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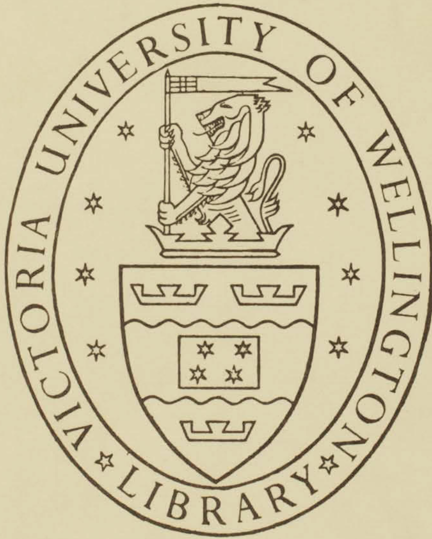
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LL.M. RESEARCH PAPER

THE "UNIFORM RULES FOR THE COLLECTION OF COMMERCIAL PAPER" INTERNATIONAL CHAMBER OF COMMERCE BROCHURE NO. 254

RESEARCH PAPER IN SALES AND SALES FINANCING FOR THE LL.M. DEGREE

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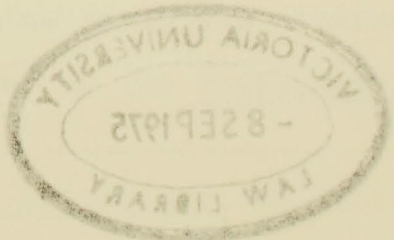
1973.



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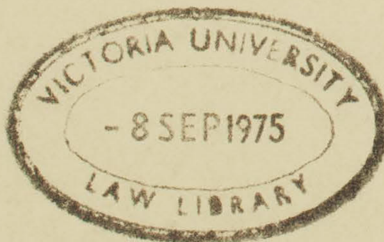

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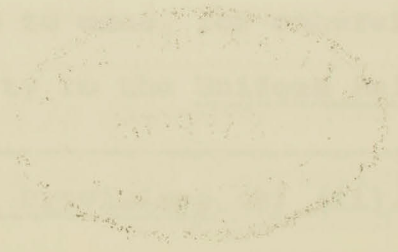

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INTRODUCTION:

The object of this paper is to compare the provisions set out in the Uniform Rules for the Collection of Commercial Paper (ICC Brochure No. 254, hereinafter the "Uniform Rules") with the common law rules for the collection of commercial paper. But it is not intended to traverse each and every sentence set out in the Uniform Rules. Rather, we shall focus our attention on the more salient features of this Code.

Chapter 1 in this paper is devoted to discussing the binding effect of the Uniform Rules. By this is meant who are the parties bound by the Code, how they are bound and what would be the likely approach of the Court towards the giving of effect to these rules.

Chapters 2, 3 and 4 attempt to define the meaning of "collection", "commercial paper" and "Remittance Letter". These are the three key concepts embedded in the Uniform Rules and without some definition of what they mean, the object of this paper would not be achieved.

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CHAPTER 1

THE BINDING EFFECT OF THE UNIFORM RULES

General Provisions and Definitions (a) reads:

> "These provisions and definitions and the following articles apply to all collections of commercial paper and are binding upon all parties thereto unless otherwise expressly agreed or unless contrary to the provisions of a national, state or local law and/or regulation which cannot be departed from."
> (emphasis supplied)

The "parties thereto" are the principal who entrusts the operation of collection to his bank (the customer), the said bank (the remitting bank), and the correspondent commissioned by the remitting bank to see to the acceptance or collection of the commercial paper (the collecting bank).[1]

Interpreted naturally, it therefore appears that the Uniform Rules bind the customer, the remitting bank and the collecting bank when the two provisos of General Provisions (a) do not apply. But it should be noted that the word "thereto" is not defined in General Provisions (b)(ii) which only defines the persons who may be bound by the Uniform Rules. A person (or bank) becomes bound to the Uniform Rules when he allows himself to be so bound. This is what General Provisions (a) must be taken to mean, for otherwise, a customer would be made a party to the Uniform Rules without his consent.

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1. General Provisions (b) (ii).

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Of course, if the Uniform Rules has acquired the required degree of notoriety as to become a mercantile practice or usage, a customer may be held bound by it even though he has not expressly consented to do so.[2]

It is therefore necessary to determine how a person (or bank) becomes bound to the Uniform Rules. To do this, a resort to various commentaries on the Uniform Customs and Practice for Documentary Credits[3] would be helpful.

General Provisions (a) of the Uniform Customs also makes it "binding upon all parties thereto unless otherwise expressly agreed."

In the case of the Uniform Customs the issuing bank and the correspondent bank become bound to each other once they have given their adherence to the Code.[4] Similarly, therefore, the remitting bank and the collecting bank will become bound by the Uniform Rules at the moment both parties adhere to the Code. The underlying basis for this result lies in the fact of common membership of the International Chamber of Commerce. An adherence or adoption[5] takes the form of a positive act on the part of a member or associate member that it will in future be bound by the Code.

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2. This point is discussed intra p. 13

3. Brochure No. 222 International Chamber of Commerce Hereinafter Uniform Customs.

4. E.P. Ellinger, Documentary Letters of Credit, p. 127

5. Both terms are used synonymously here.

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In this respect, the Uniform Customs and the Uniform Rules operate as a multilateral contract with each member promising to be bound to each other on adherence to either code. Owing to the size of membership, it is impracticable for members to inform each other of their adoption of the Codes. This is more conveniently done through the Secretariate of the I.C.C.[6] Such notification should, however, make its binding effect no less valid.

Therefore, it is clear that members who have not adopted either code or have not informed the I.C.C. of their adoption will not be bound by them. British banks prior to 1962 either ignored the fact that letters of credit issued from abroad were made subject to the Uniforms Customs or at best replied that they would not be bound thereby.[7]

The position of a customer vis-a-vis the Uniform Rules is therefore clear i.e. he would not be bound by it unless he has expressly or impliedly agreed to be bound. The practice of banks which have adopted the Uniform Customs is to incorporate the Code by express stipulation in both the application forms and the documentary credits appropriately.[8] The words normally employed are Subject to Uniform Customs and Practice

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6. The Secretariate of the I.C.C. sits in Paris. Its present address is 38, Cours Albert ler, Paris VIIIe.

7. See Maurice Megrah, Documentary Credits - A Common Code, The Banker, Vol. 113 (1963) p. 470

8. E.P. Ellinger, op. cit. p.127; Paget's Law of Banking (8th Ed.) p. 632.

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for Documentary Credits (1962 Revision), International Chamber of Commerce Brochure No. 222. In the application for credits, the letter may state that the applicant "agree" that the credit is subject to the Code while in the actual issue of a credit, the above words may appear just as an endorsement[9]. In the case of the Uniform Rules, General Provisions (c) makes it mandatory for all collection of commercial paper to be accompanied by a remittance letter. It is to be expected that banks which have adopted this Code will endorse a similar stipulation as that employed in the case of the Uniform Customs on to the remittance letter.[10]

The incorporation of the Uniform Customs to contracts dealing with letters of credit has given rise to three issues, namely, (a) the conflict of a provision of the Code with a decided case, (b) whether incorporation by mere endorsement is sufficient to bind the ordinary businessmen and (c) the position of the absence of incorporation in either an application form or a documentary credit.[11] These problems apply, mutatis mutandis to the Uniform Rules.

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9. id. Appendex Form 1 and 2. See also Soproma S.P.A. v. Marine and Animal By-Products Corp. [1966] I Ll. L.R. 367 at 368.

10. The National Bank of New Zealand Limited in a circular to staff members on the adoption of the Uniform Rules states that as a consequence of the adoption, remittance letters accompanying commercial paper for collection will include the following clause: "Subject to Uniform Rules for the Collection of Commercial Paper (1967 Revision) International Chamber of Commerce Brochure No. 254." If there is any doubt as to whether the remitting bank and the collecting become bound by the Code simply on the basis of mere adoption of the Code, such a remittance letter incorporating the Code would provide a further ground for making the respective banks so bound.

11. Ellinger, op. cit. 127

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Problem (a). The Conflict of the Code with a decided case. Professor Ellinger has argued that this problem does not appear to give rise to difficulties. The judicial decisions on the legal aspects of documentary credits are usually based on what the Courts consider to be either the express intentions of the parties or the established business practice which the parties are assumed to have had in mind when entering into the particular contractual relationship.[12] For example, the recent case of Soproma S.P.A. v. Marine By-Products Corporation[13] indicates that if the Uniform Customs is incorporated in a documentary credit, the provisions of the Code apply even if they lead to a variation in a business practice which was recognised by the Courts before the promulgation of the Code.[14]

However, in the case of the Uniform Rules there is one difference in General Provisions (a), vis-a-vis the Uniform Customs which should be noted. General Provisions (a) of the Uniform Rules has two, not one, provisos. The second proviso reads:

> "Unless contrary to the provisions of a national, state or local law and/or regulation which cannot be departed from."

The question therefore is whether this proviso makes any change to the above analysis. The operative phrase seems to be the phrase "which cannot be departed from"

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12. id. and the cases cited therein.

13. [1966] 1 Ll. L.R. 367.

14. Ellinger, id. 128.

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But first it is necessary to determine what could be meant by the phrase "national, state or local law or regulation". The natural interpretation seems to be that this phrase means the laws of a country as enacted by its duly authorised legislature. For example, in the case of Great Britain, they would be, say, the Bills of Exchange Act, 1882 or the Cheques Act 1957, including the interpretation the Courts place on these Acts. But the word "local" seems also to imply a reference to the law merchant i.e. the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law.[15] This is because the usages of merchants and traders are peculiar only to themselves and as such may be described as "local" as distinct from a "national" law which would be of a general application. The meaning of "regulation" would seem to be directed at those delegated legislation, as for example, exchange control regulations passed pursuant to an Exchange Control Act.

The next question therefore is assuming that a provision of the Uniform Rules is contrary to the national, state or local law of a country which governs the particular transaction in question[16], how does one

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15. This definition of "law merchant" is per Cockburn C.J. in Goodwin v. Roberts (1875) L.R. 10 Exch. 337 at 346.

16. As to the law governing contracts contained in a bill of exchange, see s.72 of the Bills of Exchange Act 1889. This section only deals with conflicts of national laws and not with conflict between a national law and a non-national law, such as the Uniform Rules.

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decide whether such a law can be departed from?

No problem would seem to arise in the case where a statute explicitly state that it cannot be departed from. But in the case of the collection of commercial paper, in the United Kingdom and other Commonwealth Countries, there does not appear to be any such statutes. The statute most commonly governing the collection of commercial paper in Great Britain is the Bill of Exchange Act 1882.

The Bill of Exchange Act 1882 has been held to be a codifying statute i.e. each provision of the Act is to be interpreted as it stands, and there is no justification for presuming that any particular section was meant to express rather than amend the common law.[17] But this fact does not indicate whether its provisions "cannot be departed from". Nothing in the Act itself forbids parties from contracting out.[18] The Bills of Exchange Act 1882 (U.K.) is like the Sale of Goods Act 1893 (U.K.) which parties to a contract may expressly exclude by appropriate terms. Since the Bill of Exchange Act 1882 (U.K.) does not prohibit contracting out, it is therefore not a national or state law "which cannot be departed from". The underlying basis

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17. Bank of England v. Vagliano Brothers [1891] A.C. 107. See Lord Herschell at pp.144-145.

18. Contrast s.29 of the Hire Purchase Act 1965 (U.K.) which explicitly makes certain transactions void. Also, see s.51 Hire Purchase Act 1971 (N.Z.) The Uniform Commercial Code (U.S.) allows for a variation of the Code by agreement except as otherwise provided by the Code itself: s.1 - 102.

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for this is in the well-established doctrine in the law of contract that parties are free to contract on any terms they like.

It is therefore submitted that the second proviso to General Provisions (a) of the Uniform Rules would make little difference as to the Courts approach towards the Uniform Customs. The Court would most likely follow the approach of Soproma S.P.A. v. Marine and Animal By-Products Corp[19] if a conflict arises between, say, a provision of the Bills of Exchange Act 1882 and the Uniform Rules. Of course, if a statute expressly prohibits departure from it, then the Courts would have to give effect to it.

Problem (b) Incorporation by mere endorsement.

As mentioned above, the Uniform Rules is incorporated into the remittance letter by a formula such as "Subject to Uniform Rules for the Collection of Commercial Paper (1967) Revision, International Chamber of Commerce Brochure No. 254". The question is whether such an incorporation is sufficient to bind the customer. This point was not raised in the Soproma case.[20]

It has been stated that where the agreement of the parties to a contract has been reduced to writing, the party signing will be bound by the terms of the written agreement whether or not he has read them and whether or not

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19. [1966] 1 Ll. L.R. 367.

20. Ellinger, op. cit., 129.

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he is ignorant of their precise legal effect.[21] The case normally cited to support this proposition is L'Estrange v. F. Gravcoh Ltd[22]. In this case, Scrutton L.J. laid down the rule thus:

> "When a document containing contractual terms is signed, then, in the absence of fraud, or I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."[23]

The main question seems to be whether a clause such as "Subject to Uniform Rules ...." can be considered a "contractual term". The difficulty with this clause is that by itself it does not enumerate the rights and liabilities of the contracting parties. These provisions are contained in the Uniform Rules. Hence, it is doubtful if Scrutton L.J. had meant his statement to include "contractual terms" which are not actually embodied into the written agreement but merely refer to the terms in another document. The facts of L'Estrange v. F. Gravcoh Ltd[24] itself does not resolve this point as in this case the terms of the Contract were set out in the actual document signed.[25]

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21. Chitty on Contracts (23rd Ed.) Vol. 1, para. 582; Ellinger, op. cit. 129.
22. [1934] 2 K.B. 394; [1934] All E.R. Rep. 16.
23. id. p.403; also, Maugham L.J. p. 406.
24. id.
25. In this respect, some of the so-called "ticket cases" are also not helpful as in these cases the exemption clauses relied upon by the defendants were also set out in the tickets. See Parker v. The South Eastern Railway Co (1877) 2 C.P.D. 416; Richardson, Spence & Co v. Rountree [1894] A.C. 217; Hood v. Anchor Line Ltd [1918] A.C. 837.

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The underlying principle which emerges from L'Estrange v. F. Gravcoh Ltd seems to be that a person signing a written agreement must be deemed to have read the terms of that agreement. However, it is clear that if some of the terms of the agreement signed are contained in another document, a difficult question arises as to whether a duty is imposed upon the parties to familiarise themselves with the terms set out in that other document. This question seems to be answered by the case of Thompson v. London, Midland and Scottish Railway Co.[26] The plaintiff, who could not read, bought an excursion ticket through her niece. The ticket contained the printed words "Issued subject to the conditions and regulations in the company's time tables and notices and excursion and other bills." On the excursion bill were printed the words "Excursion tickets are issued subject to the notices and conditions shown in the Company's current time tables." The plaintiff suffered injuries in the course of the journey and claimed against the defendants in negligence. The defendants relied upon a clause in the time table excluding them from actions such as that brought by the plaintiff. In the lower Court, the Commissioner formulated the issue as to whether the defendants have taken reasonable steps to bring the conditions to the notice of the plaintiff. This formula was accepted by the Court of Appeal as correct. Both the lower court and the Court of Appeal

26. [1930] 1 K.B. 41.

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held that the defendants have fulfilled their duty despite the finding of the jury that they have not. Both Courts held that once the plaintiff had brought the ticket containing certain conditions, that is sufficient reasonable steps taken by the defendant. The conditions on the ticket may refer to conditions in other documents. The fact that these other conditions can only be located in an circuitous manner is irrelevant to the issue.[27] It is for this reason that both courts held that the jury have misunderstood the law.

The ratio decidendi of the Thompson case can be abstracted at two levels. On the one hand, it may be said that the case is authority for the proposition that a written contract which incorporates or refers to terms present in another document(s) is valid so long as the person who intends to rely on the terms in the other documents has taken reasonable steps to bring those terms to the notice of the other party. On the other hand, the case may also be authority for the proposition that, accepting the first proposition, reasonable notice is satisfied if the contracting party knows, including constructive knowledge, of the existence of the incorporated terms.[28] It is subjitted that the second proposition is untenable in the light of present day social conditions.

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27. See for example, Lord Hanworth, M.R. at p. 51.

28. Anson, The Law Contract p. 145-146 (23rd Ed.)

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If the first proposition is accepted as valid, the question is therefore whether it is sufficient reasonable notice to a customer to merely make a remittance letter subject to the Uniform Rules. The rule states that the incorporated terms must be brought to the notice of the customer. It is submitted that on this basis, the mere incorporation of the Uniform Rules by the formula "subject to ...." does not satisfy this rule. A customer reading the remittance letter has no knowledge of the actual terms in the Uniform Rules although he knows that the remittance letter is subject to it.

Hence, it would seem that the remitting bank must do more to guard itself completely. The remitting bank could attach a copy of the Uniform Rules to the customer's remittance letter with the appropriate change in the formula used, such as "subject to Uniform Rules .... a copy of which is attached herewith." If this is inconvenient, the remitting bank should produce a copy of the Uniform Rules for the customer to peruse.[29]

Once the customer has acquainted himself with the terms in the Uniform Rules, it would seem that there is no need to supply him with a copy of the Uniform Rules in subsequent dealings of the same nature i.e. collection of commercial paper. The bank will, in all

29. This conclusion is based on Ellinger, op. cit. pp. 129-130. The learned author seems to take the view that Thompson's case apply only to exemption clauses. It is respectfully submitted that the case could also be interpreted as applying to all clauses in documents which are only referred to in the contract entered into between the parties.

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likelihood, be able to prove knowledge of the terms of the Uniform Rules in such a case.[30]

Problem (c) Absence of Incorporation

This problem restated, is whether the Uniform Rules apply when it is not incorporated in the remittance letter. The problem extends to the relationship between the remitting bank and the customer and the remitting bank and the collecting bank when one of them has not adhered to the Uniform Rules. It appears that the approach of the courts to both relationships would be the same as in both cases, the applicable rule is whether the Uniform Rules has enjoyed that degree of popularity between the parties as evidencing their intention to contract on its terms.[31]

In other words, if the Uniform Rules becomes a commercial custom, it will be binding on the parties. An international commercial custom has been defined as consisting of "commercial practices, usages or standards which are so widely used that business men engaged in international trade expect their contracting parties to

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30. See, however, McCutcheon v. David MacBrayne Ltd [1964] 1 All E.R. 430 where it was held that previous dealings per se is not sufficient to bind a contracting party. It must be shown that the contracting party intended to contract on the terms of the previous dealings. The situation in this case would not seem to arise in the case of the remittance letter which would usually be signed with the clause subjecting it to the Uniform Rules.

31. The terminology used here is Ellinger's, op. cit., p. 130.

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conform with them."[32] Although this definition relates to an international custom, it applies equally in a domestic context. However, two further characteristics are added to a domestic contract, namely, reasonableness and certainty.[33] It appears that these two elements would also be necessary for an international custom for it would be unreal for the courts to uphold such a custom which is either or both unreasonable and uncertain. The notoriety of a custom or usage is a matter of fact.[34] Custom or usages evolve from time to time. The length of time during which a usage has existed is an important circumstance to be taken into consideration but it is not the only consideration.[35] In sum, therefore, a binding custom may be described as a term or terms in a contract which the parties have intended to incorporate into the contract because those terms are reasonable, certain notorious and have existed for a certain period of time.[36]

Coming therefore to the Uniform Rules it must be

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32. Schmitthoff, The Sources of the Law of International Trade, p. 16. Cited in Schmitthoff, The Unification or Harmonisation of Law By Means of Standard Contracts and General Conditions, Vol.17 Int'l & Comparative L.Q. (1968) p.551 at 554. See also, Imre Gal, The Commercial Law of Nations and the Law of International Trade, 6 Cornell International Law Journal, 55 at 59-60 (1972)

33. "A custom to be good must be reasonable, certain and notorious" per Farwell L.J. in Devonald v. Rosser & Sons [1906] 2 K.B. 728 at 743.

34. Garge v. Davies [1911] 2 K.B. 445 at 448.

35. Elderstein v. Schuler & Co [1902] 2 K.B. 144

36. There appears to be several synonymous terms used instead of the word "custom". Custom has also been described as the "law merchant", "mercantile usage" "usage", "practices" etc.

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shown that it satisfy the requirements of a custom. It is submitted that this Code would not satisfy being a custom for the following reasons: (a) the time of its existence is relatively short; (b) it appears not to be widely used among customers and bankers; (c) customers and bankers do not consider themselves bound by it, short of actual incorporation into the remittance letter. It is interesting to note that in two recent decisions, one by the Court of Appeal in England[37], the other by the Privy Council[38], no attempts were madeby counsels to discuss the Uniform Customs on the basis that this Code has become the custom of Great Britain and Australia respectively. Perhaps, this is an indication that the Uniform Customs has not acquired that degree of notoriety or popularity necessary for it to become the common law of the land.

In conclusion, therefore, it is suggested that in order to forestall the problem posed by this aspect of the Uniform Rules, banks should ensure that they incorporate the Code into the remittance letter in the manner suggested above.

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37. W.J. Allan & Co Ltd v. El Nast Export and Import Co. [1972] 2 W.L.R. 800.

38. Commercial Banking Co of Sydney v. Jalsard Pty [1972] 3 W.L.R. 566.

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CHAPTER 2

The Definition of "Collection".

The Uniform Rules does not provide the meaning of ''collection'' nor is this word defined in the English Bills of Exchange Act 1882. Article 4 - 105(d) of the Uniform Commercial Code (U.S.) defines a "collecting bank" as any bank handling the item for collection except the payor bank.[1] A considerable amount of confusion abounds in the English case law as to the exact meaning of collection[2]. Much of this confusion seems to arise from the fact that although the legal position of a discounting bank differs from that of a collecting bank, the actual physical activity involved in the process of a discount or a collection have points of similarity.[3]

In order to understand the meaning of "collection", it is therefore necessary to briefly outline the mechanics or physical activity involved in a process of collection and to determine the legal definition arising therefrom.

A fundamental point to note is that cheques and bills of exchange or other similar documents are used for the obtaining of payment of money.[4] They are normally given as payment for an underlying sale of goods.[5] A person who owns a bill of exchange or a cheque

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1. 'Item' means any negotiable or non negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft (4-104(g)).
2. See P.E. Ellinger, Collection and Payment of Cheques (1969-1970) 9 West. Aust. L. Rev. 101 at 131 et seq. Also Paget's Law of Banking, Chapter 14 (8th Ed.)
3. Chorley, Law of Banking, p.99 (5th Ed) Ellinger, supra 132.
4. General Provisions (b)(i)
5. Clark and Squillante, The Law of Bank Deposits, Collections and Credit Cards, p.2 (1970)

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naturally would want to exchange cash for it or in some other way see that he secures the benefit of the payment under the document concerned. With respect to a cheque, the payment is made by the bank on whom the cheque is drawn (the drawee). In the case of a bill of exchange, the persons liable to pay are the drawer, endorser or acceptor. Often times, it may be inconvenient for a person holding such documents to personally "collect" the proceeds of the money due under the documents. With the rise of modern banking, this individual concerned may engage the services of a bank or banks to 'effect' his payment.[6] Consequently, this led to the development of a sophisticated system of collecting cheques and other documents of payment.

But a further characteristic of documents such as bills of exchange and cheques is that they are negotiable instruments. The concept of negotiable instruments is treated generally in all standard text books on banking and it is unnecessary to refer to it here in detail. Essentially, a negotiable instrument means an instrument capable of being transferred together with the rights embodied in the instrument.[7] This characteristic tends to blurr the distinction between a "collection" and a "discount".

Generally, when a customer of a bank gives that bank a cheque for 'collection', the bank may do one of the following several things. It may (a) merely

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6. Chorley, supra, 99.

7. See for example, Holden, The Law and Practice of Banking, Vol. 1. p. 117, para. 4-1 (1970).

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credit the cheque in its accounts books as cash in favour of the customer, (b) lend further on the strength of the cheque, (c) pay over the amount of the cheque or part of it in cash or in account before it is cleared, (d) agree, either then or earlier, or as a course of business, that the customer may draw before the cheque is cleared, (e) accept the cheque in avowed reduction of an existing overdraft, (f) give value in the sense of there being an antecedent debt under s.27(1)(b) of the Bills of Exchange Act 1882 (U.K.) or finally (g) merely send the cheque for "collection" without dong any of the things in (a) to (f) above.[8] Except for (g) and (a), it may be said that the bank is giving value to the customer for the cheque.[9]

But when a bank gives value for a cheque, it is said to be 'discounting' the cheque rather than merely 'collecting' it.[10] Furthermore, much confusion arose as to whether value was given for a cheque by a bank which merely credits as cash in the accounts book of a customer who hands a cheque in for "collection". But it is now well settled that the mere crediting of a cheque to the customer's account before its clearance without more is insufficient to make the "collecting" bank a discounter. In addition, the bank must agree to grant an overdraft or actually permits the customer to draw against it. The

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8. Paget's Law of Banking, 434.

9. id.

10. Ellinger, supra, fn. 5. 131.

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bank becomes a discounter also by reducing a revolving overdraft by the amount of the cheque before its clearance.[11]

However, for our present purposes, it is sufficient only to mention the distinction between a collecting bank and a discounting bank i.e. in the former no value is given to the cheque while in the latter, value is given. The necessity for this distinction arise mainly in connection with the statutory defences available to a bank arising out of these two transactions.[12] For our present purposes, the meaning of "collection" for cheques in the Uniform Rule pertains towards the obligations and rights of both the customer and the banks. In other words, we shall not be concerned with statutory defences in the course of this paper except as where this is necessary to clarify some points.

But the distinction between "collection" and "discount" may also be relevant to bills of exchange. Here, the distinction is made for the purpose of determining whether a transaction comes within the provisions of the Uniform Rules and the primary or sole criterion for determining this, is that the bill is being "collected."

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11. id.

12. In particular, the defences now embodied in s.4 of the Cheques Act 1957(U.K.). Learned discussions on the exact scope and meaning of this section can be found in most standard text books on the law of banking. More importantly, see also P.E. Ellinger, Collection and Payment of Cheques, (1969 - 1970) 9 West. Aust. L. Rev. 101 at 131.

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The concern for making the distinction here is not for the purposes of the statutory defences available as in the case of cheques. There is no statutory protection for a bank which 'collects' the proceeds of a bill.[13]

Bills of exchange are commonly used to finance transnational commercial dealings. They are usually used in conjunction with documentary letters of credit.[14] Like cheques, a bill entitles the payee to payment of a sum of money. Similarly, the payee may engage the services of a bank to "collect" this payment or to send the bill for acceptance. But it also commonly practised among bankers that they may negotiate or discount bills which are 'purportedly sent for collection'.[15] In addition, a bank may also make an advance on a bill i.e. of a certain percentage of the face value of a bill without actually 'negotiating' it.[16] A bill is 'discounted' when the owner sells it <u>after</u> it has been accepted.[17] A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferree the holder of the bill e.g. a bill payable to bearer is negotiated by

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13. Holden, <u>The Law and Practice of Banking</u> (1970) Vol. 1 para. 8-25 p.253; <u>Paget's Law of Banking</u> (1972) p.448.

14. The subject of documentary letters of credit does not come within this paper. For a thorough treatment of the subject, see E.P. Ellinger, <u>Documentary Letters of Credit</u>.

15. Collection of bills without provision of finance by banks is only one of the many transactions that a bank may have with a bill of exchange. See Holden, op. cit. Vol. 1, pp.272-282.

16. Holden, op. cit., Vol. 1, para. 8-115 p.276.

17. <u>The Bill on London</u> (1952) p. 23; Holden, op. cit., Vol. 1, para 8-97, p. 272.

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mere delivery. A bill payable to the order of a specified payee is negotiated by the endorsement of the payee, or the holder to whom the bill has been specially endorsed and delivery of it.[18] The negotiation of a bill takes place before it is accepted.[19] When a bank buys a bill i.e. discounts it, the bank has clearly given value for the bill. Similarly this is the case when a bank negotiates a bill for a customer.[20] The question that arises therefore is whether a bank is still "collecting" a bill on behalf of its customer as agent after it has given value for it. It would seem that such a transaction is not covered by the Uniform Rules as this code contemplates an agency arrangement. For example, in General Provisions (b) (ii) the word "principal" is used to describe the customer. Moreover, it would seem unnecessary for a customer to accompany a "remittance letter" in accordance with General Provisions (c) for a bill which has been negotiated to a bank. The "remittance letter" contemplates an agency relationship between the bank and the customer i.e. the bank is to act upon the instructions of the customer as provided in the remittance letter. When a banker gives his customer value for the bill and that bill has been

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18. Chitty on Contracts (1968) Vol. II para 299. cf. Act.13 United Nationals Commission on International Trade Law, Draft Uniform Law on International Bills of Exchange, A/CN.9/67 (1972).
19. Holden, op. cit. Vol. 1. para. 8-97.
20. Holden, id. para. 8-105.

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validly negotiated to him, the banker may be said to be collecting the bill on his own behalf and not on his customer's behalf. The bank being a holder of the bill can bring an action to enforce it.[21]

In sum, therefore, the Uniform Rules covers only those transactions when a bank "collects" commercial papers on behalf of its customer as an agent. This excludes those cases where the bank has given value for the commercial papers. Hence, in this respect, the Uniform Rules would seem to have only a restricted application in many banking transactions.

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21. Chitty on Contracts (1968) Vol. II, para 261.

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CHAPTER 3

The Definition of "Commercial Paper"

> "'Commercial paper' consists of clean remittances and documentary remittances. 'Clean remittances' means items consisting of one or more bills of exchange, whether already accepted or not, promissory notes, cheques, receipts, or other similar documents for obtaining the payment of money (there being neither invoices, shipping documents, documents of title, or other similar documents, nor any other documents whatsoever attached to the said items). 'Documentary remittances' means all other commercial paper, with documents attached to be delivered against payment, acceptance, trust receipt or other letter of commitment, free or on other terms and conditions."

Introduction:

The words "commercial paper" seems to have its origin in Article 3 of the United States Uniform Commercial Code. Article 3 of this Code is entitled "Commercial Papers" but nowhere in the Code itself are these two important words defined. In this respect, the Uniform Rules represents an improvement. However, it will be seen that the definition provided is non-exhaustive although the core of commercial papers are covered by the definition.

CLEAN REMITTANCES.

The most important aspect of this definition seems to be the stipulation that the items remitted for collection must not be "attached" by "any other documents", for example, invoices, shipping documents etc.

No elaboration would seem to be required of the meaning of bills of exchange, promissory notes and cheques. However, "receipts or other similar documents

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for obtaining the payment of money" require some explanation. The operative requirement is that a document to come with this definition must be one for the "obtaining of payment of money." What would such a document be? Bills of exchange, promissory notes and cheques would come within this definition. But for other examples of such documents it is necessary to look at the types of documents which are usually collected by banks. Again, the definition is open-ended and it would seem impossible to give a full list of the various documents involved.

The word "receipt" seems to contemplate the kind of document which was used in the case of Barins, Junr. & Sims v. London and South Western Bank Ltd.[1] In this case, the document was drawn, "Pay to J. Barins Jnr. and Sims the sum of Sixty-nine Pounds 7/. Provided the receipt form at foot hereof is duly signed, stamped, and dated. £69-7." The receipt form at the foot was as follows: "Received from the Great Northern Railway Company the abovenamed sum as per particulars furnished. This receipt is not to be detached from the cheque.
Signature __________. Dated ___________189___."
The document was stolen by a rogue from the plaintiffs (payees) and presented to the defendant bank. The defendants credited the document to the rogue's wife's

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1. [1900] 1 Q.B. 270. A similar type of document was also used in Gordon v. London, City, Midland Bank Ltd [1902] 1 K.B. 242; on appeal to the House of Lords, [1903] A.C. 240. The document is referred to as those coming within class (8) of this case.

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account and the next day presented it to a certain Union Bank from which they received payment. It was held that the defendants were liable to the plaintiffs for money had and received. The case is therefore an illustration of a bank collecting a "receipt". Such a document as in this case entitles a person to payment provided that on payment that person signifies his receipt of it by his signature. It is for this type of situation that the word "receipt" is intended to cover by its inclusion in the definition of clean remittances. Documents in the nature of a receipt are rarely issued at the present day except by insurance companies in respect of claims under life policies.[2]

It seems therefore that the word "receipt" applies only to a very restricted type of document. But this does not mean that a bank does not collect other documents in the course of its business.

In the first place, there are other conditional orders for payment which may be collected by banks although these documents may not be bills of exchange. For example, there may be an order to pay out of the particular fund or to pay out of the proceeds of a sale of a valid note.[2A]

A bank also collects dividend and interest warrants

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2. Holden, The Law & Practice of Banking, Vol. 1. p. 293.

2A. See Fisher v. Calvert (1879) 27 W.N. 301; Hill v. Halford (1801) 2 Bos & P. 413.

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for its customers. The modern practice is to make dividend and interest payments by means of cheques.[3] But it is by no means necessary that a dividend warrant should be a cheque.[4] Sometimes difficulties may arise as to whether a dividend warrant is a cheque or bill of exchange.[5] But for our present purposes, it is not necessary to decide this point. The point to establish is that a dividend or interest warrant is also a document for obtaining the payment of money. Another type of document for obtaining the payment of money may be a document drawn payable to "cash or order". Such a document has also been collected by banks.[6]

Banks have also collected for their customers postal and money orders which are instruments embodying instructions for the payment of money deposited at one post office and payable at the same, or at a different post office.[7] Some banks collect order payments issued by local authorities but in this respect they again seem to have no statutory protection.[8]

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3. Holden, op. cit. Vol. 1, p. 284.
4. Paget's Law of Banking p. 274 (8th Ed.)
5. See, for instance, Thairwall v. The Great Northern Railway Co [1910] 2 K.B. 509.
6. Orbit Mining & Trading Co Ltd v. Westminster Bank Ltd [1962] 2 All E.R. 552; on appeal [1963] 1 Q.B. 794.
7. See Holden, op. cit., Vol. 1, pp.300-302; there is no statutory protection whatsoever in regard to this type of collection: para. 9-69.
8. Paget's Law of Banking, 278-281.

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In sum, therefore, it is seen that clean remittances as defined by the Uniform Rules may cover the collection of Myriad types of commercial paper.

DOCUMENTARY REMITTANCES

By implication from the definition of clean remittances, the documents attached to documentary remittances would include invoices, shipping documents, documents of title and other similar documents.

Documentary remittances are commonly used in the finance or payment of transnational trade. There are generally three methods of paying the purchase of goods by an importer (buyer). He may make arrangements to pay directly to the seller. Secondly, he may have a collection arrangement with the seller. Lastly, he may make use of bankers' documentary credit[9]. In a simple collection arrangement, the exporter (seller) draws a bill of exchange on the importer (buyer). But to ensure that the buyer pays the bill of exchange, the seller attaches it to the documents of title to the goods sold and sends them to the buyer. In this way, by appointing an agent (usually a bank) in the importer's country, the seller makes sure that the documents of title are not released to the buyer until he has paid the bill of exchange or accepted it.[10] This is the

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9. C.M. Schmitthoff, The Expert Trade, 189-225. See also, Holden, op. cit., Vol. 1, p. 272 et seq., Vol. 2, 281 et seq. For a thorough treatment of documentary credits, see E.P. Ellinger, Documentary Letters of Credit.

10. Schmitthoff, id. p. 197.

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main function of documentary remittances vis-a-vis a collection arrangement. But documentary remittances have another important function, i.e. to provide collateral security to a banker accepting, discounting or negotiating a bill of exchange. This aspect of documentary remittances does not come within the province of this paper.

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CHAPTER 4

The Remittance Letter

The parties to a collection arrangement for an overseas export transaction are usually the customer (seller) the bank of the seller and the foreign bank at the place where the buyer resides.[11] The nature of a collection arrangement is that the seller instructs his bank as agent to collect the proceeds from the sale of goods to the buyer. The customer's bank in turn instructs the foreign bank to collect on its behalf for the purpose of carrying out the instructions of the seller. Sometimes, more than two banks may be involved in such a transaction. But, basically, the relationship between the various parties to such a transaction is one of agency.[12] Hence, it is necessary to see that the agents are properly instructed to carry out the wishes of the principal. The basis of the rights and liabilities of principal and agent lies in the contract concluded between them.[13] In the case of a collection arrangement, the Uniform Rules is part of the contract of agency between the customer and his bank and that bank and the remitting bank overseas. But within the Uniform Rules itself, a further provision exists as to how the customer is to instruct his bank to collect for him.

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11. General Provisions (b)(ii).

12. A question may arise as to whether the seller has any rights against the "sub-agent" appointed by his bank. This question is considered infra, p. 58

13. See generally, Bowstead on Agency.

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This provision deals with the content of the remittance letter.

General Provisions (c) reads, inter alia,

> "All commercial paper sent for collection must be accompanied by a remittance letter giving complete and precise instructions. Banks are only permitted to act upon the instructions given in such remittance letter."

The provision imposes a duty on the customer to give "complete and precise instructions" to his bank and at the same time also a duty upon the bank to act only upon the instructions given. In modern banking practices, banks usually provide their customers with a standard form of remittance letters of a nature in which the various possible types of instructions are clearly set out. The customer need only mark those clauses which he deems appropriate for his purposes.[14]

Nevertheless, General Provisions (c) seems to reaffirm the general common law rule with respect to agency contracts. In particular, it would seem that if the customer (or principal) gives an instruction which is so ambiguous as to be capable of two or more interpretations, the agent will not be in breach of contract if he acts on one interpretation of the instruction which he fairly and honestly assume the instruction to bear.[15] On the other hand, it is the

14. See for example, Kolle, Modern Banking Forms p. 2501 et seq. (Published by Warren Publications, Inc. Boston, Massachuchettes.)

15. Ireland v. Livingston (1872) L.R. 5 H.L. 395; see also Bowstead on Agency, 110 and the cases cited therein

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duty of an agent to exercise his authority exactly in the terms in which it is given.[16] The instructions given to an agent must be lawful and reasonable instructions.[17]

The second paragraph of General Provisions (c) states that if the collecting bank cannot, for any reason, comply with the instructions given in the remittance letter, it must advise the remitting bank immediately. Firstly, it is to be noted that this paragraph relates only to the duty between the collecting bank and the remitting bank. By implication therefore, it seems that the duty between the remitting bank and its customer regarding impossibility of performance is left to the domestic law of the country in which the customer and the bank resides. In English Common Law, it has been held that the duty of an agent to notify his principal of his inability to perform the principal's instructions is a duty that is necessarily implied from the nature of the employment: Callander v. Oelrichs[18]. But a question arises whether this notice must be given within a reasonable time or immediately. In Callander's case, only one of the four judges[19] stated that the notice must be effected within a reasonable time. The other three judges did not refer

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16. Holophane Ltd v. Hesseltine (1896) 13 T.L.R. 7 (C.A.).
17. Bowstead on Agency (1968) p. 111
18. (1838), 5 Bing. N.C. 58; 132 E.R. 1026.
19. Tindal, C.J., E.R. 1028.

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to this point. A dictum of Scrutton L.J. suggests that the notice must be given immediately: "When a person is instructed to procure an insurance he is bound to use reasonable care and skill to effect the policy. If he is unable to procure the policy, he must at once inform his principle of his inability to do so." (emphasis added).[20] There seems therefore to be a conflict on this point in English Common Law. But as between the remitting bank and the collecting bank, the Uniform Rules has made it clear that the notice must be effected "immediately".

With respect to the contents of the remittance letter, the Uniform Rules itself provides some guidance to the customer as to what terms he should stipulate. In a documentary remittance accompanied by a bill of exchange payable at a future date, the remittance letter should state whether the documents are to be released to the drawee against acceptance (D/A) or against payment (D/P). (Article 4). The remittance letter should give instructions as to how payment is to be "disposed of" by the collecting bank as when it is made in a local currency or in a foreign currency (Articles 5 and 6). Partial payments in respect of documentary remittances will not be accepted by the collecting bank unless it is specifically authorised by the remittance letter (Article 7, para. 2). The remittance letter should also give

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20. Hood v. West End Motor Car Packing Co [1917] 2 K.B. 38 at 47.

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specific instructions regarding legal process in the event of non-acceptance or non-payment and the form of protest (article 9). Similarly, specific instructions should be given when a customer nominates a representative to act as case-of-need (Article 10). Finally, the customer may give instructions as to how the collecting bank is to send advices or information to the remitting bank (Article 13).

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CHAPTER 5

The Substantive Law of the Uniform Rules

PRESENTATION (Articles 1, 2, 3, 4).

The presentation of the commercial paper is to be made to the drawee specified in the remittance letter.[1] Read naturally, it would seem that the collecting bank can only present to the drawee and nobody else. But this interpretation may be too strict. In English law, presentment may be made to an agent of the drawee while he is unavailable, e.g. where the drawee is abroad.[2] But, it would seem that presentment must be made to a duly authorised agent. Hence, it is not sufficient to present a bill to a person who happens to be about the premises of the drawee[3] although the wife of the drawee or endorsee may be accepted as representing him.[4] It has also been held that the executor of the drawee is also the proper person to present the bill to.[5] S. 41(1)(a) and s.45(3) of the Bills of Exchange Act, 1882 have now codified the rule that presentment may be made to some person authorised to accept or pay a bill.

Paragraph 2 of Article 1 states that remitting and collecting banks have no obligation to examine the commercial paper or the accompanying documents and

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1. General Provisions (c). Article 1, para. 1.
2. Phillips v. Astling (1809) 2 Taunt. 206; 127 E.R. 1056.
3. Cheek v. Roper (1804) 5 Esp. 175; 170 E.R. 777.
4. Cromwell v. Hynson (1796) 2 Esp. 511, N.P.
5. Caunt v. Thompson (1849), 7 C.B. 400; 137 E.R. 159.

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assume no responsibility for the form and for regularity of the commercial paper or the accompanying documents. It is difficult to see the significance of this provision. Since the Uniform Rules binds only the remitting bank, the collecting bank and the customer, it is clear that the exemption of responsibility provided by this paragraph is between the above three parties and no one else. As such, it seems hardly possible that a situation would arise whereby this provision can apply. The customer remits the commercial paper to the remitting bank and the remitting bank to the collecting bank. Surely, the customer cannot complain of the regularity or otherwise of the commercial paper which he hands over to the remitting bank. The commercial paper having been in his possession previously, the customer would seem to be estopped from alleging its regularity under the general rule of estoppel.

It is of course a well-established rule that a collecting bank does not warrant the genuiness of a bill or of any document attached when it presents the bill for payment.[6] But this rule is only applicable in the sense that the supposed warranty may have been given to the acceptor or payor of the bill. Therefore, if paragraph 2 of Article 1 seeks to incorporate this

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6. East India Co. v. Tritton (1824) 3 B. & C. 280 at 289; 107 E.R. 738; Guaranty Trust Co of N.Y. v. Hannay & Co [1918] 2 K.B. at p. 631; 119 L.T. 321 (C.A.); Gowers v. Lloyds etc Bank (1938) 158 L.T. 467 (C.A.).

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rule, it would seem to have failed to do so because the Uniform Rules does not bind either the acceptor or payor (drawee) of a bill.

Article 3 states that in the case of commercial paper payable at sight, the collecting bank must make presentation for payment without delay. The meaning of "at sight" is nowhere defined in the Code. In English law, a bill payable "at sight" is included in the definition of a bill payable on demand. S.10(1)(a) of the Bills of Exchange Act, 1882 states:

> "A bill is payable on demand -
>
> (a) Which is expressed to be payable on demand, or at sight, or on presentation;"[7]

Therefore, for the purposes of comparison with the English law, "at sight" would be taken to mean "payable on demand". Under English law, a bill payable on demand must be presented for payment within a reasonable time after its issue and after its endorsement. In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.[8] In contrast, therefore, the duty imposed by the Uniform Rules is stricter than that under English law.

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7. cf. Article 9 of UNCITRAL Draft Uniform Law on international bills of exchange and commentary (A/CN.9/67)
   "(1) A bill is payable on demand
   (a) If it states that it is payable on demand or at sight or on presentment or if it contains words of similar import;"
8. s.45(2) Bills of Exchange Act 1882.

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However, it would seem that the words "without delay" cannot be interpreted too strictly without regard to the nature of the bill, the usage of trade and the facts of the particular case. A Court faced with interpreting these two words would not afford to ignore commercial realities.[9]

Paragraph two of Article 3 states:

> "In the case of commercial paper payable at a usance other than sight the collecting bank must, where acceptance is called for, make presentation for acceptance without delay, and must, in every instance, make presentation for payment not later than the appropriate maturity date."

Since the definition of a commercial paper payable at sight in English law means a commercial paper payable on demand, it would seem to follow that a commercial paper payable at usance means in English law that the paper is not payable on demand. S.3(1) of the Bills of Exchange Act, 1882 makes a distinction between bills payable on demand and payable "at a fixed or determinable future time." Hence a commercial paper payable at usance would be one payable "at a fixed or determinable future time."[10]

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9. It is interesting to note that the UNCITRAL Draft Uniform law (supra) states that a bill which is payable on demand must be presented for payment within one year of its stated date and if the bill is undated within one year of the issue thereof: Article 53(e).

10. The word "usance" used to mean customary time and was the time for payment as fixed by custom. The practice of drawing bills at "usance" is now obsolete: Chalmers on Bills of Exchange p. 37 (Ed. Smout, 13th Ed. (1964)).

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In English law, presentment for acceptance is necessary where a bill is payable after sight or expressly stipulates that it shall be presented for acceptance or is drawn payable elsewhere than at the residence or place of business of the drawee.[11]

Presentment for payment of a bill payable at usance i.e. a bill not payable on demand, must be made on the day it falls due in English law.[12] Section 14 of the Bills of Exchange Act, 1882 reads, inter alia,

> "14. Where a bill is not payable on demand, the day on which it falls due is determined as follows:
>
> (1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace:...."

Therefore, it would seem that unless a bill otherwise provides for a specified number of days of grace, the due date for a bill payable on demand would be the time of payment as fixed by the bill plus three days of grace. Hence, a bill drawn on the 1st of November payable three months after date did not become payable until the 4th of February: Wiffen v. Roberts.[13] But it has been held that a bill drawn payable on a fixed date, December 9, was payable on that date: Yoeman

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11. S.39(1)(2) Bills of Exchange Act 1882. See also s.40 as to bills payable after sight.
12. S.45(1).
13. (1795) 1 Esp. 261; 170 E.R. 350. The term "month" in a bill means calendar month: s.14(4).

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Credit Ltd v. Gregory[14]. There appears therefore to be a conflict between these two cases. It is submitted that the Yeoman case is incorrectly decided for the reason that the Court did not refer to s.14(1). The bill drawn in this case is not a bill payable on demand. The time of payment as fixed by the bill was December 9, 1959. Therefore, applying s.14(1) the bill would have been due on the 12th December, 1959. The words in section 14(1), "where the bill itself does not otherwise provide" refers to the bill itself actually providing for "days of grace." In this case, the bill did not provide for "days of grace" and hence it is submitted s.14(1) is directly applicable to the bill. Therefore the day on which a bill not payable on demand falls due is the day as fixed by the bill plus three days of grace unless the bill otherwise provides for the days of grace.[15]

In this respect therefore, the "appropriate maturity date" referred to in Article 3 of the Uniform Rules would be interpreted in English law as the date fixed by the bill plus three days of grace unless the bill otherwise provides.

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14. [1963] 1 W.L.R. 343.

15. See also, Kennedy v. Thomas [1894] 2 Q.B. 759. The UNCITRAL Uniform Draft (A/CN.9/67) provides a somewhat "curious" provision with respect to the due date: Article 53(d) states:
"A bill which is not payable on demand must be presented for payment on the day on which it is payable or on one of the two business days which follow."

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Article 3 also provides that presentation for payment must be made "not later" than the appropriate maturity date. By implication, it would therefore seem that presentation may be made earlier than the appropriate maturity date. But in English law, such a presentation would be premature and plaintiff must be nonsuited in an action to enforce the bill for non-payment.[16] Furthermore, a bill presented prematurely would have to be presented again on the day it falls due: Prideaux v. Collier.[17] In this case, the plaintiff brought an action, as endorsee of a bill of exchange, dated March 20th 1816, drawn by the defendant upon W and payable to his own order. The defendant endorsed the bill to the plaintiff. The bill was payable on the 23rd of May but on the 22nd May the plaintiff presented the bill to W. The clerk of W remarked that the bill was not yet payable and that the defendant had no effects in their hands. The bill was not presented to W on the next day, the 23rd May but was presented on the 24th May. Lord Ellenborough held that the defendant was not liable on the bill because the drawee was not in default as the bill was not presented to the drawee on the day it became payable.

Finally, in respect of presentation, the remittance letter should state whether the documents are to be

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16. Wiffen v. Roberts (1795) 1 Esp. 261; 170 E.R. 350.

17. (1817) 2 Stark. 58; 171 E.R. 571.

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released to the drawee against acceptance (D/A) or against payment (D/P) in the case of a documentary remittance. In the absence of instructions, the documents will be released only against payment (Article 4). It has been stated that banking practice in the past has not been uniform with regard to the absence of specific instructions as to D/A or D/P documentary remittance. Certain countries regard the remittance as an D/P item while others as a D/A one.[18] As such, this last provision of Article 4 represents an improvement in effecting uniformity. Further, the provision also places an additional duty of care with respect to a collecting bank under English law. On an ambiguous instruction from a principal to an agent, in English law, the agent has only a duty to fairly and honestly construe the instruction and act upon it.[19] But in this case, the agent has no power to construe the ambiguous instruction. It must treat the item as a D/P item. The policy for this provision seems to be to ensure maximum protection for the customer.[20]

PAYMENTS (Articles 5, 6 and 7)

Both Articles 5 and 6 place a duty upon the collecting bank to immediately "dispose" or "remit"

18. B.S. Wheble, Uniform Rules for the Collection of Commercial Paper, Journal of the Institute of Bankers, Vol. 89 (1968) p. 58 at 61-62.

19. Ireland v. Livingston (1872) L.R. 5 H.L. 395.

20. B.S. Wheble, id.

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respectively the payments for a commercial paper "in accordance with the instructions given in the remittance letter". It is clear that the instructions given in the remittance letter is subject to the exchange control regulations or laws prevailing in the country of payment. For example, in the United Kingdom, s. 5 of the Exchange Control Act 1947 imposes a blanket prohibition against payment in the United Kingdom to or for the credit of a person resident outside the scheduled territories, OR to or for the credit of a person resident in the scheduled territories by order or on behalf of a person resident outside these territories except with the permission of the Treasury. This provision covers payments made under Article 6 of the Uniform Rules because though the payment made here is payment by a foreign currency, it is nevertheless a payment. Consequently, if the instructions given in the remittance letter is contrary to, say, s. 5 of the Exchange Control Act 1947 (U.K.) the instructions will not bind the collecting bank as General Provisions (a) makes the Uniform Rules subject to the provisions of a national, state or local law and/or regulation "which cannot be departed from". It is clear that a person in the United Kingdom cannot contract out of the Exchange Control Act 1947.[21]

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21. S.34 of the Act and the provisions of the Fifth Schedule make this evident.

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Consequently, the writer doubts the useful effect or purpose of Article 5 of the Uniform Rules unless its presence is in purporting to ensure that the collecting bank only accepts payment in the "local currency" and in no other types of currency.

Article 6 is a recognition that a commercial paper, e.g. a bill of exchange, may require payment in a foreign currency i.e. a currency other than that of the country of payment. This fact is not explicitly provided for in the English Bills of Exchange Act, 1882. S.3 of this Act defines a bill of exchange as, inter alia an unconditional order to pay a sum certain in "money". But it leaves silent as to whether this "money" may be expressed to be payable in a foreign currency. However, s.9(1)(d) recognises that the sum payable in a bill may be expressed to be payable "[a]ccording to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill." Furthermore, s.72(4) of the Act also recognises that the sum payable in a bill may not be "expressed in the currency of the United Kingdom". It has been said that "[i]t is very common to have bills of exchange in a currency foreign as regards one of the parties or as regards the place where the bills are issued

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or payable."[22]

It seems that under s.9(1)(d) of the Act, the bill must "indicate" or "direct" a rate of exchange.[23] But this is not always adhered to.[24] But in any event, although payment is stated to be in a foreign currency, actual payment is made by giving the payee the equivalent of the currency of the country of payment.[25] Hence, the words "relative foreign currency" in Article 6 of the Uniform Rules would be taken to mean the equivalent amount of the foreign currency in terms of the currency of the country of payment. The date at which the rate of exchange is to be determined is the date prevailing at the date when the debt became due and not that prevailing at the date of the judgment of the Court.[26]

The provisions of Article 5 and 6 must therefore be read subject to the above considerations if a collection were to take place in the United Kingdom.

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22. Lord Wright delivering the judgment of the P.C. in Syndie in Bankruptcy of Nasrallah Khoury v. Khayat [1943] A.C. 507 at 511. In this case, a promissory note was executed in Palestine promising to pay "two thousand gold Turkish pounds". The Privy Council held that the note was a promissory note under the corresponding provision of S.83 of the Bills of Exchange Act, 1882(U.K.). See also, as examples of bills payable in a foreign currency, Rouquette v. Overmann (1875) L.R. 10 Q.B. 525; Uliendahl v. Pankhurst Wright & Co (1923) 39 T.L.R. 628; Cohn v. Boulken (1920) 36 T.L.R. 767. Generally, parties to a contract may provide for payment in a foreign currency unless otherwise prohibited by express legislation. See Mann, The Legal Aspects of Money (1971) pp.184-188.
23. See for example, Rouquette v. Overmann (supra) where the rate of exchange was fixed by endorsement.
24. Cohn v. Boulken (supra)
25. Cohn v. Boulken (supra)
26. Uliendahl v. Pankhurst Wright & Co (supra). But cf. Cohn v. Boulken (supra)

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Partial Payments (Article 7).

Article 7 makes a distinction between partial payments in respect of clean remittances and partial payments in respect of documentary remittances. In respect of documentary remittances, partial payments will only be accepted "if specifically authorised in the remittance letter". But in the case of clean remittances, no such authorisation is required. However, "partial payments may be accepted if and to the extent to which and on the conditions on which partial payments are authorised by the law in force in the place of payment". In addition, the clean remittance will only be released to the drawee when full payment has been received.

Article 7 seems clearly to place an onus on the collecting bank to enquire whether the law in force in the place of payment "authorise" the acceptance of partial payments for clean remittances.

The word "authorised" is not defined in the Uniform Rules itself. In common law, it has been held that "[t]he word 'authorise' should be read in its ordinary sense of sanction, approve or countenance."[27] But the word must be read by its context.[28] Therefore, the word "authorised" in Article 7 seems to mean "sanctioned or approved". Hence, the whole effect of Article 7 means that partial payments must be approved or sanctioned by the law in force in the place of payment. In

27. Winstone v. Wurlitzer Automatic Phonograph Co etc. [1946 Angus L.R. 422 per Hersing, C.J. at p. 426.

28. Ex p. Johnson, Re MacMillan (1947) 47 N.S.W.R. 16 per Jordon C.J. at p.18.

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short, it may be said that the law in force in the place of payment must permit the acceptance of partial payments.

In English law, the general law of contract allows for payment of part of a debt subject to a number of qualifications such as accord and satisfaction.[29] But qualifications aside, the acceptance of a small sum in satisfaction does not relieve the debtor for there is no consideration for the creditor's abondment of the balance.[30] This rule is applied equally in the case of bills of exchange. Part payment of a bill in due course operates as a discharge pro tanto.[31] In addition to this common law rule permitting partial acceptance, s. 9(1)(a) and (b) of the Bills of Exchange Act, 1882 specifically recognises that a bill may provide a sum payable by stated instalments.

But if part payment of a bill is sufficient according to the law of the country where the bill was negotiated and the payment was made, it is a good defence in a suit instituted in England to plead that the bill has been fully discharged.[32]

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29. Chitty on Contracts, Vol. 1, para. 1224 (1968)
30. id.
31. Groves v. Key (1832) 3 B. & Ad. 313; see also, Hesketh v. Fawcett (1843), 11 M. & W. 356; Walwyn v. St. Quintin (1797), 1 Bos. & P. 652; Bacon v. Searles (1788) 1 Hy. Bl. 88.
32. Ralli v. Dennistoun (1851) 6 Exch. 483; 155 E.R. 633 at 638 per Parke B.

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There appears to be no rule of English law that the holderof a bill must accept partial payments. But the liability of the acceptor, drawer and indorser is to pay the bill according to its tenor.[33] As such it would seem that the holder of a bill may demand full payment from the parties liable under the bill and hence refuse any payment for less. A survey of various countries have shown that some countries favoured a rule imposing on the holder the duty to take partial payments while an almost equal number opposed such a rule on the ground that the holder should not be obliged to take less than he is entitled to.[34]

Responsibility of Acceptance (Article 8).

Earlier, we have seen that a collecting bank does not warrant the genuiness of a bill or of any document attached when it presents the bill for payment.[35] Article 8 gives the collecting bank a further exemption. It states:

> "The collecting bank is responsible for seeing that the form of the acceptance appears to be complete and correct, but it not responsible for the genuineness of any signature or for the authority of any signatory to sign the acceptance."

In English law, a general rule exists whereby an agent presenting a bill on behalf of his principal for

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33. S.54(1), 55(1)(a), 55(2).

34. UNCITRAL Draft Uniform Law (A/CN.9/67) commentary to Article 71.

35. Supra, p. 34

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acceptance is bound to exercise due diligence in effecting the presentation. Otherwise, the agent would be guilty of negligence.[36] There does not appear to be any cases in English law which touch directly on the duty and non-duty given in Article 8. As such, Article 8 may be taken as laying down a standard as to when a collecting bank would be considered negligent as it is generally accepted that questions of negligence can only be determined according to banking practice. Many cases of negligence is to be found in banks collecting in respect of cheques[37] but it is doubtful if such cases can be applied to presentment of bills for acceptances.

One textbook[38] has expressed the view that it would be physically difficult for a collecting bank to ascertain the genuineness of an acceptance signature to a bill. But the same textbook holds that the collecting bank should at least have the duty of checking the identity of the drawee. This is because it is obviously in the contemplation of the principal that his agent shall obtain the signature of the drawee and no other person.

As to the question of the mode of identifying the drawee, it would seem that much will have to depend on the circumstances of the case. For example, the

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36. Bank of Van Dieman's Land v. Bank of Victoria (1871), L.R. 3 P.C. 526.

37. See for example the discussion in Holden, The Law and Practice of Banking, Vol. 1, para. 6-94 et seq.

38. Paget's Law of Banking (8th Ed.) p. 451

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collecting bank may have a lighter duty of care in the case of a reputable drawee than in the case of a relatively unknown drawee.

PROTEST (Article 9)

Protest of a bill is to be distinguished from advice of fate as provided by Articles 11, 12 and 13 which will be discussed later.

In English law, a protest is a solemn declaration on behalf of the holder against any loss to be sustained by the non-acceptance of a bill or by the non-payment of a bill or note, as the case may be.[39]

In the case of foreign bills, it is necessary in England to have a bill protested for non-acceptance or non-payment. If a dishonoured bill is not protested, the drawer and endorsers are discharged.[40] The time allowed for noting a bill, which is the first step in protesting it, is very short i.e. the noting must not be later than the business day following the day of dishonour.[41] Hence, it is clear that the protest of a bill is a matter of great importance to the holder.

But the Bills of Exchange Act, 1882 is silent as to

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39. Halsbury's Laws of England, Vol. 3, p.201, para. 342 (3rd Ed). A typical form of protest is given in Holden, The Law and Practice of Banking Vol. 1, para. 8-83.
40. S.51(2) Bills of Exchange Act, 1882.
41. S. 51 (4).

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whether a collecting bank has a duty to take the necessary steps to protest a bill. A clear duty is encumbant upon the holder of the bill to protest it. Although s. 51(2) makes no reference to the "holder" in s. 51(1) the word "holder" is used.[42] But no reference is made to a collecting bank or agent in any of these sections unlike s. 49(13) where explicit reference is made to agents in respect of notice of dishonour.

The absence of any reference in the Act with respect to protest by agents may be interpreted as permitting an agent to protest on behalf of the principal i.e. holder. But when the principal omits to instruct the agent as to whether he should protest a bill on dishonour, the duty of the agent is unclear in English law. There appears to be no case law which decides this point.

Hence, it may appear that Article 9 of the Uniform Rules is an attempt to clarify this position. Article 9 states that in the absence of specific instructions, the banks concerned with collection are not responsible for any failure to have the commercial paper protested for non-payment or non-acceptance. In view of the urgency by which a bill must be protested

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42. See also s. 51(5) and s.51(9) where the word "holder" is also used.

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in English law, it is to be doubted whether this rule is desirable. On the contrary, it may be argued, that if a principal requires his bills to be protested, he must instruct his agents specifically to do so.

CASE OF NEED (Article 10).

The meaning of case-of-need according to Article 10 means a representative of the customer in the event of non-acceptance and/or non-payment. It seems Article 10 is a reference to s.15 of the Bills of Exchange Act, 1882 (U.K.). S.15 of this Act states "that the drawer of a bill and any endorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such a person is called the referee in case of need." The exact function of the referee in case of need is not at all clear. Textbooks have not provided any clues for this.[43] It seems to be clear that a referee in case of need is not liable on the bill as compared to, say, an accomodation party.[44] The referee in case of need as defined in s.15 does not sign the bill. As such, he would not be liable either as an acceptor, drawer or endorser.[45] The only

43, See for example, Chalmers on Bills of Exchange p.39 (1964); Byles on Bills of Exchange, p. 113 (1965) Halsbury's Laws of England, Vol. 3, p. 147 (3rd Ed); Chitty on Contracts, Vol. 2, p. 338 (1968)

44. The meaning and liability of an accomodation party is provided by s. 28(1) and (2).

45. The drawee of a bill who does not accept it as required by the Act is not liable on the bill: S. 53(1).

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and obvious function of a referee in case of need therefore is perhaps to honour the bill gratuitously on its dishonour by the appropriate respective parties liable on it.

Article 10 seems to imply that only the customer of the remitting bank may 'nominate' a case of need. But it is quite clear that s. 15 of the Bills of Exchange Act, 1882 (U.K.) states that the drawer of a bill may also 'nominate' a case of need besides the endorser of the bill. If such is the case, it would seem inappropriate to use the word 'nominate' as the customer would have no choice but to follow the nomination made by the drawer unless of course, the customer desires to nominate an additional case of need.

Article 10 also provides that the remittance letter should clearly and fully indicate the powers of a case of need. In view of the vagueness of the function of a case of need, it seems such a requirement is reasonable. In English law, the holder of a bill has an option to resort to a case of need i.e. he may not do so.[46] But s.67(1) should be noted. It provides that before a reference to a case of need is made, the bill must first be protested for non-payment.

The second paragraph of Article 10 reaffirms the point made earlier that the Uniform Rules is not concerned

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46. S.15.

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with situations where a bill is negotiated to a bank for otherwise, the collecting bank would take upon itself the obligation to see that the goods which it has "bought" would be properly warehoused.[46A]

ADVICE OF FATE (Article 11, 12 and 13).

Under Article 11, the collecting bank is to send advice of payment or advice of acceptance, with appropriate detail, to the remitting bank without delay. As regards advice on payment, it seems no difficulty would arise on this term as the collecting bank acts as agents for the remitting bank and as such would be liable to the remitting bank for any proceeds collected. The customer cannot sue the collecting bank directly as between them, no privity of contract exists.[47]

However, the question of advice with respect to acceptance may give rise to some difficulties in English law. If a bill is accepted in England, English law would seem to govern the validity of the bill as it would be a contract made in England.[48] But English law itself provides the requirements of what is a valid acceptance. Hence, s. 21(1) of the Bills of Exchange Act, 1882, provides that every contract, including the acceptor's, is incomplete and revocable until delivery of the instrument in order to give effect thereto.

46A See Holden, The Law and Practice of Banking Vol. 1, p. 280, para. 8-132.

47. Calico Printers' Association Ltd v. Barclays Bank (1931) 145 L.T. 51.

48. S.72(2) of the Bills of Exchange Act, 1882 (U.K.)

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The proviso to this sub-section states that if the drawee "gives notice" to the person entitled to the bill that he has accepted it, the acceptance become complete and irrevocable. S.2 of the Act further explains that "acceptance" means an acceptance completed by delivery or notification. Both sections are declaratory of the common law rule regarding bills of exchange and may be illustrated by the case of Cox v. Troy[49]. In this case, a bill was delivered to the acceptor for his acceptance. The acceptor wrote his acceptance on the bill but erased it on redelivery to the plaintiffs. It was held that the acceptor was not liable on the bill as he had not given his acceptance.[50] The opinion of Bayley J. may be taken as representative of the three other judges delivering the judgment of this case. Bayley J. said, inter alia,[51]

> "I have no difficulty in saying, from the principles of common sense, that it is not the mere act of writing on the bill, but the making of a communication of what is so written, that binds the acceptor; for the making of the communication is a pledge by him to the party, and enables the holder to act upon it."

Therefore, it would seem that an acceptance is complete on the actual delivery of the bill or the communication of acceptance. But to whom should the

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49. (1822) 5 B. & Ald. 474; 106 E.R. 1264.
50. see also, Bank of Van Diemen's Land v. Bank of Victoria (1871) L.R. 3 P.C. 526.
51. id. at p. 1266 E.R.

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communication be made to? It would seem that it is sufficient communication if this is made to the agent of the holder of the bill, i.e. the customer of the remitting bank. Such a rule would be supported by the general law of agency.[52] However, it may be doubted whether the collecting bank is an agent of the remitting bank's customer. General Provisions (b)(ii) of the Uniform Rules describes the collecting bank as being "the correspondent commissioned" by the remitting bank. As such, it would seem that the collecting bank cannot be an agent of the customer.[53] Therefore, it would seem that a communication to the collecting bank by the acceptor would not be sufficient for a contract to be made between the acceptor and the customer of the remitting bank. The communication must be given either to the customer himself or his authorised agent i.e. the remitting bank.

Article 12 provides that the collecting bank is to send advice of non-payment or advice of non-acceptance, with appropriate detail to the remitting bank without delay. Under the Bills of Exchange Act, 1882 (U.K.) notice of dishonour by non-acceptance or non-payment must be given to the drawer and endorser(s)

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52. See, for instance Ex. p. Cote (1873) 9 Ch. App. 27 where Mellish L.J. said, "In order to make the property in bills pass, it is not sufficient to endorse them. They must be delivered to the endorsee or to the agent of the endorsee." (emphasised).

53. See also, Calico Printers' Association Ltd v. Barclays Bank (1931) 145 L.T. 51.

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of a bill and in the absence of such notice, the drawer and endorser(s) respectively is discharged from the bill.[54] The time for giving notice of dishonour has been described as "a very short time indeed."[55] S.49(12) states that notice of dishonour must be given within a "reasonable time". But in the absence of special circumstances, where the person giving and the person to receive notice reside in the same place, it is not "reasonable time" to give notice of dishonour later than the day after the dishonour of the bill. Where the person giving and the person to receive notice resides in different places, "reasonable time" is adhered to where the notice is sent off on the day after the dishonour of the bill by post.[56]

In view of these strict rules, the significance of Article 12 of the Uniform Rules becomes clear. However, it is to be noted that the rules regarding notice of dishonour in English law become applicable only when the non-payment or non-acceptance of a bill has been communicated to the holder of the bill or his agents. Hence, unless the collecting bank overseas is a holder, i.e. payee or endorsee of a bill in possession of it, it would seem that the collecting bank would not be bound by the strict rules of notice of dishonour in English law.

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54. S. 48.

55. Holden, The Law and Practice of Banking, Vol. 1. p. 267, para. 8-75.

56. S. 49(12). For an application of rules s.49(12) and (13) see, Lombard Banking v. Central Garage [1963] 1 Q.B. 220; Yeoman Credit v. Gregory [1963] 1 W.L.R. 343; 1 All E.R. 245.

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Article 12 of the Uniform Rules sets out the duty of giving advice of dishonour between the collecting bank and the remitting bank. The collecting bank has no duty to advise the customer of the remitting bank. When a notice of dishonour reaches the remitting bank, the practice among banks in England is for the remitting bank to give notice of dishonour to its customer, leaving him to give notice to prior parties.[57] This is in accordance with s.49(13) where a bill when dishonoured is in the hands of an agent, the agent may either himself give notice to the party liable on the bill or may give notice to his principal. If a bank is also a holder for value, it will endeavour to give notice to prior parties in order that it may claim against them. But in this case, the bill would not be a "collection" bill as we have defined it under the Uniform Rules.[58]

CHARGES AND EXPENSES (Article 14 and 15)

The relationships between the collecting bank, the remitting bank and the customer are contractual and take the form of contracts of agency. As such, the three parties concerned are free to regulate their charges and expenses as set out in Article 14 and 15. The Bills of Exchange Act, 1882 (U.K.) does not regulate the question of charges and expenses.

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57. Holden, supra, p. 267-8, para. 8-77.

58. For the meaning of collection, see supra, p.16

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A general rule of common law exists to the effect that every agent has a right against his principal to be reimbursed against all expenses incurred by him in the execution of his authority.[59] The agreement to indemnify, if not express, can be regarded as an implied term of the contract that operates unless clearly excluded.[60] In this respect, the terms set out in Articles 14 and 15 regarding expenses are consonant with the common law rules.

LIABILITIES AND RESPONSIBILITIES (Article 16, 17, 18 and 19).

By way of general comment, it is to be noted that these four articles speak generally of "banks". As such, these Articles may have been intended by the drafters of the Code to declare the law that generally, banks engaged in the business of collection are exempted from certain liabilities. But it is clear that the Uniform Rules binds only three parties, the customer, the remitting bank and the collecting bank. Hence, the reference to "banks" must be taken to refer to either or both the remitting bank and the collecting bank. When the Uniform Rules come to be accepted by the international business community as an established custom, then, of course, the Code will bind even those who are not parties to it.[61]

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59. Bowstead on Agency (1968) p. 207
60. id. 208.
61. As to the question of international custom, see supra, p. 13

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Secondly, it is to be noted that the exemptions provided by the Code under this heading are specific and not general exemptions. This point will become clear as we discuss each article concerned.

The wording of Articles 16, 17 and 18 follows closely the corresponding Articles in the Uniform Customs and Practice i.e. Article 12, 10 and 11. These corresponding Articles in the Uniform Customs and Practice have been submitted by one learned writer as reasonable and fair.[62]

The most important provision of Article 16 is paragraph 1 which states:

> "Banks utilising the services of another bank for the purpose of giving effect to the instructions of the customer do so for the account of and at the risk of the latter."

The term that it is the customer who assumes the risk of the services of "another bank" does not seem to accord with English common law. Two cases may be discussed to illustrate this point. The first case is William Mackersy v. Ramsays[63]. In this case, M employed R. and Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident in Calcutta. R. and Co accepted the employment, and wrote promising to credit him with the money when received.

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62. E.P. Ellinger, Documentary Letter of Credit, p. 156, 167.

63. 9 Cl & Fin. 818; 8 E.R. 628, H.L.

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R. and Co transmitted the bill in the usual course of business to C. and Co. of London. C. and Co. remitted the bill to their own correspondent in India. The bill was duly paid in India. R. & Co. wrote to M. announcing the fact of its payment, but never actually credited him in their books with the amount. The correspondent in India failed and did not remit the payment to C. and Co. The House of Lords held that R. and Co. were the agents of M. to obtain payment of the bill and that payment having been actually made, they became <u>ipso facto</u> liable to him for the amount received. M. could not be called on to suffer any loss occasioned by the conduct of their sub-agents, as between whom and himself no privity existed. Lord Campbell said, <u>inter alia</u>, "Mackersy could not have interfered with the money either in the hands of Alexander & Co [i.e. the correspondent in India] or of Coutts & Co. There was no privity between him and either of those houses; but payment to Alexander & Co. was payment to Coutts & Co., and payment to Coutts & Co., was payment to Ramsays & Co."[64]

In the second case, <u>Calico Printers Association v. Barclays Bank</u>[65], the facts, briefly were: The plaintiffs, C.P., employed the first defendants, B. Bank to collect their bills. B. Bank employed a sub-agent,

64. At p. 638 of 8 E.R. 628.
65. (1931) 154 L.T. 51.

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the Anglo-Palestine Co, for the purposes of collection in Beyrout. The sub-agent was made the second defendants in the action. The mandate for collection to the B. Bank had the following condition: "Collections are undertaken at depositor's risk only on the understanding that no liability whatever attaches to the bank in connection therewith or with the storage and insurance of the relative goods." In addition to this exemption clause, the plaintiff also gave the following instruction: "Documents to be surrendered against payment: if goods are not taken up, please do your best on our behalf to warehouse and insure them against fire." Goods to which the bills related were destroyed by fire at the Customs House, Beyrout, when uninsured. The plaintiffs alleged that their loss was due to the negligence on the part of the defendant B. Bank and/or their sub-agents, A. P. & Co, in omitting to insure the goods.

The case was argued mainly on the grounds that the plaintiff had a direct claim against the second defendants and that alternatively, the first defendants were liable for the fault of themselves or their sub-agents. In the lower Court, Wright J. held that the plaintiffs could have no cause of action against the second defendants as there was no privity of contract. His Honour also held that the first defendants were not liable to the plaintiffs because of the exemption clause. The case went on appeal on the second finding and the Court of Appeal affirmed the finding of Wright J. that the

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exemption clause was valid and effectual to protect the first defendants. But the judgment of Wright J. expressed no doubts that the first defendants were liable for the negligence or fault of the second defendants, their sub-agents. Wright J. states the general principle as follows:[66]

> "In general, where a principal employs an agent to carry out a particular employment, the agent undertakes responsibility for the whole transaction, and is responsible for any negligence in carrying it out, even if the negligence be that of the sub-agent properly or necessarily engaged to perform some part, because there is no privity between the principal and the sub-agent."

Applying this principle to the facts of the case, his Honour further states:[67]

> "The case is one of most ordinary banking practice, and to accept the contention that the defendants, Barclays, were not responsible for the acts of the defendants, the Anglo-Palestine Bank, their foreign correspondents, or that there was privity between the latter and the plaintiffs, would be in my judgment to go contrary to the whole commercial understanding of a transaction like this."

On the basis of the Mackersy's and Calico's cases it would seem therefore that a remitting bank employing the services of another bank may be liable for the fault or negligence of that other bank. Paragraph 1 of Article 16 of the Uniform Rules is therefore an attempt to remove this basis of liability and to exempt the remitting bank.

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66. id. at 55.

67. id. 56.

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The next question therefore is whether this purported exemption of liability would be construed by the Courts as repugnant to the contract between the remitting bank and the customer or between the remitting bank and the collecting bank. The effect of paragraph 1, Article 16 of the Code is that the customer assumes the risk of the "other Bank". The type of risks that the customer is taken to assume is not set out in any detail. As such, the provision may cover all kinds of risks ranging from the negligence or error of, say, the collecting bank to the insolvency, liquidation or physical destruction of the collecting bank. However, this is not to say that the exempting clause may be repugnant _per se_. In most cases, the remitting bank has no control over the activities of the collecting bank. For example, in the _Mackersey's_ case, the bankers in Edinburgh could not do anything more than to demand remittance from the collecting house in India. As such, it is difficult to see the reasonableness of this decision. Hence, on the basis that if the remitting bank has no control over the failure of the other banks to give effect to the instructions of the customer, it would seem reasonable that the customer should assume the risk of these failures. The Uniform Commercial Code (U.S.A.) has a parallel provision. Section 4-202(3) states:

> "Subject to subsection (1)(a), a bank is not liable for the insolvency, neglect, misconduct, mistake or default of another bank or person or for loss or destruction of an item in transit

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or in the possession of others"[68]

In contrast to Article 16, the exemption clause in Article 17 is more restrictively phrased. The exemption provided by Article 17 relates to three specific situations. Firstly, no liability or responsibility is assumed by "banks" for the consequences arising out of delay or loss of any messages, letters or document in transit. A second exemption relates to consequences arising out of delay, mutilation, or other errors in the transmission of cables, telegrams or telex. Finally, there is an exemption relating to errors in the translation or interpretation of technical terms. With regard to consequences arising out of delay or loss in transit, it would seem that this exemption is a reasonable one in view of the fact that the banks concerned normally have no control over documents which have left their possession. However, the exemptions relating to the transmission of messages and the translation or interpretation of technical terms may well run contrary to the overriding duty of an agent to use reasonable diligence in carrying out his mandate. It would seem that these exemptions cannot be held to cover or protect a bank which acts recklessly in either transmitting or interpreting a message. A bank cannot agree to discharge its duty with reasonable care and at the same time also agree not to discharge the duty with reasonable care. Hence, the second and third exemptions

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68. Subsection (1)(a) states: "(1) A collecting bank must use ordinary care in (a) presenting an item or sending it for presentment."

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provided by Article 17 must be read with this qualification in view.

With respect to Article 18, it would seem that its provisions are fair and reasonable. Under the general law of contract in common law, acts of God and other force majeure serve to discharge the obligations of a contract if established to the satisfaction of the Court.[69]

Article 19 displaces any obligation which may be entrusted upon a collecting bank by the customer sending goods to it. Unless there are express agreement, it seems clear that a collecting bank has no responsibility to take delivery of goods sent to it either for storage or re-delivery. Article 19 therefore only states the law existing between the customer, the collecting and even the remitting bank. The collection of commercial paper involves either the collection of payments owing under a commercial paper or the acceptance of a commercial paper. In the case of documentary remittance, the documents of title represent the goods and the collecting bank may have a responsibility towards the custody of these documents of title. But the role of either the remitting or collecting bank does not extend to the custody of actual goods. A similar provision to Article 19 can be found in s.4-503 of the Uniform Commercial Code (U.S.)

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69. See Chitty on Contracts, Vol. 1, Chapter 22 (1968)

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CHAPTER 6

Conclusion

The Uniform Rules, like its sister Code, the Uniform Customs and Practice for Documentary Credits exemplifies the work at the present moment being undertaken by the international commercial community to effect some degree of uniformity for international business transactions. As such, both Codes are to be welcomed by the International Community.

No doubt, some of the provisions of the Uniform Rules may appear vague at places but by and large it provides a workable basis for the business community to more effectively transact their businesses. It is to be hoped that in the passage of time, greater refinements may be added to the Code and simultaneously that the Code would achieve that required degree of popularity that it becomes "the law" upon which bankers, customers and merchants enter into relationships with one another.

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