A cheque shall be drawn on one drawee only.
(4) A cheque may be drawn by the drawer on himself.

5 Unconditionality of order

(1) An order is not unconditional if it is an order to pay out of a particular fund.
(2) An otherwise unqualified order is unconditional even if coupled with
> **(a) an indication of a particular fund out of which the drawee is to reimburse himself, or of a particular account to be debited with the amount; or**
> **(b) a statement of the transaction which gave rise to the cheque; or**
> **(c) a statement that it is drawn against specified documents attached thereto for delivery on payment; or**
> **(d) a statement that it is drawn under or against a specified letter of credit or similar authority.**

(3) An order is not unconditional if it is stated to be subject to or governed by any other agreement or transaction.

6 Sum payable

(1) The sum payable in terms of a cheque is a sum certain in money although it is to be paid according to a rate of exchange indicated, or to be ascertained as directed, by the cheque.
(2) Where more than one sum is expressed to be payable in a cheque, the lesser or least, as the case may be, of such sums is the amount payable.
(3) A document containing an order to do any act in addition to the payment of money is not a cheque.

Commentary

Clause 6 is based on clause 9 of the proposed Bills of Exchange and Promissory Notes Act and follows section 15 of the Australian Cheques and Payment Order Act, 1986 in omitting all reference to interest and instalments.

7 Payable on demand

(1) An order to pay is an order to pay on demand

(a) where it is expressed to require payment on demand, at sight, or on presentation, or where it contains words of similar import; or

(b) where no time for payment is expressed in the document containing the order.

(2) A cheque is overdue six months after its date.

(3) Where a cheque is indorsed when it is overdue any presentment for payment to hold liable the indorser who has so indorsed it is excused.

8 The date

(1) Where a cheque or any signature on it is dated, the date shall, unless the contrary be proved, be presumed to be the true date of the cheque or signature.

(2) A cheque may be antedated or postdated, in which case the time when it is payable and all other periods of time provided for in this Act, shall be determined with reference to the stated date.

9 The payee

(1) Where a cheque is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

(2) A cheque may be drawn payable --

(a) to the drawer or to the drawee;

(b) to two or more payees jointly or in the alternative or to some of several payees in the alternative;

(c) to an office or the holder of an office by his title;

(d) to an estate or a trust or a fund.

(3) Where a cheque is payable to an office or the holder of an office by his title, it is payable to the holder of the office for the time being or to his principal.

(4) Where a cheque is payable to an estate or a trust or a fund, it is payable to the executor in, or the trustee of, that estate, or the trustee of that trust, or to the trustee or administrator of that fund, for the time being, as the case may be.
(5) Where a cheque is payable to two or more payees jointly, it is payable to all of them and may be negotiated, discharged and enforced only by all of them, unless one or some of them have authority to act on behalf of the other or others.

10 Payable to order

(1) A cheque is payable to order where it is expressed to be payable
(a) to a specified person, or
(b) to a specified person or to his order; or
(c) to the order of a specified person
unless it is a non-transferable cheque that complies with the requirements set out in section 52.
(2) Where a cheque is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order.

11 Payable to bearer

A cheque is payable to bearer where –
(a) it is expressed to be so payable; or
(b) it is expressed to be payable to the order of bearer; or
(c) it is expressed to be payable to order or bearer; or
(d) it is payable to "cash" or the "order of cash" or to "cash or order"; or
(e) the only or last indorsement on it is an indorsement in blank.

Commentary

The General Bar Council recommended the deletion of clauses 11(b), (c) and (d) of the original draft because they constitute exceptions to the general provisions of clause 9(1). However, the reasons for the inclusion of these paragraphs are fully set out and, in the absence of any substantial argument to the contrary, are still valid. It is accordingly submitted that the aforementioned paragraphs are to be retained.

INCOMPLETE CHEQUES

12 Incomplete cheques

(1) Where a signed document in the form of a cheque lacks any of the necessary requirements, it may be completed as a cheque using the signature as that of any party to it.

(2) Where a document referred to in subsection (1) is completed as a cheque -

(a) any party who signed it after completion shall be liable on it as completed;

(b) any party who signed it before completion

(i) shall be liable to a holder other than a holder in due course only to the extent that it is completed in accordance with any authority given by him;

(ii) shall be precluded from asserting against a holder in due course or a person who in good faith and without notice has paid it, that it was completed contrary to any authority given by him.

ALTERATION

13 Alteration

(1) Where a cheque is materially altered:

(a) parties who have signed the cheque after the material alteration has been made or who made, authorised or assented to the material alteration, shall be liable on it as altered;

(b) parties who have signed the cheque before the material alteration has been made shall be liable on it as if the alteration had not been made: Provided that a party who by his negligence contributed to the making of the alteration shall be precluded from setting up the alteration against a holder in due course or a person who has paid the cheque in good faith and without notice

(2) For the purposes of sub-section (1), an alteration is material if it alters or purports to alter the liability of any party to the cheque and includes any alteration of the date, the sum payable, the names of the parties and the time of payment.

CHAPTER 2

NEGOTIATION

14 Negotiation of cheque

(1) Negotiation is the transfer of a cheque in such a manner as to constitute the transferee the holder of the cheque.
(2) A cheque payable to bearer is negotiated by delivery.
(3) A cheque payable to order is negotiated by delivery coupled with any necessary indorsement.
(4) Where a cheque drawn payable to bearer is indorsed specially, it remains payable to bearer and may be further negotiated by delivery; but the person indorsing specially is liable as indorser only to those holders who acquired the cheque through his indorsement.

15 Effect of incapacity and illegality

The negotiation of a cheque is effective to constitute the transferee the holder of the cheque even if
(a) the cheque is negotiated by a person having no or limited capacity to contract,
(b) the negotiation of the cheque is affected by illegality.

16 Effect of transfer of cheque

(1) The transfer of a cheque vests in the transferee the rights to and upon the cheque the transferor has, except where the transferee derives his title through a holder in due course and has been a party to any fraud or illegality affecting the cheque.
(2) Except where it is otherwise agreed, the transfer without indorsement of a cheque payable to order by the holder gives the transferee the right to the unqualified indorsement of the transferor.

17 Negotiation by indorsement

(1) To effect a negotiation of the cheque, an indorsement must be written by or on behalf of the holder on the cheque or on an allonge thereto.
(2) An indorsement may consist of the simple signature of the indorser without additional words.
(3) An indorsement effects a negotiation of the cheque even if it is accompanied by words of cession, waiver, suretyship, guarantee, limitation of liability or words of similar import.

18 Payee or indorsee misdescribed

Where a cheque is payable to a person under a misspelt name or a name other than his own, he may indorse the cheque in that name or in his own name or both, but an indorsement in both names may be required by a person paying or taking the cheque.

19 Order of indorsements

Where there are two or more indorsements on a cheque, each indorsement is presumed, until the contrary is proved, to have been made in the order in which it appears on the instrument.

20 Partial indorsement

An indorsement which purports to transfer a part only of the amount payable by the cheque, or which purports to transfer the cheque to two or more indorsees severally, does not effect a negotiation of the instrument.

21 Indorsement in blank

(1) An indorsement in blank specifies no indorsee, and a cheque so indorsed becomes payable to bearer.
(2) Where a cheque payable to order has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the

indorser's signature a direction to pay the cheque to himself or his order or to some other person or the order of the latter.

22 Special indorsement

(1) A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable.
(2) The provisions of this Act relating to the payee apply with
the necessary modifications to an indorsee under a special indorsement.

23 Conditional indorsement

Where a cheque is indorsed conditionally -
(a) the indorsement effects a negotiation of the cheque whether or not the condition is fulfilled; and
(b) the person who pays the cheque does not have notice of a claim to or a defence upon the cheque merely by reason of the fact that the cheque is indorsed conditionally.

24 Indorsement for collection

(1) An indorsement for collection expresses an authority to collect payment of the cheque by words such as, for example, "for deposit"; "for collection"; "value in collection"; "pay any bank".
(2) The indorsee under an indorsement for collection
(a) may exercise all the rights arising out of the cheque;
(b) is subject to all claims and defences that are available against his indorser;
(c) may negotiate the cheque for collection only.
(3) The indorser who indorses a cheque for collection is not liable on the cheque to a subsequent holder.

25 Restrictive indorsement

(1) Subject to the provisions of section 52, where the drawer has inserted in the cheque, or an indorser in his indorsement, words prohibiting negotiation, or

indicating an intention that the instrument should not be negotiable as, for example, "not negotiable", "not transferable" or "pay [X] only", the instrument may be negotiated for collection only.

(2) The person to whom the cheque is negotiated for collection

(a) may exercise all the rights arising out of the cheque;

(b) is subject to all claims and defences which are available against the person who negotiated the cheque to him;

(c) may negotiate the cheque for collection only.

The Clearing Bankers Association proposed that clauses 24 and 25 be deleted and replaced by a provision to the effect that any indorsement restricting or prohibiting transfer be of no effect. The suggested amendment deals with both indorsements prohibiting transfer and those for collection.

Although the interests of the banks in the simplification of the cheque payment and collection process are appreciated it is nevertheless respectfully suggested that clauses 24 and 25 as presently worded adequately take these interests into account. In particular, it should be noted that neither the restrictive indorsement nor the indorsement for collection renders a cheque "non-transferable". Furthermore, foreign cheques would have to be processed and, quite apart from anything else, providing - as the banks have suggested - that a restrictive indorsement is of no effect would mean that the "indorsee" does not qualify as holder. This is certainly more detrimental to the interests of the banks than the proposed draft legislation.

26 Re-acquisition of cheque

(1) Where a cheque is returned to or re-acquired by a prior party, he may re-issue and further negotiate the cheque and strike out his own or any subsequent indorsement, but is not entitled to enforce payment against any intervening party to whom he was previously liable.

(2) A cheque may be negotiated when it is overdue except by the drawee.

CHAPTER 3

RIGHTS OF THE HOLDER

27 Holder in due course

A holder in due course is a holder who has taken an instrument,

(a) complete and regular on the face of it, by negotiation, before it is overdue;

(b) in good faith and for value and without notice of any dishonour or any claim to the instrumebnt or any defence available to prior parties.

Commentary

In his essay on the use of negotiable instruments in consumer transactions, Otto ("Verhandelbare Dokumente en Reëlmatige Houerskap by Verbruikerstransaksies" 1986 *TSAR* 309 and 1987 *TSAR* 24 and 175 at 185 and 190) makes certain proposals for the amendment of the Credit Agreements Act, 1980 (Act No 75 of 1980). Generally, these proposals are supported, but the context in which they are made must be noted. Thus, if this draft is accepted, the doctrine of holding in due course in respect of crossed cheques abolished and a "non-transferable cheque" introduced. Otto's proposals require amendment to ensure that only crossed or "non-transferable cheques" are accepted in payment of transactions falling under the Credit Agreements Act, 1980. See now *Werkstuk 46: Die Woekerwet en Verwante Aangeleenthede: Nuwe Kredietwetgewing vir Suid-Afrika* by Otto and Grové (1991) clause 26.

28 Presumption of holding in due course

Every holder is presumed to be a holder in due course until the contrary is proved: Provided that if it is admitted or proved that the issue or subsequent negotiation, of the cheque is affected with fraud 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 instrument.

29 Rights of a holder in due course

A holder in due course

(a) holds the cheque free from any claim to the cheque or any defence available to prior parties;

(b) may enforce payment of the cheque against all parties liable on it.

30 Rights of pledgee

Where the holder holds a cheque in pledge --

(a) he may exercise all the rights of a holder on the cheque;

(b) he shall, provided all the requirements of section 27 are met, be deemed to be a holder in due course only to the extent of the debt secured.

CHAPTER 4

LIABILITY OF THE PARTIES

GENERAL

31 Joint and several liability

Subject to the provisions of this Act, all the parties liable on a cheque are liable on it jointly and severally.

32 Exclusion and limitation of liability

(1) The drawer or any indorser or the signer of an aval may insert in the cheque an express stipulation -

(a) excluding or limiting his own liability to the holder;

(b) waiving presentment for payment.

(2) Unless a contrary intention appears from the cheque, a waiver operates in favour of all holders, and a waiver contained in the cheque as drawn binds all subsequent parties.

Commentary

The Clearing Bankers Association recommended certain amendments to this clause to the effect that the drawer may not exclude or limit his liability on the cheque or waive presentment and that an indorser may not waive presentment for payment. The other provisions of clause 32 are left unaffected by their proposal.

It is submitted that the only consideration that merits comment is the suggestion that the drawer of a cheque may not exclude or limit his liability on the cheque. Since a cheque is used on a large scale as an instrument of payment and is often used in circumstances where the payee is unable to scrutinise the instrument carefully there appears to be some merit in this proposal. Payments made in a busy supermarket comes to mind. However, no evidence to the effect that drawers to any extent exclude their liability on cheques to mislead payees was produced and it is respectfully submitted there seems to be no compelling need to amend the original proposals.

SIGNATURE

33 Signature as requirement for liability

(1) No person is liable on a cheque if he has not signed it as a party: Provided that -

(a) where a person signs a cheque as a party in a name other than his own he is liable on it as if he has signed it in his own name;

(b) the signature in the name of a partnership is equivalent to the signature by the person so signing of the names of all persons liable as partners of that partnership;

(c) where a person adopts or confirms a forged or unauthorised signature as his own he shall be liable as if he has made it himself or as if it has been authorised.

(2) A party need not sign a cheque with his own hand and his signature may be written or placed on it by his authority.

(3) A signature may be made in handwriting or typescript or by way of sealing, stamping, symbol, facsimile, perforation or other means.

34 Signature by agent

(1) A cheque may be signed by an agent.
(2) A person signs a cheque as an agent where it appears from the cheque that he signs it for or on behalf of a named principal or as the agent or representative of such principal: Provided that where a signature consists of the name of a firm or a juristic person and the signature or signatures of an individual or individuals the latter shall be presumed, until the contrary is proved, to have signed the cheque as agent or agents.
(3) Where a person is authorised to sign, and does sign, a cheque as an agent, he is not liable on the cheque.
(4) Except as against a party with notice, a person who signs a cheque as an agent without the authority of the person named as principal or who signs a cheque in the name of another person without his authority, shall be deemed to be a party to the cheque and personally liable on it.
(5) Except as against a party with notice, an authorised agent who signs a cheque as a party is personally liable on it.

35 Forged and unauthorised signatures

Subject to the provisions of this Act, a forged or unauthorised signature is wholly inoperative as that of the person whose name is signed: Provided that a person who by his negligence contributed to the making of a forged or unauthorised signature on a cheque shall be precluded from setting up the forgery or want of authority against a person who in good faith and without notice pays or takes it for value.

Commentary

The Clearing Bankers Association proposed that the words "or knowingly" be included after the word "negligence". This proposal is not acceptable since the matter is sufficiently covered by the common law.

36 Forged or unauthorised indorsement in name of payee

(1) A forged or unauthorised indorsement in the name of the payee is effective in favour of any person who in good faith and without notice pays or takes the instrument for value, if

(a) the drawer or any person who signs as or on behalf of the drawer intends the person named as payee to have no interest in the cheque, or

(b) the name of the payee has been supplied directly or indirectly to the drawer or maker, or any person signing on behalf of the drawer or maker, by an agent or employee of the drawer or maker, or of the person so signing, who intends the payee to have no interest in the cheque.

(2) Nothing in this section shall impose any liability on the person whose indorsement has been forged or on whose behalf the cheque has been indorsed without his authority.

DELIVERY

37 Delivery as requirement for contract on cheque

No contract of any party to a cheque shall be complete and irrevocable until delivery of the cheque by such party to conclude the contract: Provided that if a certification or an aval is written on a cheque and the drawee or signer of the aval gives notice to the person entitled to the instrument that he has certified it or signed the aval, the certification or the aval becomes complete and irrevocable; and provided further that such delivery or notice shall not be necessary to make any party liable to a holder in due course.

THE PARTIES

38 Liability of the drawee

The drawee is not liable on the cheque unless he certifies it as provided for by section 39.

39 Liability of the drawee certifying cheque

(1) A cheque is certified where it is signed by the drawee and the drawee by writing on it certifies or marks it for payment or otherwise uses words indicating that the cheque will be paid or that funds are available for its payment or that the order of the drawer is accepted.

(2) The drawee of a cheque by certifying it-

(a) engages that he will pay the holder, or the drawer or an indorser who has paid the cheque, the amount recoverable in terms of section 43 according to the tenor of his certification;

(b) is precluded from denying to a holder in due course --

(i) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the cheque,

(ii) the existence of the payee and his then capacity to indorse.

Comparative legislation

Sec 187 and 188 NIL
Sec 3-411 UCC

Commentary

1 Clause 39 aims to settle some of the questions surrounding the certification of cheques. Opinions on the legal effect of certification vary - both in South Africa and abroad, and it is clearly in the public interest that the matter be regulated by legislation (see the remark by Cowen "The Liability of a Bank in the Computer Age in respect of a Stolen Cheque" 1981 *TSAR* 193 201). The crucial question is whether the bank certifying a cheque drawn on it incurs liability (see the discussion in Cowen (1986) 213ff; Dijkman *The Certification of Cheques* (1986) 37ff; Malan 260ff; Geva "Irrevocability of Bank Drafts, Certified Cheques and Money Orders" (1986) 65 *Canadian Bar Review* 107; Pretorius "Countermanding Payment of a Certified Cheque" 1992 *SA Merc LJ* 210).

2 At the one extreme, it is argued that, "unless a custom imposing liability can be established by satisfactory evidence, the bank does not, by reason only of the language of the traditional form of certification, incur liability" (Cowen (1986) 218).

This view is supported by several English authors, who view certification as a representation of fact (eg Chorley 51 and Paget 209-11) and by the few decisions on the subject, the most important of which is *Bank of Baroda Limited v Punjab National Bank Limited* 1944 AC 176 (PC) (see also *Rosen v Barclays National Bank Ltd* 1984 3 SA 974 (W) 978).

3 Opposed to this is the view that certification is equivalent to acceptance. Stassen "Regsgevolge van Bankgewaarborgde Tjeks" 1985 *De Rebus* 149 153 forcefully argues that,

> "[d]it ly geen twyfel nie dat die bank volgens algemene beginsels kontraktuele aanspreeklikheid opdoen ... . Die belofte om by aanbieding aan die houer te betaal, is egter terselfdertyd 'n instemming met die opdrag van die trekker en derhalwe akseptasie kragtens die Wisselwet".

This is also the opinion advanced by Geva 127 who states:

> "[I]nasmuch as it is universally agreed in Canada that certification is a binding engagement of the drawee bank, the marks or stamping forming the certification should be viewed as adopted by the bank as its own 'signature'. Signature is required for liability on an instrument in general ... and for the acceptor's liability in particular ... . The drawee's liability on a bill is linked to acceptance ... . The certifying bank's payment obligation is consistent with the acceptor's statutory contract ... . Certification ought to be treated as a signature by the bank so as to establish its statutory liability as an acceptor. Finally, the prevailing view is that 'any words which indicate that the drawee means to pay is a sufficient acceptance'. Words and symbols recognised as certification meet this standard. For all these reasons, certification by the drawee bank appears to constitute an acceptance".

This approach is rejected by Cowen (1985) 217, who states that "certification does not in form purport to be an acceptance ...", but is given legislative form by section 3-411(1) UCC that provides: "Certification of a check is acceptance. Where a holder procures certification the drawer and all prior indorsers are discharged" (see also section 187 NIL).

4 Between these two extremes, Malan 260ff advances the view that certification gives rise to an independent obligation of the drawee by which he undertakes to effect or guarantee payment (see also Dijkman 74ff; Pretorius "Countermanding Payment of a Certified Cheque" 1992 *SA Merc LJ* 210). His views are based on Canadian cases (on which, see Baxter 6ff) which distinguish between certification at the request of the drawer and at the request of the holder. The latter operates as a discharge of the cheque and the substitution therefor of a primary liability by the bank, "the

implication being that the holder accepts as payment the obligation of the bank" (Baxter 6). Apparently, certification at the request of the drawer does not give rise to liability. This view is disputed de lege ferenda (Malan 262 n48, but see Geva 129, who opines that the idea of a "substituting contract can hardly accommodate the case where certification is procured by the drawer". It is submitted that it could be argued that the drawer acts as nuntius conveying the drawee's offer to the holder (see *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 989)).

5 It is not necessary to determine the correctness of these views, but legislative intervention is necessary to bring certainty to this controversial subject and to bring the law into line with public expectation. This can be achieved by imposing liability similar to that of the acceptor on the certifying bank. It is suggested that nothing in this proposal derogates from the right of a drawee bank that has certified a cheque to obtain a court order authorising it to refuse payment in an appropriate case. (This is part of a more general problem and is discussed in paragraph 2.6 of the commentary on chapter 6 of the proposed Bills of Exchange and Promissory Notes Act.)

6 The Clearing Bankers Association has suggested that the words "or the drawer, or an indorser who has paid the cheque" in clause 39(2)(a) be deleted so that liability is imposed towards the holder only. The proposed clause follows the wording of section 55(1) and since there is no reason to distinguish between the liability of an acceptor and the drawee bank certifying a cheque the proposed subclause is left intact.

The Clearing Bankers Association has also requested the deletion of clause 39(3) for the reason that cheques in this country are not certified at the request of the holder. This appears to be correct and the subclause is accordingly deleted.

40 Liability of the drawer

The drawer of a cheque by drawing it -

(a) engages that upon dishonour of the cheque he will pay the holder, or an indorser who has paid the cheque, the amount recoverable in terms of section 43;

(b) is precluded from denying to a holder in due course and to a person who takes the cheque in good faith and without notice for value, the existence of the payee and his then capacity to indorse.

41 Liability of the indorser

The indorser of a cheque by indorsing it -

(a) engages that upon dishonour he will pay the holder, or a subsequent indorser who has paid the cheque, the amount recoverable in terms of section 43;

(b) is precluded from denying to a person who takes the instrument in good faith and without notice for value

(i) the genuineness and regularity in all respects of the drawer's signature and all previous indorsements and avals;

(ii) that the cheque was at the time of his indorsement valid and subsisting.

42 Liability of the signer of an aval

(1) The liabilities of a party to a cheque may be secured by an aval.

(2) A person signs a cheque as the signer of an aval where by words such as "as aval", "as surety", or "as guarantor" he expressly indicates that he is a surety: Provided that the unqualified signature of a person other than the drawer, drawee or payee made on the back of the cheque before indorsement by the payee shall be that of the signer of an aval.

(3) The signer of an aval may specify in the cheque the party for whom he is a surety, and if he does not so specify, he shall be deemed to have given his aval for the drawer.

(4) The signer of an aval is liable jointly and severally with and as surety for the party for whom he has given his aval.

(5) Where the signer of an aval pays the cheque, he acquires the rights arising out of the cheque against the person for whom he has given his aval and against all parties liable to him.

(6) If a person signs a cheque otherwise than as a party he thereby incurs the liabilities of an indorser to a holder in due course.

43 Amount recoverable

(1) The holder may recover from any party liable on a cheque --

(a) the amount of the cheque; and

(b) interest at the prescribed rate from the time of presentment for payment or, if presentment is excused, from the time the cheque is dishonoured.

(2) Any party who pays a cheque whether wholly or in part in terms of subsection (1), may recover from any party liable to him --

(a) the amount he was compelled to pay and paid; and

(b) interest on it at the prescribed rate from the date of payment.

CHAPTER 5

PRESENTMENT FOR PAYMENT

GENERAL

44 Necessity for presentment for payment

Subject to the provisions of this Act, a cheque must be duly presented for payment in accordance with the provisions of section 45 or section 46.

45 Rules for presentment for payment

(1) A cheque must be presented for payment by or on behalf of the holder.

(2) A cheque must be presented for payment during business hours on a business day and before it is overdue.

(3) A cheque must be presented for payment to the drawee, or to a person authorised to pay or refuse payment on his behalf, at the branch of the drawee stated in the cheque or, if no such branch is stated, at any branch of the drawee.

Comparative legislation

Sec 72 SABEA
Sec 74 BEA
Sec 3-502 and 3-503 UCC
Art 29 GULC and art 25 of the Second Schedule to the Geneva Convention on the Uniform Law for Cheques
Sec 60 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

72. *Presentment of cheque for payment.*

(1) Subject to the provisions of this Act --
(a) if a cheque is not presented for payment within a reasonable time, within the meaning of sub-section (2), of its issue, and the drawer or the person on whose account it is drawn had the right, at the time at which such cheque should have been presented for payment, as between himself and the banker, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid;
(b) the holder of a cheque as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and be entitled to recover the amount from him.
(2) In determining what is a reasonable time for the purpose of paragraph (a) of subsection 1), regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

Commentary

1 Clause 45 repeats clause 52 of the proposed Bills of Exchange and Promissory Notes Act, adapting it for cheques. Reference should therefore be made to the commentary on that clause.

2.1 Since a cheque is, by definition, payable on demand, clause 52(2)(a) of the proposed Bills of Exchange and Promissory Notes Act is omitted from clause 45(2) of this draft.

2.2 A pre-printed cheque form always contains at least the name of the branch of the bank on which it is drawn and often also the address of that branch. Pre-printed cheques would therefore fall under clause 45(3)(a) and/or (b) of this draft, and have to be presented at that specific branch (*Discounting and Shipping Co (Pty) Ltd v Franskraalstrand (Pty) Ltd and others* 1962 2 SA 559 (W) 560-561; *Barclays Bank plc and others v Bank of England* 1985 1 All ER 385 391; *Discounting and Shipping*

Co (Pty) Ltd v Franskraalstrand (Pty) Ltd 1962 2 SA 559 (W) 560-1; *Navidas (Pty) Ltd v Essop* 1992 3 SA 797 (D); *Akasia Finance v Da Souza* 1993 2 SA 337 (W) 341; *Joachimson v Swiss Bank Corporation* 1921 3 KB 110 127; *Commercial Union Trade Finance v Republic Bottlers of SA (Pty) Ltd t/a Booth's Bottle Store* 1992 4 SA 728 (D) 729-30 and *Canoa Importers (Pty) Ltd v Eddy and Henshaw* case no 10200/90 (19.4.91); *Nedtravel (Pty) Ltd t/a American Express Travel Service v Moch* 1993 2 SA 38 (W)), unless the procedure provided for in clause 46 of this draft is followed. Although clause 45(3)(c) of this draft would rarely (if ever) be relevant to cheques, it nevertheless seems necessary to retain it.

While it may be argued that it has become established banking usage that a customer may draw cheques only on pre-printed cheque forms supplied by his bank, there is also authority to the contrary (see Barker *Principles and Practice of Banking in South Africa* (1952) 35; Chorley *Law of Banking* (1974) 43; *Burnett v Westminster Bank Ltd* 1965 3 All ER 81). It was held in *Burnett* that such a rule can be the result only of an agreement between bank and customer (see paragraph 1 of the German *Allgemeine Bedingungen für den Scheckverkehr* in Baumbach-Hefermehl 681). But even if it is accepted that such a practice is established in South Africa, there are two reasons why clause 45(3)(c) of this draft remains necessary. First, it cannot be assumed that a cheque on a pre-printed form will *always* be covered by clause 45(3)(a) or (b). Secondly, such a rule would apply between bank and customer only. If the customer draws a cheque on a document other than a form supplied by his bank, the document would be a valid cheque (*Roberts and Co v Marsh* (1915) 1 KB 4 (CA)). If a specific branch is not indicated in it, clause 45(3)(c) of this draft would apply.

2.3 The situation in which a cheque indicates someone other than the drawee bank as payor is rare, but not inconceivable. Clause 52(4)(c) of the proposed Bills of Exchange and Promissory Notes Act is thus repeated in clause 45(4)(b) of this draft.

2.4 Clause 52(4)(b) of the proposed Bills of Exchange and Promissory Notes Act deals with multiple drawees. According to clause 4(2) of this draft a cheque may be drawn on one drawee only. Consequently, this draft has no comparable provision.

3 According to clause 44(2) of this draft a cheque must be presented for payment "before it is overdue". In terms of clause 7(2) of this draft a cheque is overdue six

months after its date. In other words, it must be presented for payment within six months of its date. The SABEA (like most Anglo-American legislation) uses the concept of a "reasonable time". Subject to section 72 SABEA (which is discussed below), section 43(2)(b) SABEA (read with section 71 SABEA) provides that a cheque must be presented within a reasonable time after its issue to render the drawer liable, and within a reasonable time after its indorsement to render the indorser liable. In determining what is a "reasonable time" for the purposes of this provision, regard must be had to the nature of the cheque, the usage of trade with respect to similar cheques and the facts of the particular case (section 43(3) SABEA). Paragraph 1 of the commentary on clause 52 of the proposed Bills of Exchange and Promissory Notes Act points out why this approach is unsatisfactory. Consequently, this draft provides for a fixed and easily determinable period within which presentment must be made. This is also the approach followed by article 29 GULC, although the periods allowed for presentment differ. According to article 29 GULC a cheque payable in the country in which it has been issued must be presented for payment within eight days of its date. If the cheque is issued in one country and payable in another, the period for presentment is 20 days or 70 days, depending on whether the two countries are on the same continent. The very short periods allowed by the GULC are based on the idea that a cheque is essentially a payment instrument and not capable of being used for credit purposes (see Baumbach-Hefermehl 577; Hueck-Canaris 183; Brox paragraph 658). Although the basic function of the cheque is, of course, to effect payment, it is submitted that the GULC carries this notion to unacceptable extremes (see also Oelofse "Die Aard van 'n Vooruitgedateerde Tjek" 1981 *Modern Business Law* 51 55-6 and 58).

The period of six months allowed by this draft gives in a sense, recognition to the practice of some banks of treating a cheque as "stale" when six months has elapsed after its date (see Malan 257; De Wet & Yeats 813 n577; Cowen (1966) 370).

4 The normal consequence of a failure to present timeously for payment is a loss of the holder's right of recourse (section 43(1)(b) SABEA). Section 72 SABEA, however, contains a qualification with respect to *cheques* (see section 74 BEA and section 60 Australian Cheques and Payment Orders Act, 1986; Holden 162; Byles 293ff). The effect of this provision is that the *drawer* of a cheque is, in principle, *not* discharged by a failure to present it within a reasonable time as required by section 43(2)(b) SABEA. He will be discharged only if he had the right, at the time when the

cheque should have been presented for payment, as between himself and the drawee bank, to have the cheque paid, and suffers actual damage through the delay. The extent of the discharge is the extent to which the drawer is a creditor of the drawee bank to a larger amount than he would have been had the cheque been paid (section 72(1)(a) SABEA). It seems clear that the drawer would suffer damage (and be discharged) only if on the drawee bank becoming insolvent after a reasonable time for presentment has lapsed (Malan 264; De Wet & Yeats 813; *Neale v Barlinski* 1910 CPD 350 352; but see Tager paragraph 158 n5). When the drawer is so discharged, section 72(1)(b) provides that the holder of the cheque "shall be creditor, in lieu of such drawer ... of such banker to the extent of such discharge, and be entitled to recover the amount from him". In effect then, the holder can no longer hold the drawer liable, but obtains a concurrent claim for the amount of the cheque against the insolvent drawee bank. Clearly the drawer can suffer damage only if the cheque has been drawn against a credit balance (and not on the strength of overdraft facilities) with the drawee bank (but see Cowen (1966) 308, who seems to imply the opposite). Since the drawer's concurrent claim against the bank passes to the holder to the extent of the amount of the cheque, it is also clear that the drawer is discharged not only on the cheque itself, but also on the underlying obligation (Malan 264 n56).

5 Apart from some indirect references (see *Venter v Smit* 1913 TPD 231 232 and *Bell v Cook and another* 1920 CPD 125 129), the courts have considered section 72 SABEA in only two cases. In *Tom v Lurie* 1922 TPD 432, a cheque was not presented for three and a half years. The court held that the drawer had been discharged. Since there was no evidence of "damage" suffered by the drawer as a result of the delay, the court in effect ignored section 72. For this reason the judgment is clearly wrong (see De Wet & Yeats 813 n577; Cowen (1966) 308). In *Brakpan Produce and Livestock Agency Ltd v Dennill* 1922 TPD 150, on the other hand, Wessels JP stressed that the drawer must have suffered damage before he could be discharged by reason of an unreasonable delay in presentment. Referring with apparent approval to *Robinson v Hawksford* (1846) 9 QB 52 (115 ER 1195), Wessels JP said that the drawer would in any event be discharged, even without damage, after a period of six years (the prescriptive period for actions on a negotiable instrument (see section 11(c) of the Prescription Act 68 of 1969)). This view is shared by Cowen (1966) 308, De Wet & Yeats 813 n577 and Tager paragraph 125, but conflicts with the view of the courts that prescription begins to run only after due presentment if

presentment is not excused (*Van Gent v Venter* 1946 TPD 506; *Schnehage en 'n ander v Bezuidenhout* 1977 1 SA 362 (O); Malan et al *Provisional Sentence* 105 n97). Although it is desirable that prescription should begin to run from the date of issue (and not presentment) of a demand instrument (see paragraph 2 of the commentary on clause 60 of the proposed Bills of Exchange and Promissory Notes Act), this matter should be rectified by an amendment to the Prescription Act.

6 According to Cowen (1966) 308 n66, the reason for the exception to the drawer's discharge "would appear to be that a cheque is generally given in liquidation of a debt". This would be correct only if it is true that a drawer is automatically discharged on his underlying debt as well when his liability on the cheque is discharged by reason of a failure by the holder to comply with his duties. This seems to be the position in Canada (see Crawford and Falconbridge 1758) and possibly also in English law (see Chalmers & Guest 661). In South African law (see Oelofse "Die Verband tussen Tjekverbintenis en Grondliggende Verbintenis" 1982 *Modern Business Law* 30), German (see Gernhuber *Die Erfüllung und ihre Surrogate* (1983) 169-70) and Belgian (see Ronse I 688) law this is not the case, at least not when there has been no further negotiation of the cheque. Ronse I 688 rightly remarks: "Deze radikale oplossing word terecht verworpen."

It is submitted that section 72 SABEA is an attempt, more general than suggested by Cowen, to free the holder from the consequences of his failure to present timeously. Section 72 SABEA would, for example, protect the holder in the following type of case (see the facts in *Manret Holdings (Pty) Ltd v Jhazbhay* 1975 2 SA 122 (D); *National Office Supplies (Pty) Ltd v Jhazbhay* 1975 3 SA 977 (D); *Anglo-African Factors (Pty) Ltd v P and I Engineering* 1984 2 SA 501 (W)): A draws a cheque payable to B for the accommodation of B. B discounts the cheque with C. If C does not present it for payment timeously, both B and A would be discharged from liability on the instrument should the general rule apply. Furthermore, C has no underlying claim against B on which he could have relied. However, since section 72 SABEA applies, C would still be able to hold A liable on the instrument, unless the drawee bank were to become insolvent in the meantime. In this case the cheque was not given by the drawer to the payee to pay an underlying debt. But even if Cowen's basis for section 72 SABEA is accepted, the fact remains that ordinary bills are also used on a large scale "in liquidation of debts", although with credit terms built into the transaction. It is accordingly illogical that section 72 SABEA should apply only to the drawer of a cheque.

7 Section 72 SABEA ameliorates the consequences of non-compliance with the strict formal requirements for the drawer's liability. If this is desirable (which requires an answer to the question whether the drawer's liability *should* be subject to strict formal requirements), there is no reason why it should be done so half-heartedly and illogically. If, on the other hand it is not thought advisable, section 72 SABEA should be deleted in its entirety.

Section 3-502(1) UCC embodies the same idea as does section 72 SABEA, but is more consistent and logical. It provides:

> "Where without excuse any necessary presentment or notice of dishonour is delayed beyond the time when it is due (a) any indorser is discharged; and (b) any drawer or the acceptor of a draft payable at a bank or the maker of a note payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor or maker is not otherwise discharged."

It will be seen that, apart from the other cases falling under this provision, this section applies to *all* drawers, whether of bills or cheques, and whether or not a bill is payable on demand or at a fixed future date. It also applies to a failure to give timeous notice of dishonour. According to paragraph 2 of the Official Comment on this provision, its purpose "is to avoid hardship upon the holder through complete discharge, and unjust enrichment of the drawer or other party who normally has received goods or other consideration for the issue of the instrument". See further Reitman Weisblatt Schlichting Rice Cooper 122-8; Bailey 13-2 to 13-4; and especially Weber and Speidel 179-82.

8 In most countries in which legislation is based on the GULC a result similar to section 3-502 UCC is achieved, but along quite a different route. It has been pointed out (paragraph 3 above) that article 29 GULC prescribes relatively short periods for presentment for payment. Article 40 GULC makes it clear that non-compliance with this time limit leads to the loss of the rights of recourse against the indorsers *and the drawer* (Baumbach-Hefermehl 578; Zöllner 161; Brox paragraph 679 and articles 38 and 53 GULB). In this respect the GULC differs from the UCC. However, the Second Schedule to both the Geneva Convention on the Uniform Law for Bills of Exchange and Promissory Notes and the Geneva Convention or the Uniform Law for Cheques (the so-called "reservations") contains a provision that allows a qualification

of the position. Article 25 of the reservations to the Uniform Law for Cheques provides:

> "Each of the High Contracting Parties is free to decide that, in the event of forfeiture of rights or limitation of actions, proceedings may be taken in his territory against a drawer who has not provided cover or against a drawer or endorser who has made an inequitable gain."

Most of the signatories to the Geneva Conventions have, in one form or another, made use of these reservations. Germany may be taken as an example. The reservation regarding bills and notes has been incorporated in article 89 of the Wechselgesetz, and the reservation regarding cheques in article 58 of the Scheckgesetz. The first paragraph of the latter reads:

> "Der Aussteller, dessen Rückgriffsverbindlichkeit durch Unterlassung rechtzeitiger Vorlegung oder Verjährung erlöschen ist, bleibt dem Inhaber des Schecks so weit verpflichtet, als er sich mit dessen Schaden bereichern würde."

The second paragraph of article 58 provides that this "cheque enrichment claim" prescribes one year from the date of issue of the cheque as indicated on the cheque (see Baumbach-Hefermehl 637). An extensive discussion of this enrichment claim is out of place. For details, see Baumbach-Hefermehl 637 and 584-5; Hueck-Canaris 156-60; Zöllner 139-42; Jacobi 923-6 and especially Canaris "Der Wechselbereicherungsanspruch" 1977 *Wertpapier-Mitteilungen* 34.

8.1 Article 58 of the Scheckgesetz gives the holder of a cheque a subsidiary enrichment claim in two cases, viz when the cambial claim on the document has been extinguished as a result of prescription of the drawer's liability, and when it has been extinguished as a result of a failure to make timeous presentment. The reason for granting the claim in the former case is that the prescription periods for claims on bills, notes and cheques in terms of the GULB and GULC are generally much shorter than the "ordinary" prescriptive periods applicable in the various national legal systems. In terms of article 52 GULC, the right of recourse against the drawer of a cheque prescribes six months from the expiration of the period allowed for presentment, while the shortest prescriptive period provided for in the German Civil Code (paragraph 196) is two years. By allowing the special enrichment claim against the drawer whose liability on the document has become prescribed, the holder has another six months less eight days in which to sue the drawer in terms of article 58 paragraph 1 of the Scheckgesetz. It may be asked why the prescriptive period for the

drawer's liability was fixed at six months in the first place if it is deemed necessary to protect the holder against it via the special enrichment claim. In South Africa there is no ground for protecting the holder against prescription of his right of recourse on the document, since our prescriptive period for cambial debts (six years in terms of section 11(c) of the Prescription Act 68 of 1969) is much longer than the "general" prescriptive period of three years (section 11(d) of the Prescription Act). Furthermore, the fact that the underlying debt for which a cheque has been given has prescribed, does not mean that the claim on the cheque also prescribes. The latter remains in existence until its own period of prescription lapses (see *Grewar en Hanekom (Pty) Ltd v Roux* 1959 2 SA 182 (C)).

8.2 Only the case of extinction of the holder's right of recourse by reason of a failure to present for payment timeously is therefore relevant for comparative purposes. The basic requirements of the action are that the drawer must be *enriched* by the extinction of his liability on the cheque and that the holder must suffer *damage* by reason of that extinction. According to the majority view, the word "damage" in the provision should be interpreted in the abstract. This means that the holder suffers damage if *all* his claims *on the instrument* are lost, although he may still have a claim in terms of the underlying transaction (Canaris 1977 *Wertpapier Mitteilungen* at 40). This liberal view in favour of granting the action is, however, largely (or entirely, if one accepts the view of Gernhuber 172 on the effect of extinction of the claim on the instrument on an underlying claim) neutralised by the *enrichment* requirement. According to the generally held view (see BGH 1956 *Wertpapier Mitteilungen* 188; contrast Canaris 1977 *Wertpapier Mitteilungen* at 42), the drawer is not enriched provided he remains liable in terms of the underlying transaction in payment of which he has drawn the cheque. If the payee has not negotiated the cheque, the drawer remains liable in terms of the underlying transaction, and thus *not* in terms of article 58. However, should the payee discount the cheque with X (ie, sell it to X), there would be no underlying debt in terms of which the payee would remain liable to X. The payee would then finally be entitled to the proceeds of the discounting transaction as soon as his liability as indorser (if any) falls away by reason of X's failure to present the cheque timeously. It follows that the payee's underlying claim against the drawer also falls away, with the result that the drawer may be liable to X in terms of article 58 (see Baumbach-Hefermehl 395ff; Canaris 1977 *Wertpapier Mitteilungen* at 41-2; Gernhuber 174).

8.3 For the purposes of article 58, the drawer would be enriched only if, *in terms of the underlying relationship,* he has ultimately been liable for payment of the cheque. This would, of course, usually be the case, but not always. Suppose A draws a cheque in favour of B in order to accommodate him. B discounts the cheque with C, who fails to present it timeously. Since B, and not A, is, in terms of the accommodation agreement, ultimately liable to supply the funds to pay the cheque (see Malan 81; De Wet & Yeats 785-6; section 57(5) SABEA), A would not be enriched. B would receive a windfall, but since he is not the drawer, he cannot be held liable in terms of section 58 (see the strenuous but unconvincing attempt by Canaris 1977 *Wertpapier Mitteilungen* at 38-9 to bring B within the ambit of the provision).

9 It should be clear that section 72 SABEA, section 3-502 UCC, section 74 BEA, section 60 of the Australian Cheques and Payment Orders Act, 1986, article 89 Wechselgesetz and article 58 Scheckgesetz are all, to a greater or lesser extent, attempts to "soften" the effect of the formal requirements for the liability of the drawer. In those cases in which the holder has no underlying claim on which he can rely, these provisions prevent a loss to the holder and a corresponding windfall to the drawer. The question is whether this is desirable. It is true that the existence of the formal requirements increases the possibility of such a loss and consequent windfall materialising, but this is, in a sense, counterbalanced by the strict liability to which a party to a negotiable instrument is subject. The prescription of an ordinary claim also results in a loss to the creditor and a corresponding windfall to the debtor, but this is expressly sanctioned by the Prescription Act.

In the final analysis, a value judgment determines whether the holder should be given some special protection against the loss of his rights against the drawer. Since there seems to be no clear case one way or the other, section 72 SABEA has been omitted from this draft. What is clear, is that the present situation cannot be perpetuated. If a provision like section 72 SABEA is desirable, it should be extended to ordinary bills of exchange and to the duty to give notice of dishonour as well (see section 3-502 UCC).

One last point should be stressed. If a provision like section 72 SABEA is retained, it is advisable to amend the Prescription Act so that, if the day on which a debt becomes due may be unilaterally determined by the creditor, the debt shall be deemed to be due on the earliest day which the creditor was entitled so to determine

(see paragraph 2 of the comment on clause 52 of the proposed Bills of Exchange and Promissory Notes Act; further Oelofse *Die Uberrima Fides-leerstuk in die Versekeringsreg* (LLD thesis US 1983) 445-7). If this is not done, the drawer could remain liable indefinitely, which is unacceptable (see paragraph 5 above, and see Cowen 297 with reference to section 38 SABEA).

46 Presentment for payment by bank

(1) A cheque may, provided the requirements of section 45(1) are met, be presented for payment to the drawee by a collecting bank

(a) at a place designated by any clearing house rule; or

(b) at a place of payment designated by the drawee; or

(c) by means of data transmitted by or on behalf of the collecting bank whether through a clearing house or otherwise, to the drawee identifying the cheque with reasonable certainty.

(2) For the purposes of paragraph (c) of subsection (1), a cheque is deemed to be identified with reasonable certainty if

(a) the sum ordered to be paid by the cheque;

(b) the number of the cheque, if any;

(c) the account against which the cheque is drawn; and

(d) the branch of the drawee where the cheque is payable is specified or is readily ascertainable by the drawee from the data transmitted by or on behalf of the collecting bank.

(3) Where a cheque is presented for payment in terms of this section without exhibiting it to the drawee, nothing in this section shall relieve the drawee from any liability to which it would have been subject in relation to the cheque if it had been presented by being exhibited to the drawee.

47 Dishonour by non-payment

(1) A cheque is dishonoured by non-payment where -

(a) it is duly presented for payment and the cheque is not paid; or

(b) presentment for payment is excused and the cheque is not paid.

(2) Subject to the provisions of this Act, where a cheque is dishonoured by non-payment, a right of recourse against the drawer and indorsers immediately accrues to the holder.

DELAYS AND EXCUSES

48 Delay in presentment

Delay in presenting a cheque for payment is excused if the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence; Provided that if the cause of delay ceases to operate, presentment must be made with reasonable diligence.

49 Presentment excused

(1) Subject to the provisions of this Act, presentment for payment is excused-

(a) where it is delayed and the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence and continues for a period of thirty days;

(b) where, after the exercise of reasonable diligence, presentment as required by this Act cannot be made;

(c) as against a party who has expressly or impliedly waived presentment either before or after it must be made;

(d) as against a party to whom the cheque was presented for payment or from whom payment was demanded;

(e) as against a party who has countermanded payment;

(f) as against a party who is not entitled to require that the cheque be paid, or who has no reason to expect that it would be paid.

(2) Presentment for payment is excused where the drawee is insolvent, or a fictitious person, or a person not having capacity to pay, or if the drawee does not or has ceased to exist.

50 Effect of failure to present for payment

Subject to the provisions of this Act, if a cheque is not duly presented for payment, the drawer and indorsers are discharged from liability on the cheque.

CHAPTER 6

CROSSING OF CHEQUES

51 Crossing of cheques

(1) Where a cheque bears across its face an addition of two parallel transverse lines, that addition constitutes a crossing and the cheque is crossed.
(2) A cheque may be crossed by the drawer, by the holder or by a collecting bank.
(3) A crossing may be cancelled only by the drawer deleting the crossing and placing his signature next to the deletion.
(4) A crossed cheque shall be paid by the drawee only to a collecting bank or to a customer of the drawee by crediting it to his account.
(5) There cannot be a holder in due course of a crossed cheque.

52 Non-transferable cheque

(1) A non-transferable cheque is a crossed cheque that is payable to a specified person and on which the words "not transferable" or "not negotiable" appear with reasonable clarity between the two parallel lines of the crossing.
(2) A non-transferable cheque may be negotiated to a collecting bank only.

Comparative legislation

Sec 6(3), 6(5) and 32 SABEA
Sec 8(1), 8(4) and 35 BEA
Sec 3-205, 3-206 and 3-805 UCC
Art 14(2) and 18(2) GULC
Sec 39 Cheques and Payment Orders Act 1986

The relevant provisions in the Bills of Exchange Act 1964 are:

6. *Negotiability of bills*

(1) A bill must be payable either to bearer or to order to be negotiable.
(2) A bill is payable to bearer if it is expressed to be so payable, or if the only or last indorsement on it is an indorsement in blank.

(3) A bill is payable to order if it is expressed to be so payable, or if it 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.
(4) If a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order at his option.
(5) If a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties to the bill, but is not negotiable.
32. *Restrictive indorsement.*
(1) An indorsement is restrictive if it prohibits the further negotiation of the bill, or if it 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 is 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) If 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.

Commentary

1 Historically, the cheque derives from the bill of exchange. Oelofse, Stassen and Du Plessis "Hersiening van die Wisselwet" 1983 *Modern Business Law* 67 78 explain this development as follows:

> "Die redes waarom die tjek as wissel ingeklee en met die eienskappe van verhandelbaarheid beklee is, is bloot histories van aard. Die wissel was reeds 'n bekende betalingsmeganisme in Engeland toe die verskynsel van depositorekeninge deur die goudsmid-bankiers ontwikkel is en is derhalwe aangewend as instrument om onttrekking deur middel van betaling aan derdes uit sodanige depositorekeninge te bewerkstellig."

The subjection of the cheque to the principles of the law of negotiable instruments has aptly been described as a "historical accident" (see Cowen "Two Cheers (or maybe only one) for Negotiability" 1977 *THRHR* 19 36-7). It has often been questioned whether the cheque, in view of its modern use as predominantly a payment instrument, should be subject to the law of negotiable instruments (Oelofse Stassen and Du Plessis 1983 *Modern Business Law* 78-9; Murray "Crossed Checks, Account Payee, and Non-negotiable Checks: Some Suggestions from Foreign Law" 1968 *Hasting Law Journal* 273-6; Holden "Suggested Reform of the Law Relating to Cheques" 1951 *Modern Law Review* 33 44-5). Cowen 1977 *THRHR* 37 remarks:

> "Negotiability served a great role historically. It still serves a great role when credit is needed, in which event it is customary for the person wanting credit to use a promissory note or bill of exchange payable at a future date. In credit transactions these instruments must be capable of

> ready discountability, free from defences in the hands of the person discounting them. But the normal function of cheques is quite different; it is the immediate payment of debts already due. And for this purpose it is hazardous to use an instrument which may be passed on, like currency, into hands other than those of the debtor's creditor. Indeed, in the general run of cases the last thing a person making payment by cheque wishes to do is to launch a negotiable instrument upon the world. How many people would lightly send through the post R100 in currency (reserve bank notes) when paying a debt? Yet this is precisely what they often do when putting a cheque into the post, unless appropriate steps have been taken to destroy the cheque's negotiability."

Against this background, the concept of negotiability is inappropriate: the cheque should not be a negotiable instrument (Malan "The Liberation of the Cheque" 1978 *TSAR* 107 114): first, it creates the possibility of misuse by the forgery of an indorsement and enables the forger to create the appearance that he is entitled to payment. Depending on the circumstances (including the possible applicability of sections 58 and 79 SABEA), the drawer, the payee or the drawee bank will suffer the consequent loss. Secondly, the doctrine of negotiability may prevent the drawer from raising a defence that he has against the payee. This will be so where the cheque is negotiated by the payee to a third party who qualifies as a holder in due course. These difficulties would be overcome if cheques were to be "not-negotiable".

2 There is some Roman-Dutch authority on which to base the cheque as a simple payment order that is not negotiable. The common law viewed the bill of exchange, cheque and promissory note as "chosen" ("gekorene") order documents. This means that where the instrument is not payable to bearer, it must contain an express "order clause" to be negotiable by means of indorsement and delivery (De Wet & Yeats 754 n82; Cowen (1985) 51; *Van der Merwe v Franck* (1885) 2 SAR 26; *Jagger v Duncan* (1887) 2 SAR 214; *Enslin v Haupt* (1877) 7 Buchanan 58; *Thompson Watson and Co v Malan* (1843) 2 Menzies 270). Thus, where a cheque contained the order "Pay X", and not "Pay X or order" or "Pay to the order of X", it could not have been negotiated, although an *ordinary cession* of the rights arising from it was possible (see the cases mentioned above and Cowen (1985) 51). This was changed by section 6(3) SABEA and its predecessors (*OK Bazaars (1929) Ltd v Universal Stores Ltd* 1972 3 SA 175 (C) 181 and *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) 505). Section 6(3) SABEA makes it clear that a bill, cheque or note is payable to order in the absence of an "order clause", provided it does not contain words prohibiting transfer.

The Roman-Dutch position is comparable with, but not identical to, that under the UCC, section 3-805 of which provides:

> "This Article applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this Article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument."

Thus, a cheque payable to "X" is subject to all the rules that apply to negotiable instruments, except that there can be no holder in due course (*Beyer v First National Bank* 612 P 2d 1285; *Continental Bankers Life Insurance Co v Bank of Alamo* 578 SW 2d 625; Miller and Harrell 14-5; Weber and Speidel 9-10; McHugh "Articles 3 & 4: Commercial Paper and Bank Deposits and Collections" (1982) 18 *Wake Forest Law Review* 249 258). This provision excludes the second consequence referred to in paragraph 1 above, but not the first, since the instrument can still be "indorsed" (Murray 1968 *Hastings Law Journal* 276). According to our common law, on the other hand, both consequences are excluded, since the instrument is not capable of being "indorsed" at all.

It should be noted that the Revised Article 3 UCC contains no provision comparable to section 3-805: section 3-104(c) now makes it possible to have a holder in due course of a cheque without the order or bearer clauses. The policy consideration underlying this change is that a deletion of the pre-printed words on cheque forms "to the order of" can easily be overlooked; such a deletion should not affect the rights of someone who pays or purchases the instrument (Official Comment on Revised Section 3-104).

A return to the common law would bring the legal nature of a cheque in line with its economic function as a payment order. But such a change would be a radical break with the development of our law under the influence of English law, and would cause new problems of construction. It would, for example, be necessary to interpret the meaning and effect of words like "not transferable" or "not negotiable" on cheques without an order clause.

3 There are significant theoretical and practical differences concerning the form and use of non-negotiable cheques in the various legal systems.

On the one hand, there is section 3-805 UCC (see paragraph 2 above but compare section 3-104(c) Revised Article 3). This provision (read with Section 3-104(1)(d) UCC) makes it clear that an order or a bearer clause is a requirement for holding the instrument in due course. Negotiation subject to equities remains possible without these clauses, but can be entirely excluded by appropriate words on the cheque.

The Australian Cheques and Payment Orders Act, 1986, on the other hand, do not allow for a prohibition on the negotiability of cheques. Section 39(1) states that every cheque may be transferred by negotiation until it is discharged. Section 39(2) puts the issue beyond doubt: "Sub-section (1) has effect in relation to a cheque notwithstanding anything written or placed on the cheque." (See also paragraphs 47ff of the *Manning Report* (at 8ff.) The only "limitation" allowed is a crossing coupled with the words "not negotiable" (see section 53(1)(b)). The effect of this crossing is not to exclude the possibility of negotiation, but to ensure that any negotiation is subject to equities (section 55, and see section 80 SABEA). Put differently, nobody can become the holder in due course of a cheque crossed and marked "not negotiable".

3.1 Article 14(1) GULC provides that a cheque payable to a specified person, with or without an express order clause, may be transferred by means of indorsement. The cheque is therefore a "born" order paper in terms of the GULC (Hueck-Canaris 23; Meyer-Cording *Wertpapierrecht* (1980) 24-5 and see Roblot 117-8). Since the nature of the instrument as an *order* document flows from legislation, some writers refer to it as a *statutory* order document (Jacobi 578). Transfer by negotiation can, however, be excluded. Article 14(2) GULC provides:

> "A cheque made payable to a specified person, in which the words 'not to order' or any equivalent expression have been inserted, can only be transferred according to the form and with the effects of an ordinary assignment."

A clause "not to order" would exclude the possibility of negotiation, but an ordinary cession of the rights flowing from the document would still be possible. Provided the wording is wide enough, both negotiation and cession can be excluded (Von Gierke *Das Recht der Wertpapiere* (1954) 33; Raiser *Das Rektapapier* (1934) 37. The words "not transferable" would seem to be sufficient in German law to exclude both negotiation and cession; Jacobi 671; De Rooy *De Betaalcheque* (1985) 54-6; but see Stranz *Wechselgesetz* (1952) paragraph 4 on article 11 of the Wechselgesetz; Quassowski-Albrecht *Wechselgesetz* (1934) paragraph 7 on article 11 of the Wechselgesetz).

Although the GULC specifically provides for a "non-transferable cheque", it is not always possible to make use of such an instrument. In Germany, for example, the banks have effectively eliminated its use. This has been done by means of paragraphs 1 and 8 of the standard terms of contract *(Allgemeine Bedingungen für den*

Scheckverkehr, see Baumbach-Hefermehl 681) to which all cheque account holders are subject. The combined effect of these provisions is that: (i) only cheque forms supplied or approved by the bank may be used; (ii) no alterations or deletions may be made on a cheque form (see the notice on the specimen cheque forms in Zöllner 158); and (iii) a contravention of these provisions absolves the bank of its duty towards the drawer to pay. In practice banks supply only cheque forms with a "bearer" clause on it to ordinary customers (see Lehnhoff "Verwendung von Orderschecks im Inland" 1982 *Bank Information* 44). It follows that these customers cannot draw "order" cheques, let alone "non-transferable cheques". In evaluating these measures, it should be kept in mind that a substantial number of cashless payments in Germany are made by means of a well-developed system of credit transfer (Banküberweisung.)

3.2 Clause 26 of the proposed Bills of Exchange and Promissory Notes Act provides for the negotiation for collection of instruments containing words prohibiting negotiation. Very much the same approach is found in the Uncitral Convention that apply to bills and notes. It is suggested that the same approach be followed in this draft with respect to cheques, but it must be conceded that there is no pressing need to do so. Cheques are very seldom indorsed and, because of the provisions of section 79 and 83 SABEA, the collecting bank need not be holder of cheques presented for collection (see *Gishen v Nedbank Ltd* 1984 2 SA 378 (W)). In addition, a collecting bank can rely on section 84 SABEA in respect of cheques payable to order which are not or are irregularly indorsed. Clauses 24 and 25 are nevertheless inserted to cover the unusual case. But different considerations apply to the non-transferable cheque introduced by clause 52 and they are discussed in paragraph 8 below.

Two further points needs to be stressed. First, according to Uncitral Convention the negotiability of a cheque payable to bearer cannot be restricted by the insertion of specific words in it. It has been suggested that the words "not transferable" on a bearer cheque are without effect with the result that the document remains a fully transferable bearer cheque (see Oelofse "Die Posorder as Drieparty-betalingsmeganisme" 1981 *Modern Business Law* 14 16 and see the discussion in Malan et al *Provisional Sentence* 49ff). Secondly, it will be seen that a cheque can not be transferred despite an order clause added to the name of the payee. It is, of course, true that an order clause is suggestive of transferability, but words like "not transferable" purport to exclude transferability. Ideally, the payment order would then be ambiguous.

3.3 The position in Italy is that where a cheque is marked "not transferable" it may be paid only to the payee or his collecting bank. The payee may indorse the cheque only to a bank for collection, and the latter may not indorse it further (Murray 1968 *Hastings Law Journal* 287; Malan 1978 *TSAR* 115). Article 43 of the Italian Uniform Law for Cheques further provides that the words "not transferable" may be inserted in the cheque by an indorser with the same effect. Another aspect of the Italian provision is that the words "not transferable" exclude not only a negotiation (except for collection), but also a transfer of rights by means of cession (Murray 1968 *Hastings Law Journal* 287). This seems to be the position in Dutch law as well (De Rooy 54-6).

3.4 Under the Bolivian Cheque Law of 1912 "non-transferability" could be achieved by means of a special crossing (Murray 1968 *Hastings Law Journal* 291-2; Malan 1978 *TSAR* 115). Under this (now repealed) provision, payment could have been made only to the payee or to the bank to which the cheque had been crossed. Such a cheque could not have been indorsed at all and no one could have been holder in due course of it. However, this provision has been left out of the Código de Comercio, which was enacted in 1977. Article 603 of the Código de Comercio (Schettler and Büeler *Das Wechsel und Scheckrecht aller Länder* (1957) sv "Bolivien" for the text) follows the Italian approach: the drawer or any holder can exclude transferability by inserting the words "not deliverable" or "not transferable", although an indorsement for collection *to a bank* remains possible. By limiting the possibility of indorsement to *one* indorsement to a bank only, the Bolivian (and Italian) legislation has considerably reduced the risk of a forged indorsement.

3.5 Another combination of a crossing and "non-transferability" is found in article 824 of the Código de Comercio of El Salvador. It provides (translation of Murray "Drafts, Promissory Notes and Checks: A Comparison of Civilian, Quasi-civilian and Non-civilian Suggestions" 1983 *Lawyer of the Americas* 211 254-5):

> "(I) 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 favour 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 favour of said indorsee.

> (2) The check is not negotiable starting from the insertion of the clause 'for payment in account'. The clause may not be erased. The check for payment in account does not require the signature of the customer."

(Murray uses the word "indorser" instead of "indorsee" at the end of subsection (1), but this is a mistake, as appears from the German translation of Schettler and Büeler).

The clause "for payment in account" brings about both a crossing and a prohibition on negotiation. Since these words must appear in conjunction with the indorsement and because the instrument becomes "non-transferable" from the time of indorsement, there can be no confusion between the case in which the cheque is *drawn* in non-transferable form and in which it is made non-transferable by an indorser.

4 Although South African legislation provides for order and bearer cheques, section 6(5), in addition, envisages "non-transferable" instruments (section 8(1) BEA and Holden 1951 *Modern Law Review* 45-7). Section 6(5) reads:

> "If a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties to the bill, but is not negotiable.

Section 6(3) is also relevant:

> "A bill is payable to order if it is expressed to be so payable, or if it 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."

Construed literally, section 2(1) conflicts with section 6(5) SABEA. The former defines a bill as an order to pay "to a specified person or his order, or to bearer", but the latter recognises a bill that is not payable to order or bearer. In *Impala Plastics (Pty) Ltd v Coetzer* 1984 2 SA 392 (W) 395 Flemming J said: "That a bill of exchange which by definition is an order to pay to a party or order (or bearer) - may nevertheless be 'not-negotiable' in its very issue and before any negotiation, is tolerated by the legislation." He then refers to section 6 and 34 SABEA. That a document which in all respects qualifies as a cheque, but which cannot be negotiated, is still a cheque, is put beyond doubt by clause 52 of this draft.

Although section 6(5) SABEA has (in the form of its colonial predecessors) been on the statute book for many years, little use of it was made until the last two decades.

4.1 After the passing of legislation on bills, notes and cheques it became clear that a negotiation could not be eliminated by the mere omission of the order or bearer clauses (paragraph 2 above and *White Ryan and Sons v Van Schalkwijk* 1913 CPD 376 378). The first reported case in which the courts were required to indicate how the negotiation of a cheque could be eliminated is *R Barkhan Finance Corporation v Dabros (Pty) Ltd* 1968 2 SA 686 (A). It concerned four notes payable to M. Schochat and Co. The payee indorsed the notes in blank and delivered them to the appellant. The appellant then sued the respondent, the maker of the notes, as holder. The respondent denied this and pleaded that the word "only" appeared after the name of the payee, with the result that the notes could not be negotiated. Although it accepted that the ord "only" after the name of the payee would indicate an intention that an instrument should not be transferable, the court found against the respondent, because the word "only" was illegible.

Referring to section 6(5) SABEA Holmes JA remarked (at 691) that,

> "such words should be sufficiently legible and clear to indicate the intention with certainty on a perusal of the document with ordinary care. Anything less would facilitate shifts of deceptive concealment and require of holders an unreasonable degree of scrutinous care".

In his judgment in *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) Holmes JA seems to have relaxed the requirements for the operation of section 6(5) as formulated by him in *Dabros*. At 503-4 he refers to the dictum in *Dabros*, but uses the word "reasonable" before "certainty". This does not appear from *Dabros*. Gering "A Quotational Inadvertence" (1978) 95 *SALJ* 259 260 comments:

> "It may be that Holmes JA was endeavouring to bring the Appellate Division's interpretation of section 6(5) in *Dabros* into line with the statutory requirement embodied in the express wording of sections 4 and 5 of the Act; and that the word 'reasonable' was perhaps inadvertently omitted from the judgment in *Dabros*. Indeed, this would seem, with respect, to be a sounder interpretation of section 6(5) than that originally given in *Dabros*."

4.2 For a long time it has been customary to add the words "a/c payee only" to the crossing on a cheque. In *Dungarvin Trust (Pty) Ltd v Import Refrigeration Co (Pty) Ltd* 1971 4 SA 300 (W) Snyman J held that these words were words contemplated by section 6(5) so that the cheque could not be negotiated. His approach was followed in one unreported case in the Transvaal. This decision is referred to by Cowen 1977

THRHR 21 and Gering "Crossed Cheques Inscribed 'A/C Payee' or 'Not Transferable'" (1977) 94 *SALJ* 152 153. Both authors also refer to an unreported Natal judgment by Kriek J. Apparently the cheque was payable to a named payee "or bearer", and was crossed with the phrase "a/c payee only" added to the crossing. From the remarks made by Holmes JA in *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A) 500-501 referring to the judgment of Kriek J, it can be assumed that the latter accepted the correctness of *Dungarvin*, but also that the expression "a/c payee only" could not restrict the transferability of a cheque payable to bearer. *Dungarvin* was followed in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 2 SA 703 (R).

In *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A), however, the Appellate Division overruled *Dungarvin* and held that the phrase "a/c payee only" does not restrict transferability. This is also the position in English law before the recent amendment of the Cheques Act (*National Bank v Silke* (1891) 1 QB 435; *AL Underwood Ltd v Bank of Liverpool and Martins* 1924 1 KB 775 793-4; *Universal Guarantee (Pty) Ltd v National Bank of Australasia Ltd* 1965 2 All ER 98 102) Chalmers and Guest 642-3) and related systems (see the Hong Kong High Court in *Bank of Credit and Commerce Hong Kong Ltd v Hong Kong Yung Hong Trading Co Ltd* (1986) 121 *Commonwealth Law Bulletin* 47). Although these words have no effect on the transferability of cheques, they "may operate as some safeguard if the cheque should fall into wrong hands" (at 504). This remark might lend some support to the view that a collecting bank should be liable for negligently collecting payment for the wrong person (see Malan 307-8; De Wet & Yeats 810 n560; Cowen 1977 *THRHR* 23-4 and 33-5).

It should be added that in Zimbabwe the *Dungarvin* view has been discarded in favour of the decision in *Sham Magazine (Philsam Investments (Pvt) Ltd v Beverley Building Society and another* 1977 2 SA 546 (R) 550).

4.3 In *Sham Magazine* (at 504-5) Holmes JA indicated how the drawer in that case could have made the cheque non-transferable. The words "not transferable" could have been written or printed across the face of the cheque. They have nothing to do with the crossing, and an uncrossed cheque can also be made non-transferable in this way. Having said this, Holmes JA added the following obiter remark: "He could also omit 'order' and 'bearer', when adding the words 'not transferable'." This suggests that if a cheque is drawn payable to "X or order" or to "X or bearer" and contains the words "not transferable", it is nevertheless payable to X only, and cannot be

negotiated by him, despite the indication of transferability created by the words "or order" or "or bearer" (Cowen 1977 *THRHR* 39-41; Malan 49; contra Gering 1977 *SALJ* 158). This question was left open in *Dabros* (at 692) with respect to a promissory note on which the words "or order" had not been deleted.

In *Aboobaker v Gableite Distributors (Pty) Ltd* 1978 4 SA 615 (D) Milne J held that the words "not transferable" override an undeleted order clause, with the result that the payee cannot negotiate the cheque (also *Gishen v Nedbank Ltd* 1984 2 SA 378 (W)). Only the payee can be holder of it (see Byles 82). Since the payee in the case of an order document is its first holder, this approach is acceptable (Malan et al *Provisional Sentence* 50-51).

In *Impala Plastics (Pty) Ltd v Coetzer* 1984 2 SA 392 (W) the court went further. In this case the cheques were payable to "Omega Barfel or bearer" and marked "not transferable". Flemming J held that they were non-transferable, and that the plaintiff could not be their holder. The implication is clear that only Omega Barfel could have been holder. With respect, this view is not convincing. Where a cheque is payable to X or bearer, X is not necessarily its first holder, since it might initially have been delivered to Z. Indeed, it is not clear from the report in *Impala* whether the plaintiff obtained the cheques from Omega Barfel or directly from the drawer. It is submitted that these cheques remain payable to bearer, and that the approach of Kriek J in the unreported case referred to in paragraph 4.2 is preferable.

4.4 In *Sham Magazine* Holmes JA at 505 stressed that the words "not transferable" are not the only ones that make a cheque non-transferable. The word "only" after the name of the payee is also a sufficient indication of non-transferability (see *Volkskas Bpk v Johnson* 1979 4 SA 775 (C) (discussed in 1980 *De Jure* 391 and 1980 *THRHR* 416)). It is certainly of the utmost importance that whatever words are used to exclude transferability should be clearly legible. Since the cheque is a mass payment instrument, careful scrutiny of each cheque by both the paying and the collecting bank is neither possible nor desirable: the non-transferability of the instrument should proclaim itself. Hence the proposals in clause 52.

5 The ordinary meaning of the word "negotiate" (and the respective meanings of its derivatives) is the transfer of a bill, note or cheque in such a manner that the transferee becomes the holder of it (section 29(1) SABEA; *OK Bazaars (1929) (Pty) Ltd v Universal Stores Ltd* 1972 3 SA 175 (C) 180; *Impala Plastics (Pty) Ltd v*

Coetzer 1984 2 SA 392 (W) 395; Malan 112-3; but see De Wet & Yeats 753-4 and *Moti and Co v Cassim's Trustee* 1924 AD 720).

In section 80 SABEA, however, the words "not negotiable" mean something different. The section sets out that where a person takes a crossed cheque that bears on it the words "not negotiable", he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. In other words, no one can become holder in due course, although the cheque remains negotiable in the ordinary sense of the word. The words thus have different meanings, depending on whether they appear on a *crossed* cheque. This leads to confusion, and can be explained (but not justified) only by the historical background (see Cowen 1977 *THRHR* 28-9; Holden 1951 *Modern Law Review* 39-40).

This draft eliminates the ambiguous use of the words "not negotiable". Clause 51(5) provides: "There cannot be a holder in due course of a crossed cheque". The result is that the consequences outlined in section 80 SABEA are made dependent on the crossing itself. This is in accordance with a proposal made in England in 1875 by the Court of Appeal in *Smith v Union Bank of London* (1875) QB 31 34 (see also Holden 1951 *Modern Law Review* 39 and Holden *History* 234-6).

5 The so-called "not negotiable" crossing has another and quite different consequence. Section 81(1) SABEA provides:

> "If a cheque was stolen or lost while it was crossed as authorised by this Act and while it bore on it the words 'not negotiable', and it was paid by the banker upon whom it was drawn, under circumstances which do not render such banker liable in terms of this Act to the true owner of the cheque for any loss he may sustain owing to the cheque having been paid, the true owner shall, if he suffered any loss as a result of the theft or loss of the cheque, be entitled to recover from any person who was a possessor thereof after the theft or loss, and either gave a consideration therefor or took it as a donee, an amount equal to the true owner's said loss or the amount of the cheque, whichever is the lesser."

Some of the defects of section 81 SABEA have been referred to by Oelofse Stassen and Du Plessis 1983 *Modern Business Law* 77, but the question is whether the section should be retained.

Section 81 SABEA and its predecessors were inserted in our legislation by the Bills of Exchange Amendment Act, 25 of 1943. Their purpose was to make payment by cheque safer by giving the true owner a new remedy in the event of his cheque being lost or stolen and discharged by payment. The remedy given is similar to the action for conversion of English law (Emmett "The Bills of Exchange Amendment

Act, 1943" 1944 *THRHR* 65 70; De Wet & Yeats 808; Cowen (1966) 434; Malan 300; Tager paragraph 163). Thus, although the doctrine of conversion is foreign to our law (*John Bell and Co Ltd v Esselen* 1954 1 SA 147 (A) 153; *Standard Bank of SA Ltd v Minister of Bantu Education* 1966 1 SA 229 (N) 237; Takirambudde "The Legacy of the Savings/Current Account Dichotomy in Banking and Negotiable Instruments Law" (1981) 98 *SALJ* 359 361 and *Leon Bekaert Southern Africa (Pty) Ltd v Rauties Transport (Pty) Ltd* 1984 1 SA 814 (W) 816-7), it has been introduced specifically with respect to cheques crossed and marked "not negotiable'. Liability under section 81 is imposed on anyone who takes the cheque for a consideration (and this includes the taking of the cheque in payment of an existing debt (section 81(8)) or as a donee. See *SA Railways and Harbours v Outfitters (Pty) Ltd* 1952 4 SA 488 (N); *Dadoo and Sons Ltd v Administrator, Transvaal* 1954 2 SA 442 (T); *Pafitis v Naoumoff* 1965 4 SA 591 (SR); *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 4 SA 747 (A); *HK Outfitters (Pty) Ltd v Legal and General Assurance Society Ltd* 1975 1 SA 55 (T); *Government of the Republic of South Africa v Pentz and another* 1982 1 SA 553 (T) (reversed on appeal 1983 3 SA 584 (A) on the basis that the claim had become prescribed)). It has been pointed out, however, that in many cases section 81 would not assist the true owner, for instance, where the thief does not dispose of the cheque, but deposits it in his own account (De Beer *Die Ware Eienaar van die Tjek en sy Beskerming in geval van Diefstal* (LLD thesis Leiden 1979) 329-30).

A collecting bank is usually an agent only. Since it does not give a consideration for the cheque, it will usually not be liable in terms of section 81 (*Fonds Adviseurs Bpk v Trust Bank van Afrika Bpk* 1974 4 SA 883 (A)). But it gives value, and may be liable in terms of section 81, if it allows its customer to draw against the cheque before its payment (*Standard Bank of SA Ltd v Minister of Bantu Education* 1966 1 SA 229 (N); Cowen (1966) 439; Emmett 1944 *THRHR* 71-72; De Wet & Yeats 810). A collecting bank may also be liable if it fails to furnish the true owner with information regarding the cheque at his request (section 81(3) and see *Barclays National Bank Ltd v Wall* 1983 1 SA 149 (A)).

6 Although it is an exaggeration to say that the "not negotiable" crossing has proved to be a failure (Holden 1951 *Modern Law Review* 40), it has been criticised both on the basis that it is not very effective (De Beer 329-30 and Emmett 1944 *THRHR* 73 who would like to see the remedy of section 81 extended to uncrossed cheques) and on the basis that it is unjust and foreign to our law (Malan 1978 *TSAR* 215; Pretorius

"Professionele Aanspreeklikheid, die Invorderingsbank en Regshervorming" 1987 *Modern Business Law* 56 57 n10). Malan 1978 *TSAR* 215-6 remarks:

> "Responsibility in terms of section 81 SABEA is not based on fault but is strict. The meaning of the words 'not negotiable' on a cheque is fictionalised, and they are taken to be a danger signal 'held out before every person to deal with it ....'. The 'not negotiable' cheque is based on the wrong premise. In its effort to protect the drawer, the legislature fixes liability on the purchaser or possessor. Not even the negligence of the drawer contributing to the loss or theft of the cheque would seem to afford a defence against the true owner's claim. The underlying consideration of this remedy is that the purchaser is best able to prevent the circulation of the lost or stolen cheque. The relatively few cases dealing with section 81 SABEA, however, show that the cause of the loss or theft invariably arose or existed within the sphere of the drawer's or owner's control. In these cases the defendant was mostly a financial institution having limited opportunity to verify the genuineness of the signature or material legitimacy of the holder. The 'not negotiable' cheque is a contradiction in South African law, and its continued use a refusal to utilise the flexible norms of its law of obligations."

Despite the unfairness of section 81, there have been obiter statements to the effect that it also applies where there has been a valid delivery of the cheque, albeit induced by fraud (*Pafitis v Naoumoff* 1965 4 SA 591 (SR); *Government of the Republic of South Africa v Pentz and another* 1982 1 SA 553 (T), criticised in 1966 *THRHR* 261 and 1982 *De Jure* 179 respectively). Fortunately, there are also indications that the remedy is limited to cases in which the true owner has not delivered the cheque (*Bell and Skelton (Natal) (Pty) Ltd v Volkskas Beperk* 1980 1 PH A10 (N)).

The inequitable effect of section 81 SABEA is particularly apparent when a stolen cheque that is crossed and marked "not negotiable" is deposited in an account with a bank that does not offer cheque accounts, or with a building society, or with the Post Office Savings Bank (the provisions of section 115 of the Post Office Act 44 of 1958 aside). Although the financial institution collecting payment neither gives value for the cheque, nor takes it as a donee, it is *deemed* to give value in terms of section 81(2) SABEA, and is liable (eg *National Housing Commission v Cape of Good Hope Savings Bank Society* 1963 1 SA 230 (C); De Beer "Invorderingsagente wat nie Banke is nie: 'n Waarskuwing" 1983 *De Rebus* 138).

Section 81(2) SABEA provides:

> "If a person has after the theft or loss paid any such cheque into his account with a banker after having paid, or for the purpose of paying, the amount of the cheque or part thereof to the person from whom he received the cheque, or, on his direction, to any other person, he shall, for the purposes of subsection (1), be deemed to have been a possessor of the cheque and to have given a consideration therefor: Provided that the foregoing provisions of this subsection shall not

> apply to a collecting banker employing another banker as his agent for the collection of any such cheque."

The accepted view is that a financial institution which does not offer cheque accounts is not a "bank" for the purposes of the Bills of Exchange Act (see Cowen (1966) 359-60; Malan 259; Tager paragraph 154; Takirambudde (1981) 98 *SALJ* 359; *The Godfather v Commissioner for Inland Revenue* 1993 2 SA 462 (N), but Stassen "Banke en hul Kliënte" 1983 *Modern Business Law* 80 85-8). Since these financial institutions are not banks for the purposes of the Bills of Exchange Act, the proviso to section 81(2) does not apply to them. For the same reason, they are able to collect crossed cheques only by depositing them in an account with an institution that qualifies as a bank. This brings the main part of section 81(2) SABEA into operation (a fact that was apparently overlooked by Botha JA in *Fonds Adviseurs Bpk v Trust Bank van Afrika Bpk* 1974 4 SA 883 (A) 893 and De Wet & Yeats 809 n554). This objection to section 81 SABEA can, of course, be remedied by providing that these financial institutions are collecting banks (Oelofse, Stassen and Du Plessis 1983 *Modern Business Law* 74-6 and clause 1 of this draft sv "collecting bank"), but it is submitted that the better approach is to repeal section 81 SABEA entirely.

7 Whether a drawee bank that pays a non-transferable crossed cheque to another bank discharges it (section 79 SABEA) where there are one or more "indorsements" on it, is not clear. In *Volkskas Bpk v Johnson* 1979 4 SA 775 (C) three indorsements were placed on the cheque. Although the applicability of section 79 SABEA was not raised, Grosskopf J nevertheless said (at 777): "Dit is gemene saak dat die eiser nie onder enige wanindruk kon gewees het dat Barclays Nasionale Bank die geld namens Tennant and Co [the payee] invorder nie." In *Gishen v Nedbank Ltd* 1984 2 SA 378 (W), on the other hand, there was only one "indorsement" on the cheque. Goldstone J said (at 381-2):

> "On the facts before me there is no reason to assume that the defendant paid the cheque otherwise than in good faith and without negligence. In this application for summary judgment I would certainly not be justified in holding that the presence of the indorsement on the reverse side of a non-transferable cheque necessarily constitutes negligence on the part of the drawee bank."

Clauses 53 and 54 of this draft make it necessary for a court to decide whether the presence of one or more indorsements on the cheque constitutes "notice". See further

Cowen (1985) 213 n138a) and Malan & Pretorius "Holders, Collecting Banks and Payment" 1993 *TSAR* 454 where the most recent unreported decisions are considered.

8 Whether an ordinary *cession* of the rights arising from a non-transferable cheque is possible is not a matter requiring legislation. See Oelofse "Rektawissel en Rektatjek, Verhandeling en Sessie in die Duitse en Suid-Afrikaanse Reg" 1987 *Modern Business Law* 129.

9 Clause 52 introduces a "non-transferable cheque". The expression "non-transferable cheque" is used because this is the name by which all kinds of cheques that cannot be negotiated are commonly known. The "non-transferable cheque" is a crossed cheque and this means that it is payable through a bank. By requiring the "non-transferable cheque" to be crossed, payment through the "filter" of another bank is ensured. This is in accordance with the initial reaction of the banks after the decision in *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 1 SA 484 (A), that "non-transferable cheques" would be accepted for an account bearing the identical name of the payee (Cowen (1985) 209) and not paid in cash.

Although these cheques are sometimes paid in cash provided the payee is able to identify himself (Cowen (1985) 209 n130), the "non-transferable cheque" created by clause 52 is crossed: should the drawee pay it in cash, it does so at its own risk. (See also Holden "Suggested Reform of the Law relating to Cheques" (1951) 14 *Modern Law Review* 33 49.) The fact that the "non-transferable cheque" is crossed would in the normal course of events prevent its payment in cash over the counter.

The "non-transferable cheque" must comply with the form set out in section 52: it is easily identifiable so that its cash payment can be prevented.

The "non-transferable cheque" created by this draft strives to strike a balance between the interests of customers to issue a "safe" instrument of payment and those of the banks, which cannot and should not be burdened by instruments bearing an unduly wide variety of "non-transferable" markings. No instrument of payment is entirely without risk, and it is submitted that a proper balance between the conflicting interests is reached by maintaining the negotiability of cheques (clause 25) but providing at the same time for an institutional "non-transferable cheque". A "non-transferable cheque" can be indorsed by the payee to a "collecting bank" only, but in view of the provisions of clause 60 (section 83 and 84 SABEA) an indorsement is seldom required.

Since the "non-transferable cheque" is a crossed cheque, the provisions relating to the discharge of the parties to a crossed cheque apply to it. In addition, there can be no holder in due course of it. The "non-transferable cheque" does not eliminate all risk, but the risk of loss arising from theft, forgery, etc, is reduced, and its owner given an action against the collecting bank that obtains payment of the cheque negligently. It is submitted that "non-transferable cheques" do not place too heavy a burden on collecting banks, as these cheques would be readily identifiable.

10 Most of the parties who made submissions to the Commission were in favour of the introduction of the non-transferable cheque. The objections concern the fact that the public would be deprived of the right to draw cheques to make them non-transferable and that banks would not be obliged to issue non-transferable cheques to their customers. In addition, customers would presumably have to have two separate cheque books, one holding ordinary cheques and the other non-transferable cheques. While it is true that these considerations are impressive, they are not conclusive and the Commission is of the opinion that the introduction of a standardised non-transferable cheque as set out in the *Proposals* would seriously curtail the rights the public hitherto enjoyed and cause them considerable inconvenience. The Commission, however, also recognises the need to standardise cheques and considers that the provisions of clause 52(1) meet this requirement. In other words, the Commission proposes that the only way in which a cheque can be drawn "not transferable" is by crossing it and writing between the two lines of the crossing the words "not transferable" or "not negotiable".

The Clearing Bankers Association proposed that a subclause be added to the provisions dealing with the non-transferable cheque to the effect that any purported cancellation of the crossing on it is inoperative. Since the non-transferable cheque provided for in this draft is an ordinary crossed cheque no special provision as to the cancellation of the crossing need be made.

The Clearing Bankers Association also drew attention to clause 52(2) and pointed out that, as presently worded, it would prevent a collecting bank from further negotiating the cheque for collection. The words "by the payee" are accordingly deleted from clause 52(2). It should be noted that the non-transferable cheque is not necessarily negotiated to the collecting bank in terms of an express indorsement for collection. The collecting bank can therefore hold the instrument in its own right but, since it is a crossed cheque, cannot be the holder in due course of it (clause 51(5)).

Since the publication of the *Proposals*, Webber Wentzel, on behalf of the Clearing Bankers Association has submitted a further memorandum concerning the Liability of the Collecting Bank and the Non-transferable Cheque entitled *Submissions on behalf of the Clearing Bankers Association of South Africa on the proposed Imposition of a Duty of Care Owed by the Collecting Bank to the True Owner of a Lost or Stolen Cheque*. The Commission has also heard oral representations on behalf of the Clearing Bankers Association on 14 October 1991. With regard to the non-transferable cheque it has been submitted on behalf of the Clearing Bankers Association that the requirement contained in section 52 of the draft, that a non-transferable cheque be in readily identifiable standard form and be crossed be maintained. Subsequent memoranda presented on behalf of the Clearing Bankers Association also dealt with the non-transferable cheque: a *Memorandum for the SA Law Commission on the Bankers' Duty of Care in the Collection of Cheque* dated 19 March 1992 proposed either a special form of non-transferable cheque to which a duty of care is attached or, if a duty of care is to be imposed at all, a general prohibition on non-transferable cheques. On 9 June 1992 members of the SA Law Commission visited Johannesburg to review cheque clearance procedures. This visit was followed by a Memorandum by Standard Bank *The Cheque Clearance Process* dated 3 August 1992 emphasising the benefits members of the public, the business community and the banking industry enjoy from a system whereby cheques are cleared for payment on the same day as they are deposited for collection. As a result of the decision in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) collecting banks were, of course, exposed to liability for negligence, particularly in the case of non-transferable instruments. Hence it was submitted that,

> "it is in the public interest to maintain the presently operating system, but that it will only be reasonably feasible to do so if non-transferable instruments are eliminated from the system. If they are not, then by virtue of the change in the incidence of liability on collecting bankers, which will lead to the additional degree of scrutiny to guard against that liabilty materialising, and the adverse effect that in turn will have on the ability to pass on debits to the drawers of cheques on the same days cheques are deposited for collection, and the additional cost that will be occasioned to the banks as a result, will mean that banks will have to increase their charges to customers dramatically to recover those costs" (§14 of *The Cheque Clearance Process*).

A delegation from the Clearing Bankers Association met the SA Law Commission on 8 March 1993 and again on 19 March 1993 and presented documents setting out a special form of non-transferable cheque, a cheque marked "account payee only" and

containing certain distinctive features, which was being considered by the banking industry for introduction.

The Commission is impressed by the arguments raised on behalf of the banking industry and is also mindful of the view put forward in the original *Proposals*. The Commission also appreciates the differences in the clearance process here and in the United Kingdom. However, the Commission considers that a cheque in the form required by clause 52 would be easily identifiable to put the collecting banker on guard. To require a non-transferable cheque to comply with a specific form could entail that members of the public have to keep two sets of cheque books and would, in any event, deprive them of the right to draw cheques that cannot be transferred, a right they have hitherto enjoyed. The recent amendments introduced by the Cheques Act, 1992 in the United Kingdom as proposed in Annex 5 to the White Paper *Banking Services: Law and Practice* (Cm 1026 March 1990) specifically recognises the right of the drawer to make a cheque non-transferable. It provides for the insertion of section 81A in the Bills of Exchange Act 1882:

> "(1) Where a cheque is crossed and bears across its face the words 'account payee' or 'a/c payee', either with or without the word 'only', the cheque shall not be transferable, but shall only be valid as between the parties thereto.
> (2) A banker is not to be treated for the purposes of section 80 above as having been negligent by reason only of his failure to concern himself with any purported indorsement of a cheque which under subsection (1) above or otherwise is not transferable."

In addition to the above amendment, section 80 BEA as well as section 4(2)(a) of the Cheques Act are amended to apply specifically to cheques that are non-transferable in terms of section 81A BEA, thereby extending the protection available to the paying and the collecting banker.

The words "any purported indorsement of the cheque" are inserted in clauses 54(2) and 59(3)(b) to ensure that the same results as that provided for by the Cheques Act 1992 ensue.

CHAPTER 7

DISCHARGE

53 Discharge of parties

(1) A party is discharged from liability on the cheque -

(a) by any cause by which contractual obligations are discharged; and

(b) by payment made to the holder in good faith and without notice of any fraud or illegality affecting the cheque.

(2) Where a party is discharged wholly or partially from liability on the cheque, any party who has a right of recourse against him is also discharged.

(3) All the parties are discharged from liability on the cheque where a party who has no right of recourse on the cheque is discharged.

54 Discharge by payment

(1) All the parties are discharged from liability on the cheque by payment made by the drawee, in good faith and without notice of any fraud or illegality affecting the cheque -

(a) to a collecting bank of any cheque drawn on it;

(b) to one of its customers of any cheque drawn on it by crediting it to his account provided the customer is the holder of the cheque or holds it by virtue of an apparently regular indorsement or series of indorsements;

(c) to the holder of any cheque other than a crossed cheque or to the person who holds such cheque by virtue of an apparently regular indorsement or series of indorsements.

(2) For the purposes of subsection (1), the drawee shall not have notice of any fraud or illegality affecting the cheque by reason only of any indorsement of the cheque, or the absence of the indorsement of the payee, or any irregularity in any indorsement in the cheque.

Commentary

Professor Oelofse has objected to clause 54(1)(b) and submitted that there should be added to it words to the effect that the customer whose account is credited should be the holder or the apparent holder because of an apparently regular indorsement or series of indorsements. The proposed paragraph is based on the wording of section 83(1) that, in turn, is somewhat similar to section 1 of the English Cheques Act, 1957 although the latter section does not require payment to or the crediting of the account of a customer. Section 83(1) is thus better geared to protect the interests of their customer. Since section 83 did not require the customer to be the holder or the apparent holder the banks have decided to require, in the case of "negotiated cheques", "the endorsement of the payee and any subsequent endorsee except where the cheque has been specially endorsed to the customer for whose account it is collected ...".

The proposal of Professor Oelofse has merit and it is suggested that the following proviso be added to clause 54(1)(b): "provided the customer is the holder of the cheque or holds it by virtue of an apparently regular indorsement or series of indorsements."

It should, however, be added that it is not suggested and has not been suggested that section 83(1) is intended to relieve the drawee bank "without more" of the responsibility to examine indorsements.

55 Effect of discharge against holder in due course

The discharge of a party is not effective against a subsequent holder in due course.

56 Duty on payment

Except where it is otherwise agreed or where presentment for payment is made in terms of paragraph (c) of subsection (1) of section 46, where a cheque is paid, the person to whom payment is made shall deliver the cheque to the person making payment.

57 Payment by third person

(1) A cheque may be paid by any person, including a stranger to the instrument.

(2) Where a cheque is paid by a stranger -

(a) the person paying the cheque acquires the rights of the person to whom payment was made against the party on whose behalf payment was made and against all parties liable to him; and

(b) any party subsequent to the party on whose behalf payment was made is discharged.

58 Partial payment

(1) The holder is not obliged to take a partial payment.

(2) Where the holder does not take a partial payment, the instrument is dishonoured by non-payment.

(3) Where the holder takes a partial payment from the drawee --

(a) all the parties are discharged from liability on the cheque to the extent of the amount paid;

(b) the cheque is dishonoured as to the amount unpaid.

(4) Where the holder takes a partial payment from a party other than the drawee --

(a) the party making payment is discharged from liability on the cheque to the extent of the amount paid;

(b) the holder must deliver to such party a copy of the cheque.

(5) Where a partial payment is made, the party to whom payment is made shall, unless otherwise agreed, note the amount paid by indorsement on the cheque.

(6) Where the balance is paid, the party to whom payment is made shall, unless otherwise agreed, deliver to the party making payment the cheque.

CHAPTER 8

COLLECTION OF CHEQUES

59 Liability on collection of cheques

(1) Where a cheque which is lost or stolen is paid in terms of section 54 and the true owner suffers a loss as a result of such payment, he shall be entitled to recover an amount equal to his loss or the amount of the cheque, whichever is the lesser, from any bank, whether or not it is also the paying bank, whose negligence in collecting payment of the cheque contributed to such loss.
(2) Any bank which collected payment of such cheque after its theft or loss shall, when requested by the true owner in writing, furnish him with all information at its disposal in connection with the cheque and the account for which it has been collected, and if it fails or refuses to do so within a reasonable time of such request, it shall, for the purposes of subsection (1), be deemed to have collected payment of such cheque negligently and to have caused such loss.
(3) Without limiting the provisions of subsection (1), for the purposes of subsection (1),

(a) a bank shall prima facie be negligent in collecting payment of a cheque

(i) if it opens an account for a customer without taking reasonable steps to verify the identity, address and standing of the customer;

(ii) if it collects payment for a customer who does not appear to be entitled to payment ex facie the cheque;

(b) a bank shall not be negligent in collecting payment of a cheque by reason only of the fact that the payee or indorsee of a cheque is wrongly designated or that his name is misspelt or by reason only of any indorsement of the cheque, or the absence of the indorsement of the payee, or an irregularity in any indorsement in the cheque.

(4) The Apportionment of Damages Act, 34 of 1956 shall apply mutatis mutandis to a claim arising under the provisions of subsection (1).

Comparative legislation

Sec 4 Cheques Act
Sec 3-417 and 4-207 UCC
Sec 95 Australian Cheques and Payment Orders Act 1986

Commentary

1 Introduction

Clause 59 of this draft is a partial codification of the potential common-law delictual liability of a collecting bank or financial institution that collects payment of a lost or stolen cheque on behalf of someone other than the true owner of such cheque. It is a partial codification since it does not purport to deal with all the common-law elements of the lex Aquilia, but merely recognises in principle that a collecting bank owes a duty of care (in the policy-duty sense) to avoid causing loss to the owner of a stolen cheque by negligently dealing with it.

The potential delictual liability of the collecting bank to the owner of a lost or stolen cheque has been the topic of some academic discussion in South Africa: De Beer *Die Ware Eienaar van die Tjek en sy Beskerming in geval van Diefstal* (1979, unpublished LLD thesis, University of Leiden (hereafter De Beer *Diefstal*)); De Beer "Die Aanspreeklikheid van die Invorderingsbankier teenoor die Ware Eienaar van 'n Tjek" (1978) 41 *THRHR* 360; Cowen "The Liability of a Bank in the Computer Age in respect of a Stolen Cheque" 1981 *TSAR* 193 (hereafter Cowen "Liability"); Cowen "Two Cheers (or maybe only one) for Negotiability" (1977) 40 *THRHR* 19; Malan "Professional Responsibility and the Payment and Collection of Cheques" 1978 *De Jure* 326, 1979 *De Jure* 31 (hereafter Malan "Professional"); Malan "Once More on Professional Responsibility" 1979 *De Jure* 363; Pretorius "Professionele Aanspreeklikheid, die Invorderingsbank en Regshervorming" (1987) 9 *Modern Business Law* 56 (hereafter Pretorius "Aanspreeklikheid"); Sinclair "Fictitious and Non-existing Payees - the English Heritage" (1973) 90 *SALJ* 369; Tager "The Collecting Banker's Liability to the True Owner of a Lost or Stolen Cheque" (1979) 96 *SALJ* 372 (hereafter Tager); Van Zyl *Tjekretensie in die Suid-Afrikaanse Wisselreg* (1986, unpublished LL M thesis, Randse Afrikaanse Universiteit); Waring "Where the Buck Stops" (1980) 43 *THRHR* 416; Oelofse "Onlangse Ontwikkelings in die

Tjekreg" (1991) 3 *SA Merc LJ* 364; Malan & Pretorius "The Perfect Cheque?" 1992 *TSAR* 77 at 82; De Beer & Olivier "Aanspreeklikheid Weens Verhandeling van 'n Nie-oordraagbare Tjek" (1991) 16:2 *Journal for Juridical Science* 152. See also Malan & Pretorius "The Collecting Bank Revisited" (1991) 54 *THRHR* 705n1; Nagel & Greeff "Die Deliktuele Aanspreeklikheid van die Invorderingsbank" (1992) 55 *THRHR* 314 at 314--315 and Charl Hugo "The Negligent Collecting Bank: Recent Decisions Introduce a New Era" (1992) 3 *Stellenbosch LR* 115n1 for a more or less comprehensive list of sources and articles dealing with the topic.

The delictual liability of the collecting bank has also been the subject of litigation in South African courts: *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 251; *Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd* 1977 3 SA 188 (W); *Worcester Advice Office v First National Bank of Southern Africa Ltd* 1990 4 SA 811 (C); *Bonitas Medical Aid Fund v Volkskas Bank Ltd and another* 1991 2 SA 231 (W); *Bonitas Medical Aid Fund v Volkskas Bank Ltd and another* 1992 2 SA 42 (W) and *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A). See also the obiter remarks in *Leal & Co v Williams* 1906 TS 554 and *Liquidators of Cape of Good Hope Building Society v Bank of Africa* (1900) 17 SC 480.

The delictual liability of collecting banks and other financial institutions to the owner of a lost or stolen cheque was also the subject of litigation in Zimbabwe: *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 2 SA 703 (R); *Philsam Investments (Pvt) Ltd v Beverley Building Society* 1977 2 SA 546 (R); *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 4 SA 553 (ZSC); *UDC Ltd v Bank of Credit and Commerce Zimbabwe Ltd* 1990 3 SA 529 (ZH) and *Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1991 4 SA 82 (ZSC). Apart from the fact that the common law of Zimbabwe is also the Roman-Dutch law, these decisions are of particular interest because they are based on developments that occurred in the South African law.

2 *Historical background*

There is one important difference between the English and the South African law: although the South African Bills of Exchange Act was modelled on and greatly influenced by the English Bills of Exchange Act of 1882, the past uncertainty as regards the potential delictual liability of a bank which collects payment of a lost or

stolen cheque on behalf of someone other than the owner of such cheque, can be traced back to the indiscriminate borrowing and incorporation of foreign principles into our law. Roman-Dutch law does not recognise the English tort of conversion (*Leal & Co v Williams* 1906 TS 554 557-8; *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 4 SA 553 (ZSC) 555).

Roman-Dutch law permits the owner to pursue his property into the hands of strangers, even those who came by it honestly. But once they part with it honestly, the true owner is without remedy against them. At English common-law, where conversion applies, the position is quite different. Salmond *The Law of Torts* (1977) at 95 defines conversion as "an act ... of willful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another whereby that other is deprived of the use and possession of it". In *Marfani & Co Ltd v Midland Bank Ltd* 1968 1 WLR 956 (CA) 970-71 Diplock LJ describes the effect of the tort of conversion in this regard as follows:

> "At common law, one's duty to one's neighbour who is the owner, or entitled to possession of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them ... [I]t matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. The duty is absolute, he acts at his peril. A banker's business, of its very nature, exposes him daily to this peril ... . If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically upon assumpsit, for money had and received."

Under the doctrine of conversion a collecting bank in England would have been liable to the owner of a stolen cheque whether bona fide or not, whether negligent or not. It was for this reason that legislation in England was necessary, not to pin liability on the collecting bank, but to relieve him of liability where he could show that he acted in good faith and without negligence. This is the effect of section 82 BEA and section 4 of the Cheques Act of 1957. Section 4 of the Cheques Act 1957 reads:

> "4(1) 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 an 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 payment thereof."

The gist of this provision is that a collecting bank does not incur liability towards the true owner of a lost or stolen cheque if the *collecting bank* can show that it acted in good faith and without negligence. Section 82 of the English Act was also designed to give the collecting bank protection that the common-law denied him. It was therefore not necessary to provide for the delictual liability (which would embrace a duty of care in the policy-duty sense) of a collecting bank at English common-law since the obligation of a collecting bank was far wider at common-law than that which would have arisen under a duty of care (*Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 4 SA 553 (ZSC) 556). Even so, the whole structure of the English Bills of Exchange Act is such that the cheque collection process works on the assumption that the collecting bank would incur liability towards the true owner of a lost or stolen cheque if the collecting bank negligently collects payment of such cheque on behalf of someone other than the true owner of the cheque. The Bills of Exchange Act is indeed a "closely integrated and technical piece of legislation" (Cowen "Liability" 199). When the South African legislature enacted the South African Bills of Exchange Act that was closely modelled on the English Act, the difference between the two legal systems as far as the common-law liability of the collecting bank was concerned, was not borne in mind (Hahlo and Kahn *South Africa: The Development of it Laws and Constitution* (1960) 726). The upshot of this is that as the result of the incomplete adoption of the English Act, the liability of the collecting bank was not in harmony with the original legal milieu from which it originated: in its newly adopted home the cheque collection process did not operate in an environment where the law compelled collecting banks to exercise due care in the collection of cheques.

3 *The delictual liability of the collecting bank: Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 1 SA 783 (A)*

The recognition in the South African law of the delictual liability of a collecting bank to the owner of a lost or stolen cheque has always been controversial. All the academic writers, with the exception of DV Cowen in an article "The Liability of a Bank in the Computer Age in Respect of a Stolen Cheque" 1981 *Tydskrif vir die Suid-Afrikaanse Reg* 193 (hereafter Cowen "Liability"), argued in favour of the recognition of the principle that a collecting bank owes a duty of care (in the policy-duty sense) to avoid causing loss to the owner of a stolen cheque by negligently dealing with it (cf Cowen "Two Cheers (or maybe only one) for Negotiability" (1977) 40 *THRHR* 19 at 34).

In *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) the Appellate Division has brought matters to a head and has held that there is

> "no reason in principle why a collecting banker should not be held liable under the extended lex Aquilia for negligence to the true owner of a cheque, provided all the elements or requirements of Aquilian liability have been met" (at 797A--B).

The facts in *Indac Electronics* were briefly as follows: the appellant alleged that it was the true owner of a crossed cheque marked "not negotiable" and made payable to "Indac Electronics" or order. The cheque was drawn on one of the respondent's branches. The plaintiff also alleged that it did not endorse the cheque in blank or specially in favour of a named person. One of the defendant's other branches received the cheque for collection on behalf of a certain Le Roux, who was a customer of the defendant at its collecting branch. The defendant paid the proceeds of the cheque to Le Roux despite the fact that he had no right to receive such payment. The plaintiff alleged that the defendant was aware, or, alternatively, should have been aware, of the fact that Le Roux was not entitled to payment of the proceeds of the cheque and that in the circumstances, as the collecting bank, it owed a duty of care to the plaintiff as payee and true owner of the cheque to avoid causing loss to it by dealing negligently with the cheque. The defendant was alleged to have acted in breach of such duty and, in so doing, to have caused the plaintiff to sustain loss in the amount of the cheque.

In the Transvaal Provincial Division the defendant successfully excepted to this cause of action on the basis that in the absence of actual knowledge of its customer's defective title, there existed no legal duty on the part of the defendant, as collecting bank, to avoid dealing negligently with the cheque. In upholding the exception, Eloff DJP regarded himself bound by the earlier Witwatersrand Local Division decisions in *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 251 and *Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd* 1977 3 SA 188 (W). There it was held that in the absence of actual knowledge of its customer's defective title there existed no legal duty on the part of a collecting bank to avoid dealing negligently with a lost or stolen cheque. (See Pretorius 1990 *Annual Survey of the South African Law* 319ff for a full discussion of the historical development leading up to the decision in *Indac Electronics*.)

In delivering the judgment of the appeal, Vivier JA pointed out that the correctness of the decisions in the *Yorkshire Insurance* and *Atkinson Oates* cases must be considered view of in the subsequent development of our law (at 796C). Both cases

were decided before the landmark decisions in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) and *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) where the Appellate Division has put the seal of approval on a wider perception of the scope of the lex Aquilia - that liability can exist in principle for pure economic loss not arising from physical injury to person or property. (For a full discussion of the impact of *Administrateur, Natal*, see, inter alia, Boberg *The Law of Delict* I *Aquilian Liability* (1984) 103ff; Burchell "The Birth of a Legal Principle -- Negligent Statements Causing Pure Economic Loss" (1980) 97 *SALJ* 1; Van der Walt "Nalatige Wanvoorstelling en Suiwer Vermoënskade: die Appèlhof Spreek 'n Duidelike Woord" 1979 *Tydskrif vir die Suid-Afrikaanse Reg* 145.)

In *Indac Electronics* the court thus held that a delictual action for damages is available to the owner of a lost or stolen cheque if he can establish (a) that the collecting bank received payment of the cheque on behalf of someone who was not entitled to payment, (b) that in receiving such payment the collecting bank acted unlawfully and negligently, (c) that the conduct of the collecting bank caused the owner to sustain loss, and (d) that the damages claimed represent proper compensation for such loss (at 797C--E).

The judge held that in the case before him only the element of unlawfulness was in issue: the exception was taken solely on the ground that the facts alleged by the plaintiff did not support a legal duty on the part of the defendant not to act negligently, so that, as a result, the defendant's conduct in its capacity as collecting bank was not unlawful (at 797E--F). To determine whether the defendant was under such a duty not to act negligently, the court is called upon to exercise a value judgment embracing all relevant facts and involving policy considerations (at 797F--G; see also Pretorius "Nalatige Wanvoorstelling en Suiwer Vermoënsverlies: Die Regsplig om Skade te Voorkom" (1986) 19 *De Jure* 57 and 243 and "Aanspreeklikheid" 56 esp 59ff).

Vivier JA highlighted five considerations that were pertinent to the question whether a collecting bank owes a duty of care to the owner of a lost or stolen cheque (at 798--800).

First, the objection of limitless or indeterminate liability usually raised against the recoverability of pure economic loss (for a full discussion see Pretorius *Aanspreeklikheid van Maatskappy-ouditeure teenoor Derdes op grond van Wanvoorstelling in die Finansiële State* (1985) 262ff). This objection does not hold water in a case such as this, since the extent of the potential loss is finite (the face

value of the cheque) and the potential claimants are easily predictable and limited to the drawer or the payee (or someone holding title under him. Besides, each potential claim will arise separately from any other and will be related to a specific act on the part of the collecting banker. (See also *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 4 SA 553 (ZSC) at 564G--565B.) This observation vindicates the submission that

> "[n]one of the objections usually levelled against the recovery of economic loss are ... really relevant to the recognition of the liability of the paying or collecting bank. The identity of the claimant is determinable. He is the 'true' owner of the cheque and can, in principle, be ascertained by applying the norms of the law of property regarding ownership of, and real rights in, movable property. The extent of the loss which is or should be recoverable is limited to the amount of the cheque. It is not a situation in which the courts would be flooded by potential claimants. Nor is it a matter which would expose the banks to limitless liability" (Malan "Professional Responsibility and the Payment and Collection of Cheques" (1978) 11 *De Jure* 326, (1979) *De Jure* 31 at 38 (hereafter Malan "Professional").

In *Worcester Advice Office v First National Bank of Southern Africa Ltd* 1990 4 SA 811 (C) the court observed that although the "vigilance and expertise which collecting bankers will be called upon to exhibit, if the duty of care is recognised, may not seem to much to ask in an individual case", the court was nevertheless of the opinion that "cumulatively, taking the aggregate of cheques collected through the clearing system, it is likely to be colossal" (at 819G--I), so that the "ensuing potential liability ... [would be] too great a burden to be placed upon collecting bankers and spread among its customers" (at 820A). In *Indac Electronics* Vivier JA, however, had difficulty understanding how that court could have reached this conclusion without any evidence before it - that case was decided on exception (at 798E--H, and see also Malan & Pretorius "Collecting Bank" 716). Furthermore, the reasoning of the court would seem to amount to the indeterminate-liability argument in disguise: to say that a collecting bank cannot be expected to take reasonable care in dealing with a particular cheque because that will mean that he will also have to take reasonable care in dealing with a vast number of other cheques is not a valid argument. This underscores the view expressed by Malan & Pretorius that what the court in *Worcester Advice* was "hypothesising is similar to suggesting that a medical doctor in an extremely busy practice should not be held liable for negligence because of the large number of patients he has to examine daily" (Malan & Pretorius "Collecting Bank" at 712)

Secondly, there is constantly a risk that payment of a cheque may be obtained with relative ease by an unlawful possessor. (As Holden "Suggested Reform of the

Law Relating to Cheques" (1951) 14 *Modern LR* 33 once observed: "The inherent weakness of the present system is the comparative ease with which a thief can collect the proceeds of cheques that he has stolen".) His lordship thus recognised that there is a need for the true owner of a cheque to be protected, especially since he relies on the collecting bank to look at the named payee on the face of the cheque before collecting and paying the cheque that his customer handed to him for collection (at 799A--B). To emphasise this need the court referred (at 799A) to the fact that the Jack Committee (*Banking Services: Law and Practice Report by the Review Committee* under the chairmanship of Jack CBE (HMSO Cm 622 (1989)) recently recommended the expansion of the liability on the part of the collecting bank in the United Kingdom (see, further, Malan & Pretorius "Collecting Bank" 710--11; Cusine "The Collecting Banker's Protection in Scots Law" 1978 *Juridical Review* 233).

Thirdly, the collecting bank undertakes in the course of its professional services to collect other persons' cheques payable to its client; it should be aware that its failure to exercise reasonable care may result in loss to the true owner of the cheque. The collecting bank, by virtue of its calling, has or professes to have special skill and competence in its field, and it can or ought to appreciate the significance of instructions upon a cheque. The collecting bank is thus able to reduce, if not avoid, loss to the owner by exercising reasonable care in the collection of cheques. If there were no legal duty to take reasonable care, the collecting bank need not examine or even look at the cheque to ascertain to whom it payable. The crossing of a cheque would be of little consequence if no legal duty existed on the part of the collecting bank (at 799B--E). (See further Pretorius "Aanspreeklikheid" 62--3 for a full discussion of this consideration.) The acceptance of the above echoes the view expressed in *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* where Gubbay JA said:

> "What [counsel for the respondent] did urge was that dictates of policy justify placing the liability of a collecting bank upon a different footing from that of the ordinary intermediary. Support for that approach is forthcoming from Professor Malan, who in 1979 *De Jure* at 34-37 writes convincingly of the 'professional responsibility' of bankers as a class. He ... argues that as a banker, by virtue of his calling, has or ought to have special skill and competence, it is unsound and illogical to equate his position in collecting payment of a stolen cheque with that of an ordinary bona fide purchaser of stolen goods who subsequently disposes of the goods in good faith. For in the exercise of his expertise and responsibility which arise from the professional services he renders the public, the banker owes a duty of care (in the policy-duty sense) to avoid causing loss to the owner of a stolen cheque by negligently dealing with it. In my view the argument is attractive" (at 565B--F).

Fourthly, it must be accepted that the business of banking has changed substantially in recent times. These changes have brought with them a change in the bank-customer relationship. In South Africa the formation of the Automated Clearing Bureau has mechanised the clearing process of cheques. Although collecting banks accept responsibility for collecting the correct amounts, they apparently do not regard it as their responsibility to ensure that cheques are collected for the correct party unless they are put on notice to make inquiries in a specific instance. But the fact remains that the collecting bank is the only party able to know whether the cheque is being collected on behalf of a person who is entitled to receive payment. The drawee bank has to rely on the collecting bank to ascertain whether payment is being collected on behalf of a person who is so entitled. In *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* (supra) Gubbay JA also explained the critical function of the collecting bank in the cheque collection process:

> "[T]he collecting banker appreciates or ought to appreciate the significance of instructions upon a cheque and that they are there to be observed. He can verify whether the payee designated on the cheque is his client. He alone is in a position to know whether it is being collected on behalf of the person entitled to receive payment; the paying banker has no knowledge of that ... . If the cheque indicates that his client is not so entitled, the collecting banker is able to safeguard the drawer from loss by acting as a buffer. He has the machinery at his disposal to do so. He can allow a reasonable period of time to elapse before paying out to his client the funds represented by the cheque, thereby permitting either enquiries to be made as to the depositor's title, or the drawer an adequate opportunity to instruct the drawee bank to stop payment on the cheque. By exercising reasonable diligence in this regard the collecting banker is able to minimise, if not neutralise, the relatively high risk affecting a cheque in the sense that payment can be obtained by an unlawful possessor with comparative ease" (at 565F--I).

Although Cowen "Liability" at 219 concedes that "a collecting bank is in the best position to ascertain (by the careful examination of cheques and by making enquiries) whether its customer has a good title to cheques deposited for collection", he argues that this exercise may yet prove to be too costly since it will involve a detailed examination of each cheque deposited for collection followed by enquiries in cases of doubt as to the depositor's title all of which may be very time-consuming and may require skilled staff (at 220). It is submitted that this argument is erroneous. A clear distinction must be drawn between the recognition of a duty of care (in the policy-duty sense) and the standard of care to be exercised. The recognition of such a duty of care is merely an indication of potential delictual liability since delictual liability as such is dependent on the question whether *all the other requirements of the lex Aquilia have been met* (Malan & Pretorius "Collecting Bank" 713). The standard

of care demanded is the legal measure by which the conduct of the defendant is judged. It relates to the question whether the particular defendant acted negligently under the particular circumstances. The recognition of a duty of care involves policy considerations, and the fact that the collecting banker is the only one who is in a position to know whether the cheque is being collected on behalf of the person who is entitled to receive payment is a policy consideration that must be taken into account. The quality of the standard of care that the collecting bank should adopt to take the necessary steps to ascertain whether its client is entitled to receive payment is determined by the question whether a reasonable man (diligens paterfamilias) would have taken measures to guard against the likelihood of injury. In *Indac Electronics* Vivier JA thus correctly, it is submitted, pointed out that the collecting bank is fully aware of its responsibility, and it might well be said that it is under a duty to ensure that it presents a cheque for payment only on behalf of a client entitled to that payment (at 799F--H).

Finally, the drawer or owner of a cheque is unable to take any steps to protect himself from the loss he will suffer if the collecting bank negligently collects payment on behalf of person who is not entitled to it. But a collecting bank that acts negligently and is consequently held liable to pay damages to the owner will always have a claim for reimbursement against its customer who deposited the cheque for collection (at 799H--I). (See also Pretorius "Aanspreeklikheid" 64n72; Stassen "Die Regsaard van die Verhouding tussen 'n Bank en sy Kliënt" (1980) 2 *Modern Business Law* 77 at 90ff for a full discussion of the ratio of this principle.) If the collecting bank's customer is unable to reimburse, it would be more appropriate to visit liability on the bank that chose to accept its customer's business than on the innocent true owner. (For a full discussion of some of the theories on the allocation of loss in the event of forgeries see, for example, "Allocation of Losses from Check Forgeries under the Law of Negotiable Instruments and the Uniform Commercial Code" (1953) 62 *Yale LJ* 417 at 433ff; Barak "The Uniform Commercial Code - Commercial Paper An Outsider's View" (1968) 3 *Israel LR* 7 at 184ff; Pretorius "Aanspreeklikheid" 64n7.)

Because of these considerations Vivier JA was thus satisfied that the balance of considerations operated in favour of recognising a legal duty on the part of the collecting bank to the owner of a lost or stolen cheque to avoid causing him pure economic loss be negligently dealing with such cheque (at 801A--B). It is, however, important to note that since the matter was decided on exception the court stressed that a final evaluation and balancing of policy considerations should not be undertaken at exception stage and that it would suffice to say,

> "firstly, that the lex Aquilia does provide a basis upon which a collecting banker may be held liable in negligence to the true owner of a lost or stolen cheque, and, secondly, that there are considerations of policy and convenience ... which prima facie indicate the existence of a legal duty on the part of the collecting banker to prevent loss by negligently dealing with the cheque in question. This prima facie indication may be rebutted by the evidence which the defendant might led at the trial, duly tested and evaluated in the light of any countervailing evidence which might be lead by the plaintiff" (at 801B--D).

It is submitted that it is unlikely that a collecting bank would be able to rebut the prima facie legal duty to prevent loss by negligently dealing with the cheque. The recognition of such a duty does not inevitably entail delictual liability on the part of the collecting bank. Furthermore, the practical implications that may result from the recognition of a duty of care should also be taken into account as a policy consideration to determine the existence of the duty of care. (A duty of care arises only where the apprehended damage could be prevented by reasonable, practicable and affordable measures (*Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 111F--112E and 116H--117B; Van der Walt *Delict: Principles and Cases* (1979) § 23).)

The decision in *Indac Electronics* has been and is to be welcomed (Nagel & Greeff op cit 319-20; Hugo op cit 127; Coenraad Visser "Banking May Never be the Same" (1992) 21 *Businessman's Law* 211; Michael Kidd "Can a Collecting Banker be held Liable under the Lex Aquilia? Recent Developments and Some Thoughts on the Future" (1993) 110 *SALJ* 1), and it is perhaps time to regard the unlawfulness issue as being settled and rather attempt to formulate some guidelines for the future.

4 *The question of causation*

An essential element of delictual liability is the existence of a causal nexus between the defendant's conduct and the detrimental consequences sustained by the plaintiff. Before a collecting bank would incur delictual liability to the owner of a lost or stolen cheque, it must be proved that there is a causal nexus between the defendant's conduct and the loss suffered by the true owner of the lost or stolen cheque. To determine the existence of such causal nexus, regard will be had to the general principles of delictual liability. The existence of a causal nexus must be determined with regard to the particular circumstances of the case.

In *Indac Electronics* the Appellate Division correctly emphasised that all the requirements of Aquilian liability have to be met before a defendant can be held

accountable for the loss he may have caused. The question of negligence, the possibility of contributory negligence on the part of the drawer, and the issue of causation may thus play a critical role in the future determination of the ultimate delictual liability of the collecting bank (Pretorius "Aanspreeklikheid" 67ff). In *Worcester Advice Office v First National Bank of Southern Africa Ltd* (supra) Van Niekerk J and Comrie AJ remarked that "issues of causation and contributory negligence are likely to prove intractable" (at 820I--J) in the case of the possible delictual liability of a collecting bank. This statement is simply not correct. The decision of the Zimbabwe Supreme Court in *Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1991 4 SA 82 (ZSC) (as discussed by Pretorius in 1991 *Annual Survey of the South African Law* 265) illustrates that in certain circumstances the contributory negligence of the *drawer* may indeed be significantly greater than that of the collecting bank. Furthermore, the court in *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) at 912G--H had little difficulty in coming to the conclusion that the drawer of a cheque had acted negligently in drawing the cheque "in an improper and unbusinesslike manner". Hoexter J also expressed the view that "the issue of causality [did not] provide any substantial problems" in the particular case (at 912H). In *Barclays Bank DCO v Straw* 1965 2 SA 93 (O), for example, the negligence of the drawer was held not to be the causa causans of the loss sustained where the amount payable on a cheque had been altered without the drawer's consent (cf Boberg 1965 *Annual Survey of the South African Law* 179--80). See also *Bonitas Medical Aid Fund v Volkskas Bank Ltd and another* 1992 2 SA 42 (W) at 49D--G.

5 *Negligence and the collecting bank*

The standard of care demanded is the legal measure by which the conduct of the defendant is judged and relates to the question whether the particular defendant acted negligently under the circumstances. The standard of care that the law demands is ordinarily that which a reasonable man (diligens paterfamilias) would exercise in the same situation. The determination of the potential liability of the collecting bank will focus on the question of negligence. In general, negligence arises if "(*a*) a diligens paterfamilias in the position of the defendant -- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such

occurrence; and (*b*) the defendant failed to take such steps" (per Holmes JA in *Kruger v Coetzee* 1966 2 SA 428 (A) at 430E--F). When the liability of a professional is in question, the standard of care against which his conduct has to be measured is that which may reasonably be expected of a person engaged in that profession (*Van Wyk v Lewis* 1924 AD 438 at 444; *Randaree & others NNO v WH Dixon and Associates & another* 1983 2 SA 1 (A) at 4D--F; *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 2 SA 703 (R) 717E--G; Pretorius "Aanspreeklikheid" 67; TJ Scott "Die Reël imperitia culpae adnumeratur as Grondslag vir die Nalatigheidtoets vir Deskundiges in die Deliktereg" in *Petere Fontes LC Steyn-Gedenkbundel* 124ff). The conduct of the collecting bank as professional should thus comply with that of the bonus argentarius (Malan "Professional" 39; Hugo op cit 127).

The standard of care required should furthermore be measured by the general level of skill and diligence possessed and exercised at the relevant time of the conduct in question (*Van Wyk v Lewis* supra 444; *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 (CA) at 972; *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* supra at 714F--H). Although a court may take cognisance of the standard of care generally adopted by other members of the profession, conformity with general practice is merely prima facie evidence of the absence of negligence (*Colman v Dunbar* 1933 AD 141 at 157; *Marfani & Co Ltd v Midland Bank Ltd* (supra) at 975; JC van der Walt *Delict* § 43). The question of negligence must furthermore be determined with regard to the particular circumstances of the case. Although some valuable guidance can be obtained from English case law (Malan "Professional" 39; Hugo op cit 128), it should nevertheless be borne in mind that the infinite variety of circumstances that may arise makes it undesirable, if not impossible, to formulate and advance concrete standards of conduct for all conceivable situations (Van der Walt *Delict* § 39).

When a bank opens a new account for a prospective client it is standard banking practice to take reasonable steps to ascertain at least the identity of the client (Malan & Pretorius "Collecting Bank" 713; Pretorius "Aanspreeklikheid" 68). In *Marfani & Co Ltd v Midland Bank Ltd* (supra) LJ Cairns pointed out that although "it might be thought desirable that some such document as a passport or a driving licence should be asked for" to establish identity, the verification by some respectable referee may suffice in appropriate circumstances (at 980). (It is noteworthy, however, that the Jack Committee (op cit § 7.27) has recommended that certain steps be taken to

remedy the position where too much protection has been given to banks as a result of the decision in *Marfani & Co Ltd v Midland Bank Ltd* (supra).) Reasonable steps do not, it is submitted, embrace the authentication of a document, such as a driving licence, that was given to prove identity. If a bank opens a bank account on behalf of a company, it would amount to the taking of reasonable steps should the bank ask for a copy of the memorandum and articles of association, a copy of the relevant resolution of a directors' meeting, and a list of names and specimen signatures of persons authorised to sign under the resolution (*Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* supra 906D--H). A study of the decisions in England reveals that many instances of fraud or theft could have been prevented if the collecting bank had taken reasonable steps to ascertain the identity of its client upon the opening of a new account (*Lloyds Bank Ltd v EB Savory and Co* [1933] AC 201 (HL); Malan & Pretorius "Collecting Bank" 713; Pretorius "Aanspreeklikheid" 70nn120--2).

A collecting bank should also exercise reasonable care in the collection of cheques on behalf of its customers. In *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* supra at 717E--H Goldin J remarked the following about the collection of cheques:

> "Generally speaking, where there is something on the face of the cheque, taken in relation to the customer for whom it is collected, which should put the banker upon inquiry, he ignores it at his peril. So that where a cheque is payable to a specified payee, it is prima facie evidence of negligence in the collecting banker to take the cheque for collection on behalf of a person other than that indicated."

Reasonable practical measures to avoid damage will not, however, involve a detailed examination of each cheque deposited for collection followed by enquiries in cases of doubt as to the depositor's title (Malan *Bills of Exchange, Cheques and Promissory Notes in South African Law* § 354; Malan & Pretorius "Collecting Bank" 713). Reasonable care does not as a rule call for the authentication or verification of the validity of an endorsement in blank on a cheque made payable to the order of a third party. But a particular marking or inscription (such as "not transferable") on a cheque may constitute one of the factors that may effect the *degree of care* to be applied, since such markings or inscriptions may in certain circumstances require a greater degree of care to be exercised (Malan & Pretorius "Collecting Bank" 715). "Non-transferable" cheques are not capable of being "indorsed" and it is respectfully submitted that a bank would be prima facie negligent if it collects payment of such a cheque on behalf of a customer who purports to be holding it in terms of an "indorsement" (see further Pretorius "Aanspreeklikheid" 71). In *Bonitas Medical Aid*

Fund v Volkskas Bank Ltd and another 1992 2 SA 42 (W), for example, Plewman J found that because the teller who received the cheque for collection directed no attention to the "not transferable" crossing or even to the fact that the collecting bank itself was named as payee, the collecting bank "must be considered to have had, at least, constructive knowledge that the proceeds of the cheque were being applied to the credit of a person not entitled thereto in terms of the instrument itself" (at 49C--D).

6 *Contributory negligence*

Since the liability of the collecting bank will be based on the principles underlying delictual liability for negligence, there is no reason, in principle, why the Apportionment of Damages Act 34 of 1965 should not be applicable (Malan "The Liberation of the Cheque" 1978 *TSAR* 107, 201 215; Pretorius "Aanspreeklikheid" 71; Tager "The Collecting Banker's Liability to the True Owner of a Lost or Stolen Cheque" (1979) 96 *SALJ* 372 397-8; *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 2 SA 703 (R) 718). Section 1(1)(a) reads:

> "Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage".

The question of contributory negligence on the part of the drawer may thus play a critical role in the future determination of the ultimate delictual liability of the collecting bank (Pretorius "Aanspreeklikheid" 67ff). In *Worcester Advice Office v First National Bank of Southern Africa Ltd* (supra) Van Niekerk J and Comrie AJ remarked that "issues of causation and contributory negligence are likely to prove intractable" (at 820I--J) in the case of the possible delictual liability of a collecting bank. However, the decision of the Zimbabwe Supreme Court in *Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1991 4 SA 82 (ZSC) (as discussed by Pretorius in 1991 *Annual Survey of the South African Law* 265) illustrates that in certain circumstances the contributory negligence of the *drawer* may indeed be significantly greater than that of the collecting bank. See also *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd's Law Rep 114 where the drawer of a cheque was also held to be contributory negligent. The criterion for determining the existence of contributory negligence is similar to that of establishing negligence on the part of a

defendant. A failure to exercise reasonable care in his own interest would constitute contributory negligence on the part of a plaintiff (Van der Walt *Delict* paragraph 44; Pretorius "Aanspreeklikheid" 71). Contributory negligence must be determined with regard to the particular circumstances of the case. For example, a court may well find contributory negligence on the part of the true owner if he, as drawer, draws a cheque in such a manner to facilitate the forgery thereof (*Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N)) or fails to take due precautions as regards the custody or control of his cheque book.

7 *Damages*

To succeed in a delictual action the plaintiff must prove damnum, ie a calculable pecuniary loss or diminution in his patrimony resulting from the defendant's unlawful and culpable conduct (Boberg *Delict* 475). The object of awarding damages is to place the plaintiff in the position he would have been had the delict not been committed. Clause 59 of this draft entitles the true owner of a lost or stolen cheque to recover an amount equal to his loss or the amount of the cheque, whichever is the lesser, from any collecting bank that collected payment of the cheque with negligence.

8 The Association of Attorneys of South Africa supports clause 59 and the imposition of liability on the part of the collecting banker. Although the Association has some reservations on the question whether it is proper for the legislature to unnecessary alter the common law, it is acknowledged that the proposed liability is no doubt necessary in the light of the other proposals regarding the crossing of cheques (clause 51) and the abolition of the remedy in terms of section 81 of the Bills of Exchange Act 1964.

9 The General Bar Association supports clause 59 and states that this clause

> "is die resultaat van diepgaande navorsing en die noodsaaklikheid van die aanspreeklikheid daarin vervat, kan nie misken word nie. Alhoewel meeste bankiers klousule 59 as 'n euwel sal beskou, word daar nogtans aan die hand gedoen dat die klousule onveranderd behou moet word."

10 The Clearing Bankers Association objected to clause 59 and prepared a separate memorandum (hereafter "*Memorandum*") in this regard. These objections were,

however, raised before the Appellate Division delivered its judgment in *Indac Electronics*. Events seem to have overtaken the whole issue. Since the arguments in support of the imposition of delictual liability on the part of the collecting bank have been dealt with in *detail*, it will suffice to merely summarise the some of the arguments raised by the Clearing Bankers Association:

10.1 The banks regard the imposition of liability as unfair and submit that the issue at stake is "to strike the correct balance between the interests of two innocent parties, one of whom has to bear the loss as a result of the fraudulent conduct of a third." The *Memorandum* also argues that clause 59 is much wider than the present restricted liability in terms of section 81 of the Bills of Exchange Act, 1964.

It should be noted that the liability envisaged by clause 59 can be incurred only by a collecting bank that collected payment of the cheque *negligently*. It is therefore not a question of imposing liability on an innocent party as the *Memorandum* seems to suggest. Although it is conceded that the potential liability in terms of clause 59 is much wider than the restricted liability in terms of section 81, it is neither here nor there. The liability envisaged by clause 59 accords with the general principles of delictual liability under the Lex Aquilia. The foreign provisions of section 81 of the Bills of Exchange Act has, in any event, been criticised on several occasions (Malan *Bills of Exchange, Cheques and Promissory Notes in South African Law* § 335; Malan "The Liberation of the Cheque" 1978 *TSAR* 107, 201 215-6; Emmett "Bills of Exchange Amendment Act, 1943" 1944 *THRHR* 65).

10.2 The *Memorandum* points out that despite the increased usage of electronic funds transfer, the usage of cheques continues to grow. The figures supplied indicate that the number of items processed through the Automated Clearing Bureau in 1988 was 320,507,681 with a turnover value of R2,603,501 million that represents an increase of some 8,6% over the previous year when some 295,270,455 items were processed which represented a turnover value of R2,195,840 million. Although the *Memorandum* concedes that the potential liability of the collecting bank is in every instance limited to the face value of the cheque, it nevertheless argues that the number of items processed and the turnover value is vast and that it is common for cheques to be cleared which have a face value running to many millions of rands.

The indeterminate liability-argument has already been discussed in detail. It should be borne in mind that the number of items referred to above are collected by

various collecting banks and branches of these banks and it is not as if all the items are collected by a single bank. Furthermore, each potential claim will arise separately from any other and will be related to a specific act on the part of a specific collecting bank. The collecting bank is not faced with the dilemma of a single negligent act giving birth simultaneously to inestimable loss from an indeterminate class of potential victims launching an endless stream of actions: the potential plaintiffs are limited to two and are easily predictable, namely the drawer of the cheque or the payee or persons holding title under him.

In addition, the fact that the face value of an individual cheque may run into many millions of rands is of no consequence: the amount of the claim is restricted to the amount ex facie the cheque. The extent of the potential loss should also not influence the question as to the existence of a duty of care.

10.3 The *Memorandum* maintains that the submission that banks profess to posses professional skill "over states the actual facts of the case" and states that the cheque clearing process in reality involves a labour intensive activity performed repetitively at a fairly mundane level. It is argued that although "the staff concerned are enjoined to take reasonable precautions to avoid collecting cheques for parties whom they know can have no title to them, they nevertheless perform their duties relieved of the pressure of potential liability." The potential liability would require the employment of additional people and the taking of additional safeguards that would involve a cost of nearly R25 million per annum.

It should be pointed out that the *Memorandum* does not dispute that banks profess professional skill but merely contend that the cheque clearing process itself involves activity repetitively performed at a fairly mundane level. This may be said of various other professions, for example the auditing profession that sometimes involves stocktaking, but that does not distract from the fact that one is dealing in principle with an aspect of professional liability. To say that the employees are now performing their duties relieved of the pressure of potential liability is not quite true. The standard of care that a professional must comply with should not be determined by the question whether potential liability may ensue. The proposed clause 59 will to a great extent result in the compliance with existing banking practice.

10.4 The banks maintain that the business of banking has changed fundamentally in the last century. Collecting banks regard it as their responsibility to ensure that the

correct amounts are collected but do not regard it as their function to ensure that cheques are collected for the correct party unless they are put on notice somehow or other to make enquiry in a specific instance. Banks have also attempted to inform their customers that they do not accept responsibility for ensuring that depositors/account holders have lawful title to cheques collected by them. The *Memorandum* explains that the formation of the Automated Clearing Bureau in Johannesburg in 1973 and its extension to Cape Town and Durban thereafter mechanised the collection process and served further to change the practice to one of collecting the specified amounts of the cheques for the customers presenting them for collection so that banks now regard it as their function to collect the correct value stated on the cheque, but not to collect that value for the payee stated thereon.

It is conceded that there has been a change in the business of banking as far as the relationship between banker and customer is concerned. The essence of this change in the relationship between bank and customer is reflected in the very important provisions of clause 62 (see below). It is significant that the Jack report recommended that the provisions of section 4 of the Cheques Act of 1957 are to be extended to Scotland and also that certain steps be taken to remedy the position where too much protection has been given to the bank as a result of the decision in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 (CA) (cf paragraph 7.27).

That collecting banks regard it as their responsibility to ensure that the correct amounts are collected whilst they do not regard it as their function to ensure that cheques are collected for the correct party unless they are put on notice to make enquiry in a specific instance, is also of no consequence. A duty of care is imposed by law and the existence of such a duty is determined upon consideration of all the relevant circumstances (Malan "Professional Responsibility" 32; Van der Walt *Delict: Principles and Cases* (1979) par 25 and cf *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833-4). At any rate, the existence of a duty of care is not determined by the question whether a particular individual admits or accepts the existence of a duty of care.

Lastly, the fact that collecting banks have attempted to inform their customers that they do not accept responsibility for ensuring that depositors/account holders have lawful title to cheques collected by them, is, it is respectfully submitted, irrelevant. Such notice would, firstly, at most amount to a term in the bank customer contract. Secondly, the assumption of liability is not a prerequisite for liability in the South African law. If a person were, for example, to display a notice in the wind screen of

his motor vehicle that he would not be liable for any injuries that may be sustained by pedestrians as a result of his negligent driving, such notice would definitely not exclude his potential delictual liability.

10.5 The *Memorandum* argues that if the banks were to operate within the scope of the potential liability they would have to take additional measures that would slow down the cheque clearing process. It is argued that the volume of cheques processed by the Automated Clearing Bureau is such that strict deadlines have been imposed on the banks for the handling of cheques for each day. If a bank fails to meet this deadline, the cheques are held over for clearance to the following day. This could lead to significant opportunity costs being incurred which could increase the costs of the cheque clearing process.

It should be noted that the recognition of a duty of care will not necessarily result in a detailed examination of each cheque deposited for collection. Reasonable practical measures to avoid damage will not involve a detailed examination of each cheque deposited for collection followed by enquiries in cases of doubt as to the depositor's title. No one would suggest that a teller should examine each cheque in a bundle deposited on a busy morning. Furthermore, a comparative study reveals that in the greater majority of foreign legal systems, collecting banks that negligently collect payment of a lost or stolen cheque can incur liability to the true owner of such cheque. The imposition of such liability has not resulted in an over expensive cheque collection process nor is there any evidence of any mammoth delays in the cheque collection process. In fact, the indications are the opposite despite a greater volume of cheques being present.

10.6 The *Memorandum* maintains that since the standard of care with which the collection of cheques should take place may vary from time to time in accordance with current banking practice, there should be no liability imposed on banks in the light of the current banking practice prevailing presently in South Africa. By imposing liability, it is argued, "the practice of banks would, paradoxically, have to change, with consequences that may not be beneficial to the banked (sic) population at large ...".

It is respectfully submitted that the recognition of a duty of care on the part of the collecting bank will indeed benefit the banking population at large. The recognition of such a duty will not only lead to a simplification of the Bills of Exchange legislation but it will also enhance and improve the protection afforded the

true owner of a cheque in the event of theft or loss of possession. By exercising reasonable diligence the collecting banker would be able to minimise, if not neutralise, the relatively high risk affecting a cheque in the sense that payment can be obtained by an unlawful possessor with comparative ease (*Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 4 SA 553 (ZSC) 565). This will in turn lead to a safer and more reliable method of payment.

Although it is true that the standard of care required may change from time to time (*Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 (CA) 972), it must also be borne in mind the standard of care is determined with reference to community evaluations. It is true that considerable weight attaches to whether the banker's conduct complied with practices accepted as normal and general by other members of the banking community in the same circumstances. General practice in regard to precautionary measures in particular situations and activities is indicative of the legal standard of care required. Conformity with general practice shows the absence of negligence: failure to comply with standard practice is, on the other hand, an indication of the presence of negligence. However, conformity with general practice adopted by other members of a profession is merely prima facie evidence of the absence of negligence. What constitutes compliance with the legal standard of care required remains a matter for judicial expression and definition. The practice prevailing presently in South Africa does not by itself constitute compliance with what should be the legal standard of care required.

10.7 The *Memorandum* lists some of the problems that are encountered by banks in the process of the collection of cheques and suggest that these problems would have to be addressed:

10.7.1 Large corporate customers often deposit their cheques in bulk for collection. If such cheques had to be processed by special examination of bank officials, costs would be increased substantially.

Although this aspect was dealt with in detail it should be remembered that should a bank be exposed to delictual liability because, for example, it collected payment on a cheque on behalf of someone other than the true owner of the cheque, such bank would always be entitled to recover the amount that it is obliged to pay, from its customer. Thus, the collecting bank would only be out of pocket when it is unable to recover the amount of the damages it was obliged to pay from its customer on whose behalf it collected payment. The likelihood of damages for the collecting

bank is limited to those instances where it is unable to recover from its client. It is, for example, the general practice of banks in England to insist that those customers who daily pay a large number of cheques into their accounts for collection, must provide the bank with an indemnity for any loss the bank may incur as a result of the client presenting a lost or stolen cheque for collection. The result is that collecting banks in England simply do not subject each cheque deposited for collection to a detailed examination. In fact, the greater majority of cheques are not subjected to any examination at all. In South Africa it would not be necessary for the banks to insist on an express indemnity because such indemnity is implied by law (Stassen "Die Regsaard van die Verhouding tussen 'n Bank en sy Kliënt" (1980) 2 *Modern Business Law* 77 90ff; De Wet & Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) 4ed by De Wet & Van Wyk 342).

10.7.2 Drawers of cheques often insert the names of payees incorrectly and an official scrutiny would result in a large number of cheques being refused for collection. An example would be that a cheque payable to "Town Treasurer" being deposited by a municipality into its account having a different title.

It should be remembered that this difficulty will only be encountered in instances where the cheques are made out to the order of the payee or the cheque contains words indicating an intention that they should not be transferable. One should express the hope that the collection of a cheque will indeed be refused if the cheque indicates that the person presenting it is not entitled to the payment thereof.

10.7.3 Banks do not as a matter of practice copy all cheques collected before they are returned under cover of a bank statement. A cheque may be issued uncrossed and payable to a certain person, or to bearer, and after payment has been made and the cheque is returned with the statement, the customer could cross it or effect some other material change.

Fraud of this nature is unquestionably also a problem under the existing legislation. It is submitted that clause 62 of the proposed draft will largely address this problem.

10.7.4 At present banks take deposits of cheques through the Automated Teller Machines (ATM's).

It is assumed that cheques are checked after their deposit since a failure to do so, it is submitted, be tantamount to gross negligence. It is submitted that the standard of care applicable to a deposit over the counter should be identical with that of a deposit by means of an Automated Teller Machine. If any provision of the procedure is necessary it should be done.

It is submitted that there are compelling reasons for the imposition of a duty of care on a collecting bank. These considerations, it is submitted, justify the imposition of duty of care not only by the courts but also by the legislature. Such a duty of care will not only lead to a simplification of the Bills of Exchange legislation but it will also enhance and improve the protection afforded the true owner of a cheque in the event of theft or loss of possession. Legislation dealing with negotiable instruments is closely integrated and technical in nature. The duty of care on the part of the collecting bank is one of the cornerstones of the proposed Act. It is thus recommended that clause 59 be retained in its present form.

60 Rights of collecting bank

Where a cheque, which is payable to order, or a non-transferable cheque is delivered by the holder thereof to a collecting bank for collection, and such cheque is not indorsed or is irregularly indorsed by such holder, such bank shall have such rights, if any, as it would have had if, upon such delivery, the holder had indorsed it in blank.

CHAPTER 9

BANK AND CUSTOMER

61 Authority to debit customer's account

Subject to the provisions of this Act, the drawee may debit the account of a customer with the amount of a cheque that is drawn by the customer and paid in terms of Section 54.

62 Operation of account

(1) Unless otherwise agreed between the parties, the drawee shall exercise reasonable care towards its customer in the payment of cheques and a customer shall exercise reasonable care towards the drawee in the drawing and custody of cheques and in the operation of his account.
(2) The Apportionment of Damages Act, 34 of 1956 shall apply mutatis mutandis to a claim arising from any breach of the provisions of subsection (1).

Comparative legislation

Sec 3-401; 3-404; 3-405; 3-406 UCC
Sec 4-401; 4-406 UCC
Sec 101; 200-202 New Payment Code
Sec 4-401 to 4-407 Revised UCC

1 *Introduction*

Clause 61 of this draft is a new provision. The bank-and-customer relationship is based on a comprehensive mandate in terms of which the customer lends money to the bank on current account, the bank undertaking to repay it on demand by honouring cheques drawn on it and to perform certain other services for the customer, such as the collection of cheques and other instruments, and the keeping and accounting of his current account (Stassen "Drieparty-betalingsmeganismes in die Moderne Bankreg-die Regsaard van die Verhouding tussen Bank en Kliënt" 1980 *Modern Business Law* 77). Where the mandatory (the bank) has performed in terms of the mandate contained in an individual cheque, the mandatory is entitled to be compensated and reimbursed by

the mandator. In *Volkskas Bpk v Johnson* 1979 4 SA 775 (C) 777-8 Grosskopf J explains:

> "Die verhouding tussen bankier en kliënt behels dat die bankier sy kliënt se opdrag om te betaal, soos uitgedruk in 'n tjek, moet uitvoer. Indien hy dit doen, is hy geregtig om die kliënt se rekening te debiteer met die bedrag van die tjek."

Clause 61(a) confirms this principle. The provisions of clause 61 must be read with those of clauses 12, 13, 35 and 63. It should be noted that clause 61 applies to overdue or stale cheques as well; they can be validly paid. Section 89 of the Australian Cheques and Payment Orders Act, 1986 is thus not followed.

2 *The forgery of a drawer's signature*

2.1 *The common law*

The common law position is that where the signature of the drawer on a cheque is forged, the drawee bank pays the cheque at its own risk and may not debit the account of the drawer or recover the amount so paid from him.

This principle is explained by Pothier 1.4.54.

> "Indien een falsaris eenen geheel valschen Wisselbrief op mijnen naam, en aan mijnen Banquier houdende, gemaakt had, en dat hij mijn schrift en mijne onderteekenig had nagemaakt, zoo dat een oplettend en kundig man 'er mede konde bedrogen worden, in dat geval is 'er geen twijffel aan, of de Banquier, aan wien hij deezen Wissel had aangeboden, en die de daar in vermelde somme betaald had, zoude tegen mij geene actie hebben, om hem dezelve te vergoeden; want de algemeene last, dien ik hem gegeven heb, om de Wisselbrieven, door mij op hem te trekken, te accepteeren en te betaalen, is alleen betrekkelijk tot Wisselbrieven, die van mij voortkomen en kan zig niet uitstrekken tot dien valschen Wissel, die uit mijnen boezem niet gekomen is."

The same sentiments are expressed by Lochau *Verhandeling over de Feilen en Gebreken in den Wisselhandel* 2.17:

> "[Wanneer] ... de vervalscher een' geheel onechten wisselbrief gemaakt, en des trekkers naam valschelyk geschreven hebbe, betaalt de aannemer denzelven op zyn eigen gevaar, hebbende geen verhaal tegen den trekker, maar alleen tegen den vervalscher. ... Ook maakt het geen onderscheid, of de valscheid zoo klaar zy, datze ten eerste oog loope, dan of dezelve kunstiger bedekt, en niet zoo klaarblykelyk zy. Want daar is geen reden, waarom de zender of trekker die schade zoude lyden, naardien geen van hun beiden eenige onderhandeling met den betrokkenen aangegaan, of hem immer last gegeven heeft om de betaling te doen."

However, the drawer of a cheque owed a duty to the drawee bank to draw the cheque in such a manner in order to prevent forgery or to facilitate alteration that could mislead the drawee bank. Pothier 1.4.51 explains:

> "Met sit al, indien het door verzuim van den Trekker was toegekomen, dat de Banquier misleid was, vermits de Trekker geene zorge gedragen had, om zijnen Wissel zoo te schrijven, dat de vervalschingen werden voorgekomen, bij voorbeeld, indien hij de somme, bij den Wisselbrief getrokken, in cijffers had geschreven, en men een nul daar bij gevoegd had, zoude de Trekker in dat geval gehouden zijn den Banquier schadeloos te stellen wegens het nadeel, hij hem door de vervalsching van den Wisselbrief geleden, waar toe de Trekker, door zijne schuld, aanleiding gegeven heeft.

See also Reitz 26 on Heneccius 7.2, 11 and Van der Keessel *Praelectiones* th 872.

2.2 *The English law*

2.2.1 Duty to draw cheques carefully

Before 1918 there was some uncertainty as to the existence and extent of the duty of a customer towards his bank to exercise care in drawing his cheques so as not to invite or facilitate fraudulent alteration (Holden I *Law and Practice* 72-5; Byles 285-8). However, in 1918, in the case of *London Joint Stock Bank Ltd v MacMillan & Arthur* 1918 AC 777 the house of lords approved of the earlier decision in *Young v Grote* (1827) 4 Bing 253 (130 ER 764) and held that a customer of a bank owes a duty to the bank in drawing a cheque to take reasonable and ordinary precautions against forgery, and if as the natural and direct result of the neglect of those precautions the amount of the cheque is increased by forgery, the customer must bear the loss as between himself and the bank. Thus, if the drawer draws a cheque in breach of his duty to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery and the bank suffers loss as a result, the bank may debit the drawer's account with the amount of the forged or altered cheque. Since 1918, *MacMillan* has been followed in various other jurisdictions (Australia: *Commonwealth Trading Bank of Australia v Sidney Wide Stores Pty Ltd* (1981) 55 ALJR 574; Canada: *Will v Bank of Montreal* (1931) 3 DLR 526, *Kilburn v Co-op Centre Credit Union Ltd* (1972) 33 DLR (3d) 233; India: *Tanjore Permanent Bank Ltd v SR Rangachari* 1959 AIR (Mandras) 119; *Joydeb Das v National Bank of India Ltd* 1961 65 Calcutta WN 282; New Zealand: *National Bank of New Zealand v Walpole & Patterson Ltd* 1975 2

NZLR 7; South Africa: *Standard Bank of SA Ltd v Kaplan* 1922 CPD 214 222; *Burns v Forman* 1953 2 SA 226 (W) 229; *Barclays Bank v Straw* 1965 2 SA 93 (O) 95; Sri Lanka: *Kulatilleke v Mercantile Bank of India* (1957) 59 Ceylon NLR 190).

2.2.2 Forgery of the drawer's signature

The general rule in English law as regards the forgery of the drawer's signature is that where the signature of the drawer on a cheque is forged, the drawee bank pays the cheque at its own risk and may not debit that account of the drawer or recover the amount so paid (*London and River Plate Bank v Bank of Liverpool* 1896 1 QB 7; *Bank of Ireland v Evans' Charities Trustees* 1855 5 HLC 389 410-11; *Greenwood v Martins Bank Ltd* 1932 1 KB 371 (CA) 382, 1933 AC 51. In *London Joint Stock Bank Ltd v MacMillan & Arthur* 1918 AC 777 823 lord Shaw observed: "[A] cheque with the signature of a customer forged is not the customer's mandate or order to pay."). In this connection, the skilfulness or otherwise of the forgery is entirely irrelevant. The sole ground of decision is that the banker has in fact made payment without his customer's authority.

There are exceptions to the rule that the bank that pays a forged cheque does so at its own risk. The drawer may be held liable by his adoption of the forged signature (*Bron v Westminster Bank Ltd* 1964 2 Lloyd's Rep 187), or by his deliberate failure to inform the bank timeously of the forgery (*M'Kenzie v British Linen* 1881 6 App Cas 82 109; *Greenwood v Martins Bank Ltd* 1932 1 KB 371 (CA) 381. However, in order to cast upon the customer the risk of loss resulting from his negligence, it is said that the negligence must be in the immediate transaction itself, that is, in the manner in which the cheque was drawn.

Recently, in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* 1985 2 All ER 947 the Privy Council had to decide whether the decisions in *MacMillan* and *Greenwood* still represented the current English law and whether it could be said that English law recognises today any duty of care owed by the customer to his bank in the operation of a current account beyond, first, a duty to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery and, second, a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it. It was argued on behalf of the drawee banks that there is a duty on the customer to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented

to the bank for payment. It was further argued, irrespective of the aforementioned duty, that the customer owes a duty to the drawee bank to take steps to check his periodic bank statements as a reasonable customer in his position would take to enable him to notify the bank of any debit items in the account that he has not authorised. It was submitted on behalf of the drawee bank that the source of this obligation is to be found both in the contract law as an implied term of the banking contract and in the tort law as a civil obligation arising from the relationship of banker and customer (963). Lord Scarman, delivering the unanimous decision of the Privy Council, overturned the decision from the Hong Kong Court of Appeal (*Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* 1984 1 Lloyd's Rep 555) and held that in the absence of express agreement to the contrary, the duty of care owed by a customer to the drawee bank in the operation of his current account was indeed limited to a duty to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery and a duty to inform the bank of any unauthorised cheques purportedly drawn on the account as soon as the customer becomes aware of them. The customer has no duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques from being presented for payment, nor is he obliged to check periodic bank statements to enable him to notify the bank of unauthorised debit items.

This finding is in stark contrast to the decision of the Hong Kong Court of Appeal. In the Hong Kong Court of Appeal Cons J referred to the decision in *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1981) 122 DLR (3d) 519 where Montgomery J of the Ontario High Court of Justice stated at 532:

> "I cannot see that a large sophisticated bank customer who receives daily statements of account from its bank, whose daily bank transactions amount to many thousands of dollars, can be absolved of responsibility for checking the accuracy of those statements in respect of cheques bearing forged signatures. If the bank is to be held liable to its customer for honouring cheques bearing forged signatures surely it must be considered a part of commercial custom that the customer take steps to identify forgeries and prevent their recurrence as part of normal business practice".

With reference to the above quote Cons J thought that "the existence or otherwise of a general duty of this kind ought not depend upon the nature or size of the customer's business (*Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* 1984 1 Lloyd's Rep 555 564). The learned judge was of the opinion that

> "[i]t cannot be economically feasible nowadays for a bank to subject the signature on each and every cheque presented to a thorough examination or comparison with the specimen signature card. Banks must look to other protection. Thus, after a great deal of hesitation, I find myself finally led to the conclusion that, in the world in which we live today, it is a necessary condition

> of the relation of banker and customer that the customer should take reasonable care to see that in the operation of the account the bank is not injured" (at 560).

In the Privy Council lord Scarman observed with reference to this statement of Cons J in the court a quo:

> "One can fully understand the comment of Cons JA [sic] that the banks must today look for protection. So be it. They can increase the severity of their terms of business, and they can use their influence, as they have in the past, to seek to persuade the legislature that they should be granted by statute further protection. But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change. The business of banking is the business not of the customer but of the bank. They offer a service, which is to honour their customer's cheques when drawn on an account in credit or within an agreed overdraft limit. If they pay out on cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service which it is their business to offer. The limits set to the risk in the *Macmillan* and *Greenwood* cases can be seen to be plainly necessary incidents of the relationship. Offered such a service, a customer must obviously take care in the way he draws his cheque, and must obviously warn his bank as soon as he knows that a forger is operating the account."

Lord Scarman also dealt with the submission that a drawee bank can rely on the law of tort as the source of civil obligation in terms of which there is a duty on the customer to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to the bank for payment. His lordship had the following to say in this regard:

> "[I] do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, [I] ... believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort ...".

Thus, on the basis of *Tai Hing* it is concluded that in English law the position is that in the absence of express agreement to the contrary, the duty of care owed by a customer to the drawee bank in the operation of his current account is limited to a duty to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery as well as a duty to inform the bank of any unauthorised cheques purportedly

drawn on the account as soon as the customer becomes aware of them. The customer has no duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques from being presented to the drawee bank for payment, nor is he obliged to check periodic bank statement to enable him to notify the bank of unauthorised debit items. See further in this regard: Ellinger "Bank's Liability for Paying Fraudulently Issued Cheques" 1985 *Oxford Journal of Legal Studies* 293; EPE "The Macmillan Doctrine Reviewed in Hong Kong" 1984 *Lloyd's Maritime and Commercial Law* 559; Newell "The Relationship of Banker and Customer" 1985 *NLJ* 943; Ogilvie "Banker and Customer Revisited" (1986) 65 *Canadian Bar Review* 3 9-12.

2.3 *The South African law*

2.3.1 Introduction

The present South African law is very similar to the English law.

2.3.2 *Duty to draw cheques carefully*

The South African law recognises that a customer owes a contractual duty to his bank to draw his cheques with reasonable care in order to prevent forgery or alteration that could mislead the bank. In *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1973 2 SA 281 (C) 288, for example, Corbett J said that "a customer owes a duty to draw his cheques with reasonable care in order to prevent forgery ...". See also *Standard Bank of SA Ltd v Kaplan* 1922 CPD 214 223-4; *Trull v Standard Bank of South Africa* (1892) 4 SAR 203 205; *Union Government v National Bank of South Africa Ltd* 1921 AD 121 128-9; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 383; *Barclays Bank v Straw* 1965 2 SA 93 (O) 96. If the drawer draws a cheque in breach of his duty to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery and the bank suffers loss as a result, the bank may debit his account with the amount of the forged or altered cheque (Malan paragraph 323; Cowen 373-4; Pretorius "Die Verhouding tussen 'n Bank en sy Kliënt" (1982) 45 *THRHR* 333 336; *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1973 2 SA 281 (C) 291; *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 4 SA 747 (A) 761-2; *Barclays Bank v Straw* 1965 2 SA 93 (O) 96).

2.3.3 Forgery of the drawer's signature

The general rule in the South African law as regards the forgery of the drawer's signature is that where the signature of the drawer on a cheque is forged, the drawee bank pays the cheque at its own risk and may not debit the account of the drawer or recover the amount so paid (Malan paragraph 323; Malan "The Liberation of the Cheque" 1978 *TSAR* 107, 201-2; Cowen 373-4; Pretorius "Banker Customer Relationship" 1985 *Annual Survey of South African Law* 344; *Standard Bank of SA Ltd v Kaplan* 1922 CPD 214 222; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 283-5; *Holzman v Standard Bank Ltd* 1985 1 SA 360 (W) 363). This was also the position at common law (paragraph 2.1 above, cf Pothier 1.4.54; Lochau *Verhandeling over de Feilen en Gebreken in den Wisselhandel* 2.17). In this connection, the skilfulness or otherwise of the forgery is entirely irrelevant (Cowen 374). The sole ground of decision is that the banker has in fact made payment without his customer's authority. In certain circumstances, however, the customer (drawer) may be precluded from relying on the forgery of his signature. These are exceptions to the rule that the bank that pays a forged cheque does so at its own risk. Where the customer, for instance, adopts a forged signature as his own or confirms it, he may be estopped from relying on the forgery (Malan paragraph 322; *Brown v Westminster Bank Ltd* 1964 2 Lloyd's Rep 187). A customer may also be precluded from relying on a forgery if he knows of, or suspects, a forgery and fails to inform the bank of it (*Union Bank's Liquidators v Beit* (1892) 9 SC 109; *Standard Bank of SA Ltd v Kaplan* 1922 CPD 214; *Broekman v TCD Motors (Pty) Ltd* 1949 4 SA 418 (T) 425; *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 2 SA 47 (T) 51; *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 276-7; *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 4 SA 747 (A) 761). However, it is not the customer's duty to examine his bank statements, nor to inform his bank of incorrect entries made on them (*Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 283; *Standard Bank of SA Ltd v Kaplan* 1922 CPD 214 220-21; *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 4 SA 747 (A) 762; *Holzman v Standard Bank Ltd* 1985 1 SA 360 (W) 363; Malan paragraph 323; Cowen 374).

But the customer's duty to the drawee bank is a limited one, said the court in *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) at 283:

> "A customer's duty to his banker is a limited one. Save in respect of drawing documents to be presented to the bank and in warning of known or suspected forgeries he (the customer) has no duty to the bank to supervise his employees, to run his business carefully or to detect forgeries".

(See also *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 4 SA 747 (A) 761-2.) Malan therefore points out that the customer's negligence must be in the manner in which the cheque was drawn and that it is unlikely that the customer's negligence as custodian of his cheque book or in the appointment or supervision of his employees would entitle the bank to debit his account (Malan paragraph 323).

In *Holzman v Standard Bank Ltd* 1985 1 SA 360 (W) 363, a judgment delivered on 15 July 1982, Nicholas J quoted the aforementioned passage in *Big Dutchman* with approval. In answering the submission that there is in principle no difference between lack of reasonable care in the operation of a banking account which results in forgery of a raised amount or altered payee and that the same lack of care can result in a complete forgery of the drawer's signature because in each case it is the customer's negligence which facilitates the forgery, Nicholas J in *Holzman v Standard Bank Ltd* 1985 1 SA 360 (W) 364 quoted with approval the following passage in the judgment of Kennedy J in the case of *Lewis Sanitary Steam Laundry v Barclay and Co Ltd* (1906) 95 LT 444 at 447:

> "[In] order to relieve the banker from the consequences of paying money upon a forged cheque, it is not enough for the banker to show that the conduct of his customer, willful, careless or wasteful, or all, enabled the fraud to be committed. He must show that the customer caused him to pay the money upon the forged cheque. It is not enough to show that the customer gave occasion for his so paying -- that different conduct would have prevented the fraud and the payment by the banker ... [T]he case of *Bank of Ireland v Trustees of Evans' Charities* 5 HL Cas 389 establishes the proposition that negligence to make an estoppel must be in, or immediately connected with, the transaction itself which is complained of. 'The carelessness of the customer or neglect of the customer to take precautions unconnected with the act itself, cannot be put forward by the banker in justifying his own default ...'".

Thus, in the South African law a customer's duty to the drawee bank is a limited one. The duty of care owed by a customer to the drawee bank in the operation of his current account is limited to a duty to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery as well as a duty to inform the bank of any unauthorised cheques purportedly drawn on the account as soon as the customer becomes aware of, or suspects, a forgery. The customer has no duty to take reasonable precautions in the management of his business with the bank to prevent

forged cheques from being presented to the drawee bank for payment, ie the customer has no duty to the bank to supervise his employees, to run his business carefully or to detect forgeries. Furthermore, it is not the customer's duty to examine his bank statements, nor to inform his bank of incorrect entries made on them.

3 *The proposals for reform*

3.1 Introduction

As mentioned earlier, clause 62(1) of this draft is intended to modify the existing South African law as regards the forgery of a drawer's signature and consequently the rule that the bank that pays a forged cheque does so at its own risk. Clause 62(1), particularly the last part of it, is intended to deal with the situation where a drawer fails to take reasonable precautions in the management of his business with the bank so as to prevent forged cheque from being presented to the drawee bank for payment, in particular where the drawer fails to take reasonable steps to supervise his employees who had been entrusted with the signing, custody or preparation of cheques or cheque forms.

Although in both the English and South African law the position is that in the absence of express agreement to the contrary, the duty of care owed by a customer to the drawee bank in the operation of his current account is limited to a duty to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery as well as a duty to inform the bank of any unauthorised cheques purportedly drawn on the account as soon as the customer becomes aware of them, a duty to take precautions in the operation of a banking account is recognised in other jurisdictions.

3.2 *Comparative law trends*

3.2.1 France

The relationship between drawer and drawee is not regulated by the Geneva Uniform Cheque Law. Article 16 of *Annex II* to the *Reservations* to the *Convention providing a Uniform Law for Cheques and Protocol* left it to the contracting states to provide measures regulating this relationship in the event of the loss or theft of a cheque.

In French law the consequences of the payment of a forged cheque are in principle determined by the law of mandate. The bank therefore primarily bears the risk of making payment on a forged cheque. It may only debit the loss to the drawer if the latter was in some way or other at fault. (See the authorities cited in 1978 *TSAR* 107, 201 203 n137; Ripert-Roblot *Traité de droit commercial* (1992) §§ 2205ff, 2213, 2279.)

The lack of care of the drawer may consist inter alia in his negligence in the safekeeping of his cheques or cheque book, or in his signing cheques in blank, or in his lack of control over his employees, servants or representatives (Vezian *La Responsabilité du Banquier en Droit Privé Français* (1977) 114-5). The onus of proving fault rests on the bank, and in certain circumstances there may be an apportionment of responsibility according to the degree at which the parties were at fault (Vézian 117).

This allocation of the risk of which the bank in principle bears the risk of a payment made on a forged cheque is often, if not always, contractually varied. Although a clause is usually inserted in the banker customer agreement that will exclude the responsibility of the bank, such a clause will free the bank only of responsibility for culpa levis and affords no defence for gross negligence (Vézian *La Responsabilité* 16ff).

3.2.2 *West Germany*

The relationship between banker and customer as regards the forgery of the drawer's signature in German law is governed by the *Allgemeine Geschäftsbedingungen* which incorporates paragraph 11 of the *Bedingungen für den Scheckverkehr* which reads:

> "Alle Folgen eines Zuwiderhandelns gegen die vorstehenden Bedingungen sowie alle Nachteile des Abhandenkommens, der missbräuchlichen Verwendung, der Fälschung und Verfälschung von Schecks, Scheckvordrucken und des Vordrucks der Empfangsbescheinigung trägt der Kontoinhaber. Das bezogene Institut haftet im Rahmen des von ihm zu verwedenden Verschulden nur in dem Masse, als es im Verhältnis zu anderen Ursachen an der Entstehung des Schadens mitgewirkt hat."

The *Allgemeine Geschäftsbedingungen* (AGB) are regarded as terms of the bank customer agreement by which the risk of payment of a forged cheque is shifted from the bank, which would normally bear it, to the customer (Baumbach-Hefermehl 681-3); Malan "The Liberation of the Cheque" 1978 *TSAR* 107, 201 204). Paragraph 11

only applies to cheques delivered to the customer and does not increase his responsibility with regard to cheques that he has not received and in respect of which he is more or less in the position of a stranger. The criterion for loss is not the drawing of the individual cheques but rather the delivery and acceptance of the cheques pursuant to the bank-customer agreement. The risk of loss is primarily born by the owner of the cheque.

Malan "The Liberation of the Cheque" 1978 *TSAR* 107, 201 204 points out that the AGB regulates the responsibility of the customer in much the same way as the "Sphären-Theorie" put forward by Ulmer (*Das Recht der Wertpapiere* (1938) 316) by which the bank is authorised to debit its client "wenn die -- für sie nicht erkenbare -- Fälschung auf einen Umstand zurückzuführen ist, der in der Sphäre des Ausstellers liegt ..." as in the case of the loss of a cheque book or the unauthorised use thereof by an employee. The client, both by operation of sec 11 of the AGB and in terms of Ulmer's theory, has to bear the loss even though he may not be at fault. Section 11, however, relates only to the risk of forgery but does not exclude the bank's duty of verifying the formal regularity of the cheque. The bank remains bound to a "ordnungsmässige und sorgfältige Prüfung" of the cheques (Baumbach-Hefermehl 479). The AGB itself retains the bank's responsibility for "nachgewiesenes Verschulden". The bank would be duly exercising its duty and would be acting without fault if it pays a cheque that has the outward appearance of regularity. Certain circumstances would call upon the bank to inquire as to the holder's right to payment. These circumstances are limited not only to the cheque itself but may be in the person of the holder, the amount payable and other factors.

The German law thus restricts the drawee bank's obligations in payment of a cheque to the outward appearance of regularity of it. The philosophy behind this approach is that the most effective measures against theft, loss and forgery are those that can be taken by the owner or customer in the safeguarding of his cheques and in his organisational control over employees and representatives (1978 *TSAR* 107, 201 204). A drawee bank can contribute to decreasing this risk only to a limited extent by exercising control over the formal regularity of cheques when effecting payment.

3.2.3 *Canada*

Ogilvie "Banker and Customer Revisited" (1986) 65 *Canadian Bar Review* 3 7 summarises the Canadian law in this regard as follows:

> "[T]he common law has also implied several terms into the banking contract in relation to the customer's duties to the bank. First, a customer is obliged to take reasonable care in executing his written orders so as not to mislead the bank or facilitate forgery. A bank is not obliged to honour an ambiguous or suspicious instruction. Secondly, a customer is obliged to inform the bank as soon as he knows that a forged instrument has been presented or is about to be presented to it. Thirdly, there is growing evidence that in Canada ... a customer owes a duty to verify the accuracy of the accounts rendered to him, even in the absence of an account verification agreement otherwise he is estopped from re-opening them. Fourthly, there is at least one Canadian authority for the implication of a duty on the part of a large commercial customer owed to the bank to implement and utilise reasonable office and accounting procedure so as to facilitate the prevention of forgery."

The Canadian authority for the implication of a duty on the part of a large commercial customer owed to the bank to implement and utilise reasonable office and accounting procedures to facilitate the prevention of forgery is, of course, the decision in *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1981) 122 DLR (3d) 519 where Montgomery J of the Ontario High Court of Justice stated at 532:

> "I cannot see that a large sophisticated bank customer who receives daily statements of account from its bank, whose daily bank transactions amount to many thousands of dollars, can be absolved of responsibility for checking the accuracy of those statements in respect of cheques bearing forged signatures. If the bank is to be held liable to its customer for honouring cheques bearing forged signatures surely it must be considered a part of commercial custom that the customer take steps to identify forgeries and prevent their recurrence as part of normal business practice".

The decision of the Ontario High Court of Justice in *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1981) 122 DLR (3d) 519 was confirmed by the Ontario Court of Appeal in *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1982) 139 DLR (3d) 575. Ogilvie's submission that a customer owes a duty to verify the accuracy of the accounts rendered to him, is based on a number of authorities (Ogilvie "Banker and Customer Revisited" (1986) 65 *Canadian Bar Review* 3 7 fn21).

Ogilvie opines that the hesitancy of the courts to increase the scope of the customer's duties towards the drawee bank may be based on the argument that banks are in a better position to suffer losses and to insure against negligent customers (Ogilvie "Banker and Customer Revisited" (1986) 65 *Canadian Bar Review* 3 9). He points out that it could be argued, however, that even if the defendant is a bank, it is, prima facie, patently unfair to make the drawee bank the insurer when it was not responsible for the loss and that it would encourage a policy of confrontation between banker and customer on a matter in which their interests are mutually dependent and

require co-operation to prevent losses. The learned author also suggests that the adoption of the approach in *Canadian Pacific* in relation to ordinary consumers would result in a massive re-allocation of the risk and loss in favour of the consumer since the Canadian tort law is one of the techniques used for overriding unfair contract terms. The author concludes that

> "[u]nless the courts prove more sympathetic than at present to commercial parties, or more willing to impose tortious duties in the teeth of the contractual undertakings, it is unlikely that re-allocation in favour of commercial parties will result other than when the contract is silent as to the distribution of the risk. The adoption of a duty of reasonable care would also result, however, in the possibility that in those situations in which the standard form contract on strict construction is not applicable a consumer would have to bear the loss when he was responsible for it, wholly or in part. The re-allocation of the loss to the responsible party is, however, prima facie not a bad thing."

3.2.4 *Hong Kong*

Although the decision of the Hong Kong Court of Appeal in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* 1984 1 Lloyd's Rep 55 was overturned in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* 1985 2 All ER 947 by the Privy Council on appeal, it is still noteworthy to take cognisance of the judgment in the Hong Kong Court of Appeal. In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* 1984 1 Lloyd's Rep 555 560 Cons J expressed the opinion that,

> "[i]t cannot be economically feasible nowadays for a bank to subject the signature on each and every cheque presented to a thorough examination or comparison with the specimen signature card. Banks must look to other protection. Thus, after a great deal of hesitation, I find myself finally led to the conclusion that, in the world in which we live today, it is a necessary condition of the relation of banker and customer that the customer should take reasonable care to see that in the operation of the account the bank is not injured."

In a separate judgment, Hunter J concluded that "a customer owes to his banker both in contract and in tort a duty to take reasonable care to ensure the proper working of his account ..." (580).

3.2.5 *United States of America: The Uniform Commercial Code*

The common law position was that where the signature of the drawer on a cheque had been forged, the drawee bank paid the cheque at its own risk and could not debit the account of the drawer or recover the amount so paid from him (Anonymous

"Allocation of Losses from Check Forgeries under the Law of Negotiable Instruments and the Uniform Commercial Code" (1953) 62 *Yale Law Journal* 417 420; Whaley "Negligence and Negotiable Instruments" (1974) 53 *North Carolina Law Review* 1 4-10; Colombo "Commercial Paper and Forgery: Broader Liability for Banks?" (1980) 3 *Law Forum* 813 818; Dow and Ellis "The Proposed Uniform New Payments Code: Allocation of losses resulting from forged drawer's signatures" (1985) 22 *Harvard Journal on Legislation* 399 402-6).

The UCC introduced a new regime in this regard. Under section 4-401 UCC a bank may debit the customer's account only with those items that are "properly payable". Cheques that contain a forged drawer's signature are not items properly payable in terms of sections 4-401 and 3-401 of the UCC (Colombo "Commercial Paper and Forgery: Broader Liability for Banks?" (1980) 3 *Law Forum* 813 819 and the authorities cited in fn 45; Lechner "The Drawer's Negligence: A Powerful but Underutilized Defence in Forged Check Cases" (1983) 15 *Uniform Commercial Code Law Journal* 291 292). Hence, as a general rule, the drawee bank cannot debit the drawer's account with the amount of cheques so paid because the drawee bank is only permitted to charge a customer's account when an item is properly payable. There are, however, possible defences in terms of sections 3-406 and 4-406 that the drawee bank may assert in order to shield itself from liability for paying cheques that contain a forged drawer's signature.

Section 4-406 UCC provides:

> "Customer's duty to discover and report unauthorized signature or alteration.
> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration of an item and must notify the bank promptly after discovery thereof.
> (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank
> (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and
> (b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.
> (3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank paying the item(s).
> (4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on

> the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.
> (5) If under this section a payor bank has a valid defence against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defence the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim."

The so-called "bank statement duties" or "post-payment duties" are based on the assumption that the drawer is in the best position to discover the forgery of his signature by an examination of his bank statements (Farnsworth "UCC Brief No 10: Forgery and Alteration of Checks" (1968) 14 *Practical Lawyer* 75 77; Anonymous "Allocation of Losses from Check Forgeries under the Law of Negotiable Instruments and the Uniform Commercial Code" (1953) 62 *Yale Law Review* 417 453; Dow and Ellis "The Proposed Uniform New Payments Code: Allocation of Losses Resulting from Forged Drawer's Signatures" (1985) 22 *Harvard Journal on Legislation* 399 409). This duty only becomes operative when the bank does any one of three things with respect to the statement of account: the first action is the sending of the statement and items to the customer; the second action is the holding of such statement and items available for the customer pursuant to a request or instructions of the customer; the third action is stated as "otherwise in a reasonable manner makes the statement and items available to the customer." The Official Comment (paragraph 2) explains that the last mentioned circumstance is intended to cover unusual situations, for example, where the bank knows that a customer has left a former address but does not know any new address to which to send the statement or to obtain instructions from the customer. A court will have a discretion to determine whether a particular action or practice of a bank, other than sending statements and items or holding them pursuant to instructions, is reasonable.

As regards the forgery of a series of cheques, the Official Comment (paragraph 3) explains that section 406(2)(b)

> "follows substantial case law that payment of an additional item or items bearing an unauthorized signature or alteration by the same wrongdoer is a loss suffered by the bank traceable to the customer's failure to exercise reasonable care in examining his statements and notifying the bank of objections to it. One of the most serious consequences of failure of the customer to comply with the requirements of subsection (1) is the opportunity presented to the wrongdoer to repeat his misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine his statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items."

There can be no doubt that the imposition of the so-called "bank statement duties", if the customer does exercise reasonable care and promptness in the examination of his statement, can indeed help to thwart or prevent the forgery of a series of cheques (De Beer "Aantekeninge oor die Verhouding Ware Eienaar - betrokkene Bank en die Bankier - kliëntooreenkoms" 1980 *Obiter* 28; Pretorius "Banker-customer Relationship" 1985 *Annual Survey of South African Law* 344 348).

The imposition of the "post-payment duties" was not welcomed from all quarters. One commentator remarked:

> "Supporters of the new legislation justify placing loss on the drawer for his negligence in not discovering and reporting the fraudulent check. But the Act will not serve the goal of allocating loss on a negligence basis in fairly frequent situations. Under the Act the drawer will be held liable, for example, where he has, without negligence, entrusted a dishonest employee with the verification of checks, and the employee fails to report the invalid check in order to cover his earlier act of creating it. And in situations such as this, loss will rest on the non-negligent drawer irrespective of the negligence of other parties associated with the instrument" (Anonymous "Allocation of Losses from Check Forgeries under the Law of Negotiable Instruments and the Uniform Commercial Code" (1953) 62 *Yale Law Journal* 417 453).

Where the customer notifies the drawee bank timeously of a suspected forgery or in the event of the forgery of a series of cheques which occurred between the paying of the first forgery and the fourteen days mentioned in section 4-406(2)(b) after receipt of the statement of accounts (if the drawee bank sends monthly statements to the customer, this period can be as long as six or seven weeks -- Lechner "The Drawer's Negligence: A Powerful but Underutilized Defence in Forged Check Cases" (1983) 15 *Uniform Commercial Code Law Journal* 291 293 (hereafter Lechner "Drawer's negligence")), the drawee bank would still be entitled to resist the customer's demand for recredit if the customer was negligent and thereby contributed to the making of the forgery. Section 3-406 of the UCC is relevant in this regard:

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

Hinchey "An Analysis of Bank Defences to Check Forgery and Alteration Claims under Uniform Commercial Code Articles 3 and 4: Claimants' Negligence and

Failure to Give Notice" (1982) 10 *Peperdine Law Review* 1 27-8 (hereafter Hinchey "Analysis") points out that although section 4-406 and section 3-406 are both intended to preclude a negligent customer from claiming against the drawee bank, the two sections are different in the following respects: first, section 4-406 deals strictly with the relationship between a customer and his bank whereas section 3-406 can preclude other parties, such as a negligent payee, from claiming against a bank. This estoppel, however, works against the negligent party only -- it does not prevent other parties to the instrument from raising the forgery (Whaley "Negligence and Negotiable Instruments" (1974) 53 *North Carolina Law Review* 1 19); second, section 3-406 deals primarily with a customer's negligence prior to the forgery or alteration whereas section 4-406 deals with the customer's negligence after the forged or altered cheque is paid; third, the standard of care required of the bank is phrased in terms of "reasonable commercial standards" under section 3-406 while it is phrased as "ordinary care" under section 4-406(3).

The question whether a drawer through his negligence substantially contributed to a material alteration of the instrument or to the making of an unauthorised signature, has been the subject of numerous decisions in America (Hinchey "Analysis" 14-20; Lechner "Drawer's negligence" 300ff) Paragraph 7 of the Official Comment to section 3-406 states that the Code makes no attempt to define negligence which "substantially contributes" to the making of the forged signature and the question is left open to the court on the facts of each case. Hinchey concludes that the majority of decisions applying this section as well as the weight of academic opinion would regard "substantially contribute" as used in section 4-406 to mean

> "nothing more than casue-in-fact, the sole issue whether the negligence was a substantial factor ... in the making of either an unauthorized signature or a material alteration. This view has been said to include negligent conduct on the part of the drawer of a check which would have been too remote under the proximate cause standard of causation. Therefore, the question of causation under section 3-406 becomes a relatively simple factual inquiry. The more difficult policy determinations as to whether a duty existed can be formulated by the courts or legislatures, rather than being subsumed in the amorphous concept of proximate cause." (Hinchey "Analysis" 14).

Although the question as to whether the drawer's negligence substantially contributed to the making of an unauthorised signature is a question to be determined by the trier of fact, the courts have held in numerous decisions that the actions of a drawer which usually constitute negligence that substantially contribute to the making of an unauthorised signature include: the negligent hiring and supervising of a dishonest

employee without adequately investigating his references (Lechner "Drawer's negligence" 304ff; Hinchey "Analysis" 15ff); the lack of adequate internal controls which, if they existed, would have prevented the wrongdoing which resulted from their omission (Lechner "Drawer's negligence" 309ff; Whaley "Negligence and Negotiable Instruments" (1974) 53 *North Carolina Law Review* 1 29ff; Kronemyer "The Internal Controls Defence" 1983 *Banking Law Journal* 40; Hinchey "Analysis" 19) and the failure to take reasonable measures to safeguard cheque books and cheque signing apparatus (Hinchey "Analysis" 16).

3.3 Reform of South African law

There may be merit in the argument that

> "[i]t cannot be economically feasible nowadays for a bank to subject the signature on each and every cheque presented to a thorough examination or comparison with the specimen signature card. ... In the world in which we live today, it is a necessary condition of the relation of banker and customer that the customer should take reasonable care to see that in the operation of the account the bank is not injured" (per Cons J in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* 1984 1 Lloyd's Rep 555 560).

No view is expressed on the soundness of this proposition, but it is submitted that it is unfair to make the drawee bank the insurer for losses in respect of forged drawer' signatures when the exercise of reasonable care on the part of the customer could have avoided the loss. The most effective measures against theft, loss and forgery, it is submitted, are those that can be taken by the owner or customer in the safeguarding of his cheques and in his organisational control over employees and representatives.

Although the South African law would deny the existence of such a duty on the part of a customer, it should be borne in mind that modern banking practices have changed and that there has been a marked increase in the volume of cheques. It cannot be economically feasible nowadays for a bank to subject the signature on every cheque presented to a thorough examination or comparison with the specimen signature card. However, it is submitted that support for the recognition of such a duty can be found in the application of the general principles of the Roman-Dutch law. If one accepts that certain aspects of the banker-customer relationship can be characterised as an instance of mandate, it follows that the mandator, or customer, has a duty towards his mandatary, the drawee bank, to act with reasonable care in the

operation of his current account. In *Burns v Forman* 1953 2 SA 226 (W) 229 the court correctly pointed out that

> "the bank, being in the position of a mandatary, is entitled to be reimbursed by the mandator (the customer) for all expenditure incurred in the execution of its mandate, and where it has disbursed without negligence on its part but through the negligence of its customer, a greater sum than actually authorised, there is no reason why it should not be entitled to charge the customer with the full sum paid out on the cheque."

The same principle can apply as far as the forgery of the drawer's signature is concerned.

The customer's duty to act with reasonable care in the operation of his current account is not based on the mandate contained in an individual cheque, but flows from the general mandate that the drawee bank should effect payments on the instructions of his customer. It is one of the incidents of this general agreement. The duty of the customer to draw cheques with reasonable care or to inform the bank of known or suspected forgeries cannot be "independent" duties, but are mere examples of the general duty to take reasonable care. Whether a particular act or omission of the customer constitutes negligence depends on whether a diligens paterfamilias in the position of the customer (a) would reasonably have foreseen the possibility of his conduct causing loss to the bank; (b) would have taken reasonable steps to guard against such loss; and failed to take those steps. The customer's conduct must also be the cause of the loss -- an issue that may involve considerations of legal policy (*Minister of Police v Skosana* 1977 1 SA 31 (A) 34). The problem whether the conduct of a mandator "caused" the mandatary's loss was known in Roman and Roman-Dutch law (Joubert "The Agent's Right to Compensation for Loss" (1970) 87 *SALJ* 457 459; *Weber v Gavronsky Bros* 1920 AD 48 51). Some authors excluded losses arising extra mandati causa or by casus fortuitus or which were incurred not propter mandatum seu mandati causa. In this context it is understandable that the courts have included losses due to the careless drawing of an individual cheque and excluded losses resulting from the lack of supervision of employees or the careless running of a business. But to say that a customer has no duty to the bank to supervise his employees, to conduct his business carefully or to detect frauds, disguises the real problem. The reason for non-liability is not the existence of "selective" duties but the fact that the customer was not negligent or that his conduct did not cause the particular loss.

Clause 62 of this draft would enable the court to find that the particular act or omission of the customer was the cause of the loss. The result can only be reached if

the Bills of Exchange Act recognises in principle that a customer owes a duty to the drawee bank to act with reasonable care in the operation of his current account. To impose certain "post-payment duties" on a customer (similar to that of the UCC -paragraph 3.2.5.1 above) would not only be foreign to the whole structure and tradition of our legislation, but will also, it is submitted, not solve the root of the problem as regards the forgery of the drawer's signature ie that the most effective measures against theft, loss and forgery are those that can be taken by the owner or customer himself in the safeguarding of his cheques and in his organisational control over employees and representatives. The imposition of specific "post-payment duties" on a customer to examine his bank statements will, generally, only prevent the forgery of a series of cheques (although it may in a given case be unreasonable for a customer not to verify his bank statements) whilst the duty to act with reasonable care in the operation of a current account will ensure that the loss is shifted to the customer only when he is in breach of this duty.

4 Clause 62(1) extends the duty a customer owes his bank and imposes on him a duty to exercise reasonable care in the drawing and custody of cheques and in the operation of his account. Clause 62(1), in addition, requires the drawee to effect payment of cheques drawn on it with reasonable care. It is submitted that this part of the proposed provision reflects the existing position: the drawee bank as mandatary is bound to perform his mandate with reasonable care (see the authorities cited in paragraph 2.2.5 of chapter 6 of the proposed Bills of Exchange and Promissory Notes Act and by Malan 273 n26).

Clause 62(2) applies the provisions of the Apportionment of Damages Act, 34 of 1956 to claims that may arise under the provisions of clause 62(1). This specific provision is necessary in view of the decisions in *OK Bazaars (1929) Ltd & others v Stern and Ekermans* 1976 2 SA 521 (C) and *Barclays Bank DCO v Straw* 1965 2 SA 93 (O). In *OK Bazaars* 530 Watermeyer J held:

> "[I] do not think that the legislature in our Act intended to introduce the principle of apportionment of damages in contractual claims. Nor do I think that it intended to introduce it in respect of certain contractual claims, namely those in which it could be said that there was a degree of fault on the part of the defendant in that he had failed to comply with a contractual term not to be negligent". (See, however, the valid criticism of Boberg *The Law of Delict* (1984) 713 and authorities cited.)

The purpose of clause 62(2) is to enable the courts to come to equitable decisions in cases where both parties have been negligent but the negligence of one of them had

been the "causa causans" of the loss (eg *Barclays Bank DCO v Straw* 1965 2 SA 93 (O)). Clause 62(2) enables the court to apportion the loss by taking into account the degree in which the parties were at fault. The provisions of the Apportionment of Damages Act, 34 of 1956 apply mutatis mutandis: this proviso is necessary for a claim between bank and customer is not always specifically for damages but often takes the form of an estoppel raised against a claim to debit the account or to correct an entry.
It should be noted that clause 61 authorises the drawee to debit a customer's account with the amount of a cheque paid in terms of clause 54. Clause 54 requires payment to be made "in good faith and without notice". Although the concepts "notice" and "negligence" are similar in some respects they are not the same (see clause 1(2)). Thus, although a cheque has been paid in terms of section 54 (and the drawee has become entitled to debit the customer's account) an apportionment is still possible if both the drawee and the customer have been negligent. Furthermore, where payment is made "with notice" and the drawee has also been negligent, the drawee may not debit the customer's account although it can invoke clause 62(2) to recover part of its loss if the customer has also been negligent. But where the customer has not been negligent, the drawee cannot debit his account if its payment does not comply with the provisions of clause 54. (Clause 61, it should be added, must be read subject to the other provisions of the proposed Act, eg those relating to incomplete cheques (clause 12), alteration (clause 13), forgery (clause 35) and countermand (clause 63).)

5 The Association of Attorneys does not support the provisions of clause 62 of the proposed Cheques Act and argue for the retention of the existing South African law in this regard. The Association raises the following arguments in favour of the retention of the status quo:

5.1 That bank and customer relationship should preferably be regulated by contract between the parties inter se. This view is not only echoed by the decision of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 but is also now endorsed by the judgment of Le Dain J in the decision of the Supreme Court of Canada in *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1988) 40 DLR (4th) 385. The last-mentioned judgment was delivered subsequent to the publication of the original *Proposal*-document in 1988. In allowing the appeal, Le Dain J set aside the judgment of the Court of Appeal and held that

> "a customer of a bank does not, in the absence of a verification agreement, owe a duty to the bank to examine his bank statements and vouchers with reasonable care and to report any discrepancies within a reasonable time, nor does a customer, 'sophisticated' or otherwise, owe a duty to its bank to maintain an adequate system of internal accounting controls for the prevention and minimisation of loss through forgery" (at 432).

5.2 That the introduction of truncation, which is primarily for the benefit and convenience of banks, would no doubt complicate the present position as regards the bank and customer relationship with the result that it may be fairly difficult for a customer to comply with the duty in terms of clause 62.

5.3 The arguments in favour of the recognition of a duty on the part of the customer to act with reasonable care in the operation of his account have already been discussed in detail. These arguments will therefore not be repeated here.

Although it is true that compelling arguments could be raised both in favour and against the imposition of a duty to act with reasonable care in the operation of a bank account, it is nevertheless submitted that the probabilities are in favour of the imposition of such a duty. We would furthermore like to draw attention to the following:

5.3.1 The Jack report supports the imposition of some duty on the customer:

> "6.13 On the balance, we are impressed by the case for some reform of the law. It does seem most unfair that customers who exhibit the degree of negligence shown by the plaintiff in the Tai Hing case should, in the eyes of the law, be entitled to sue their bank with impunity. But we join the opposition of the majority of our consultees to a statutory duty on customers to examine bank statements, which seems an unreasonable imposition. A fortiori, we also go along with the majority in rejecting a 'settled account system', even for business customers. In the case of both these options, we see force in Lord Scarman's contention that banking is not the customer's business. In other words, customers are entitled to rely on banks performing their own functions to the highest professional standards. Yet the bank is surely entitled to some protection against the most reprehensible negligence on its customer's part.
> "6.14 We therefore favour a statutory provision whereby, in an action against a bank in debt or for damages, arising out of unauthorised payment, contributory negligence may be raised as a defence, but only if the court is satisfied that the degree of negligence shown by the plaintiff is sufficiently serious for it to be inequitable that the bank should be liable for the whole amount of the debt or damages. The effect of this provision would be to permit a bank to plead contributory negligence to a limited extent in an action brought against it in debt arising out of unauthorised payment, but to restrict, subject to the same limitation, its ability to use that as a defence in a similar action for damages."

5.3.2 The rationale of the decision of the Supreme Court of Canada in *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1988) 40 DLR (4th) 385 has been

criticised in that country. Ellinger, in an article entitled "Reflections on Recent Developments Concerning the Relationship of Banker and Customer" (1988) 14 *Canadian Business LJ* 129 writes the following at 145:

> "The existing state of the law ... appears even more disturbing when it is considered in the light of modern banking. The construction given in *Tai Hing* to the verification clauses is based on a technical reading of contractual terms which undoubtedly flies in the face of the meaning that would be given to them by a reasonable man who reads them without an eye for legal niceties. Moreover, it is difficult to see why banks should bear the responsibility for one type of fraud occasioned by the customer's negligence but escape liability in others. ... [M]odern banking is based on speed and strict adherence to instructions. In real life, banks do not have the time to keep a vigilant eye on the affairs of each customer. It is, therefore, a question of economic policy whether responsibility should rest with them or be borne by the customer. The piecemeal approach, anchored in the 19th and early 20th- century cases, is, it is submitted, unsatisfactory."

See also Goode "Comments on Peter Ellinger's Paper"(1988) 14 *Canadian Business LJ* 179 who points out at 181 that

> "whilst banks are seeking to impose the duty of verification on the customer, they make it as difficult as possible, in England at any rate, for him to fulfil that duty. No longer do bank statements identify the payee; no longer does the customer receive back the cheques he has drawn. In the modern era, which contrary to banking mythology does not herald an improvement in banking services but rather a mere declaration in the rate of their decline, the customer has meticulously to complete and preserve his cheque counterfoils and then laboriously match these against his bank statements."

This issue will no doubt have to be addressed in the "clearing house rules" and will hopefully resolve the second reservation of the Association of Attorneys referred to above.

5.3.3 It should be remembered that the recognition of a duty to act with reasonable care in the operation of an individual's current account accords with the common law principles of the South African law. The duty to act with reasonable care is not based on the mandate contained in an individual cheque but flows from the general mandate that the drawee bank should effect payments on the instructions of his customer. It is one of the general incidents of this general agreement.

5.4 It is accordingly submitted that there are definitely cogent and compelling reasons for the recognition of a duty to act with reasonable care in the operation of an individual's current account. It is therefore recommended that clause 62 be retained in its present form.

63 Termination of duty and authority to pay

(1) The duty and authority of a bank to pay a cheque drawn on it by its customer are terminated by receipt of

(a) countermand of payment;

(b) notice of the customer's death or incapacity;

(c) notice that the customer has been sequestrated or wound-up or placed under judicial management or declared a prodigal;

provided such countermand or notice identifies the cheque or customer with reasonable particularity.

(2) Payment of a cheque may be countermanded verbally or in writing. Notwithstanding any agreement to the contrary, a verbal countermand shall be binding on the drawee for fourteen days; and a written countermand for one year.

Comparative legislation

Sec 89 and 90 Cheques and Payment Orders Act 1986
Sec 4-403, 404 and 405 UCC
Sec 73 SABEA
Sec 75 BEA
Art 32 and 33 GULC
Sec 4-403 Revised UCC

The relevant provisions in the Bills of Exchange Act 1964 are:

73. *Revocation of banker's authority.*

The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by –
(a) countermand of payment;
(b) receipt of notice of the customer's death;
(c) receipt of notice of the customer having become insolvent.

Commentary

1 Clause 63 attempts to clarify some of the uncertainties in section 73 SABEA, and is based on the view "that the public interest is best served if apparently regular cheques

... are fully effectual as between bank and customer until the bank becomes aware of the customer's loss of capacity to act" (Douglas *The Termination of the Duty and Authority of a Bank to Honour its Customer's Cheques and Other Instructions for Payment, including the Broader Implications for a Bank of Sections 341(2) and 348 of the Companies Act 1973* (1985) 669).

2 Clause 63(1)(a) repeats section 73(a) but requires the countermand to identify the cheque with reasonable particularity and to give the drawee a reasonable opportunity to act on it. These requirements apply also to the notice of death, etc, terminating the drawee's authority provided for in clause 63(1)(b) and (c). The latter requirement is borrowed from sections 4-403(1) and 4-405(1) UCC. The view is taken,

> "that stopping payment is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense. The inevitable occasional losses through failure to stop should be borne by the banks as a cost of the business of banking" (Official Comment 2 on section 4-403 UCC).

The provisions of clause 63(2) are based on section 4-403(2). It is submitted that the provisions of clause 63(1) and (2) would render unenforceable a term in an agreement such as the one in *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (C) ("I shall be pleased if you will kindly stop payment of the undermentioned document, on the understanding that I have no claim against the bank in the event of such document being inadvertently paid by the bank"). Clause 63(2) also aims "to facilitate stopping payment by clearing the records of the drawee of accumulated unrevoked stop orders" (Official Comment 7 on section 4-403 UCC).

3 The reference in clause 63(1)(b) to the customer's having become incapacitated is based on the suggestion of Douglas 28ff 669ff as are the references in clause 63(1)(c) to sequestration, winding-up and declaration as a prodigal (at 161ff and 669ff). It should be noted that section 73(c) SABEA provides that the drawee's authority is terminated by "receipt of notice of the customer having become insolvent". Clause 63(1)(c) refers specifically to the sequestration or winding up of the customer. It is submitted that Douglas is correct in assuming that "insolvent" refers to the actual sequestration or winding-up of the customer (at 177).

> "A number of factors point to the correctness of the assumption. The law does not deprive a person of his capacity to act merely because his liabilities exceed his assets, and it is considered

> unlikely that the legislature would have intended to partially deprive him of his capacity to act by in effect preventing him from operating a bank account. The object of the section is not to deprive persons of rights as soon as their liabilities exceed their assets, but to protect banks which unwittingly continue to honour customer's cheques without knowledge that the customer has been placed in sequestration or winding-up. Moreover, the point in time at which a person becomes factually insolvent is seldom readily ascertainable ... . Accordingly, it is considered unlikely that the legislature would have intended the termination of a bank's duty and authority to depend on so uncertain a circumstance."

4 The Association of Insolvency Practioners of Southern Africa suggested that paragraph (d) be added to clause 63(1) to the effect that notice shall be deemed to have been given on publication of any of the circumstances set out in paragraphs (b) and (c) in the Government Gazette and/or on written or verbal notice by the Master, curator bonis, trustee or provisional trustee, liquidator or provisional liquidator, judicial manager or provisional judicial manager of the circumstances set out in paragraph (c).

Although there is merit in this suggestion its incorporation in the proposed legislation does not appear to be necessary since the provision setting out the circumstances under which a person has notice of a fact is sufficiently wide to cover the eventualities provided for (clause 1(2)). What is more, a person would have notice of the circumstances specified if he is given verbal or written notice by any of the officers referred to; no specific deeming provision is thus necessary.

The Clearing Bankers Association suggested that clause 63(2) be replaced by a provision to the effect that a countermand can be given in writing only. This involves a departure from the present position (section 73(a) Bills of Exchange Act, 1964).

It is respectfully submitted that there is no sound reason to deprive customers of their right to countermand payment verbally. The provisions of clause 63, it is submitted, strike an equitable balance between the interests of the bank and the customer.

The Clearing Bankers Association also recommended that a provision be inserted in this clause to the effect that where a cheque has been certified, the drawee shall have the authority to pay the cheque and debit the account of the customer. It is suggested that this is in any event the position with the exception of cases where payment is not made in good faith. No specific regulation appears to be necessary.

In this draft the final words of clause 63(1) are deleted in order to remove any uncertainty as to when the countermand becomes operative. The wording in this regard of section 73(a) SABEA is retained.

CHAPTER 10

MISCELLANEOUS PROVISIONS

CONFLICT OF LAWS

64 Rules applicable

(1) Where a cheque drawn or made in one country is negotiated, accepted or payable in another country, the law governing the rights, duties and liabilities of the parties to it shall be determined in accordance with the provisions of this section.
(2) The capacity of a person to bind himself by cheque shall be determined in accordance with the law of the place where the contract is made: Provided that if a person lacks capacity according to the law of the place where the contract is made he shall nevertheless be bound if he has contractual capacity according to the law of the Republic, or of his domicile at the time of contracting, or of the place where the contract is to be performed.
(3) The validity of the cheque as regards requisites in form is determined by the law of the place where the cheque is issued, and the validity, as regards requisites in form, of every supervening contract such as certification, indorsement or aval is determined by the law of the place where the contract is made: Provided that-

> (a) a cheque first delivered outside the Republic is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; and
> (b) a cheque first delivered outside the Republic that conforms, as regards requisites in form, to the law of the Republic may, for purposes of enforcing payment, be treated as valid as between all persons who negotiate or hold or become parties to it in the Republic.

(4) The interpretation and legal effect of the contract of the drawer, indorser, the drawee certifying, or the signer of an aval is determined by the law of the place where such contract is to be performed: Provided that, where an instrument payable in the Republic is indorsed outside the Republic, the indorsement shall as regards the payer be interpreted and have legal effect according to the law of the Republic.
(5) The law of the place where a cheque is payable shall determine-

(a) the necessity for and sufficiency of presentment for payment of the cheque;

(b) the necessity for and sufficiency of a protest or notice of dishonour of the cheque;

(c) the due date of the cheque.

(6) The validity and effect of a discharge from liability under a cheque shall be determined by the law of the place with which the particular contract has its closest and most real connection.

(7) Where a cheque is drawn outside but is payable in the Republic and the sum payable is not expressed in the currency of the Republic, the court may give judgment in that foreign currency: Provided that the debtor shall be entitled to comply with the judgment by paying in South African currency, in which case the conversion to South African currency shall be made on the date of the actual payment.

LOST CHEQUES

65 Right to obtain duplicate

(1) Where a cheque is lost before it is overdue, whether by destruction, theft or any other cause, the owner is entitled to

(a) request the drawer to deliver to him a duplicate cheque of the same tenor;

(b) request any other party to sign the duplicate cheque according to the tenor of the lost cheque;

provided he gives security, if required, to indemnify him or them against all claims by any person upon the lost cheque.

(2) Any request in terms of subsection (1) must be made in writing and must contain

(a) in the case of a request in terms of paragraph (a) of subsection (1), sufficient particulars to enable the drawer to identify the lost cheque and to draw a duplicate of the same tenor; and

(b) in the case of a request in terms of paragraph (b) of subsection (1), a duplicate of the lost cheque signed by the drawer.

(3) The drawer shall within 14 days of a request in terms of paragraph (a) of subsection (1) or, if security in terms of subsection (1) is required, within 14 days

after such security is given, draw and deliver to the person who made the request the duplicate cheque.

(4) Any party other than the drawer shall within 14 days of a request in terms of paragraph (b) of subsection (I) or, if security in terms of subsection (I) is required, within 14 days after such security is given, sign and deliver to the person who made the request, the duplicate cheque.

(5) Subject to the provisions of this section --

(a) the holder of a duplicate cheque and all the parties to it shall have all the rights and duties they would have had if the holder had been in possession of the lost cheque;

(b) any delay in presenting the duplicate cheque for payment caused by the loss of the lost cheque or by the obtaining of a duplicate cheque or the signature of any party to it shall be excused, provided that the owner of the lost cheque has demanded payment from the party or parties liable to him with reasonable diligence and within a reasonable time after acquiring notice of the loss of the cheque.

(6) The holder shall be entitled to the same rights to negotiate the duplicate cheque as he enjoyed in respect of the lost cheque.

Commentary

In a very valuable contribution the Clearing Bankers Association referred to the use of the expressions "owner" (clause 65), "true owner" (clause 59) and "person entitled to the cheque" (clause 37) and pointed out that they were not defined. It is conceded that the meaning of an expression such as "true owner" is not altogether clear but it is suggested that the development of this expression be left to the courts. "Owner" in clause 65 is intended to mean precisely that and "the person entitled to the cheque" in clause 37 can be the owner but need not be.

66 Action upon lost cheque

Where a cheque is lost, whether by destruction, theft or any other cause, or cannot be produced -

(a) the owner or any person who has paid it, is entitled to institute or maintain any action, counterclaim or other proceeding, other than an action for provisional sentence, upon the cheque against any party to it; provided --

(i) he gives security, if required, to indemnify such party against all claims by any person upon the cheque and

(ii) he proves that, if he had been in possession of the cheque he would have had a right to payment against such party.

(b) any failure to present the lost cheque for payment shall be excused provided the person who was the holder or the owner or any person who has paid it has demanded payment from the party or parties liable to him with reasonable diligence and within a reasonable time after acquiring notice of the loss of the cheque.

EVIDENCE

67 Evidential value of unindorsed or irregularly indorsed cheque

An unindorsed or irregularly indorsed cheque that has been or appears to have been paid by the drawee is prima facie evidence of receipt by the payee of the sum payable.

Commentary

Clause 67 is commented upon in paragraph 7 of the commentary on clause 53 of the proposed Bills of Exchange and Promissory Notes Act.

ANALOGOUS DOCUMENTS

68 Analogous documents

The provisions of this Act that apply to crossed cheques shall apply also to

(a) postal and money orders; and

(b) any document

(i) issued on behalf of the State

(ii) drawn upon or addressed to a servant of the State; and

(iii) intended to enable any person to obtain payment on demand of the sum mentioned in such document from such servant or from or through a bank.

The relevant provisions in the Bills of Exchange Act 1964 are:

82. Application of sections 75 to 81 to certain documents other than cheques.

Sections seventy-five to and including eighty-one shall also apply to any document issued by a customer of any banker and intended to enable any person to obtain payment on demand of the sum mentioned in such document from such banker (or from any banker, if the document was issued on behalf of the State), and shall so apply as if the said document were a cheque, and the said sections shall mutatis mutandis also apply to any document which --
(a) was issued on behalf of the State;
(b) is drawn upon or addressed to a servant of the State (hereafter in this section called the drawee); and
(c) is intended to enable any person to obtain payment on demand of the sum mentioned in such document from the drawee or from or through a banker, as if the said document were a cheque and as if the drawee were a banker and the State his customer: Provided that nothing in this section contained shall render any such document a negotiable instrument.

Commentary

1 The provisions of the Bills of Exchange Act, 1964, particularly those relating to cheques, extend also to other instruments, the so-called "analogous instruments". The Act does not, however, always define these other instruments clearly.

Section 82 extends the provisions of sections 75 to 81 (ie those relating to crossed cheques) to

A "Any document issued by a customer of any banker and intended to enable any person to obtain payment on demand of the sum mentioned in such document from such banker (or from any banker, if the document was issued on behalf of the State").

and also to

B "Any document which -
(a) was issued on behalf of the State;
(b) is drawn upon or addressed to a servant of the State (hereafter in this section called the drawee); and
(c) is intended to enable any person to obtain payment on demand of the sum mentioned in such document from the drawee or from or through a banker."
The provisions of section 83 apply to cheques, to the document described in A above as well as to (section 83(1)(c)):

C "A draft payable on demand drawn by such first-mentioned banker [ie drawee] upon himself, or upon his agent who is a banker, whether payable at the head office or some other office of his bank or of such agent".

Section 83 also applies to the document described in B above (section 83(2)).

Section 99 applies the provision of the Act governing crossed cheques to

D "warrants for the payment of dividends";

E "coupons for payment of interest" and

F "postal and money orders".

2 The document described in A includes an instrument intended to be a cheque but which lacks any of its requirements, such as a document payable to "cash or order" (Cowen (1985) 315). The description in A would also fit a conditional document, for instance, a "cheque" with a receipt form attached and making the order subject to the signing of the receipt (Cowen (1985) 315; *Report of the Select Committee on the subject of the Bills of Exchange Amendment Bill*, SC 10 of 1963 at 72 76-7). Section 4(2)(b) of the Cheques Act, 1957 is precise and applies its provisions to "any document issued by a customer of a banker that, though not a bill of exchange, is intended to enable a person to obtain payment from that banker of the sum mentioned in the document". Although the provisions of sections 82 and 83(1)(b) are wide enough to apply to other instruments, it is submitted that the provisions of clause 11 would, to some extent, make it unnecessary to repeat the said sections. Moreover, conditional documents, like those with a receipt form attached, are encountered so seldom that no specific legislation covering them appears to be needed.

3 The document described in B includes payment orders addressed to the Secretary to the Treasury by government departments ("warrant vouchers"), documents drawn by officials of the Post Office on the Postmaster-General and those drawn by the Chief Accountant of the South African Transport Services on the South African Transport Services (Cowen (1985) 315). These instruments are not cheques. They are not drawn on a bank, but they are usually treated as cheques. In view of the wide variety of documents falling into this category, this general formulation is retained in clause 68.

4 As it is drawn by the drawee himself the document described in C is not a cheque. In view of the provisions of clause 4(3), a similar provision in clause 68 is not necessary.

5 Warrants for the payment of dividends and coupons for the payment of interest (examples D and E) are either ordinary cheques or covered by the document described in B. It is submitted that no special provision need be made for them.

6 The provisions of section 99 relating to postal and money orders are retained in clause 68. (For a critical examination, see De Beer "Die Effek van die Kruising van Poswissels en Posorders met besondere verwysing na die Regsposisie van die Poskantoor" 1987 *De Jure* 385.)

69 Repeal of laws

Notwithstanding the repeal of the Bills of Exchange Act, 1964 (Act No 34 of 1964), the provisions of that Act relating to cheques shall remain applicable to, and govern, any cheque drawn prior to the date of repeal.

70 Short title

This Act shall be called the Cheques Act, 199*, and shall come into operation on a date fixed by the State President by Proclamation in the Gazette.

ANNEXURE A

BILLS OF EXCHANGE AND PROMISSORY NOTES ACT

Act to amend the laws relating to bills of exchange and promissory notes

1 Definitions

(1) In this Act, unless the context otherwise indicates --
'acceptor' means the drawee who has accepted the bill drawn on him;
'bank' means the Reserve Bank or a bank as defined in section 1 of the Banks Act, 1990 (Act No 94 of 1990);
'bearer' means the person in possession of an instrument which is payable to bearer;
'bill' means a bill of exchange as defined in section 2;
'clearing house' means an association of banks;
'clearing house rules' means the rules of a clearing house designed to regulate the clearing of payments between members;
'drawee' means the person on whom a bill is drawn;
'holder' means the payee or indorsee of an instrument who is in possession of it, or the bearer of it;
'instrument' means a bill or a note;
'issue' means the first delivery of an instrument to a holder;
'note' means a promissory note as defined in section 2;
'party' means the drawer, maker, acceptor, indorser or the signer of an aval;
'payee' means the person in whose favour the drawer directs payment to be made or to whom the maker undertakes to pay;
'prescribed rate' means the rate of interest prescribed under the Prescribed Rate of Interest Act, No 55 of 1975, and which is applicable at the time when, in terms of this Act, interest begins to run;
'Registrar' means the Registrar of Banks as defined in section 1 of the Banks Act, 1990 (Act No 94 of 1990);
'Reserve Bank' means the South African Reserve Bank as defined in section 1 of the South African Reserve Bank Act, 1989 (Act No 90 of 1989);

(2) For the purposes of this Act, a person has notice of a fact if he

(a) has actual knowledge of it;

(b) has received a notification of it;

(c) has knowledge of other facts and circumstances giving rise to the likely inference that such fact exists.

(3) For the purposes of this Act, a person takes or pays an instrument in good faith if he takes or pays it honestly.

(4) For the purposes of this Act, a person takes an instrument for value if he acquires it under onerous title.

CHAPTER 1

REQUIREMENTS OF FORM

FORM AND INTERPRETATION

2 Definition of bill and note

(1) A bill of exchange is a written document, signed by the drawer, which contains an unconditional order whereby the drawer directs the drawee to pay a sum certain in money, on demand or at a definite time, to the payee or to his order, or to bearer.

(2) A promissory note is a written document, signed by the maker, which contains an unconditional promise whereby the maker undertakes to pay a sum certain in money, on demand or at a definite time, to the payee or to his order, or to bearer.

(3) An instrument payable on demand, or at a fixed period after sight, must be dated.

3 The drawer and maker

(1) An instrument may be drawn or made by a person having no or limited capacity to contract.

(2) An instrument may be drawn or made by two or more drawers or makers.

4 The drawee

(1) The drawee must be named or otherwise indicated with reasonable certainty in a bill.
(2) A bill may be drawn on two or more drawees but an order directed to two or more drawees in the alternative or in succession is not a bill.
(3) A bill may be drawn by the drawer on himself.

5 Unconditionality of order or promise

(1) An order or a promise is not unconditional if it is an order or a promise to pay out of a particular fund.
(2) An otherwise unqualified order or an otherwise unqualified promise is unconditional even if coupled with

(a) an indication of a particular fund out of which the drawee or maker is to reimburse himself, or of a particular account to be debited with the amount; or

(b) a statement of the transaction which gave rise to the instrument; or

(c) a statement that it is drawn against specified documents attached thereto for delivery on acceptance or on payment; or

(d) a statement that it is drawn under or against a specified letter of credit or similar authority.

(3) An order or a promise is not unconditional if it is stated to be subject to or governed by any other agreement or transaction.

6 Sum payable

(1) The sum payable in terms of an instrument is a sum certain in money although it is to be paid

(a) with interest;

(b) by stated instalments;

(c) by stated instalments, and upon default in payment of any instalment or interest the whole sum or the balance owing becomes due by virtue of a provision to that effect in the instrument; or

(d) according to a rate of exchange indicated, or to be ascertained as directed, by the instrument.

(2) Where more than one sum is expressed to be payable in an instrument, the lesser or least, as the case may be, of such sums is the amount payable: Provided the drawee may refuse to pay such instrument.
(3) Where an instrument is expressed to be payable with interest, it runs from the date of the instrument, unless the instrument otherwise provides.
(4) Where an instrument is expressed to be payable with interest, but no rate of interest is indicated, interest shall be payable at the prescribed rate.
(5) A document containing an order or a promise to do any act in addition to the payment of money is not an instrument.

7 Payable on demand

(1) An instrument is payable on demand

(a) where it is expressed to be payable on demand, at sight, or on presentation, or where it contains words of similar import; or

(b) where no time for payment is expressed in it.

(2) An instrument payable on demand is overdue six months after its date.
(3) Where an instrument is indorsed when it is overdue, any presentment for acceptance or payment or any notice of dishonour necessary to hold liable the indorser who has so indorsed it is excused.

8 Payable at a definite time

(1) An instrument is payable at a definite time where it is expressed to be payable

(a) on a stated date; or

(b) at a fixed period after a stated date or at a fixed period after date or at a fixed period after sight; or

(c) by stated instalments at stated dates; or

(d) by stated instalments at stated dates, and upon default in payment of any instalment or of interest the whole becomes due by virtue of a provision to that effect in the instrument.

(2) The due date of an instrument payable at a definite time is determined as follows:

(a) Where the date on which the instrument would fall due is a non-business day, the instrument is payable on the next business day.

(b) Where the instrument is payable at a fixed period after a stated date or at a fixed period after date or at a fixed period after sight, the due date is determined by excluding the day from which the period begins to run, and by including the day of payment.

(c) Where a bill is payable at a fixed period after sight, the period runs from the date of acceptance if the bill is accepted, and from the date of dishonour, if the bill is dishonoured by non-acceptance.

9 The date

(1) Where an instrument or any signature on it is dated, the date shall, unless the contrary be proved, be presumed to be the true date of the instrument or signature.
(2) An instrument or an acceptance may be antedated or post-dated, in which case the time when it is payable and all other periods of time provided for in this Act, shall be determined with reference to the stated date.
(3) If an instrument payable at a fixed period after sight is not dated, any holder may insert therein the true date of the the instrument or the true date of the acceptance, as the case may be, and the instrument or bill shall then be payable accordingly: Provided that

(a) if the holder in good faith and by mistake inserts a wrong date; or

(b) if a wrong date is inserted and the bill subsequently comes into the hands of a holder in due course,

the bill shall be payable as if the date so inserted is the true date.

10 The payee

(1) Where an instrument is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.
(2) An instrument may be drawn or made payable-

(a) to the drawer or to the drawee or to the maker;

(b) to two or more payees jointly or in the alternative, or to some of several payees in the alternative;

(c) to an office or the holder of an office by his title;

(d) to an estate or a trust or a fund.

(3) Where an instrument is payable to an office or the holder of an office by his title, it is payable to the holder of the office for the time being or to his principal.

(4) Where an instrument is payable to an estate or a trust or a fund, it is payable to the executor in, or the trustee of, that estate, or the trustee of that trust, or to the trustee or administrator of that fund, for the time being, as the case may be.
(5) Where an instrument is payable to two or more payees jointly, it is payable to all of them and may be negotiated, discharged or enforced only by all of them, unless one or some of them has authority to act on behalf of the other or others.

11 Payable to order

(1) An instrument is payable to order where it is expressed to be payable --

(a) to a specified person; or

(b) to a specified person or to his order; or

(c) to the order of a specified person;

and does not contain words prohibiting negotiation or indicating an intention that the instrument should not be negotiable.

(2) Where an instrument is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order.

12 Payable to bearer

An instrument is payable to bearer where -
(a) it is expressed to be so payable; or
(b) it is expressed to be payable to the order of bearer; or
(c) it is expressed to be payable to order or bearer; or
(d) it is payable to 'cash' or the 'order of cash' or to 'cash or order'; or
(e) the only or last indorsement on it is an indorsement in blank.

INCOMPLETE INSTRUMENTS

13 Incomplete instruments

(1) Where a signed document in the form of an instrument lacks any of the necessary requirements, it may be completed as an instrument using the signature as that of any party to it.
(2) Where a document referred to in sub-section (1) is completed as an instrument --

(a) any party who signed it after completion shall be liable on it as completed;
(b) any party who signed it before completion
(i) shall be liable to a holder other than a holder in due course only to the extent that it is completed in accordance with any authority given by him;
(ii) shall be precluded from asserting against a holder in due course or a person who in good faith and without notice has paid it, that it was completed contrary to any authority given by him.

ALTERATION

14 Alteration

(1) Where an instrument is materially altered:
(a) parties who have signed the instrument after the material alteration has been made or who made, authorised or assented to the material alteration shall be liable on it as altered;
(b) parties who have signed the instrument before the material alteration has been made shall be liable on it as if the alteration had not been made: Provided that a party who by his negligence contributed to the making of the alteration shall be precluded from setting up the alteration against a holder in due course or a person who has paid the instrument in good faith and without notice.
(2) For the purposes of sub-section (1), an alteration is material if it alters or purports to alter the liability of any party to the instrument and includes any alteration of the date, the sum payable, the names of the parties and the time of payment.

CHAPTER 2

NEGOTIATION

15 Negotiation of instrument

(1) Negotiation is the transfer of an instrument in such a manner as to constitute the transferee the holder of the instrument.
(2) An instrument payable to bearer is negotiated by delivery.
(3) An instrument payable to order is negotiated by delivery coupled with any necessary indorsement.
(4) Where an instrument drawn or made payable to bearer is indorsed specially, it remains payable to bearer and may be further negotiated by delivery, but the person indorsing specially is liable as indorser only to those holders who acquired the instrument through his indorsement.

16 Effect of incapacity and illegality

The negotiation of an instrument is effective to constitute the transferee the holder of the instrument even if
(a) the instrument is negotiated by a person having no or limited capacity to contract;
(b) the negotiation of the instrument is affected by illegality.

17 Effect of transfer of instrument

(1) The transfer of an instrument vests in the transferee the rights to and upon the instrument the transferor has, except where the transferee derives his title through a holder in due course and has been a party to any fraud or illegality affecting the instrument.
(2) Except where it is otherwise agreed, the transfer without indorsement of an instrument payable to order by the holder gives the transferee the right to the unqualified indorsement of the transferor.

18 Negotiation by indorsement

(1) To effect a negotiation of the instrument, an indorsement must be written by or on behalf of the holder on the instrument or on an allonge thereto.
(2) An indorsement may consist of the simple signature of the indorser without additional words.
(3) An indorsement effects a negotiation of the instrument even if it is accompanied by words of cession, waiver, suretyship, guarantee, limitation of liability or words of similar import.

19 Payee or indorsee misdescribed

Where an instrument is payable to a person under a misspelt name or a name other than his own, he may indorse the instrument in that name or in his own name or both, but an indorsement in both names may be required by a person paying or taking the instrument.

20 Order of indorsements

Where there are two or more indorsements on an instrument, each indorsement is presumed, until the contrary is proved, to have been made in the order in which it appears on the instrument.

21 Partial indorsement

An indorsement which purports to transfer a part only of the amount payable by the instrument, or which purports to transfer the instrument to two or more indorsees severally, does not effect a negotiation of the instrument.

22 Indorsement in blank

(1) An indorsement in blank specifies no indorsee, and an instrument so indorsed becomes payable to bearer.
(2) Where an instrument payable to order has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the

indorser's signature a direction to pay the instrument to himself or his order or to some other person or to the order of the latter.

23 Special indorsement

(1) A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable.
(2) The provisions of this Act relating to the payee apply with the necessary modifications to an indorsee under a special indorsement.

24 Conditional indorsement

Where an instrument is indorsed conditionally --
(a) the indorsement effects a negotiation of the instrument whether or not the condition is fulfilled; and
(b) the person who pays the instrument does not have notice of a claim to or a defence upon the instrument merely by reason of the fact that the instrument is indorsed conditionally.

25 Indorsement for collection

(1) An indorsement for collection expresses an authority to collect payment of the instrument by words as, for example, 'for deposit'; 'for collection'; 'value in collection; 'pay any bank'.
(2) The indorsee under an indorsement for collection
   (a) may exercise all the rights arising out of the instrument;
   (b) is subject to all claims and defences which are available against his indorser;
   (c) may negotiate the instrument for collection only.
(3) The indorser who indorses an instrument for collection is not liable on the instrument to a subsequent holder.

26 Restrictive indorsement

(1) Where the drawer or the maker has inserted in the instrument, or an indorser in his indorsement, words prohibiting negotiation, or indicating an intention that the instrument should not be negotiable as, for example, 'not negotiable', 'not transferable' or 'pay [X] only', the instrument may be negotiated for collection only.
(2) The person to whom an instrument is negotiated for collection
(a) may exercise all the rights arising out of the instrument;
(b) is subject to all claims and defences which are available against the person who negotiated the instrument to him;
(c) may negotiate the instrument for collection only.

27 Re-acquisition of instrument

(1) Where an instrument is returned to or re-acquired by a prior party, he may re-issue or further negotiate the instrument and strike out his own or any subsequent indorsement, but is not entitled to enforce payment against any intervening party to whom he was previously liable.
(2) An instrument may be negotiated when it is overdue except by the drawee, the acceptor and the maker.

CHAPTER 3

RIGHTS OF THE HOLDER

28 Holder in due course

A holder in due course is a holder who has taken an instrument,

(a) complete and regular on the face of it by negotiation before it is overdue;
(b) in good faith and for value and without notice of any dishonour or any claim to the instrument or any defence available to prior parties.

29 Presumption of holding in due course

Every holder is presumed to be a holder in due course until the contrary is proved: Provided that if it is admitted or proved that the acceptance, issue or subsequent negotiation, of the instrument is affected with fraud 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 instrument.

30 Rights of a holder in due course

A holder in due course

(a) holds the instrument free from any claim to the instrument or any defence available to prior parties;

(b) may enforce payment of the instrument against all parties liable on it.

31 Rights of pledgee

Where the holder holds an instrument in pledge

(a) he may exercise all the rights of a holder on the instrument;

(b) he shall, provided all the requirements of section 28 are met, be deemed to be a holder in due course only to the extent of the debt secured.

CHAPTER 4

LIABILITY OF THE PARTIES

32 Joint and several liability

Subject to the provisions of this Act, all the parties liable on an instrument are liable on it jointly and severally.

33 Exclusion and limitation of liability

(1) The drawer or any indorser or the signer of an aval may insert in the instrument an express stipulation-

(a) excluding or limiting his own liability to the holder;

(b) waiving any or all of the holder's duties.

(2) Unless a contrary intention appears from the instrument, a waiver operates in favour of all holders, and a waiver contained in the instrument as drawn or made binds all subsequent parties.

SIGNATURE

34 Signature as requirement for liability

(1) No person is liable on an instrument if he has not signed it as a party: Provided that

(a) where a person signs an instrument as a party in a name other than his own he is liable on it as if he has signed it in his own name;

(b) the signature in the name of a partnership is equivalent to the signature by the person so signing of the names of all persons liable as partners of that partnership;

(c) where a person adopts or confirms a forged or unauthorised signature as his own he shall be liable as if he has made it himself or as if it has been authorised.

(2) A party need not sign an instrument with his own hand and his signature may be written or placed on it by his authority.

(3) A signature may be made in handwriting or typescript or by way of sealing, stamping, symbol, facsimile, perforation or other means.

35 Signature by agent

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

(2) A person signs an instrument as an agent where it appears from the instrument that he signs it for or on behalf of a named principal or as the agent or representative of such principal: Provided that where a signature consists of the name of a firm or a juristic person and the signature or signatures of an individual or individuals the latter shall be presumed, until the contrary is proved, to have signed the instrument as agent or agents.

(3) Where a person is authorised to sign, and does and sign, an instrument as an agent, he is not liable on the instrument.

(4) Except as against a party with notice, a person who signs an instrument as an agent without the authority of the person named as principal or who signs an instrument in the name of another person without his authority, shall be deemed to be a party to the instrument and personally liable on it.
(5) Except as against a party with notice, an authorised agent who signs an instrument as a party is personally liable on it.

36 Forged and unauthorised signatures

Subject to the provisions of this Act, a forged or unauthorised signature shall not operate as that of the person whose name is signed: Provided that a person who by his negligence contributed to the making of a forged or unratified unauthorised signature on an instrument shall be precluded from setting up the forgery or want of authority against a person who in good faith and without notice pays or takes it for value.

37 Forged or unauthorised indorsement in name of payee

(1) A forged or unauthorised indorsement in the name of the payee is effective in favour of a holder in due course or person who pays the instrument in good faith and without notice, if

(a) the drawer or maker or any person who signs as or on behalf of the drawer or maker intends the person named as payee to have no interest in the instrument; or

(b) the name of the payee has been supplied directly or indirectly to the drawer or maker, or any person signing on behalf of the drawer or maker, by an agent or employee of the drawer or maker, or of the person so signing, who intends the payee to have no interest in the instrument.

(2) Nothing in this section shall impose any liability on the person whose indorsement has been forged or on whose behalf the instrument has been indorsed without his authority.

DELIVERY

38 Delivery as requirement for contract on instrument

No contract of any party to an instrument shall be complete and irrevocable until delivery of the instrument by such party to conclude the contract: Provided that if an acceptance or an aval is written on an instrument and the acceptor or signer of the aval gives notice to the person entitled to the instrument that he has accepted it or signed the aval, the acceptance or the aval becomes complete and irrevocable; and provided further that such delivery or notice shall not be necessary to make any party liable to a holder in due course.

THE PARTIES

39 Liability of the drawee

The drawee is not liable on the instrument until he accepts it as required by this Act.

40 Liability of the acceptor

The acceptor of a bill by accepting it -

(a) engages that he will pay the holder, or the drawer or an indorser who has paid the bill, the amount recoverable in terms of section 47 according to the tenor of his acceptance;

(b) is precluded from denying to a holder in due course --

(i) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill (ii) the existence of the payee and his then capacity to indorse.

41 Form of acceptance

(1) An acceptance must be written on the bill and may consist in

(a) the signature of the drawee accompanied by the word 'accepted' or any other word or expression indicating his assent to the order of the drawer;

(b) the signature of the drawee alone;

(2) A bill may be accepted before it is signed by the drawer, or while it is otherwise incomplete, or when it is overdue, or after it has been dishonoured.

(3) Where a bill drawn payable a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder is entitled, unless otherwise agreed, to have the acceptance dated as of the date of first presentment thereof to the drawee for acceptance.

(4) If a bill drawn payable a fixed period after sight is accepted and the acceptor fails to date the acceptance, the drawer or any holder may insert the date of acceptance.

42 Qualified acceptance

(1) An acceptance must be unqualified.

(2) An acceptance is qualified if it in any way varies the effect of the bill as drawn.

(3) An acceptance to pay at particular place or by a particular agent shall be deemed to be a general acceptance, unless it expressly states that the bill is payable at that place or by that agent only.

(4) The holder may refuse to take a qualified acceptance and treat the bill as dishonoured by non-acceptance.

(5) If the holder takes a qualified acceptance

(a) the drawer or any indorser who does not assent to it is discharged;

(b) the acceptor is liable according to the tenor of his qualified acceptance.

43 Liability of the maker

The maker of a note by making it --

(a) engages that he will pay the holder, or an indorser who has paid the note, the amount recoverable in terms of section 47 according to the tenor of the note;

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

44 Liability of the drawer

The drawer of a bill by drawing it --

(a) engages that upon dishonour of the bill and any necessary notice of dishonour he will pay the holder, or an indorser who has paid the bill, the amount recoverable in terms of section 47;

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

45 Liability of the indorser

The indorser of an instrument by indorsing it -

(a) engages that upon dishonour of the instrument and any necessary notice of dishonour, he will pay the holder, or a subsequent indorser who has paid the instrument, the amount recoverable in terms of section 47;

(b) is precluded from denying to a person who takes the instrument in good faith and without notice for value

(i) the genuineness and regularity in all respects of the drawer's or maker's signature and all previous indorsements and avals:

(ii) that the instrument was at the time of his indorsement valid and subsisting.

46 Liability of the signer of an aval

(1) The liabilities of a party to an instrument may be secured by an aval.

(2) A person signs an instrument as the signer of an aval where by words such as 'as aval', 'as surety' or 'as guarantor' he expressly indicates that he is a surety: Provided that the unqualified signature of a person other than the drawer, maker, drawee or payee made on the back of the instrument before indorsement by the payee shall be that of the signer of an aval.

(3) The signer of an aval may specify in the instrument the party for whom he is surety, and if he does not so specify, he shall be deemed to have given his aval for the drawer or maker.

(4) The signer of an aval is liable jointly and severally with, and as surety for, the party for whom he has given his aval.

(5) Where the signer of an aval pays the instrument, he acquires the rights arising out of the instrument against the person for whom he has given his aval and against all parties liable to him.
(6) It is not necessary to give notice of dishonour to the signer of an aval.
(7) If a person signs an instrument otherwise than as a party he thereby incurs the liabilities of an indorser to a holder in due course.

47 Amount recoverable

(1) The holder may recover from any party liable on the instrument
(a) at maturity
(i) the amount of the instrument; and
(ii) interest, where the instrument is payable with interest;
(b) after maturity
(i) the amount of the instrument; and
(ii) interest;
(aa) where the instrument is payable with interest until maturity, at the rate stated or determined in terms of section 6 until maturity, and at the prescribed rate after maturity; or
(bb) where the instrument is payable with interest after maturity, at the rate of interest stated or determined in terms of section 6; or
(cc) where the instrument is not payable with interest, at the prescribed rate
(aaa) in the case of an instrument payable on demand, from the time of presentment for payment or, if presentment is excused, from the time the instrument is dishonoured; and
(bbb) in the case of any other instrument from the maturity of the instrument;
(iii) the expenses of notice of dishonour if notice of dishonour was required and was given;
(c) before maturity
(i) the amount of the instrument with interest, where the instrument is payable with interest, to the date of payment, subject to a discount from the date of payment to the date of maturity at the prescribed rate at the date of payment;
(ii) the expenses of notice of dishonour if notice of dishonour was required and was given.
(2) Any party who pays an instrument whether wholly or in part in terms of subsection (1) may recover from any party liable to him

(a) the amount which he was compelled to pay and paid;

(b) interest on it at the prescribed rate from the date of payment;

(c) the expenses of notice of dishonour if notice of dishonour was required and given.

CHAPTER 5

DUTIES OF THE HOLDER

PRESENTMENT FOR ACCEPTANCE

48 Necessity for presentment for acceptance

(1) A bill may be presented for acceptance.

(2) A bill must be presented for acceptance:

(a) where it is payable after sight,

(b) where it stipulates that it shall be presented for acceptance.

49 Rules for presentment for acceptance

A bill must be presented for acceptance

(a) by or on behalf of the holder;

(b) to the drawee or to a person authorised to accept or refuse acceptance on his behalf;

(c) where the bill is addressed to two or more drawees, to any one of them or to a person authorised to accept or refuse acceptance on behalf of any one of them, unless the bill provides otherwise;

(d) at a reasonable hour on a business day;

(e) before it is overdue;

(f) where it is a bill payable at a fixed period after sight, within one year of its date.

50 Dishonour by non-acceptance

(1) A bill is dishonoured by non-acceptance where

(a) it is duly presented for acceptance and

(i) acceptance as prescribed by this Act is refused; or

(ii) the bill is not accepted before the end of the business day following presentment;

(b) presentment for acceptance is excused and the bill is not accepted as prescribed by this Act.

(2) Subject to the provisions of this Act, where a bill is dishonoured by non-acceptance, a right of recourse immediately accrues to the holder against the drawer and indorsers, and no presentment for payment is necessary.

PRESENTMENT FOR PAYMENT

51 Necessity for presentment for payment

Subject to the provisions of this Act, an instrument must be duly presented for payment according to the provisions of section 52 or section 53.

52 Rules for presentment for payment

(1) An instrument must be presented for payment by or on behalf of the holder.

(2) An instrument must be presented for payment at a reasonable time on a business day

(a) on the day it falls due; or

(b) if it is payable on demand, before it is overdue.

(3) An instrument must be presented for payment

(a) at the place of payment specified in it; or

(b) if no place of payment is specified in it, at the address of the drawee or maker specified in it; or

(c) in any other case, wherever the drawee or maker can be found;

(4) An instrument must be presented for payment

(a) to the drawee or maker or to a person authorised to pay or refuse payment on his behalf; or

(b) if the bill is addressed to, or the note made by, two or more drawees or makers and no place of payment is specified in it, to any one of them or to a person authorised to pay or refuse payment on behalf of any one of them, unless the instrument provides otherwise; or

(c) if the instrument designates a person as payor, to that person, or to a person authorised to pay on his behalf.

53 Presentment for payment by bank

(1) An instrument drawn on or made by or payable at a bank (in this section referred to as the 'paying bank') may, provided the other requirements of section 52 are met, be presented for payment to the paying bank by a bank collecting payment (in this section referred to as the 'collecting bank') in terms of any applicable clearing house rule

(a) at a place designated by any clearing house rule; or

(b) at a place of payment designated by the paying bank; or

(c) by means of data transmitted on behalf of the collecting bank to the paying bank identifying the instrument with reasonable certainty.

(2) For the purposes of paragraph (c) of subsection (1), an instrument is deemed to be identified with reasonable certainty if

(a) the sum ordered or promised to be paid by the instrument;

(b) the number of the instrument, if any;

(c) the account against which the instrument is drawn or payable; and

(d) the branch of the paying bank where the instrument is payable

are specified or are readily ascertainable by the paying bank from the data transmitted by or on behalf of the collecting bank.

(3) Where an instrument is presented for payment in terms of this section without exhibiting it to the paying bank, nothing in this section shall relieve the paying bank of any liability to which it would have been subject in relation to the instrument if it had been presented by being exhibited to the paying bank.

54 Dishonour by non-payment

(1) An instrument is dishonoured by non-payment if

(a) it is duly presented for payment and the instrument is not paid; or

(b) presentment for payment is excused and

(i) if it is an instrument payable on demand, the instrument is not paid: or

(ii) if it is an instrument payable at a definite time, the instrument is overdue and unpaid.

(2) Subject to the provisions of this Act, where an instrument is dishonoured by non-payment, a right of recourse against the drawer and indorsers immediately accrues to the holder.

55 Proof of dishonour

(1) A statement on an instrument which appears to have been signed and dated by the drawee or maker or a person authorised to accept or pay or refuse acceptance or payment on his behalf, and specifying

(a) the person on whose behalf the instrument was presented for payment;

(b) the place and date of presentment;

(c) that acceptance or payment is refused

shall be prima facie proof of dishonour.

(2) A statement on an instrument, on a duplicate or on a document containing written particulars of the instrument, which has been signed and dated by a notary specifying

(a) the person at whose request the instrument is protested;

(b) the place and date of protest and the reason for protesting the instrument;

(c) the demand, whether for acceptance or payment, made and the answer given, or the fact that the drawee or maker could not be found, if such is the case,

shall be prima facie proof of dishonour.

NOTICE OF DISHONOUR

56 Necessity for notice of dishonour

(1) Subject to the provisions of this Act and subsections (2) and (3), if an instrument has been dishonoured by non-acceptance or non-payment, notice of dishonour must be given to the drawer and each indorser.

(2) Where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill has been accepted in the meantime.

(3) Notice of dishonour operates for the benefit of any party who has a right of recourse on the instrument against the party to whom notice was given.

57 Rules for notice of dishonour

(1) Notice of dishonour must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the instrument.
(2) Notice of dishonour must be given to the drawer and each indorser or to a person authorised to receive notice on his or their behalf.
(3) Notice of dishonour may be given in writing or by any other means of communication, and must be in terms that sufficiently identify the instrument and intimate that it has been dishonoured by non-acceptance or non-payment: Provided that a misdescription of the instrument shall not vitiate the notice, unless the person to whom the notice is given is in fact misled thereby.
(4) A notice of dishonour is deemed to be given if it is duly addressed and posted or transmitted through any communications facility provided by the Post Office, whether or not it is actually received.
(5) Notice of dishonour must be given or sent in terms of subsection (4) not later than on the business day, excluding a Saturday, after the instrument is dishonoured or notice given by another party is received.
(6) Where an instrument, when dishonoured, is in the hands of an agent, he may give notice of dishonour either to the party liable on the instrument or to his principal, and if he gives notice to his principal, his principal is entitled to give notice of dishonour to the drawer and each indorser within the period provided for by subsection (5) after he has received notice.
(7) Where there are two or more drawers or indorsers who are partners, notice to any one of them constitutes notice to all of them, even if the partnership is dissolved after they have drawn or indorsed the instrument.

DELAYS AND EXCUSES

58 Delay in presentment or notice of dishonour

(1) Delay in presenting an instrument for acceptance or payment or in giving notice of dishonour is excused if the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence: Provided that if the cause of delay ceases to operate, presentment must be made or notice must be given with reasonable diligence.

(2) Where presentment for acceptance or payment is excused and the instrument is dishonoured for non-acceptance or non-payment, any delay in giving notice of dishonour is excused, unless the holder or an indorser obliged to give notice of dishonour has received notice of the dishonour: Provided that notice of dishonour must be given with reasonable diligence after the holder or such indorser receives notice of the dishonour of the instrument.

59 Presentment and notice of dishonour excused

(1) Subject to the provision of this Act, presentment for acceptance or payment or notice of dishonour is excused

(a) where it is delayed and the delay is caused by circumstances beyond the control of the holder or his agent and not imputable to his or his agent's default, misconduct or negligence and continues for a period of thirty days;

(b) where, after the exercise of reasonable diligence, presentment or notice of dishonour as required by this Act cannot be made or given;

(c) as against any party who has expressly or impliedly waived presentment or notice of dishonour either before or after it must be made or given;

(d) as against a party to whom the instrument was presented for acceptance or payment or from whom payment was demanded;

(e) as against a party who has countermanded payment;

(f) as against a party who is not entitled to require that the instrument be accepted or paid, or who has no reason to expect that it would be accepted or paid.

(2) Presentment for acceptance is excused where the drawee is dead, and presentment for acceptance or payment is excused where the drawee or maker is insolvent, or a fictitious person, or a person not having capacity to accept or pay, or if the drawee is a juristic person which does not exist or has ceased to exist.

60 Non-compliance with holder's duties

(1) Subject to the provisions of this Act -

(a) where an instrument is not duly presented for acceptance or payment, the drawer and indorsers are discharged from liability on the instrument;

(b) where notice of dishonour is not duly given to the drawer and each indorser, any drawer or indorser to whom such notice is not given, is discharged from liability on the instrument.

(2) Where, in terms of a qualified acceptance or a note, presentment for payment is required, the acceptor or maker, in the absence of an express stipulation to that effect, is not discharged by an omission to present the instrument for payment on its due date or within the time allowed for such presentment.

CHAPTER 6

DISCHARGE

61 Discharge of parties

(1) A party is discharged from liability on the instrument:

(a) by any cause by which contractual obligations are discharged; and

(b) by payment made to the holder at or after maturity or, before maturity, upon dishonour by non-acceptance, in good faith and without notice of any fraud or illegality affecting the instrument.

(2) Where a party is discharged wholly or partially from liability on the instrument, any party who has a right of recourse against him is also discharged.

(3) All the parties are discharged from liability on the instrument:

(a) where the liability of a party who has no right of recourse on the instrument is discharged; and

(b) by payment made by the drawee, or the acceptor, or the maker to the holder at or after maturity or, before maturity, upon dishonour by non-acceptance, in good faith and without notice of any fraud or illegality affecting the instrument.

62 Effect of discharge against holder in due course

The discharge of a party is not effective against a subsequent holder in due course.

63 Duty on payment

Except where it is otherwise agreed or where presentment for payment is made in terms of paragraph (c) of subsection (1) of section 53, where an instrument is paid,

the person to whom payment is made shall deliver the instrument to the party making payment.

64 Payment by third person

(1) An instrument may be paid by any person, including a stranger to the instrument.
(2) Where an instrument is paid by a stranger:

(a) the person paying the instrument acquires the right of the person to whom payment was made against the party on whose behalf payment was made and against all parties liable to him; and
(b) any party subsequent to the party on whose behalf payment was made is discharged.

65 Partial payment

(1) The holder is not obliged to take a partial payment.
(2) Where the holder does not take a partial payment, the instrument is dishonoured by non-payment.
(3) Where the holder takes a partial payment from the drawee, the acceptor or the maker:

(a) all the parties are discharged from liability on the instrument to the extent of the amount paid;
(b) the instrument is dishonoured to the extent of the amount unpaid.

(4) Where the holder takes a partial payment from a party other than the drawee, the acceptor or the maker:

(a) the party making payment is discharged from liability on the instrument to the extent of the amount paid;
(b) the holder must deliver to such party a copy of the instrument.

(5) Where a partial payment is made, the party to whom payment is made shall, unless otherwise agreed, note the amount paid by indorsement on the instrument.
(6) Where the balance is paid the party to whom payment is made shall, unless otherwise agreed, deliver the instrument to the party making payment.

CHAPTER 7

MISCELLANEOUS PROVISIONS

BILL IN A SET

66 Rules for a bill in a set

(1) Where a bill is drawn in a set, each part of which is numbered and contains a reference to the other parts, the whole of the parts constitutes one bill.
(2) Where a holder of a set indorses two or more parts to different persons, he is liable on every such part, and each subsequent indorser is liable on the part he himself has indorsed, as if the said parts were separate bills.
(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed to be the true owner of the bill: Provided that nothing in this subsection shall affect the rights of a person who in due course accepts or pays the part first presented to him.
(4) (a) The acceptance of a bill drawn in a set may be written on any part of the set, and must be written on one part only.
(b) If the drawee accepts more than one part, and such accepted parts fall into the hands of different holders in due course, he is liable on every part as if it were a separate bill.
(5) Where the acceptor of a bill drawn in a set pays it without requiring that the part bearing his acceptance be delivered to him, and that part at maturity is outstanding and in the hands of a holder in due course, he is liable to the holder.
(6) Subject to the provisions of subsections (2), (3), (4) and (5), where all the parties to one part of a bill drawn in a set are discharged by payment or otherwise, all the parties to the bill are discharged.

CONFLICT OF LAWS

67 Rules applicable

(1) Where an instrument drawn or made in one country is negotiated, accepted or payable in another country, the law governing the rights, duties and liabilities of the parties to it shall be determined in accordance with the provisions of this section.
(2) The capacity of a person to bind himself by an instrument shall be determined in accordance with the law of the place where the contract is made: Provided that if a person lacks capacity according to the law of the place where the contract is made he shall nevertheless be bound if he has contractual capacity according to the law of the Republic, or of his domicile at the time of contracting, or of the place where the contract is to be performed.
(3) The validity of the instrument as regards requisites in form is determined by the law of the place where the instrument is issued, and the validity, as regards requisites in form, of every supervening contract such as acceptance, indorsement or aval is determined by the law of the place where the contract is made: Provided that --

(a) an instrument first delivered outside the Republic is not invalid by reason only that it is not stamped in accordance with the law of the place of issue, and

(b) an instrument first delivered outside the Republic which conforms, as regards requisites in form, to the law of the Republic may, for purposes of enforcing payment, be treated as valid as between all persons who negotiate or hold or become parties to it in the Republic.

(4) The interpretation and legal effect of the contract of the drawer, indorser, acceptor, maker, or the signer of an aval is determined by the law of the place where such contract is to be performed: Provided that, where an instrument payable in the Republic is indorsed outside the Republic, the indorsement shall as regards the payer be interpreted and have legal effect according to the law of the Republic.
(5) The law of the place where an instrument is payable shall determine -

(a) the necessity for and sufficiency of presentment for acceptance or payment of the instrument;

(b) the necessity for and sufficiency of a protest or notice of dishonour of the instrument;

(c) the due date of the instrument.

(6) The validity and effect of a discharge from liability under an instrument shall be determined by the law of the place with which the particular contract has its closest and most real connection.

(7) Where an instrument is drawn outside but is payable in the Republic and the sum payable is not expressed in the currency of the Republic, the court may give judgment in that foreign currency: Provided that the debtor shall be entitled to comply with the judgment by paying in South African currency, in which case the conversion to South African currency shall be made on the date of the actual payment.

LOST INSTRUMENTS

68 Right to obtain duplicate

(1) Where an instrument is lost before it is overdue, whether by destruction, theft or any other cause, the owner is entitled to

(a) request the drawer or maker to deliver to him a duplicate instrument of the same tenor;

(b) request any other party to sign the duplicate instrument according to the tenor of the lost instrument;

provided he gives security, if required, to indemnify him or them against all claims by any person upon the lost instrument.

(2) Any request in terms of subsection (1) must be made in writing and must contain

(a) in the case of a request in terms of paragraph (a) of subsection (1), sufficient particulars to enable the drawer or maker to identify the lost instrument and to draw or make a duplicate of the same tenor; and

(b) in the case of a request in terms of paragraph (b) of subsection (1), a duplicate of the lost instrument signed by the drawer or maker.

(3) The drawer or maker shall within 14 days of a request in terms of paragraph (a) of subsection (1) or, if security in terms of subsection (1) is required, within 14 days

after such security is given, draw or make and deliver to the person who made the request the duplicate instrument.

(4) Any party other than the drawer or maker, shall within 14 days of a request in terms of paragraph (b) of subsection (1) or, if security in terms of subsection (1) is required, within 14 days after such security is given, sign and deliver to the person who made the request, the duplicate instrument.

(5) Subject to the provisions of this section --

(a) the holder of a duplicate instrument and all the parties to it shall have all the rights and duties they would have had if the holder had been in possession of the lost instrument;

(b) any delay in presenting the duplicate instrument for acceptance or payment caused by the loss of the lost instrument or by the obtaining of a duplicate instrument or the signature of any party to it shall be excused, provided that the owner of the lost instrument has demanded acceptance or payment from the drawee or maker or other party liable to him with reasonable diligence and within a reasonable time after acquiring notice of the loss of the instrument.

(6) The holder shall be entitled to the same rights to negotiate the duplicate instrument as he enjoyed in respect of the lost instrument.

69 Action upon lost instrument

Where an instrument is lost, whether by destruction, theft or any other cause, or cannot be produced -

(a) the owner or any person who has paid it, is entitled to institute or maintain any action, counterclaim or other proceeding, other than an action for provisional sentence, upon the instrument against any party to it; provided --

(i) he gives security, if required, to indemnify such party against all claims by any person upon the instrument; and

(ii) he proves that, if he had been in possession of the instrument, he would have had a right to payment against such party.

(b) any failure to present the lost instrument for payment shall be excused provided the person who was the holder or the owner or any person who has paid it has demanded payment from the drawee or maker or other party liable to him with reasonable diligence and within a reasonable time after acquiring notice of the loss of the instrument.

70 Repeal of laws

(1) Subject to the provisions of subsection (2), the Bills of Exchange Act, No 34 of 1964 is hereby repealed.
(2) Notwithstanding such repeal, the provisions of the said Act relating to bills and notes shall remain applicable to, and govern, any instrument drawn or made prior to the date of repeal.

71 Short title
This Act shall be called the Bills of Exchange and Promissory Notes Act, 199*, and shall come into operation on a date fixed by the State President by Proclamation in the Gazette.

ANNEXURE B

CHEQUES ACT

Act to amend the laws relating to cheques

1 Definitions

(1) In this Act, unless the context otherwise indicates --
'bank' means the Reserve Bank or a bank as defined in section 1 of the Banks Act, 1990 (Act No 94 of 1990);
'bearer' means the person in possession of a cheque which is payable to bearer;
'cheque' means a cheque as defined in section 2;
'clearing house' means an association of banks:
'clearing house rules' means the rules of a clearing house designed to regulate the clearing of payments between members;
'collecting bank' means a bank, or a mutual bank, or the Post Office Savings Bank collecting payment of a cheque;
'drawee' means the bank on which a cheque is drawn;
'holder' means the payee or indorsee of a cheque who is in possession of it, or the bearer of it;
'issue' means the first delivery of a cheque to a holder;
'mutual bank' means a mutual bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990);
'party' means the drawer, indorser, the drawee who certifies a cheque or the signer of an aval;
'payee' means the person in whose favour the drawer directs payment to be made;
'Post Office Savings Bank' means the Post Office Savings Bank as defined in section 1 of the Post Office Act, 1958 (Act No 44 of 1958);
'prescribed rate' means the rate of interest prescribed under the Prescribed Rate of Interest Act, No 55 of 1975, and which is applicable at the time when, in terms of this Act, interest begins to run;
'Registrar' means the Registrar of Banks as defined in section 1 of the Banks Act, 1990 (Act No 94 of 1990);
'Reserve Bank' means the South African Reserve Bank as defined in section 1 of the South African Reserve Bank Act, 1989 (Act No 90 of 1989);

(2) For the purposes of this Act, a person has notice of a fact if he

(a) has actual knowledge of it;

(b) has received a notification of it

(c) has knowledge of other facts and circumstances giving rise to the likely inference that such fact exists.

(3) For the purposes of this Act, a person takes or pays a cheque in good faith if he takes or pays it honestly.

(4) For the purposes of this Act, a person takes an instrument for value if he acquires it under onerous title.

CHAPTER 1

REQUIREMENTS OF FORM

FORM AND INTERPRETATION

2 Definition of cheque

A cheque is a written document containing the word 'cheque', signed by the drawer, which is dated and contains an unconditional order whereby the drawer directs the drawee to pay a sum certain in money on demand to the payee or to his order, or to bearer.

3 The drawer

(1) A cheque may be drawn by a person having no or limited capacity to contract.

(2) A cheque may be drawn by two or more drawers.

4 The drawee

(1) The drawee of a cheque must be a bank entitled to accept deposits of money withdrawable by cheque.
(2) The drawee must be named or otherwise indicated with reasonable certainty in the cheque.
(3) A cheque shall be drawn on one drawee only.
(4) A cheque may be drawn by the drawer on himself.

5 Unconditionality of order

(1) An order is not unconditional if it is an order to pay out of a particular fund.
(2) An otherwise unqualified order is unconditional even if coupled with

(a) an indication of a particular fund out of which the drawee is to reimburse himself, or of a particular account to be debited with the amount; or

(b) a statement of the transaction which gave rise to the cheque; or

(c) a statement that it is drawn against specified documents attached thereto for delivery on payment; or

(d) a statement that it is drawn under or against a specified letter of credit or similar authority.

(3) An order is not unconditional if it is stated to be subject to or governed by any other agreement or transaction.

6 Sum payable

(1) The sum payable in terms of a cheque is a sum certain in money although it is to be paid according to a rate of exchange indicated, or to be ascertained as directed, by the cheque.
(2) Where more than one sum is expressed to be payable in a cheque, the lesser or least, as the case may be, of such sums is the amount payable.
(3) A document containing an order to do any act in addition to the payment of money is not a cheque.

7 Payable on demand

(1) An order to pay is an order to pay on demand

(a) where it is expressed to require payment on demand, at sight, or on presentation, or where it contains words of similar import; or

(b) where no time for payment is expressed in the document containing the order.

(2) A cheque is overdue one year after its date.

(3) Where a cheque is indorsed when it is overdue any presentment for payment to hold liable the indorser who has so indorsed it is excused.

8 The date

(1) Where a cheque or any signature on it is dated, the date shall, unless the contrary be proved, be presumed to be the true date of the cheque or signature.

(2) A cheque may be antedated or postdated, in which case the time when it is payable and all other periods of time provided for in this Act, shall be determined with reference to the stated date.

9 The payee

(1) Where a cheque is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

(2) A cheque may be drawn payable --

(a) to the drawer or to the drawee;

(b) to two or more payees jointly or in the alternative or to some of several payees in the alternative;

(c) to an office or the holder of an office by his title;

(d) to an estate or a trust or a fund.

(3) Where a cheque is payable to an office or the holder of an office by his title, it is payable to the holder of the office for the time being or to his principal.

(4) Where a cheque is payable to an estate or a trust or a fund, it is payable to the executor in, or the trustee of, that estate, or the trustee of that trust, or to the trustee or administrator of that fund, for the time being, as the case may be.

(5) Where a cheque is payable to two or more payees jointly, it is payable to all of them and may be negotiated, discharged and enforced only by all of them, unless one or some of them have authority to act on behalf of the other or others.

10 Payable to order

(1) A cheque is payable to order where it is expressed to be payable
(a) to a specified person, or
(b) to a specified person or to his order; or
(c) to the order of a specified person
unless it is a non-transferable cheque that complies with the requirements set out in section 52.
(2) Where a cheque is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order.

11 Payable to bearer

A cheque is payable to bearer where --
(a) it is expressed to be so payable; or
(b) it is expressed to be payable to the order of bearer; or
(c) it is expressed to be payable to order or bearer; or
(d) it is payable to 'cash' or the 'order of cash' or to 'cash or order'; or
(e) the only or last indorsement on it is an indorsement in blank.

INCOMPLETE CHEQUES

12 Incomplete cheques

(1) Where a signed document in the form of a cheque lacks any of the necessary requirements, it may be completed as a cheque using the signature as that of any party to it.
(2) Where a document referred to in subsection (1) is completed as a cheque -
(a) any party who signed it after completion shall be liable on it as completed;
(b) any party who signed it before completion
(i) shall be liable to a holder other than a holder in due course only to the extent that it is completed in accordance with any authority given by him;

(ii) shall be precluded from asserting against a holder in due course or a person who in good faith and without notice has paid it, that it was completed contrary to any authority given by him.

ALTERATION

13 Alteration

(1) Where a cheque is materially altered:

(a) parties who have signed the cheque after the material alteration has been made or who made, authorised or assented to the material alteration, shall be liable on it as altered;

(b) parties who have signed the cheque before the material alteration has been made shall be liable on it as if the alteration had not been made: Provided that a party who by his negligence contributed to the making of the alteration shall be precluded from setting up the alteration against a holder in due course or a person who has paid the cheque in good faith and without notice

(2) For the purposes of sub-section (1), an alteration is material if it alters or purports to alter the liability of any party to the cheque and includes any alteration of the date, the sum payable, the names of the parties and the time of payment.

CHAPTER 2

NEGOTIATION

14 Negotiation of cheque

(1) Negotiation is the transfer of a cheque in such a manner as to constitute the transferee the holder of the cheque.

(2) A cheque payable to bearer is negotiated by delivery.

(3) A cheque payable to order is negotiated by delivery coupled with any necessary indorsement.
(4) Where a cheque drawn payable to bearer is indorsed specially, it remains payable to bearer and may be further negotiated by delivery; but the person indorsing specially is liable as indorser only to those holders who acquired the cheque through his indorsement.

15 Effect of incapacity and illegality

The negotiation of a cheque is effective to constitute the transferee the holder of the cheque even if
(a) the cheque is negotiated by a person having no or limited capacity to contract,
(b) the negotiation of the cheque is affected by illegality.

16 Effect of transfer of cheque

(1) The transfer of a cheque vests in the transferee the rights to and upon the cheque the transferor has, except where the transferee derives his title through a holder in due course and has been a party to any fraud or illegality affecting the cheque.
(2) Except where it is otherwise agreed, the transfer without indorsement of a cheque payable to order by the holder gives the transferee the right to the unqualified indorsement of the transferor.

17 Negotiation by indorsement

(1) To effect a negotiation of the cheque, an indorsement must be written by or on behalf of the holder on the cheque or on an allonge thereto.
(2) An indorsement may consist of the simple signature of the indorser without additional words.
(3) An indorsement effects a negotiation of the cheque even if it is accompanied by words of cession, waiver, suretyship, guarantee, limitation of liability or words of similar import.

18 Payee or indorsee misdescribed

Where a cheque is payable to a person under a misspelt name or a name other than his own, he may indorse the cheque in that name or in his own name or both, but an indorsement in both names may be required by a person paying or taking the cheque.

19 Order of indorsements

Where there are two or more indorsements on a cheque, each indorsement is presumed, until the contrary is proved, to have been made in the order in which it appears on the instrument.

20 Partial indorsement

An indorsement which purports to transfer a part only of the amount payable by the cheque, or which purports to transfer the cheque to two or more indorsees severally, does not effect a negotiation of the instrument.

21 Indorsement in blank

(1) An indorsement in blank specifies no indorsee, and a cheque so indorsed becomes payable to bearer.
(2) Where a cheque payable to order has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the cheque to himself or his order or to some other person or the order of the latter.

22 Special indorsement

(1) A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable.
(2) The provisions of this Act relating to the payee apply with
the necessary modifications to an indorsee under a special indorsement.

23 Conditional indorsement

Where a cheque is indorsed conditionally -

(a) the indorsement effects a negotiation of the cheque whether or not the condition is fulfilled; and

(b) the person who pays the cheque does not have notice of a claim to or a defence upon the cheque merely by reason of the fact that the cheque is indorsed conditionally.

24 Indorsement for collection

(1) An indorsement for collection expresses an authority to collect payment of the cheque by words such as, for example, 'for deposit'; 'for collection'; 'value in collection'; 'pay any bank'.

(2) The indorsee under an indorsement for collection

(a) may exercise all the rights arising out of the cheque;

(b) is subject to all claims and defences that are available against his indorser;

(c) may negotiate the cheque for collection only.

(3) The indorser who indorses a cheque for collection is not liable on the cheque to a subsequent holder.

25 Restrictive indorsement

(1) Subject to the provisions of section 52, where the drawer has inserted in the cheque, or an indorser in his indorsement, words prohibiting negotiation, or indicating an intention that the instrument should not be negotiable as, for example, 'not negotiable', 'not transferable' or 'pay [X] only', the instrument may be negotiated for collection only.

(2) The person to whom the cheque is negotiated for collection

(a) may exercise all the rights arising out of the cheque;

(b) is subject to all claims and defences which are available against the person who negotiated the cheque to him;

(c) may negotiate the cheque for collection only.

26 Re-acquisition of cheque

(1) Where a cheque is returned to or re-acquired by a prior party, he may re-issue and

further negotiate the cheque and strike out his own or any
subsequent indorsement, but is not entitled to enforce payment against any intervening party to whom he was previously liable.
(2) A cheque may be negotiated when it is overdue except by the drawee.

CHAPTER 3

RIGHTS OF THE HOLDER

27 Holder in due course

A holder in due course is a holder

(a) who has taken an instrument, complete and regular on the face of it, by negotiation, before it is overdue;

(b) in good faith and for value and without notice of any dishonour or any claim to the instrument or any defence available to prior parties.

28 Presumption of holding in due course

Every holder is presumed to be a holder in due course until the contrary is proved: Provided that if it is admitted or proved that the issue or subsequent negotiation of the instrument is affected with fraud 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 instrument.

29 Rights of a holder in due course

A holder in due course

(a) holds the cheque free from any claim to the cheque or any defence available to prior parties;

(b) may enforce payment of the cheque against all parties liable on it.

30 Rights of pledgee

Where the holder holds a cheque in pledge --

(a) he may exercise all the rights of a holder on the cheque;

(b) he shall, provided all the requirements of section 27 are met, be deemed to be a holder in due course only to the extent of the debt secured.

CHAPTER 4

LIABILITY OF THE PARTIES

GENERAL

31 Joint and several liability

Subject to the provisions of this Act, all the parties liable on a cheque are liable on it jointly and severally.

32 Exclusion and limitation of liability

(1) The drawer or any indorser or the signer of an aval may insert in the cheque an express stipulation -
(a) excluding or limiting his own liability to the holder;
(b) waiving presentment for payment.
(2) Unless a contrary intention appears from the cheque, a waiver operates in favour of all holders, and a waiver contained in the cheque as drawn binds all subsequent parties.

SIGNATURE

33 Signature as requirement for liability

(1) No person is liable on a cheque if he has not signed it as a party: Provided that -

(a) where a person signs a cheque as a party in a name other than his own he is liable on it as if he has signed it in his own name;

(b) the signature in the name of a partnership is equivalent to the signature by the person so signing of the names of all persons liable as partners of that partnership;

(c) where a person adopts or confirms a forged or unauthorised signature as his own he shall be liable as if he has made it himself or as if it has been authorised.

(2) A party need not sign a cheque with his own hand and his signature may be written or placed on it by his authority.

(3) A signature may be made in handwriting or typescript or by way of sealing, stamping, symbol, facsimile, perforation or other means.

34 Signature by agent

(1) A cheque may be signed by an agent.

(2) A person signs a cheque as an agent where it appears from the cheque that he signs it for or on behalf of a named principal or as the agent or representative of such principal: Provided that where a signature consists of the name of a firm or a juristic person and the signature or signatures of an individual or individuals the latter shall be presumed, until the contrary is proved, to have signed the cheque as agent or agents.

(3) Where a person is authorised to sign, and does sign, a cheque as an agent, he is not liable on the cheque.

(4) Except as against a party with notice, a person who signs a cheque as an agent without the authority of the person named as principal or who signs a cheque in the name of another person without his authority, shall be deemed to be a party to the cheque and personally liable on it.

(5) Except as against a party with notice, an authorised agent who signs a cheque as a party is personally liable on it.

35 Forged and unauthorised signatures

Subject to the provisions of this Act, a forged or unauthorised signature is wholly inoperative as that of the person whose name is signed: Provided that a person who by his negligence contributed to the making of a forged or unauthorised signature on a cheque shall be precluded from setting up the forgery or want of authority against a person who in good faith and without notice pays or takes it for value.

36 Forged or unauthorised indorsement in name of payee

(1) A forged or unauthorised indorsement in the name of the payee is effective in favour of any person who in good faith and without notice pays or takes the instrument for value, if

(a) the drawer or any person who signs as or on behalf of the drawer intends the person named as payee to have no interest in the cheque, or

(b) the name of the payee has been supplied directly or indirectly to the drawer or maker, or any person signing on behalf of the drawer or maker, by an agent or employee of the drawer or maker, or of the person so signing, who intends the payee to have no interest in the cheque.

(2) Nothing in this section shall impose any liability on the person whose indorsement has been forged or on whose behalf the cheque has been indorsed without his authority.

DELIVERY

37 Delivery as requirement for contract on cheque

No contract of any party to a cheque shall be complete and irrevocable until delivery of the cheque by such party to conclude the contract: Provided that if a certification or an aval is written on a cheque and the drawee or signer of the aval gives notice to the person entitled to the instrument that he has certified it or signed the aval, the certification or the aval becomes complete and irrevocable; and provided further that such delivery or notice shall not be necessary to make any party liable to a holder in due course.

THE PARTIES

38 Liability of the drawee

The drawee is not liable on the cheque unless he certifies it as provided for by section 39.

39 Liability of the drawee certifying cheque

(1) A cheque is certified where it is signed by the drawee and the drawee by writing on it certifies or marks it for payment or otherwise uses words indicating that the cheque will be paid or that funds are available for its payment or that the order of the drawer is accepted.

(2) The drawee of a cheque by certifying it-

(a) engages that he will pay the holder, or the drawer or an indorser who has paid the cheque, the amount recoverable in terms of section 43 according to the tenor of his certification;

(b) is precluded from denying to a holder in due course --

(i) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the cheque,

(ii) the existence of the payee and his then capacity to indorse.

40 Liability of the drawer

The drawer of a cheque by drawing it -

(a) engages that upon dishonour of the cheque he will pay the holder, or an indorser who has paid the cheque, the amount recoverable in terms of section 43;

(b) is precluded from denying to a holder i. due course and to a person who takes the cheque in good faith and without notice for value, the existence of the payee and his then capacity to indorse.

41 Liability of the indorser

The indorser of a cheque by indorsing it -

(a) engages that upon dishonour he will pay the holder, or a subsequent indorser who has paid the cheque, the amount recoverable in terms of section 43;

(b) is precluded from denying to a person who takes the instrument in good faith and without notice for value

(i) the genuineness and regularity in all respects of the drawer's signature and all previous indorsements and avals;

(ii) that the cheque was at the time of his indorsement valid and subsisting.

42 Liability of the signer of an aval

(1) The liabilities of a party to a cheque may be secured by an aval.
(2) A person signs a cheque as the signer of an aval where by words such as 'as aval', 'as surety', or 'as guarantor' he expressly indicates that he is a surety: Provided that the unqualified signature of a person other than the drawer, drawee or payee made on the back of the cheque before indorsement by the payee shall be that of the signer of an aval.
(3) The signer of an aval may specify in the cheque the party for whom he is a surety, and if he does not so specify, he shall be deemed to have given his aval for the drawer.
(4) The signer of an aval is liable jointly and severally with and as surety for the party for whom he has given his aval.
(5) Where the signer of an aval pays the cheque, he acquires the rights arising out of the cheque against the person for whom he has given his aval and against all parties liable to him.
(6) If a person signs a cheque otherwise than as a party he thereby incurs the liabilities of an indorser to a holder in due course.

43 Amount recoverable

(1) The holder may recover from any party liable on a cheque --
(a) the amount of the cheque; and
(b) interest at the prescribed rate from the time of presentment for payment or, if presentment is excused, from the time the cheque is dishonoured.
(2) Any party who pays a cheque whether wholly or in part in terms of subsection (1), may recover from any party liable to him --
(a) the amount he was compelled to pay and paid; and
(b) interest on it at the prescribed rate from the date of payment.

CHAPTER 5

PRESENTMENT FOR PAYMENT

GENERAL

44 Necessity for presentment for payment

Subject to the provisions of this Act, a cheque must be duly presented for payment in accordance with the provisions of section 45 or section 46.

45 Rules for presentment for payment

(1) A cheque must be presented for payment by or on behalf of the holder.
(2) A cheque must be presented for payment during business hours on a business day and before it is overdue.
(3) A cheque must be presented for payment to the drawee, or to a person authorised to pay or refuse payment on his behalf, at the branch of the drawee stated in the cheque or, if no such branch is stated, at any branch of the drawee.

46 Presentment for payment by bank

(1) A cheque may, provided the requirements of section 45(1) are met, be presented for payment to the drawee by a collecting bank

(a) at a place designated by any clearing house rule; or

(b) at a place of payment designated by the drawee; or

(c) by means of data transmitted by or on behalf of the collecting bank, whether through a clearing house or otherwise, to the drawee identifying the cheque with reasonable certainty.

(2) For the purposes of paragraph (c) of subsection (1), a cheque is deemed to be identified with reasonable certainty if

(a) the sum ordered to be paid by the cheque;

(b) the number of the cheque, if any;

(c) the account against which the cheque is drawn; and

(d) the branch of the drawee where the cheque is payable is specified or is readily ascertainable by the drawee from the data transmitted by or on behalf of the collecting bank.

(3) Where a cheque is presented for payment in terms of this section without exhibiting it to the drawee, nothing in this section shall relieve the drawee from any liability to which it would have been subject in relation to the cheque if it had been presented by being exhibited to the drawee.

47 Dishonour by non-payment

(1) A cheque is dishonoured by non-payment where -

(a) it is duly presented for payment and the cheque is not paid; or

(b) presentment for payment is excused and the cheque is not paid.

(2) Subject to the provisions of this Act, where a cheque is dishonoured by non-payment, a right of recourse against the drawer and indorsers immediately accrues to the holder.

DELAYS AND EXCUSES

48 Delay in presentment

Delay in presenting a cheque for payment is excused if the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence; Provided that if the cause of delay ceases to operate, presentment must be made with reasonable diligence.

49 Presentment excused

(1) Subject to the provisions of this Act, presentment for payment is excused-

(a) where it is delayed and the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence and continues for a period of thirty days;

(b) where, after the exercise of reasonable diligence, presentment as required by this Act cannot be made;

(c) as against a party who has expressly or impliedly waived presentment either before or after it must be made;

(d) as against a party to whom the cheque was presented for payment or from whom payment was demanded;

(e) as against a party who has countermanded payment;

(f) as against a party who is not entitled to require that the cheque be paid, or who has no reason to expect that it would be paid.

(2) Presentment for payment is excused where the drawee is insolvent, or a fictitious person, or a person not having capacity to pay, or if the drawee does not or has ceased to exist.

50 Effect of failure to present for payment

Subject to the provisions of this Act, if a cheque is not duly presented for payment, the drawer and indorsers are discharged from liability on the cheque.

CHAPTER 6

CROSSING OF CHEQUES

51 Crossing of cheques

(1) Where a cheque bears across its face an addition of two parallel transverse lines, that addition constitutes a crossing and the cheque is crossed.

(2) A cheque may be crossed by the drawer, by the holder or by a collecting bank.

(3) A crossing may be cancelled only by the drawer deleting the crossing and placing his signature next to the deletion.

(4) A crossed cheque shall be paid by the drawee only to a collecting bank or to a customer of the drawee by crediting it to his account.

(5) There cannot be a holder in due course of a crossed cheque.

52 Non-transferable cheque

(1) A non-transferable cheque is a crossed cheque that is payable to a specified person and on which the words 'not transferable' or 'not negotiable' appear with reasonable clarity between the two parallel lines of the crossing.

(2) A non-transferable cheque may be negotiated to a collecting bank only.

CHAPTER 7

DISCHARGE

53 Discharge of parties

(1) A party is discharged from liability on the cheque -

(a) by any cause by which contractual obligations are discharged; and

(b) by payment made to the holder in good faith and without notice of any fraud or illegality affecting the cheque.

(2) Where a party is discharged wholly or partially from liability on the cheque, any party who has a right of recourse against him is also discharged.

(3) All the parties are discharged from liability on the cheque where a party who has no right of recourse on the cheque is discharged.

54 Discharge by payment

(1) All the parties are discharged from liability on the cheque by payment made by the drawee, in good faith and without notice of any fraud or illegality affecting the cheque -

(a) to a collecting bank of any cheque drawn on it;

(b) to one of its customers of any cheque drawn on it by crediting it to his account provided the customer is the holder of the cheque or holds it by virtue of an apparently regular indorsement or series of indorsements;

(c) to the holder of any cheque other than a crossed cheque or to the person who holds such cheque by virtue of an apparently regular indorsement or series of indorsements.

(2) For the purposes of subsection (1), the drawee shall not have notice of any fraud or illegality affecting the cheque by reason only of any indorsement of the cheque, or the absence of the indorsement of the payee, or any irregularity in any indorsement in the cheque.

55 Effect of discharge against holder in due course

The discharge of a party is not effective against a subsequent holder in due course.

56 Duty on payment

Except where it is otherwise agreed or where presentment for payment is made in terms of paragraph (c) of subsection (1) of section 46, where a cheque is paid, the person to whom payment is made shall deliver the cheque to the person making payment.

57 Payment by third person

(1) A cheque may be paid by any person, including a stranger to the instrument.
(2) Where a cheque is paid by a stranger -
 (a) the person paying the cheque acquires the rights of the person to whom payment was made against the party on whose behalf payment was made and against all parties liable to him; and
 (b) any party subsequent to the party on whose behalf payment was made is discharged.

58 Partial payment

(1) The holder is not obliged to take a partial payment.
(2) Where the holder does not take a partial payment, the instrument is dishonoured by non-payment.
(3) Where the holder takes a partial payment from the drawee --
 (a) all the parties are discharged from liability on the cheque to the extent of the amount paid;
 (b) the cheque is dishonoured as to the amount unpaid.
(4) Where the holder takes a partial payment from a party other than the drawee --
 (a) the party making payment is discharged from liability on the cheque to the extent of the amount paid;
 (b) the holder must deliver to such party a copy of the cheque.
(5) Where a partial payment is made, the party to whom payment is made shall, unless otherwise agreed, note the amount paid by indorsement on the cheque.

(6) Where the balance is paid, the party to whom payment is made shall, unless otherwise agreed, deliver to the party making payment the cheque.

CHAPTER 8

COLLECTION OF CHEQUES

59 Liability on collection of cheques

(1) Where a cheque which is lost or stolen is paid in terms of section 54 and the true owner suffers a loss as a result of such payment, he shall be entitled to recover an amount equal to his loss or the amount of the cheque, whichever is the lesser, from any bank, whether or not it is also the paying bank, whose negligence in collecting payment of the cheque contributed to such loss.
(2) Any bank which collected payment of such cheque after its theft or loss shall, when requested by the true owner in writing, furnish him with all information at its disposal in connection with the cheque and the account for which it has been collected, and if it fails or refuses to do so within a reasonable time of such request, it shall, for the purposes of subsection (1), be deemed to have collected payment of such cheque negligently and to have caused such loss.
(3) Without limiting the provisions of subsection (1), for the purposes of subsection (1),

(a) a bank shall prima facie be negligent in collecting payment of a cheque

(i) if it opens an account for a customer without taking reasonable steps to verify the identity, address and standing of the customer;

(ii) if it collects payment for a customer who does not appear to be entitled to payment ex facie the cheque;

(b) a bank shall not be negligent in collecting payment of a cheque by reason only of the fact that the payee or indorsee of a cheque is wrongly designated or that his name is misspelt or by reason only of any indorsement of the cheque, or the absence of the indorsement of the payee, or an irregularity in any indorsement in the cheque.

(4) The Apportionment of Damages Act, 34 of 1956 shall apply mutatis mutandis to a claim arising under the provisions of subsection (1).

60 Rights of collecting bank

Where a cheque, which is payable to order, or a non-transferable cheque is delivered by the holder thereof to a collecting bank for collection, and such cheque is not indorsed or is irregularly indorsed by such holder, such bank shall have such rights, if any, as it would have had if, upon such delivery, the holder had indorsed it in blank.

CHAPTER 9

BANK AND CUSTOMER

61 Authority to debit customer's account

Subject to the provisions of this Act, the drawee may debit the account of a customer with the amount of a cheque that is drawn by the customer and paid in terms of Section 54.

62 Operation of account

(1) Unless otherwise agreed between the parties, the drawee shall exercise reasonable care towards its customer in the payment of cheques and a customer shall exercise reasonable care towards the drawee in the drawing and custody of cheques and in the operation of his account.
(2) The Apportionment of Damages Act, 34 of 1956 shall apply mutatis mutandis to a claim arising from any breach of the provisions of subsection (1).

63 Termination of duty and authority to pay

(1) The duty and authority of a bank to pay a cheque drawn on it by its customer are terminated by receipt of

(a) countermand of payment;

(b) notice of the customer's death or incapacity;

(c) notice that the customer has been sequestrated or wound-up or placed under judicial management or declared a prodigal;

provided such countermand or notice identifies the cheque or customer with reasonable particularity.

(2) Payment of a cheque may be countermanded verbally or in writing. Notwithstanding any agreement to the contrary, a verbal countermand shall be binding on the drawee for fourteen days; and a written countermand for one year.

CHAPTER 10

MISCELLANEOUS PROVISIONS

CONFLICT OF LAWS

64 Rules applicable

(1) Where a cheque drawn or made in one country is negotiated, accepted or payable in another country, the law governing the rights, duties and liabilities of the parties to it shall be determined in accordance with the provisions of this section.
(2) The capacity of a person to bind himself by cheque shall be determined in accordance with the law of the place where the contract is made: Provided that if a person lacks capacity according to the law of the place where the contract is made he shall nevertheless be bound if he has contractual capacity according to the law of the Republic, or of his domicile at the time of contracting, or of the place where the contract is to be performed.
(3) The validity of the cheque as regards requisites in form is determined by the law of the place where the cheque is issued, and the validity, as regards requisites in form, of every supervening contract such as certification, indorsement or aval is determined by the law of the place where the contract is made: Provided that -

(a) a cheque first delivered outside the Republic is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; and
(b) a cheque first delivered outside the Republic that conforms, as regards requisites in form, to the law of the Republic may, for purposes of enforcing payment, be treated as valid as between all persons who negotiate or hold or become parties to it in the Republic.

(4) The interpretation and legal effect of the contract of the drawer, indorser, the drawee certifying, or the signer of an aval is determined by the law of the place where such contract is to be performed: Provided that, where an instrument payable in the Republic is indorsed outside the Republic, the indorsement shall as regards the payer

be interpreted and have legal effect according to the law of the Republic.

(5) The law of the place where a cheque is payable shall determine-

(a) the necessity for and sufficiency of presentment for payment of the cheque;

(b) the necessity for and sufficiency of a protest or notice of dishonour of the cheque;

(c) the due date of the cheque.

(6) The validity and effect of a discharge from liability under a cheque shall be determined by the law of the place with which the particular contract has its closest and most real connection.

(7) Where a cheque is drawn outside but is payable in the Republic and the sum payable is not expressed in the currency of the Republic, the court may give judgment in that foreign currency: Provided that the debtor shall be entitled to comply with the judgment by paying in South African currency, in which case the conversion to South African currency shall be made on the date of the actual payment.

LOST CHEQUES

65 Right to obtain duplicate

(1) Where a cheque is lost before it is overdue, whether by destruction, theft or any other cause, the owner is entitled to

(a) request the drawer to deliver to him a duplicate cheque of the same tenor;

(b) request any other party to sign the duplicate cheque according to the tenor of the lost cheque;

provided he gives security, if required, to indemnify him or them against all claims by any person upon the lost cheque.

(2) Any request in terms of subsection (1) must be made in writing and must contain

(a) in the case of a request in terms of paragraph (a) of subsection (1), sufficient particulars to enable the drawer to identify the lost cheque and to draw a duplicate of the same tenor; and

(b) in the case of a request in terms of paragraph (b) of subsection (1), a duplicate of the lost cheque signed by the drawer.

(3) The drawer shall within 14 days of a request in terms of paragraph (a) of subsection (1) or, if security in terms of subsection (1) is required, within 14 days after such security is given, draw and deliver to the person who made the request the duplicate cheque.

(4) Any party other than the drawer shall within 14 days of a request in terms of paragraph (b) of subsection (1) or, if security in terms of subsection (1) is required, within 14 days after such security is given, sign and deliver to the person who made the request, the duplicate cheque.

(5) Subject to the provisions of this section --

(a) the holder of a duplicate cheque and all the parties to it shall have all the rights and duties they would have had if the holder had been in possession of the lost cheque;

(b) any delay in presenting the duplicate cheque for payment caused by the loss of the lost cheque or by the obtaining of a duplicate cheque or the signature of any party to it shall be excused, provided that the owner of the lost cheque has demanded payment from the partee or parties liable to him with reasonable diligence and within a reasonable time after acquiring notice of the loss of the cheque.

(6) The holder shall be entitled to the same rights to negotiate the duplicate cheque as he enjoyed in respect of the lost cheque.

66 Action upon lost cheque

Where a cheque is lost, whether by destruction, theft or any other cause, or cannot be produced -

(a) the owner or any person who has paid it, is entitled to institute or maintain any action, counterclaim or other proceeding, other than an action for provisional sentence, upon the cheque against any party to it; provided --

(i) he gives security, if required, to indemnify such party against all claims by any person upon the cheque and

(ii) he proves that, if he had been in possession of the cheque he would have had a right to payment against such party.

(b) any failure to present the lost cheque for payment shall be excused provided the person who was the holder or the owner or any person who has paid it has demanded payment from the party or parties liable to him with reasonable diligence and within a reasonable time after acquiring notice of the loss of the cheque.

EVIDENCE

67 Evidential value of unindorsed or irregularly indorsed cheque

An unindorsed or irregularly indorsed cheque that has been or appears to have been paid by the drawee is prima facie evidence of receipt by the payee of the sum payable.

ANALOGOUS DOCUMENTS

68 Analogous documents

The provisions of this Act that apply to crossed cheques shall apply also to

(a) postal and money orders; and

(b) any document

(i) issued on behalf of the State

(ii) drawn upon or addressed to a servant of the State; and

(iii) intended to enable any person to obtain payment on demand of the sum mentioned in such document from such servant or from or through a bank.

69 Repeal of laws

Notwithstanding the repeal of the Bills of Exchange Act, 1964 (Act No 34 of 1964), the provisions of that Act relating to cheques shall remain applicable to, and govern, any cheque drawn prior to the date of repeal.

70 Short title

This Act shall be called the Cheques Act, 199*, and shall come into operation on a date fixed by the State President by Proclamation in the Gazette.