

# THE CONVENTION ON THE UNIFORM LAW OF INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES: A COMPARISON TO THE UNIFORM COMMERCIAL CODE

## I. INTRODUCTION

There are two prevailing systems of negotiable instruments law among the trading countries of the world.<sup>1</sup> One system is the Geneva Uniform Law which has unified to a great degree the negotiable instruments law in continental Europe, Latin America, and Japan.<sup>2</sup> The other system is the British Bill of Exchange Act, which with few exceptions extends throughout the British Commonwealth and Article III of the Uniform Commercial Code in the United States.<sup>3</sup> Because these two systems differ substantially,<sup>4</sup> the degree of success that each system has achieved in unifying the negotiable instruments law within its own geographic sphere raises questions concerning possible impediments to further unification.<sup>5</sup> Some fear that efforts to further unify negotiable instruments law would result in a splintering of the uniformity already achieved.<sup>6</sup> An indication of the opposition to further unification has been the refusal of the United States to become a party to the Geneva Convention Providing for a Uniform Law for Bills of Exchange and Promissory Notes (1930) or to the Geneva Convention Providing a Uniform Law for Checks (1931).<sup>7</sup>

In 1966, the United Nations General Assembly established the United Nations Commission on International Trade Law (UNCITRAL),<sup>8</sup> to reduce legal obstacles to the flow of international trade.<sup>9</sup> The Commission decided that the

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<sup>1</sup> Yntema, *Unification of Laws Respecting Negotiable Instruments*, 4 INT'L L.Q. 178, 179 (1951) [hereinafter referred to as Yntema].

<sup>2</sup> CONVENTION PROVIDING A UNIFORM LAW FOR BILLS OF EXCHANGE AND PROMISSORY NOTES, opened for signature June 7, 1930, 143 L.N.T.S. 259. See also Leary and Husted, *An Approach to Drafting an International Commercial Code and a Modus Operandi Under Present Laws*, 49 COL. L. REV. 1070, 1071 (1949).

<sup>3</sup> Bills of Exchange Act, 45 & 46 VICT. L. R., c. 61 (1882). UNIFORM COMMERCIAL CODE (1972 version). See also Yntema, *supra* note 1 at 179.

<sup>4</sup> *Draft Uniform Law on International Bills of Exchange and International Promissory Notes*, Introduction 4, U.N. Doc. A/CN.9/WG. IV/WP.2 (1972) [hereinafter ULIB]. For example, the two systems vary with respect to rules governing the form and content of negotiable instruments, the effect of stipulations on an instrument such as drawing without recourse and interest clauses, the conditions under which a person can acquire an instrument free from claims and defenses of other parties, the effect of forged signatures and material alterations, regrets under a cost instrument, the formalities required in connection with protest for non-acceptance or non-payment of an instrument, the consequences of failure to give notice of dishonor and the facts leading to discharge of liability and the effects of such discharge.

<sup>5</sup> Yntema, *supra* note 1, at 179.

<sup>6</sup> *Id.* at 179.

<sup>7</sup> REGISTER OF TEXT OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 154, 192 (1971).

<sup>8</sup> 1 Y.B. U.N. COMM'N ON INT'L TRADE L. 1, U.N. Doc. A/CN.9/SER.A (1970).

<sup>9</sup> *Id.* at 1.

task of harmonizing negotiable instruments law should be directed toward finding solutions to problems arising out of the co-existence of these systems.<sup>10</sup> The Commission, deciding that efforts to harmonize rules applicable to domestic and international transactions would be difficult, chose to create a new negotiable instruments law for optional use<sup>11</sup> in international transactions only.<sup>12</sup>

The initial hurdle facing UNCITRAL was to determine what types of negotiable instruments are currently used to make international payments. Replies to UNCITRAL's inquiries directed to governments and banking and trade institutions<sup>13</sup> revealed the use of a wide range of payment methods,<sup>14</sup> the most common of which were negotiable instruments (such as checks, bills of exchange, known as drafts under the Uniform Commercial Code,<sup>15</sup> and promissory notes) and inter-bank transfers<sup>16</sup> (such as telegraphic or mail transfers).<sup>17</sup> In spite of facts which indicate a trend toward an increasing use of inter-bank transfers,<sup>18</sup> the Commission concluded that "negotiable instruments play a vital role in international payment transactions, and that the problems encountered in this area made it advisable to continue work on this subject."<sup>19</sup>

Preparation of the "Draft Uniform Law on International Bills of Exchange and International Promissory Notes with Commentary" has been the response to UNCITRAL's mandate. UNCITRAL has charged a Working Group with preparation of the final draft of the Uniform Law.<sup>20</sup> As its title indicates, the draft uniform law extends its coverage to international bills of exchange and international promissory notes.<sup>21</sup> However, due to the even greater disparity between the Geneva Uniform Law and the common law development of rules relating to checks than between the rules relating to bills of exchange and promissory notes, consideration of the possibility of including checks in the final draft or of creating a separate uniform law on international checks has been delegated to the Working Group.<sup>22</sup>

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<sup>10</sup> *Supra* note 8, at 103-04.

<sup>11</sup> *Supra* note 4, at Introduction 5.

<sup>12</sup> *Supra* note 8, at 244.

<sup>13</sup> *Supra* note 8, at 243.

<sup>14</sup> *Supra* note 8, at 247.

<sup>15</sup> UNIFORM COMMERCIAL CODE § 3-104(2)(a) (1972 version) [hereinafter UCC].

<sup>16</sup> The United States Federal Reserve System estimates that about 90 per cent of the dollar volume of payments arising from international transactions and originating or terminating in that country are effected by means of inter-bank and intra-bank transfers. The percentage of these bank transfers which represent final settlement incident to other methods of payments is unreported. *Supra* note 8, at 247.

<sup>17</sup> *Supra* note 8, at 247.

<sup>18</sup> *Supra* note 8, at 248.

<sup>19</sup> *Supra* note 4, at Introduction 3.

<sup>20</sup> 3 Y.B. U.N. COMM'N ON INT'L TRADE L. 21, U.N. DOC. A/CN.9/SER.A (1972).

<sup>21</sup> *Supra* note 4, at Introduction 3.

<sup>22</sup> *Supra* note 20, at 20. The Working Group is also responsible for developing a statute of limitations. ULIB art. 79. Other responsibilities of the Working Group appear in the appropriate section of the text.

The Uniform Law serves as an index to potential negotiable instruments problems and offers a somewhat different approach than does the Uniform Commercial Code to the solution of these problems. Therefore, in order to assist the practitioner in deciding which negotiable instruments law best suits his needs, this note will provide a contrast of the salient provisions of the draft Uniform Law with the statutory scheme of Article Three of the Uniform Commercial Code.

## II. CHOICE OF LAW: APPLICABILITY OF THE CONVENTION ON UNIFORM LAW ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

The Convention on the Uniform Law of International Bills of Exchange and International Promissory Notes (hereinafter referred to as the ULIB) contemplates that parties to an international commercial transaction may choose the ULIB as the applicable law governing bills of exchange or promissory notes used to make international payments.<sup>23</sup> To be applicable, the ULIB requires that an instrument conform to a set of requisites (see § 3 *infra*), some of which are ordinarily referred to as the requisites of negotiability.<sup>24</sup> In addition to the requisites of negotiability, the ULIB requires that the instrument expressly contain language that it is drawn subject to the Convention<sup>25</sup> and expressly show an international diversity existing between the country in which the instrument is drawn or made and the country of the drawee, payee or place of payment.<sup>26</sup> The diversity requirement was included to conform with current commercial practice.<sup>27</sup> However failure to meet the requirement of diversity does not effect the applicability of the ULIB.<sup>28</sup> The underlying theory of this flexibility is that to allow a showing of lack of international diversity as a defense against applicability would hinder circulation of an international bill of exchange or note.<sup>29</sup>

The ULIB itself allows citizens of a noncontracting country to choose the ULIB as the negotiable instrument law applicable to an international commercial transaction.<sup>30</sup> However if the United States does not become a party to the convention, the inquiries relevant to the United States are (1) whether a state would give effect to a choice of the ULIB by persons seeking enforcement of an instrument in a state court and (2) if an instrument conforms with the ULIB but fails to conform to the requisites of negotiability under the UCC, whether the UCC would be used as a source of law for negotiable instruments problems apart from the issue of negotiability itself.

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<sup>23</sup> ULIB art. 1, Comment 5.

<sup>24</sup> Compare UCC § 3-104 with ULIB art. 1.

<sup>25</sup> ULIB art. 1 (2)(a), (2)(b).

<sup>26</sup> ULIB art. 1 (2)(e), (3)(e).

<sup>27</sup> ULIB art. 1, Comment 9.

<sup>28</sup> ULIB art. 2.

<sup>29</sup> *Id.*, Comment 2.

<sup>30</sup> ULIB art. 3.

In response to the first inquiry, the Uniform Commercial Code (hereinafter referred to as UCC) provides in section 1-105(1) for a choice of law as follows:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or such other state or nation shall govern their rights and duties.

Two difficulties interact in this code section: first, what is the meaning of "reasonable relation" and second, is the ULIB the law of any parties' nation? The official comments to the code assert that the test of reasonable relationship is similar to that laid down in *Seeman v. Philadelphia Warehouse Co.*,<sup>31</sup> that "ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs."<sup>32</sup> In the situation where both making and performance occur in a country which has not entered the convention, it appears to be impossible to meet the reasonable relationship test. Yet the UCC comments state that although there is no significant contact between the transaction and the law of a jurisdiction chosen to govern the agreement, that choice might still be effective as a shorthand expression of the intent of the parties.<sup>33</sup> However, may one conclude that this intent of the parties' language gives section 1-105 enough breadth to allow persons to choose the ULIB as the applicable negotiable instrument law where there is no significant contact between the transaction and a country which has entered the convention? In so doing one would necessarily ignore the significant contact test. Conversely must one conclude that the significant contact test establishes the sole framework within which a choice of law, such as ULIB, can be made? The code drafters realizing that it would be some time before the UCC would be adopted in all states, included section 1-105 with the intent of reducing conflict of laws problems which might arise until all states adopted the code.<sup>34</sup> The problem which possibly results from the fact that the ULIB might not be the law of any country in which parties to a transaction are citizens was not anticipated because the drafters of the UCC were not dealing with events in which persons might choose a treaty on negotiable instruments as the governing body of law.

Although the language of Section 1-105 of the UCC seems to present a stumbling block to a choice of the ULIB when the making or performance occurs in a country or countries which are not members of the convention, it should not be a permanent obstacle. Section 1-102 of the UCC allows the effect of the provisions of that Act to be varied by agreement, with the exception that obligations of good faith, diligence, reasonableness and care where prescribed by the Act may not be disclaimed. However even with regard to these excep-

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<sup>31</sup> 274 U.S. 403 (1927). See UCC § 1-105, Comment 1.

<sup>32</sup> 274 U.S. 403 (1927).

<sup>33</sup> UCC § 1-105, Comment 1.

<sup>34</sup> Reese, *The Uniform Commercial Code and its Application in Non-Code States*, 15 BAYLOR L. REV. 291, 297 (1963).

tions, Section 1-102 provides that the parties may agree to reasonable standards for measuring good faith, diligence, reasonableness, and care. Courts, in construing these provisions, might be persuaded to allow people to chose the ULIB directly when they could achieve the same results by incorporating the ULIB into an agreement varying the effects of provisions of the UCC.

In response to the second inquiry, that is, to what degree would the ULIB supplant the state's negotiable instrument law, Section 3-104 of the UCC states that to be negotiable within that Article "an instrument must contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power may be given by the maker or drawer except as authorized by this Article." In elaborating what promises or orders are authorized, Section 3-105 of the UCC states that an instrument is not unconditional if it contains a promise by the maker or drawer that the instrument is drawn subject to another agreement. Thus an instrument drawn subject to the ULIB would not meet the UCC requirements for negotiability. Although this consequence alone is of small concern since the UCC recognizes negotiable instruments which do not conform to its own criteria for negotiability,<sup>35</sup> Article III of the UCC provides a large body of negotiable instruments law independent of the issue of negotiability itself, reference to which might be necessary for unforeseen interpretive problems incurred in using the ULIB. For example, assume that X is both the holder and payee of a negotiable instrument which is drawn subject to the ULIB. The instrument is stolen from X and the thief falsely endorses X's signature on the instrument, and then presents the instrument for payment to Y. Y then pays the amount of the instrument to the thief. Although the ULIB does not contain a provision relating to conversion,<sup>36</sup> under the UCC X could bring a tort action against Y for conversion.<sup>37</sup> However, as will be seen later, to allow X to assert a conversion action against Y would alter the scheme of loss allocation under the ULIB.<sup>38</sup> Thus the problem of allowing reference to the UCC for issues, other than negotiability, involves not only the risk of applying a single code provision out of the context of the whole scheme of the UCC, but also the risk that the UCC solution might be inconsistent with the framework of the ULIB.

On the other hand, provisions relating to negotiable instruments in the UCC might be used to solve questions left unanswered by the ULIB where use of these provisions would not violate the statutory framework of the ULIB or UCC. Unfortunately, there is little authority in the UCC for this proposition. In fact the authority is to the contrary. Section 3-805 of the UCC states that the provisions of Article III apply "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

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<sup>35</sup> UCC § 3-104, Comment 1.

<sup>36</sup> *Supra* note 4. The ULIB leaves tort problems to the "applicable national law."

<sup>37</sup> UCC § 3-419(1)(c).

<sup>38</sup> ULIB art. 22.

course of such an instrument." It has been shown that an instrument drawn subject to the ULIB might not meet the unconditional requirement for negotiability under the UCC. This would seem to foreclose the use of Section 3-805. Support for the proposition of applying the reasoning of the UCC perhaps can be found in the drafter's Comment to Section 3-805 which suggests applying the UCC by analogy to negotiable instruments which are not otherwise negotiable under the terms of the UCC, *i.e.*, those violating the requirement that an instrument read "pay to the order of X" rather than "pay to X". If the Comment is describing a philosophy underlying the UCC which is broader than the specific provision of Section 3-805, then provisions of the UCC relating to negotiable instruments might be allowed to fill some interpretive gaps in the ULIB. Again the foregoing statements are subject to the caveat that the UCC provisions not be applied inconsistently with the framework of the ULIB, or be lifted out of context.

### III. REQUISITES OF NEGOTIABILITY

The formal requirements necessary for a writing to qualify as a negotiable instrument under the UCC and ULIB are very similar. Section 3-104 of the UCC and Article 1 of the ULIB require the writing to be signed by the maker or drawer and to contain an unconditional promise or order to pay a sum certain of money on demand or at a specified time.<sup>39</sup> Beyond this core of similar requirements, differences emerge. Under the UCC an instrument may be payable to the order of a specific person or to bearer; under the ULIB, the instrument must be payable to a specified person or to his order.<sup>40</sup> As previously mentioned, the ULIB requires that the writing identify itself as an international bill of exchange or promissory note and evidence international diversity between drawer or maker and drawer, payee or place of payment.<sup>41</sup> Further specific differences surface in the sections amplifying the meaning of the formal requirements set forth in Section 3-104 of the UCC and Article 1 of the ULIB.

*A. Sum certain:* Rather positively defining sum certain, Section 3-106 of the UCC and ULIB Article 7 define sum certain by stating the conditions under which sum certain is not violated. Under the UCC a sum payable is still a sum certain even though (1) it is to be paid with stated interest, (2) by stated installments, (3) with different rates of interest before or after default or a specified date, (4) or with a stated discount or addition if paid before or after the date fixed for payment, (5) with exchange or less exchange at a fixed or current rate, (6) or with costs of collection or attorney's fees or both on default.<sup>42</sup> The ULIB provides that the sum certain requirement is met although the instrument is to be paid with stated interest, by stated installments or

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<sup>39</sup> Compare UCC § 3-104 with ULIB art. 1.

<sup>40</sup> Compare UCC § 3-104(1)(d) with ULIB art. 1(2)(b).

<sup>41</sup> ULIB art. 1(2)(a),(b),(e),(3)(e).

<sup>42</sup> UCC § 3-106.

according to an indicated rate of exchange or to a rate of exchange to be determined as directed by the instrument, *i.e.*, in a currency other than the place of payment.<sup>43</sup>

Unless a foreign currency is specified in the instrument as the medium of payment, the UCC states that payment is always acceptable in U.S. currency based on the rate of exchange prevalent in the United States on the date the instrument is payable or on the day of demand, if it is a demand instrument.<sup>44</sup> The ULIB suggests two alternatives in respect to currency for consideration by the Working Group. Alternative A follows the UCC provision, with the additional qualification that the currency be that of the country where payment is made after dishonor. The holder may choose among one of three dates for the applicable rate of exchange — the date of dishonor, maturity, or payment.<sup>45</sup> The option given the holder after maturity protects him against post-maturity currency fluctuation.<sup>46</sup> However, if the drawer or maker stipulates payment in a specified currency on the instrument,<sup>47</sup> the only protection against fluctuation afforded the holder is to specify a rate of exchange in the instrument.<sup>48</sup>

Alternative B declares that the sum payable shall be in the currency stated on the instrument.<sup>49</sup> However, if the maker or drawer stipulates on the instrument that the currency to be used is that of the place of payment,<sup>50</sup> then the rate of exchange is the one applicable on the date that the instrument becomes payable unless a rate of exchange is specified in the instrument;<sup>51</sup> in the event of dishonor, the holder may select the most favorable rate of exchange from either the date of dishonor, maturity or payment.<sup>52</sup> Thus the ULIB and the UCC offer protection from currency fluctuation prior to the date when an instrument becomes payable only insofar as a rate of exchange is indicated on the instrument. However, unlike the UCC, the ULIB does offer some degree of protection to the holder from adverse post-maturity fluctuation. The ULIB has submitted to its Working Group another section aimed at the resolution of currency problems for which there is no counterpart in the UCC. Under the ULIB, if a currency is designated similarly in two countries but with different

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<sup>43</sup> ULIB art. 7, Comment 4.

<sup>44</sup> UCC § 3-107.

<sup>45</sup> ULIB art. 74, Alternative A. The drafters declare that Alternative A is based on the assumption that the mere fact that the sum payable is expressed in foreign currency is insufficient to prove that the intention of the parties is for the medium of payment at maturity to be the foreign currency specified in the instrument, ULIB art. 74, Comment 7.

<sup>46</sup> ULIB art. 74, Comment 12.

<sup>47</sup> *Id.*, Alternative A.

<sup>48</sup> *Id.*, Alternative A(1)(b).

<sup>49</sup> *Id.*, Alternative B. This proposed article is based on the assumption if the sum is expressed in foreign currency the intention of the parties is that the foreign currency be the medium of payment. ULIB art. 74, Comment 8.

<sup>50</sup> *Id.*, Alternative B(2)(a).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, Alternative B(2)(b).

values, the instrument is payable in the currency of the country where payment is to be made.<sup>53</sup>

Both the UCC and the ULIB permit stipulating interest without violating the sum certain requirement.<sup>54</sup> But when the instrument does not specify the rate, interest shall run from the date of the instrument at the judgment rate of the place of payment under the UCC,<sup>55</sup> or at the legal rate under the ULIB.<sup>56</sup> If the instrument is undated, interest shall run from the date of issue.<sup>57</sup> The ULIB does not clearly express what country's legal rate is to be used before maturity.

*B. Unconditional promise or order:* The ULIB seems to endorse the common law concept of a negotiable instrument as a "carrier without baggage."<sup>58</sup> Thus under the ULIB, persons will be unable to add additional promises, orders, or powers on the face of the instrument or by reference to powers or promises contained in a separate agreement.<sup>59</sup> One possible exception, to be considered by the Working Group, is whether or not the instrument may state that any unpaid balance shall become due immediately upon default of an installment.<sup>60</sup> In contrast, the UCC allows an instrument to incorporate by reference or contain powers, orders, and promises to the extent authorized under the negotiable instruments Article.<sup>61</sup> For example, unlike the UCC,<sup>62</sup> there is no provision in the ULIB for an instrument to state its consideration for the transaction which gave rise to the instrument. The instrument may not refer to or state that it grows out of a separate agreement or refer to a separate agreement as to prepayment or acceleration,<sup>63</sup> nor may it state that it is secured.<sup>64</sup>

*C. Order or bearer paper:* In contrast to the UCC,<sup>65</sup> the ULIB does not allow the issuance of an instrument which reads: "Pay to bearer."<sup>66</sup> This impediment is circumvented when a drawer issues to himself and indorses it in blank.<sup>67</sup> Although the ULIB does not define indorsing in blank, presumably it has the same meaning as under the UCC. An indorsement in blank under the

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<sup>53</sup> ULIB art. 8(2).

<sup>54</sup> Compare UCC 3-106(1)(a) with ULIB art. 7(a).

<sup>55</sup> UCC § 3-118(d).

<sup>56</sup> ULIB art. 8(4), art. 8, Comment 5. ULIB art. 67(b) does state the interest rate shall be that of the place of payment (proposed alternative at residence or place of business of holder) after maturity.

<sup>57</sup> Compare UCC § 3-118(d) with ULIB art. 8(3).

<sup>58</sup> ABA CORP., BANKING AND BUSINESS L. SECTION 91 (1964).

<sup>59</sup> There is no provision in the ULIB which operates as an exception to the requirement of an unconditional order to pay. Compare with UCC authority for such an exception. UCC §§ 4-104(1)(b), 3-105, 3-112.

<sup>60</sup> ULIB art. 9(3)(c),(4)(b).

<sup>61</sup> UCC §§ 4-104(1)(b), 3-105, 3-112.

<sup>62</sup> UCC § 3-105(1)(b).

<sup>63</sup> UCC § 3-105(1)(c).

<sup>64</sup> UCC § 3-105(1)(e).

<sup>65</sup> UCC § 3-111.

<sup>66</sup> ULIB art. 1(2)(b), (3)(b).

<sup>67</sup> ULIB art. 1, Comment 8.



UCC specifies no particular indorsee and may consist solely of a signature.<sup>68</sup> Moreover, an instrument is payable to order under the ULIB even though it simply states "pay to X."<sup>69</sup> Under the UCC, if an instrument is negotiable save for lacking "order of," it is governed by all of the rules of Article III except that there can be no holder in due course.<sup>70</sup> As a matter of practical significance, by making all instruments "payable to the order of X," one would eliminate at least this impediment to negotiability under both the UCC and the ULIB.

**D. Multiple parties:** Both the UCC and the ULIB allow multiple parties as payees while the ULIB further allows multiple parties as makers or drawers.<sup>71</sup> If multiple parties are designated in the alternative, rights may be exercised by any of the parties.<sup>72</sup> If multiple parties are designated in conjunction, rights may be exercised only by all.<sup>73</sup> If an instrument is payable to A and/or B, the UCC states that the instrument is payable in the alternative to A, or to B, or to A and B together.<sup>74</sup> The ULIB does not provide a construction for an instrument payable to A and/or B.

**E. Completion of an incomplete instrument:** Under the ULIB, the possessor of an instrument, which contains requisite words of internationality and is signed by the maker or drawer, but which lacks an element of requisite form and/or content, shall be presumed to have authority from such maker or drawer to insert such elements, thereby rendering the instrument negotiable.<sup>75</sup> When an incomplete instrument is completed in a manner otherwise than within the authority given, the lack of authority is no defense against a holder who takes without knowledge of the lack of authority.<sup>76</sup> Under the UCC, there is no presumption that a possessor of an instrument has the authority to complete an incomplete instrument, but when the instrument is completed in accordance with the authority given, it is effective as completed.<sup>77</sup> The liability on the instrument is contractual in nature.<sup>78</sup> If a holder or his agent makes an unauthorized completion which is fraudulent and material, *i.e.*, changes the contract of any party in any respect,<sup>79</sup> except as against a subsequent holder in due course, this act discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense.<sup>80</sup> Thus, lack

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<sup>68</sup> UCC § 3-204(2).

<sup>69</sup> ULIB art. 1, Comment 8.

<sup>70</sup> UCC § 3-805.

<sup>71</sup> Compare UCC § 3-116 with ULIB art. 10.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> UCC § 3-116.

<sup>75</sup> ULIB art. 11(1).

<sup>76</sup> ULIB art. 11(2). ULIB art. 6 defines knowledge as actual knowledge, or the absence thereof due to one's own gross negligence or if the holder has been informed of a fact of if the fact appears on the face of the instrument.

<sup>77</sup> UCC § 3-115(1).

<sup>78</sup> J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE, § 13-6, at 408 (1972).

<sup>79</sup> UCC § 3-407(1).

<sup>80</sup> UCC § 3-407(2)(a). However, § 3-407(2)(b) states "no other alteration discharges any party

of knowledge by the holder is not the determining factor under the UCC in avoiding discharge of parties whose contracts have been changed; instead the critical factor is whether a person may assert that the party whose liability such person is seeking to establish is precluded from arguing that the completion was unauthorized.<sup>81</sup>

#### IV. PROCESS OF TRANSFER AND NEGOTIATION

Although neither the UCC nor the ULIB statutorily defines transfer, Comments to the ULIB describe transfer as similar in consequence to an assignment.<sup>82</sup> Comments to the UCC suggest a similar meaning for the term.<sup>83</sup> Under both the UCC and the ULIB the consequence of a transfer is to vest in the transferee the proprietary right to the instrument as well as such rights as the transferor had against parties who signed the instrument.<sup>84</sup>

Negotiation is a special type of transfer in such form that the transferee becomes a holder.<sup>85</sup> A holder in turn may become what is synonymously referred to as a protected holder under the ULIB or a holder in due course under the UCC<sup>86</sup> (hereinafter referred to by the name each statutory scheme uses). Under the UCC, a transferee can become a holder only if that person takes by negotiation or satisfies its definition of a holder.<sup>87</sup> Negotiation of an instrument payable to bearer is effected by delivery of the instrument to the transferee.<sup>88</sup> An instrument payable to the order of a specific payee is negotiated by delivery of the instrument plus any necessary indorsement.<sup>89</sup> An indorsement is necessary to the extent that negotiation requires it and it can only be made by the holder or his agent.<sup>90</sup> Section 1-201(20) of the UCC defines a holder as a person who possesses an instrument drawn to him or to bearer. Implicit in the UCC definition is the fact that the holder must take the instrument with a complete chain of necessary indorsements. If a necessary indorsement is left off or unauthorized (including forgery) in the absence of an estoppel against a

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and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given." Comment 3(c) to UCC § 3-407 says "or is precluded from asserting the defence" is added to recognize the possibility of estoppel or other defences not resting on assent.

<sup>81</sup> A preclusion might be available to one of the designated beneficiaries under UCC § 3-406 if the drawer negligently contributed to the unauthorized completion and the other requirements of § 3-406 were met. Similarly a preclusion might be based on an estoppel principle under § 3-104 under the proper circumstances.

<sup>82</sup> ULIB art. 12, Comment 1.

<sup>83</sup> UCC § 3-201.

<sup>84</sup> Compare ULIB art. 12, Comment 1 with UCC § 3-201.

<sup>85</sup> Compare UCC § 3-202(1) with ULIB art. 13(2).

<sup>86</sup> Compare ULIB art. 5(9) with UCC § 3-302.

<sup>87</sup> UCC § 3-202, Comment 1.

<sup>88</sup> UCC § 3-202(1).

<sup>89</sup> UCC § 3-202(1), (2). The ULIB begins "indorsement" with an "e" and the UCC with an "i". For the sake of uniformity, "indorsement" will be spelled according to the UCC version except in direct quotations from the ULIB.

<sup>90</sup> UCC § 3-202(2).

party to the instrument, no party subsequent to the unauthorized indorsement can become a holder.<sup>91</sup>

Under the UCC, a restrictive indorsement is one which is conditional, (e.g., "pay on the arrival of the goods") or purports to prohibit further transfer, or is for collection, or is for the benefit of some person.<sup>92</sup> After a restrictive indorsement, the instrument may still be negotiated.<sup>93</sup> Except for an intermediary bank,<sup>94</sup> a transferee of an instrument bearing a conditional indorsement or an indorsement for collection can become a holder in due course as long as value is given consistent with the restrictive indorsement and the other requirements for holder in due course status are met.<sup>95</sup> Although the UCC permits a transferee subsequent to a conditional indorsement to become a holder<sup>96</sup> with further prospects of becoming a holder in due course, the requirement of giving value consistent with the indorsements suggests that the condition must be fulfilled in order for the transferee to become a holder. A restrictive indorsement purporting to prohibit further transfer can not prevent further negotiation.<sup>97</sup> Finally, when an indorsement conveys less than the entire instrument, negotiation does not occur and the transferee can not become a holder.<sup>98</sup>

To become a holder in due course, a holder must take the instrument for value, in good faith, and without notice that the instrument is overdue or has been dishonored and without notice of any defense or claim to the instrument on the part of any person.<sup>99</sup>

The ULIB is similar to the UCC in that a transferee becomes a holder if he takes the instrument by negotiation or if he is the payee or indorsee of an instrument and is in possession of the instrument.<sup>100</sup> However, the ULIB prohibits issuance of an instrument made payable to bearer,<sup>101</sup> but subsequent to issuance, an instrument payable to the order of a specific person may be converted to a bearer instrument. Such a converted instrument is negotiated in the same manner as under the UCC.<sup>102</sup> Further, under the ULIB an unauthorized or forged indorsement does not prevent negotiation of the instrument to a holder, provided the holder is without knowledge of such indorsement and the instrument bears an uninterrupted series of indorsements.<sup>103</sup>

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<sup>91</sup> This conclusion is drawn from reading UCC § 3-404 together with UCC § 3-202.

<sup>92</sup> UCC § 3-205.

<sup>93</sup> UCC § 3-206(1).

<sup>94</sup> UCC § 4-105(c) defines an intermediary bank as "any bank to which an item is transferred in the course of collection except the depositary bank or payor bank."

<sup>95</sup> UCC § 3-206(3), (4).

<sup>96</sup> UCC § 3-206(3).

<sup>97</sup> UCC § 3-206(1), Comment 2.

<sup>98</sup> UCC § 3-202(3).

<sup>99</sup> UCC § 3-302(1).

<sup>100</sup> ULIB art. 5(6). A transferee is not vested with his transferor's rights if he is a protected holder, if the transferee has participated in a transaction giving rise to a claim or defense to the instrument. ULIB art. 25(2).

<sup>101</sup> ULIB art. 1(2)(b), (3)(b).

<sup>102</sup> ULIB art. 13(1)(b), (1)(a).

<sup>103</sup> ULIB art. 22(1).

While the ULIB does not define restrictive indorsements, it does deal with indorsements which are substantially the equivalent, although it treats them differently than does the UCC. A restrictive indorsement which prohibits further transfer may be negotiated only for collection,<sup>104</sup> and a restrictive indorsement purporting to negotiate an instrument subject to a condition, (e.g., "pay on the arrival of the goods,") is negotiable irrespective of whether the condition is fulfilled.<sup>105</sup> After an indorsement for collection, the indorser shall not be liable on the instrument to any subsequent holder.<sup>106</sup> This concept is intended to prevent a subsequent holder from acting inconsistently with the terms of the indorsement.<sup>107</sup> Thus, this provision effects the same result as the UCC provisions relating to indorsements for collection. The theory underlying this rule is that the purpose of the indorsement for collection is to collect the instrument for the indorser and not from him.<sup>108</sup> Therefore, under the ULIB, an indorsement for collection resembles an indorsement without recourse.<sup>109</sup>

The ULIB protects a transferee who is a holder of a negotiable instrument which is complete, regular, and not overdue on its face. However, the holder must be without knowledge of any claims or defenses affecting the instrument or of the fact that it has been dishonored.<sup>110</sup> Knowledge means actual knowledge.<sup>111</sup> The drafters of the ULIB have referred to the Working Group the question of possibly expanding the definition of knowledge to include constructive knowledge based on negligence and knowledge once possessed but forgotten at the time the transferee acquired the instrument.<sup>112</sup> In contrast with the UCC, the ULIB does not require that a holder give value to become a protected holder, nor is the good faith requirement of the UCC necessary.<sup>113</sup>

#### V. CONSEQUENCES OF NEGOTIATION

The primary consequences flowing from the negotiation of an instrument, as compared with the transfer of an instrument, are that a holder in due course or protected holder is created, the finality principle becomes applicable, and certain procedural advantages result.

A holder in due course cuts off all claims<sup>114</sup> to the instrument and all defenses of a party with whom he has not dealt, except certain "real defenses."<sup>115</sup> Thus,

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<sup>104</sup> ULIB art. 16.

<sup>105</sup> ULIB art. 17.

<sup>106</sup> ULIB art. 20.

<sup>107</sup> *Id.*, Comment 3.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*, example B. An indorsement without recourse has the effect of excluding or limiting the liability of the party making such a stipulation on the instrument. ULIB art. 31.

<sup>110</sup> ULIB art. 5(9).

<sup>111</sup> ULIB art. 6, Comment 1.

<sup>112</sup> *Id.*

<sup>113</sup> UCC § 3-302(1)(b).

<sup>114</sup> UCC § 3-305(1).

<sup>115</sup> In UCC § 3-305(2), the real defenses are described as infancy to the extent that it is a defense to a simple contract; such other incapacity, or duress or illegality of the transaction as

common commercial defenses such as failure of consideration, nonperformance of any condition precedent, nondelivery, or fraud in the inducement are not available against a holder in due course.<sup>116</sup> A protected holder cuts off all claims to the instrument,<sup>117</sup> all defenses by anyone except defenses which render the obligation of a party null and void according to "applicable national law,"<sup>118</sup> and any defense of discharge or absence of liability on the ground that the instrument was dishonored by nonacceptance or by nonpayment or was not duly protested.<sup>119</sup> The stipulation of the ULIB that the obligation of a party is to be rendered null and void according to applicable national law raises doubt as to whether all of the "real defenses" would be available against a protected holder. For example, infancy, a "real defense" under the UCC, merely renders the obligation voidable under the ULIB.<sup>120</sup> Similarly in the United States, the law of each state determines whether incapacity, duress, or illegality is a real defense which would render the obligation a nullity.<sup>121</sup> Furthermore, there is no express provision in the UCC that fraud in the factum renders the obligation null and void. With regard to the defense of discharge, Comments to the ULIB indicate that the freedom of the protected holder against the defense of discharge is the same as that of the holder in due course and neither may have notice of a discharge upon taking the instrument.<sup>122</sup>

The finality principle asserts that payment or acceptance by the drawer is final in favor of a holder in due course or a person who in good faith has changed his position in reliance on the payment.<sup>123</sup> This rule has two limitations under the UCC. First, prior to its midnight deadline<sup>124</sup> or before final payment occurs, whichever is first, a payor bank may recover a payment improperly paid on a demand instrument if it returns the instrument or sends notice of dishonor to the party making presentment.<sup>125</sup> A payor bank is a bank on which an instrument is payable as drawn or accepted.<sup>126</sup> Final payment by a payor bank takes place when any one of the following events first occurs: (1) the instrument is paid in cash; (2) the instrument is settled<sup>127</sup> by the payor

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renders the obligation of a party a nullity; non-negligent fraud in the factum; discharge in insolvency proceedings; and any other discharge of which the holder has notice when he takes the instrument.

<sup>116</sup> UCC § 3-306.

<sup>117</sup> ULIB art. 25(1)(a).

<sup>118</sup> ULIB art. 25(1)(b) and art. 25, Comment 2.

<sup>119</sup> ULIB art. 25(1)(c).

<sup>120</sup> UCC § 3-305, Comment 4.

<sup>121</sup> *Id.*, Comment 5. See J. WHITE & R. SUMMERS, *supra* note 78, at 488-89.

<sup>122</sup> ULIB art. 25, Comment 3.

<sup>123</sup> Compare UCC § 3-418 with ULIB art. 22.

<sup>124</sup> UCC § 4-104(h) defines midnight deadline as midnight on the next banking day following the banking day on which the bank receives the relevant item or notice or from which the time for taking action commences to run, whichever is later.

<sup>125</sup> UCC §§ 3-418, Comment 5, 4-301(1).

<sup>126</sup> UCC § 4-105(b).

<sup>127</sup> UCC § 4-104(j).

without the payor reserving a right to revoke the settlement and without having such right by statute,<sup>128</sup> clearinghouse rule, or agreement; (3) the instrument is posted to the account of the person to be charged; (4) a provisional settlement for the instrument is made and the settlement is not revoked in the time and manner permitted by statute, clearinghouse rule, or agreement.<sup>129</sup> Second, the finality principle is inapplicable if any presentment warranty<sup>130</sup> is violated.<sup>131</sup>

Under the ULIB, payment by the drawee is final.<sup>132</sup> Thus, legal relations between the drawee and drawer, payee and drawer, the indorsers between themselves, and between the drawee and person receiving payment are settled in a final way.<sup>133</sup> As the ULIB does not mention bank collection procedures, limitations on the finality principle which stem from bank collection procedures are derived from national law. Therefore a negotiable instrument drawn subject to the ULIB and paid by a payor bank in the United States would be subject to the rule allowing a payor bank to recover improperly made payments prior to its midnight deadline or before final payment is made, whichever is first. The ULIB expressly limits the finality principle in one respect: "where an endorsement was forged or signed by an agent without authority, the drawer or the maker or the person whose endorsement was forged or was signed by an agent without authority shall have against the forger or such agent and against the person who took the instrument from the forger or from such agent the right to recover compensation for any damage that he may have suffered because of the operation of . . ."<sup>134</sup> the rule that a forged or unauthorized indorsement

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<sup>128</sup> UCC § 4-301 gives such a right before the midnight deadline.

<sup>129</sup> UCC § 4-213(1).

<sup>130</sup> UCC § 3-417(1). Presentment warranties are defined as follows:

(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 of 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.

<sup>131</sup> UCC § 3-418.

<sup>132</sup> ULIB art. 22, Comment 11.

<sup>133</sup> *Id.*

<sup>134</sup> ULIB art. 22(2).

does not preclude a transferee from becoming a holder if at the time of acquiring the instrument he is without knowledge of the forged or unauthorized indorsement and an uninterrupted series of endorsements appear on the instrument.<sup>135</sup> Although the ULIB states that this is the only limitation to the finality principle,<sup>136</sup> another restricted set of limitations does exist: (1) any person who pays an instrument in which the amount has been altered and who is without knowledge of the alteration at the time of payment may recover the amount of the alteration from the party who altered the instrument and from any subsequent party who had knowledge of the alteration when he transferred or negotiated the instrument; (2) any person who pays an instrument which has been altered in such a way as to modify the written undertaking of any party to the instrument, other than by an alteration of the amount, provided the person paying has no knowledge of the alteration, may recover the amount paid from the person who altered the instrument or from any subsequent party who had knowledge of the alteration when he transferred or negotiated the instrument; and (3) any person who pays an instrument in which the signature of the maker or drawer has been forged, without knowledge of such forgery, may recover the amount from the forger or from any party subsequent to the maker or drawer who had knowledge of such forgery.<sup>137</sup>

Under the UCC, a procedural advantage in the form of a summary recovery on the instrument accrues to a party who produces an instrument and claims payment, unless the genuineness of signatures is specifically denied by the party to be charged for payment.<sup>138</sup> Although the person claiming on the instrument must prove the genuineness of the signatures, a presumption of genuineness operates in his favor if the signature is by someone who is alive and competent; if the party who produced the instrument establishes the signature, he is entitled to recover unless the defendant establishes a defense.<sup>139</sup> Similarly, the ULIB provides that every holder is presumed to be protected and a defense must be established before a holder is required to establish that he is protected.<sup>140</sup>

## VI. RIGHTS AND LIABILITIES OF THE PARTIES

*A. Principal-Agent:* Under both the UCC and the ULIB, liability on an instrument does not arise until a person signs the instrument.<sup>141</sup> Although liability is statutory, the UCC characterizes the liability as contractual.<sup>142</sup> Both systems provide that an agent's signature on the instrument is binding upon his principal when the agent is acting within his authority and his representative

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<sup>135</sup> ULIB art. 22(1).

<sup>136</sup> ULIB art. 22, Comment 11.

<sup>137</sup> ULIB art. 73(1), (2), (3).

<sup>138</sup> UCC § 3-307.

<sup>139</sup> *Id.*

<sup>140</sup> ULIB art. 26.

<sup>141</sup> Compare UCC § 3-401(1) with ULIB art. 27(1).

<sup>142</sup> J. WHITE & R. SUMMERS, *supra* note 78, at 408.

capacity appears on the instrument.<sup>143</sup> When neither the principal's name nor the agent's representative capacity appears on the instrument, the agent's signature personally binds the agent.<sup>144</sup> Under those circumstances, the UCC provides that parol evidence is inadmissible to negate the agent's personal liability.<sup>145</sup> However parole evidence is admissible to modify the agent's personal liability when either the principal's name or the agent's representative capacity is on the instrument but the other is missing.<sup>146</sup> Where both elements are present but separated, the UCC appears to allow parol evidence to clarify the relationship.<sup>147</sup> The ULIB is silent on the availability or non-availability of parol evidence under the foregoing circumstances.

*B. Drawer, Maker, and Indorser;* Under the UCC, upon dishonor of a bill of exchange and any necessary notice of dishonor or protest the drawer of the bill is contractually obligated to pay the amount of the bill to the holder or to any indorser who takes it up.<sup>148</sup> A maker engages to pay a promissory note according to its tenor at the time of his engagement or as completed pursuant to the rules regarding incomplete instruments.<sup>149</sup> The indorser has the same contractual obligation as the drawer.<sup>150</sup> However, by indorsing "without recourse" on the instrument, the indorser may disclaim any liability on the contract of indorsement.<sup>151</sup> Under the ULIB, upon dishonor and any necessary protest, a drawer engages to pay the amount of the bill and any interest and expenses claimable under Article 67(b) or 68 to the holder or any party who is in possession of the bill and who is discharged from liability on the bill under Articles 69(2), 70, 71 and 76.<sup>152</sup> The maker engages to pay to the holder the amount of the note at maturity, and after maturity that amount plus any allowable amount under Article 67(b) or 68.<sup>153</sup> The indorser's contract is the same as that of the drawer.<sup>154</sup>

Although the UCC provides that a forged or unauthorized indorsement precludes further negotiation,<sup>155</sup> the ULIB permits further negotiation of such an instrument.<sup>156</sup> The ULIB further provides that when an agent has forged or

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<sup>143</sup> Compare UCC § 3-403(1) with ULIB art. 30.

<sup>144</sup> Compare UCC § 3-403(2)(a) with ULIB art. 30(3).

<sup>145</sup> UCC § 3-403, Comment 3.

<sup>146</sup> UCC § 3-403(2)(b).

<sup>147</sup> UCC § 3-403(3).

<sup>148</sup> UCC § 3-413(2).

<sup>149</sup> UCC § 3-413(1). For completion of an incomplete instrument see UCC § 3-115 and text Part III, *supra*.

<sup>150</sup> UCC § 3-414(1).

<sup>151</sup> UCC § 3-414, Comment 1.

<sup>152</sup> ULIB art. 34.

<sup>153</sup> ULIB art. 34B. The ULIB preserves the concept found in the UCC § 3-413 of the primary liability of the maker.

<sup>154</sup> ULIB art. 41. The indorser's liability is secondary as is the drawer's, *i.e.*, it requires notice and protest.

<sup>155</sup> This conclusion is drawn from a reading of UCC § 3-202(1) together with § 3-404(1).

<sup>156</sup> ULIB art. 22(1).



signed an indorsement without authority, the drawer, maker, or the person whose signature was forged or signed without authorization has the right to recover compensation from the forger, agent, or the first taker after such forgery or unauthorized signature for any damages he may have suffered.<sup>157</sup> However, the owner immediately preceding the forgery or unauthorized signature loses his rights to and upon the instrument.<sup>158</sup> Therefore, although it is possible for the first taker after the forgery or unauthorized signature to meet the ULIB's qualifications for protected holder status, he nevertheless takes subject to this statutory right of recovery by the drawer, maker, or other damaged party whose signature was forged without authorization.

If a holder makes a fraudulent and material alteration on an instrument, the UCC provides for the discharge of any party prior to the alteration against any person other than a subsequent holder in due course.<sup>159</sup> A material alteration is an alteration which changes the contract of any party to the instrument in any respect.<sup>160</sup> Negligence by a person may operate to preclude this defense of discharge in either the unauthorized signature or material alteration situation, but assertion of the negligence argument is confined to specific parties and circumstances.<sup>161</sup> Under the ULIB, a party who signed the instrument prior to the material alteration is still liable according to the original tenor of the instrument.<sup>162</sup> Again a material alteration is an alteration which changes the contract of any party to the instrument in any respect.<sup>163</sup> If the party himself made or assented to the alteration, he shall be liable according to the altered text;<sup>164</sup> and if the party through his own negligent conduct facilitated the material alteration, he shall be liable to a holder who is without knowledge<sup>165</sup> of the alteration according to the form of the altered text.<sup>166</sup> The ULIB does not provide that such negligence could affect the seemingly absolute right of these parties to recover the original amount of the instrument from the first taker after a forgery or unauthorized signature.

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<sup>157</sup> ULIB art. 22(2).

<sup>158</sup> ULIB art. 22, Comment 8.

<sup>159</sup> UCC § 3-407(2)(a).

<sup>160</sup> UCC § 3-407(1).

<sup>161</sup> UCC § 3-406. First the preclusion against the defense of discharge when a material alteration occurs is available only in favor of a holder in due course, the drawer, or other payor. Second, more than ordinary negligence may be required of the drawer where he allegedly facilitated a material alteration. *Commonwealth v. National Control Bank*, 10 UCC REP. SERV. 1421 (1972). Third, the party asserting the preclusion must have paid in accordance with reasonable commercial practices. However, UCC 3-404, Comment 4 provides the possibility of an estoppel argument against denial of a signature where negligence was involved. *Coopers v. Union Bank*, 9 Cal.3d 371, 107 Cal. Rptr.1, 507 P.2d 609 (1973). Fourth, the negligence of the person must substantially contribute to the material alteration or unauthorized signature. Fifth, the alteration must be material.

<sup>162</sup> ULIB art. 29(1)(b).

<sup>163</sup> ULIB art. 29(2).

<sup>164</sup> ULIB art. 29(1)(b)(i).

<sup>165</sup> ULIB art. 11(2).

<sup>166</sup> ULIB art. 29(1)(b)(ii).

*C. Drawee-Acceptor:* Both the ULIB and the UCC operate on the principle that drawing a bill does not in itself effect an assignment of funds in the hands of the drawee.<sup>167</sup> Thus, the drawee, who is the addressee of the drawer's order, is not liable on the instrument to a holder even though he arbitrarily dishonors the bill.<sup>168</sup> The drawee becomes liable on the instrument when he accepts the bill, and only drawees may accept a bill.<sup>169</sup> The signature of the drawee on the instrument and notification of the acceptance to the holder constitute an acceptance.<sup>170</sup> When the drawee accepts, he engages to pay the instrument according to its tenor at the time of his engagement or as completed, pursuant to the rules on completing incomplete instruments.<sup>171</sup> Under the ULIB, a similar engagement is made to pay the amount of the bill at maturity, and after maturity the amount plus any interest and expenses claimable under Article 67(b) or 68.<sup>172</sup>

Both the UCC and the ULIB provide for general and "qualified or conditional" acceptance.<sup>173</sup> The UCC and the ULIB use the terms "qualified or conditional" to mean an acceptance varying the terms of the bill.<sup>174</sup> The holder may treat a "qualified or conditional" acceptance as a dishonor of the bill.<sup>175</sup> When a holder takes a "qualified or conditional" acceptance, unless the drawer or indorser or, under the ULIB, the guarantor, affirmatively assents, he is discharged from liability on the instrument.<sup>176</sup> One major qualification under the ULIB is that a holder may not refuse an acceptance of part of the amount of the bill, but he may treat the bill as dishonored as to the amount not accepted,<sup>177</sup> and the drawer, indorser, or guarantor may not be discharged when the holder takes a partial acceptance under these circumstances.<sup>178</sup> The Working Group is studying the possibility of treating an acceptance which varies the place for payment in the same manner as a partial acceptance.<sup>179</sup> The UCC, provides that an acceptance does not become qualified by virtue of the fact that the acceptance names a place or particular bank as the location for payment in the United States, unless the instrument must be presented only at such location.<sup>180</sup> The ULIB states simply that an acceptance varying the place for payment is a qualified acceptance.<sup>181</sup>

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<sup>167</sup> Compare UCC § 3-409 with ULIB art. 35(2).

<sup>168</sup> Compare J. WHITE & R. SUMMERS, *supra* note 78, at 410 with ULIB art. 35, Comment 1.

<sup>169</sup> Compare UCC §§ 3-401, 3-410 with ULIB art. 37, Comment, art. 35(1).

<sup>170</sup> Compare UCC § 3-410, Comment 3 with ULIB art. 37.

<sup>171</sup> UCC § 3-413(1).

<sup>172</sup> ULIB art. 36.

<sup>173</sup> Compare UCC §§ 3-410, 3-412 with ULIB art. 39.

<sup>174</sup> *Id.*

<sup>175</sup> Compare UCC § 3-412(1) with ULIB art. 40(1).

<sup>176</sup> Compare UCC § 3-412(3) with ULIB art. 40(2).

<sup>177</sup> ULIB art. 40(3).

<sup>178</sup> ULIB art. 40.

<sup>179</sup> ULIB art. 40(2).

<sup>180</sup> UCC § 3-412(2).

<sup>181</sup> ULIB art. 39(3).

The UCC elaborates on the possibility of drawee liability on the instrument under circumstances which do not meet the requirements of a written acceptance. For example, words of assignment appearing in other facts may be a basis for an assignment of funds.<sup>182</sup> Under the ULIB, a drawee is assured that if he pays a person known to him to be the authentic payee or indorsee, his payment will discharge him of his obligation on the instrument.<sup>183</sup> There is no provision, as under the UCC, for conversion liability where the drawee refuses to return an instrument to the rightful owner or pays on a forged indorsement.<sup>184</sup>

*D. Negotiator or Transferor:* The UCC provides that any person, who for consideration transfers an instrument by indorsement to any subsequent holder who takes the instrument in good faith, warrants to his transferee that he has good title, that all the signatures are genuine, that the instrument is not materially altered, that no defense of any party is good against him, and that he has no knowledge of any insolvency proceeding instituted against the maker, drawer, or acceptor.<sup>185</sup>

The ULIB does not incorporate the concept of warranties. It does provide that:

any person who negotiates an instrument shall be liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to the negotiation (a) A signature on the bill or note was forged or unauthorized; or (b) The instrument was materially altered; or (c) A party has a valid claim or defence (sic); or (d) The bill is dishonored by non-acceptance or non-payment.<sup>186</sup>

The holder seeking damages must have taken the instrument without knowledge of such defects.<sup>187</sup> Damages include any liability on the instrument that a holder may incur to a subsequent holder as well as his inability to recover payment from the proper payee.<sup>188</sup>

*E. Guarantor:* Under the ULIB, by using words on the instrument such as "guaranteed", "aval," or "good as aval," or words of similar meaning, any person may guarantee payment in whole or in part in favor of a specified party.<sup>189</sup> If no party is specified as the beneficiary of the guarantee, then the drawer or maker is guaranteed.<sup>190</sup> The guarantor is liable on the instrument to the same extent as the party for whom he has become guarantor, unless otherwise stipulated on the instrument.<sup>191</sup> Thus, if the party guaranteed is the drawer

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<sup>182</sup> UCC § 3-409, Comment 1.

<sup>183</sup> ULIB art. 22, Comment 16.

<sup>184</sup> UCC § 3-419.

<sup>185</sup> UCC § 3-417(2).

<sup>186</sup> ULIB art. 42(1).

<sup>187</sup> ULIB art. 42(2).

<sup>188</sup> ULIB art. 42, Comment 1.

<sup>189</sup> ULIB art. 43.

<sup>190</sup> *Id.*

<sup>191</sup> ULIB art. 44(1).

or indorser, the guarantor is not liable on the bill if the bill was not duly presented for payment.<sup>192</sup> The bill must be presented for payment to trigger liability of the drawer and indorser on the instrument.<sup>193</sup> If the party guaranteed is discharged or has a defense to his liability on the instrument, the guarantor is similarly discharged or has the same defense available to him.<sup>194</sup> The guarantor is liable on the instrument even when the party for whom he has guaranteed is not liable on the instrument, unless the guaranteed party's freedom from liability is apparent on the face of the instrument.<sup>195</sup> For example, a drawer may lack capacity or his signature may be forged with the result that he incurs no liability on the bill; yet the guarantor is still liable in each case because non-liability is not evident on the instrument.<sup>196</sup> The key to understanding the liability of the guarantor within the framework of the ULIB is the distinction between no liability having arisen on the instrument and liability which has arisen on the instrument but which has been discharged. Unlike the ULIB a guarantor under the UCC guarantees payment of the instrument generally and not payment by a specified party.<sup>197</sup> An accommodation party under the UCC is a surety for another party to the instrument.<sup>198</sup> Thus, a guarantor under the ULIB appears to embrace the concept of a guarantor and accommodation party under the UCC collectively. But this is not so because suretyship law appears not to be available to guarantors under the ULIB. The ULIB provides that a guarantor is liable on the instrument even when the party for whom he guarantees is not liable, unless that party's lack of liability is apparent on the face of the instrument.<sup>199</sup>

*F. Holder and Protected Holder or Holder in Due Course:* A holder who is not a protected holder under the ULIB or a holder in due course under the UCC takes subject to any valid claim to the instrument and any defense of any party which would be available on a simple contract.<sup>200</sup> Under the ULIB, a party may not avoid liability to a holder, nor may a holder avoid liability to a subsequent party, on the ground that a third person has a claim to the instrument, unless such third person has himself claimed the instrument from the holder and has informed the party thought to be liable on the instrument.<sup>201</sup>

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<sup>192</sup> ULIB art. 44, Comment 1.

<sup>193</sup> ULIB art. 52(1).

<sup>194</sup> ULIB art. 44, Comment 1.

<sup>195</sup> ULIB art. 44(2).

<sup>196</sup> ULIB art. 44, Comment 2.

<sup>197</sup> UCC § 3-416(1). The liability of a person who guarantees under the UCC becomes indistinguishable with that of a co-maker and he waives any right to presentment and notice of dishonor. UCC § 3-416(5).

<sup>198</sup> UCC § 3-415.

<sup>199</sup> Dohm, *Draft Uniform Law on International Bills of Exchange and International Promissory Notes*, 21 AM. J. COMP. L. 474, 503 (1973). Dohm concludes that an accommodation party under the UCC is in a position of greater safety than a guarantor under the ULIB because while a guarantor is jointly and severally liable under ULIB Art. 33, he does not have the defense available to the accommodation party.

<sup>200</sup> Compare ULIB art. 24 with UCC § 3-306.

<sup>201</sup> *Id.*

The UCC provides that the claim of a third person is not available as a defense to a party liable on the instrument unless the third person defends the action for such party.<sup>202</sup> The rights of the protected holder and holder in due course have been contrasted in the section on consequences of negotiation.

*G. Example of an application of the preceding principles under the UCC and the ULIB in relation to the allocation of losses following a forgery and material alteration of a negotiable instrument:* If Drawer makes payment to Payee in the form of a bill drawn on Drawee, and the bill is stolen by Thief, materially altered as to amount and Payee's indorsement forged, then transferred by Thief to Innocent Taker who, having no knowledge of the wrong doing, transfers to Transferee who presents to Drawee whereupon final payment is made, the following consequences obtain:

(1) The UCC would not discharge Drawer of liability on the instrument. Thus, Payee would have a conversion claim against the Drawee, and retain a claim for the underlying obligation against Drawer. Drawee, would by a combination of presentment and transfer warranties place the ultimate loss on Thief, or in his absence, the first taker, Innocent, for the entire amount of the instrument, assuming no negligence on Payee's part. In the event of the insolvency of Innocent Taker, the loss would fall on Transferee, reached via transfer warranties.

(2) Under the ULIB, if Drawer were non-negligent, he would satisfy his liability by a charge to his account in the original amount by Drawee. Drawee would discharge his liability on the instrument by payment. Rather than a conversion claim against Drawee, Payee has a right of action against Thief, or Innocent Taker, for the original amount of the instrument. Drawee has a claim for the amount of the alteration against Thief or any subsequent party with knowledge of the alteration. Negotiator's liability does not come into play since Transferee's presentment to Drawee did not constitute a negotiation. If Innocent Taker is insolvent, the loss attributed to the original amount of the instrument would be borne by Payee since his statutory right is confined to the first taker. Whether Innocent Taker is insolvent or not, Drawee would bear the loss attributable to the amount of the alteration, since all parties subsequent to the Thief had no knowledge of the alteration.

Thus, some conclusions may be drawn in respect to the loss allocation system of the ULIB and the UCC. A provision for a conversion action by the proper payee against the drawee has been omitted by the ULIB in favor of a direct action by the payee against the thief or first taker for the original amount of the instrument. In theory, both the UCC and the ULIB attempt to place the loss, at least for the original amount of the instrument, on the first taker, if the thief can not be found. The UCC and the ULIB differ as to who must assert such liability. The UCC requires the drawee to reach the first taker via presentment and transfer warranties. If there is more than one party to the instrument after the theft and material alteration, the drawee has, in effect, a class of

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<sup>202</sup> UCC § 3-306.

parties against whom to seek liability. The ULIB requires the proper payee to assert the liability rather than the drawee, and he is limited to asserting such liability against the thief and the first taker. The UCC allows the drawee to recover the entire amount of the instrument as altered, whereas the ULIB forces the drawee to suffer the loss attributable to the alteration. Finally, if the first taker, is insolvent the UCC provides for the ultimate loss to fall on the first solvent transferee after the taking. If the first taker is insolvent the ULIB causes the loss attributable to the alteration to fall on the drawee and the loss attributable to the original amount of the instrument to fall on the proper payee. There is always the possibility that American courts would allow a conversion action in addition to the statutory scheme under the ULIB. In that case, what might have been an otherwise unsatisfactory scheme of loss allocation from the payee's standpoint, would now be a much more advantageous system of allocating the ultimate loss.

## VII. PRESENTMENT, DISHONOR, RECOURSE

*A. Presentment for Acceptance:* An acceptance is the drawee's signed engagement to honor the draft.<sup>203</sup> Under the UCC, a bill must necessarily be presented when the bill so provides, or when the date of payment depends on such presentment (for example when a bill is payable at a fixed period after sight), or when the bill is payable elsewhere other than at the residence or place of business of the drawer.<sup>204</sup> Any other bill may be presented at the holder's option if payable at a stated date.<sup>205</sup> The ULIB with two modifications, is in substantial agreement with the UCC regarding the circumstances in which a bill may or must be presented for acceptance. First, the current draft of the ULIB defers to its Working Group for further study the consequences of the requirement of making presentment for acceptance necessary if the bill is payable elsewhere than at the residence or place of business of the drawer.<sup>206</sup> Second, optional presentment for acceptance may be made not only on instruments payable at a stated date, but also on instruments payable on demand.<sup>207</sup> However, the consequences that flow from the failure to make a necessary presentment for acceptance are different under the ULIB and UCC. If presentment is necessary because the bill so provides under the ULIB, only the party (drawer, indorser, or guarantor) who stipulates that presentment for acceptance is necessary is not liable on the instrument if presentment is not made.<sup>208</sup> The ULIB further provides that the drawer, indorsers, and guarantors, inclusively, shall have no liability on the instrument if any of the other enumerated circumstances make presentment for acceptance necessary and such present-

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<sup>203</sup> Compare UCC § 3-410(1) with ULIB art. 37.

<sup>204</sup> UCC § 3-501(1)(a).

<sup>205</sup> *Id.*

<sup>206</sup> ULIB art. 46(1)(c).

<sup>207</sup> ULIB art. 46(2).

<sup>208</sup> ULIB art. 46, Comments.

ment is not made.<sup>209</sup> Under the UCC, any indorser except one who indorsed the instrument after maturity<sup>210</sup> is automatically discharged of liability on the instrument when a necessary presentment is delayed beyond the time when it is due.<sup>211</sup> A drawer or acceptor of a draft payable at a bank or the maker of a note payable at a bank is discharged only if he has been deprived of funds because of the insolvency of the bank during the delay in presentment.<sup>212</sup>

Considerable differences exist between the ULIB and UCC concerning the time within which presentment must be made, the conditions for an excused delay in presentment, and the conditions under which presentment is entirely excused. When a bill is drawn payable at a fixed period after sight, the ULIB requires that presentment be made within a year of the date of the instrument.<sup>213</sup> The UCC requires presentment be made within a reasonable time after its date or issue whichever is later.<sup>214</sup> Both the UCC and the ULIB require that presentment for acceptance must occur before maturity if the instrument is payable on a stated date or a fixed period thereafter.<sup>215</sup> Finally, the UCC includes a catchall provision concerning presentment for acceptance of other instruments. It states that presentment is due within a reasonable time after the drawer or indorser becomes liable on the instrument.<sup>216</sup> The ULIB does not provide this degree of flexibility. The UCC but not the ULIB, provides for an excused delay in presentment for acceptance, if a party is without notice that the bill is due or the delay is caused by circumstances beyond his control and he exercises reasonable diligence to present after the delay ceases.<sup>217</sup> Both systems provide for conditions under which a presentment for acceptance is entirely excused. The UCC excuses presentment for acceptance: (1) when the maker, drawer, or drawee of any instrument except a documentary draft is dead or in insolvency proceedings after issue of the instrument;<sup>218</sup> (2) when acceptance is refused but not for lack of a proper presentment;<sup>219</sup> (3) when the party to be charged has waived such presentment expressly.<sup>220</sup> If the waiver is in the body of the instrument, the waiver is binding on all<sup>221</sup> but if the waiver appears above an indorsement it is binding solely on the indorser;<sup>222</sup> (4) when the party to be charged has himself dishonored the instrument or counter-

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<sup>209</sup> ULIB art. 50(2).

<sup>210</sup> UCC § 3-501(4).

<sup>211</sup> UCC § 3-502(1)(a).

<sup>212</sup> UCC § 3-502(1)(b).

<sup>213</sup> ULIB art. 48(f).

<sup>214</sup> UCC § 3-503(1)(b). UCC § 3-503(2) states that reasonable time is determined by the nature of the instrument, usage of banking or trade and the facts of the particular case.

<sup>215</sup> Compare UCC § 3-503(1)(a) with ULIB art. 48(e).

<sup>216</sup> UCC § 3-503(1)(c).

<sup>217</sup> UCC § 3-511.

<sup>218</sup> UCC § 3-511(3)(a).

<sup>219</sup> UCC § 3-511(3)(b).

<sup>220</sup> UCC § 3-511(2)(a).

<sup>221</sup> UCC § 3-511(6).

<sup>222</sup> *Id.*

manded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid;<sup>223</sup> (5) when by reasonable diligence presentment can not be made;<sup>224</sup> (6) if the party to accept is not at the place specified on the instrument;<sup>225</sup> (7) when protest is waived.<sup>226</sup> The ULIB excuses presentment for acceptance: (1) when the drawer is dead, lacks capacity, or is in the course of insolvency proceedings;<sup>227</sup> (2) when presentment can not be effected within the time limit with an exercise of reasonable diligence;<sup>228</sup> (3) when a party has waived presentment, in respect of such party.<sup>229</sup>

Both the UCC and the ULIB treat the bill as dishonored when a necessary or optional presentment for acceptance is made and refused by the drawee or when the presentment is excused and the instrument is not duly accepted or paid.<sup>230</sup> When the bill is dishonored by non-acceptance, the holder may immediately seek to hold the drawer or indorser (or the guarantor under the ULIB)<sup>231</sup> liable for the amount of the instrument, subject to any necessary notice of dishonor and protest under the UCC<sup>232</sup> and subject to due protest under the ULIB.<sup>233</sup>

**B. Presentment for Payment:** A holder or his agent must present the instrument to the drawee, acceptor, maker or other payor<sup>234</sup> at the place specified in the instrument for payment or, if no place is specified, at the place of business or residence of the person to pay.<sup>235</sup> A holder may present the instrument in person or may, under the UCC but not the ULIB, present the instrument by mail or through a clearinghouse.<sup>236</sup> Under the UCC presentment for payment is a condition precedent to any right of action against the drawer, the indorsers, the acceptor of a bill payable at a bank and the maker of a note payable at a bank.<sup>237</sup> Delay in presentment for payment results in a discharge of these parties' liability in a similar fashion as a delay in presentment for acceptance, *i.e.*, automatically with respect to the indorser, but only if the drawee becomes insolvent during the delay with respect to the other parties.<sup>238</sup> Presentment for payment is not necessary to charge a maker, acceptor,<sup>239</sup> or

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<sup>223</sup> UCC § 3-511(2)(b).

<sup>224</sup> UCC § 3-511(2)(c).

<sup>225</sup> UCC § 3-504(2)(c).

<sup>226</sup> UCC § 3-511(5).

<sup>227</sup> ULIB art. 49(1).

<sup>228</sup> ULIB art. 49(2).

<sup>229</sup> ULIB art. 49(3).

<sup>230</sup> Compare UCC § 3-507 with ULIB art. 51.

<sup>231</sup> Compare UCC § 3-507(2) with ULIB art. 51(2).

<sup>232</sup> UCC § 3-507(2).

<sup>233</sup> ULIB art. 57.

<sup>234</sup> Compare UCC § 3-504(1) with ULIB art. 53(a).

<sup>235</sup> Compare UCC § 3-504(2)(c) with ULIB art. 53(f)(i), (ii), (iii).

<sup>236</sup> UCC § 3-504(2)(a), (b). See ULIB art. 48, Comment 11.

<sup>237</sup> UCC § 3-501(1)(b), (c).

<sup>238</sup> *Id.*

<sup>239</sup> UCC § 3-501, Comment 4.



a guarantor.<sup>240</sup> Under the ULIB, presentment for payment is necessary to render the drawer, indorsers, and their guarantors liable.<sup>241</sup> Presentment for payment is not necessary to render a maker, an acceptor, or their guarantors liable.<sup>242</sup>

As in the case of presentment for acceptance, the greatest variation between the UCC and the ULIB regarding presentment for payment is with respect to the time frame within which a timely presentment must be made, the conditions which give rise to an excused delay, and the conditions in which presentment may be entirely excused.

Differences between the UCC and ULIB regarding when presentment for payment is to be made are as follows: instruments payable on demand may be presented for payment within a reasonable time under the UCC<sup>243</sup> but under the ULIB they must be presented within a year of the date on the instrument or date of issue.<sup>244</sup> An instrument payable on a date specified on the instrument must be presented on that date under the UCC, but the ULIB allows presentment within the two succeeding business days of such date.<sup>245</sup> Although the ULIB Working Group is considering a provision for the acceleration of an instrument, thereby making it immediately payable, it does not specify when presentment of an accelerated instrument is necessary. Under the UCC presentment for payment in the event of acceleration must occur within a reasonable time after acceleration.<sup>246</sup>

Both the UCC and ULIB provide for an excused delay in presentment for payment. The UCC excuses delay if the holder is without notice that presentment for payment is due or if the delay is caused by circumstances beyond the holder's control and he exercises reasonable diligence to present the instrument for payment after the delay ceases.<sup>247</sup> Under the ULIB the delay must be caused by circumstances beyond the control of the holder and presentment must be promptly made after the delay ceases.<sup>248</sup> The Working Group has been charged with defining "prompt" statutorily in terms of days.<sup>249</sup>

The conditions under which presentment for payment may be entirely excused under the UCC are the same as those giving rise to an excused presentment for acceptance, with one additional condition. When a bill is dishonored by nonacceptance, later presentment for payment is excused unless an acceptance has been made in the meantime.<sup>250</sup> The ULIB allows presentment for

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<sup>240</sup> UCC § 3-416(5).

<sup>241</sup> ULIB art. 52(1), (2).

<sup>242</sup> ULIB art. 52(3), Comment 3.

<sup>243</sup> UCC § 3-503(1)(e).

<sup>244</sup> ULIB art. 53(e).

<sup>245</sup> Compare UCC § 3-503(1)(c) with ULIB art. 53(d).

<sup>246</sup> UCC § 3-503(1)(d).

<sup>247</sup> UCC § 3-511(1).

<sup>248</sup> ULIB art. 54(1).

<sup>249</sup> *Id.*

<sup>250</sup> UCC § 3-511(4).

payment to be excused as follows: (1) when a party has waived presentment;<sup>251</sup> (2) on a non-demand instrument when the cause of delay extends beyond thirty days after maturity;<sup>252</sup> (3) on a demand instrument when the cause of delay extends beyond thirty days after the time limit for presentment;<sup>253</sup> (4) when the drawer, acceptor, or maker is in insolvency proceedings after the issue of the instrument in the country where presentment is to be made;<sup>254</sup> (5) when the bill has been protested for dishonor by non-acceptance;<sup>255</sup> (6) regarding the drawer, when the drawee or acceptor is not bound as between himself and the drawer to pay the bill, and the drawer has no reason to believe the bill would be paid if presented.<sup>256</sup>

Under both the ULIB and the UCC dishonor occurs when presentment for payment is made and refused by the drawee or when presentment for payment is excused and the instrument is not paid.<sup>257</sup> Both systems provide that the holder's recourse after a dishonor by non-payment must follow the same pattern of notice and protest as that following a dishonor by non-acceptance.<sup>258</sup>

*C. Dishonor, Notice of Dishonor, and Protest:* As explained in the two previous sections, a dishonor occurs when an instrument is presented to a drawee for acceptance or payment and it is refused or if presentment is excused and the instrument is not duly accepted or paid. In the case of a bill drawn or payable outside of the United States, the UCC requires that the holder protest a dishonor in order to hold the drawer and the indorsers liable on the instrument.<sup>259</sup> An unexcused failure to do so discharges the drawer and indorsers.<sup>260</sup> Protest is optional in any other case,<sup>261</sup> but notice of dishonor is required in addition to any necessary protest on any type of instrument negotiable within Article III to charge an indorser, drawer, or acceptor of a bill or maker of a note payable at a bank.<sup>262</sup> While an unexcused failure to give such notice will always discharge the indorser, it will only discharge the latter three parties if they were damaged as a result of the insolvency of the drawee during the delay of the notice.<sup>263</sup> Under the ULIB a holder must protest a bill dishonored by non-acceptance or non-payment to charge a drawer, indorsers, or the guarantors of either.<sup>264</sup> A holder must protest a note dishonored by non-payment in

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<sup>251</sup> ULIB art. 54(2)(a).

<sup>252</sup> ULIB art. 54(2)(b).

<sup>253</sup> ULIB art. 54(2)(c).

<sup>254</sup> ULIB art. 54(2)(d).

<sup>255</sup> ULIB art. 54(2)(e).

<sup>256</sup> ULIB art. 54(2)(f).

<sup>257</sup> Compare UCC § 3-507 with ULIB art. 56.

<sup>258</sup> *Id.*

<sup>259</sup> UCC § 3-501(3).

<sup>260</sup> UCC § 3-502(2).

<sup>261</sup> UCC § 3-501(3).

<sup>262</sup> UCC § 3-501(2).

<sup>263</sup> UCC § 3-502(1)(b).

<sup>264</sup> ULIB art. 57, Comment 1.

order to hold any indorsers and their guarantors liable on the note.<sup>265</sup> These parties are secondarily liable. An unexcused failure to protest will prevent the liability of secondary parties from arising.<sup>266</sup> A holder does not have to protest dishonor to an acceptor of a bill, a maker of a note, or the guarantor of either in order to charge these parties who are primarily liable.<sup>267</sup> Notice of dishonor must be given to parties who are secondarily liable but failure to do so does not result in the non-liability of parties who are primarily liable; rather it renders the holder liable for any damages caused by lack of notice.<sup>268</sup>

The mechanics of a notice of dishonor are the same under the ULIB and UCC. Notice may be given by or on behalf of the holder or any party who has received notice or any other party who can be compelled to pay the instrument.<sup>269</sup> Notice may be oral or written and be in any terms which identify the instrument and state that it has been dishonored.<sup>270</sup>

The UCC and ULIB differ as to the means by which a protest may be effected. Under the UCC a protest is a certificate of dishonor made by a United States consul, vice consul, notary public or other person authorized to certify dishonor by the law of the place where dishonor occurs.<sup>271</sup> The protest must identify the instrument and certify either that presentment was made or the reason why it was excused and that it has been dishonored.<sup>272</sup> The ULIB provides for a simplified form of protest and an "authenticated protest."<sup>273</sup> The simplified protest consists of a written declaration on the instrument that the acceptance or payment is refused, signed and dated by the drawer, acceptor, or maker.<sup>274</sup> The "authenticated protest" is a statement of dishonor signed and dated by a person authorized to certify dishonor by the law of the place where the dishonor occurs.<sup>275</sup> An "authenticated protest" also includes who requested the protest, the place, and the reason for protesting.<sup>276</sup> An "authenticated protest" is necessary when the holder does not elect to use the simplified protest, or when the dishonoring party refuses to make the declaration, or when the instrument stipulates that an "authenticated protest" must be made.<sup>277</sup>

The ULIB and UCC vary as to the time limits within which any necessary notice of dishonor and protest must be made. Under the UCC except for the possibility of noting,<sup>278</sup> notice of dishonor and protest must be made by a bank

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<sup>265</sup> ULIB art. 60(2).

<sup>266</sup> ULIB art. 60.

<sup>267</sup> ULIB art. 57, Comment 1, art. 44, Comment 1.

<sup>268</sup> ULIB arts. 62, 66.

<sup>269</sup> Compare UCC § 3-508(1) with ULIB art. 62(3).

<sup>270</sup> Compare UCC § 3-508(3) with ULIB art. 63.

<sup>271</sup> UCC § 509(1).

<sup>272</sup> UCC § 3-509(2).

<sup>273</sup> ULIB art. 58.

<sup>274</sup> ULIB art. 58(1).

<sup>275</sup> ULIB art. 58(3).

<sup>276</sup> ULIB art. 58(3)(a), (b), (c).

<sup>277</sup> ULIB art. 58(2).

<sup>278</sup> UCC § 3-509(5). The officer to make protest may note the protest on the instrument before protest is due and make the formal certificate of dishonor later as of the date of noting.

before its midnight deadline. Otherwise it must be made before midnight of the third business day following the dishonor or receipt of notice of dishonor.<sup>279</sup> The ULIB requires protest to be made on the day of dishonor or not later than the second succeeding business day.<sup>280</sup> Notice of dishonor must be given not later than the second business day following the day of protest, or, if protest is excused, the day of dishonor, or the day of receipt of notice.<sup>281</sup>

As was the case with delayed or excused presentment for payment, both the UCC and the ULIB provide that notice of dishonor and protest may be delayed or entirely excused. The UCC allows a delay in giving protest or notice of dishonor under the same conditions that it allows a delay in making presentment for acceptance or payment.<sup>282</sup> The ULIB allows a delay in protest or notice of dishonor under the same conditions that it allows a delay in presentment for payment.<sup>283</sup> Protest and notice of dishonor are excused under the UCC for the same reason: (1) regarding an indorser, when the indorser indorses after maturity;<sup>284</sup> (2) when notice or protest is waived by a party to be charged. If the waiver is contained in the instrument it is binding on all parties but if above an indorsement it binds only the indorser;<sup>285</sup> (3) when the party to be charged has dishonored the instrument or countermanded payment or otherwise has no reason to expect or no right to require the instrument to be accepted or paid;<sup>286</sup> (4) when by reasonable diligence notice or protest cannot be given;<sup>287</sup> (5) when the draft is dishonored by nonacceptance unless the instrument has been accepted beforehand.<sup>288</sup>

Under the ULIB, protest and notice of dishonor are excused for the following reasons: (1) when notice is waived and it is binding only on the party making it;<sup>289</sup> (2) when the cause of delay in giving notice continues beyond thirty days after the last day on which notice should have been given;<sup>290</sup> (3) regarding the drawer, when the drawer and drawee are the same person, or when the bill is presented to the drawer for acceptance or payment, or when the drawee or acceptor is under no obligation to accept or pay or when the drawee has countermanded payment;<sup>291</sup> (4) regarding the indorser, when the indorser is the person to whom the instrument was presented for payment.<sup>292</sup> The ULIB also

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<sup>279</sup> UCC §§ 3-508(2), 3-509(4).

<sup>280</sup> ULIB art. 59(1)(2).

<sup>281</sup> ULIB art. 64.

<sup>282</sup> UCC § 3-511(1). See text part VII A, *supra*.

<sup>283</sup> ULIB arts. 61(1), 65(1). See text part VII B, *supra*.

<sup>284</sup> UCC § 3-501(4).

<sup>285</sup> UCC § 3-511(2)(a).

<sup>286</sup> UCC § 3-511(2)(b).

<sup>287</sup> UCC § 3-511(2)(c).

<sup>288</sup> UCC § 3-511(4).

<sup>289</sup> ULIB arts. 61(2)(a), 65(2)(a).

<sup>290</sup> ULIB arts. 61(2)(b), 65(2)(b).

<sup>291</sup> ULIB arts. 61(2)(c), 65(2)(c).

<sup>292</sup> ULIB arts. 61(2)(d), 65(2)(d).

dispenses with protest and notice of dishonor when presentment for acceptance or payment is excused.<sup>293</sup>

### VIII. DISCHARGE

Under the ULIB, discharge of a party's liability on an instrument results from any of six events: (1) when payment is made;<sup>294</sup> (2) when a holder unconditionally renounces the liability of a party on the instrument;<sup>295</sup> (3) when a party rightfully reacquires an instrument as against those who had recourse against him;<sup>296</sup> (4) when a party is discharged, parties who had recourse against him are discharged;<sup>297</sup> (5) when a party does not assent to a holder taking a qualified acceptance other than acceptance of a partial amount of the instrument;<sup>298</sup> (6) when by act or agreement a party is discharged of his contractual liability for the payment of money.<sup>299</sup> No discharge is effective against a subsequent protected holder who is without knowledge of the discharge.<sup>300</sup> If a drawer or indorser is discharged on the instrument, each is also discharged on the underlying obligation to the immediate parties.<sup>301</sup>

The six events which result in discharge under the ULIB also produce a partial or entire discharge of a party under the UCC.<sup>302</sup> The UCC contains two further provisions which result in discharge: (1) a party is discharged when, without his consent, the holder (without a reservation of rights) releases or agrees not to sue any person against whom the party, to the knowledge of the holder, has a right of recourse or when the holder agrees to suspend against such person the right to enforce the instrument or collateral;<sup>303</sup> (2) an unexcused delay in presentment, notice of dishonor or protest results in the automatic discharge of an indorser. It also results in the discharge of a drawer, an acceptor of a bill payable at a bank, or the maker of a note payable at a bank if the drawee becomes insolvent during the delay.<sup>304</sup> Like the ULIB, under the UCC no discharge is effective against a subsequent holder in due course unless

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<sup>293</sup> ULIB arts. 61(2)(e), 65(1).

<sup>294</sup> ULIB art. 69(a).

<sup>295</sup> ULIB art. 69(b).

<sup>296</sup> ULIB art. 69(c).

<sup>297</sup> ULIB art. 69(d).

<sup>298</sup> ULIB art. 69(e).

<sup>299</sup> ULIB art. 69(2).

<sup>300</sup> ULIB art. 25, Comment 3. A renunciation is an effective discharge against a subsequent protected holder since it must be written on the instrument. ULIB art. 76, Comment 1.

<sup>301</sup> ULIB art. 69, Comment 2.

<sup>302</sup> UCC § 3-601. In the event of qualified acceptance, the UCC provides that if a holder takes a partial acceptance of the amount and the drawer and endorser do not assent, they are discharged. UCC 3-412.

<sup>303</sup> UCC §§ 3-601(1)(d), 3-606.

<sup>304</sup> UCC § 3-601(1)(i). The reason the ULIB does not provide for this event as a discharge of liability is that no liability materializes when a necessary presentment for acceptance or payment or protest is not made.

he takes with notice of any discharge.<sup>305</sup> Also, a discharge on the instrument results in a discharge on the underlying obligation.<sup>306</sup>

The ULIB provides that a party is discharged when he pays<sup>307</sup> the holder or a party subsequent to himself the amount due.<sup>308</sup> Thus a payor is discharged even if he pays a forger, or a person who took from a forger, provided that the payor was without knowledge of the forgery and the instrument bore an uninterrupted series of indorsements. A payor is also discharged if he pays a person having a right to payment on a lost instrument even if the payor knows of a claim to the instrument.<sup>309</sup> A holder may accept partial payment which results in pro tanto discharge of any party liable on the instrument and the instrument is treated as dishonored as to the unpaid amount.<sup>310</sup> Any person who pays on an instrument, which is materially altered as to its amount or otherwise (including a forgery of the drawer's or maker's signature) without knowledge of the alteration, shall have the right to recover the amount of the alteration or, if the alteration was other than as to its amount, the amount of the instrument from any subsequent party who took the instrument with knowledge of the alteration.<sup>311</sup> When any party tenders payment to a holder at or after maturity, and the holder refuses such offer, that party (and any party who has recourse against such party) shall not be liable for expenses of any sort which accrue subsequent to the offer.<sup>312</sup> Finally, the holder may refuse to take payment in a place other than where the instrument is duly presented and may treat the instrument as dishonored.<sup>313</sup>

Under the UCC a party is discharged from his liability on the instrument to the extent of payment or satisfaction,<sup>314</sup> even though it is made with knowledge

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<sup>305</sup> UCC § 3-602. Since a renunciation need not be made on the instrument under the UCC, in the event that the renunciation was by separate agreement, the discharge would not be effective against a subsequent holder in due course who took without notice. UCC § 3-605. However, if a renunciation is placed on the instrument or an indorsement is cancelled after a prior party reacquires the instrument, an effective discharge against a subsequent holder in due course results. UCC § 3-208.

<sup>306</sup> UCC § 3-802(1)(b).

<sup>307</sup> See text part III, *supra*.

<sup>308</sup> ULIB art. 70(1).

<sup>309</sup> ULIB art. 70, Comment 1, 14. Lost instruments are governed by ULIB art. 80, which provides in substance that upon proof of a right to payment and the contents of an instrument, the person who lost the instrument shall have the same right to payment as if the instrument were not lost. The party who pays has a right to demand security or, if this can not be given, payment of the amount due is made into court. This satisfies the request for payment and will serve to indemnify the party who paid on the lost instrument and who is subsequently discharged of liability on the instrument. ULIB art. 82. A party who pays on a lost instrument and to whom the instrument is subsequently presented by another shall notify the person he paid not later than one of the two business days which follow the presentment; failure to do so renders him liable for any damages caused thereby. ULIB art. 81.

<sup>310</sup> ULIB art. 71.

<sup>311</sup> ULIB art. 73.

<sup>312</sup> ULIB art. 75.

<sup>313</sup> ULIB art. 72.

<sup>314</sup> UCC § 3-601(1)(a).

of a claim of another person, except in four instances: (1) when prior to discharge the claimant supplies indemnity deemed adequate by the holder,<sup>315</sup> (2) when the claimant enjoins payment or satisfaction in an action in which the holder and claimant are parties;<sup>316</sup> (3) when the party in bad faith pays a holder who acquired the instrument by theft or acquired the instrument through one who acquired by theft, unless the acquiring party has the right of a holder in due course;<sup>317</sup> (4) when a party (other than an intermediate or payor bank which is not a depository bank) pays on an instrument inconsistently with the terms of a restrictive indorsement.<sup>318</sup> Unlike the ULIB, payment on a lost instrument does not necessarily discharge the party who pays.<sup>319</sup> Like the ULIB a holder may accept part payment and a pro tanto discharge occurs.<sup>320</sup> The corollary to the ULIB rule of recovery by a party paying an altered instrument from a holder subsequent to the alteration who knew of the alteration is the concept of a warranty given by a person presenting an instrument for payment to someone who pays.<sup>321</sup> Finally, the tender of payment rule under the UCC is the same as that of the ULIB.<sup>322</sup>

#### IX. CONCLUSION

The attempt of this note has been to contrast the operation of the salient provisions of the ULIB with those of the UCC. The ULIB makes a prominent departure from the UCC in the following respects: its return to the concept of a "carrier without baggage" with the single exception of a right of acceleration contained in the instrument; greater protection offered a holder vis-a-vis currency fluctuation after dishonor; the creation of a presumption that a possessor of an instrument has authority to make an authorized completion; less rigorous requirements to achieve protected holder status; variation as to the effect of certain restrictive indorsements; variation in the role of the guarantor from the concept of either a guarantor or accommodation party under the UCC; the substitution of a fixed time limitation within which presentment for acceptance and payment must be made; the use of protest as the operative equivalent of notice of dishonor under the UCC; different handling of lost instruments; variation in the consequences following a failure to make timely protest or notice of dishonor; and perhaps most importantly the streamlining and, under some circumstances, the reallocation of loss following forgery and material alteration.

In regard to the acceptance of the ULIB by American courts, the focus has been on two problems. The first problem is the restrictive language of the

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<sup>315</sup> UCC § 3-603(1).

<sup>316</sup> *Id.*

<sup>317</sup> UCC § 3-603(1)(a).

<sup>318</sup> UCC § 3-603(1)(b).

<sup>319</sup> UCC § 3-804, Comment.

<sup>320</sup> UCC § 3-603, Comment 3.

<sup>321</sup> UCC § 3-417(1).

<sup>322</sup> Compare UCC § 3-604, with ULIB art. 75.

choice of law provision of the UCC. Provisions of the UCC other than the choice of law provision suggest that despite the fact that none of the parties' countries is a member of the Convention on the Uniform Law of International Bills of Exchange and Promissory Notes, these parties ought to be able to effectively choose the ULIB. Secondly, since an instrument which is negotiable under the ULIB may of necessity fail to meet the requirements of negotiability under the UCC, is reference to the UCC for the law on issues other than negotiability precluded? Although there is scant support that it is not precluded in the UCC itself, courts ought to make use of the UCC as a statement of the law merchant unless the specific provisions are incompatible with the statutory framework of the ULIB.

Although differences do exist between the ULIB and the UCC, there is a sufficient degree of similarity to create the most appealing feature of the ULIB. This feature is that an American party to an international transaction does not have to give up altogether the negotiable instrument law of the UCC for another, perhaps unfamiliar, body of law; and a foreign party may avoid some of the unfamiliarity of the UCC and a majority of its local interpretation.

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