National Library of Canada
Bibliothèque nationale du Canada

Acquisitions and Bibliographic Services Branch
Direction des acquisitions et des services bibliographiques

395 Wellington Street
Ottawa, Ontario
K1A 0N4

395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file Votre référence

Our file Notre référence

NOTICE

The quality of this microform is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Reproduction in full or in part of this microform is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30, and subsequent amendments.

AVIS

La qualité de cette microforme dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

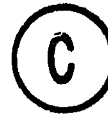
La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

La reproduction, même partielle, de cette microforme est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30, et ses amendements subséquents.

Canada

UNIVERSITY OF ALBERTA

A CRITICAL APPRAISAL OF THE CONTINUED RELEVANCE OF BILLS OF EXCHANGE IN AN INTERNATIONAL ELECTRONIC TRADE ENVIRONMENT

BY 

SAMUEL OKWUDILI MADUEGBUNA

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of MASTER OF LAWS.

FACULTY OF LAW

Edmonton, Alberta

FALL, 1992

National Library of Canada

Bibliothèque nationale du Canada

Canadian Theses Service

Service des thèses canadiennes

Ottawa, Canada
K1A 0N4

The author has granted an irrevocable non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of his/her thesis by any means and in any form or format, making this thesis available to interested persons.

L'auteur a accordé une licence irrévocable et non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de sa thèse de quelque manière et sous quelque forme que ce soit pour mettre des exemplaires de cette thèse à la disposition des personnes intéressées.

The author retains ownership of the copyright in his/her thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without his/her permission.

L'auteur conserve la propriété du droit d'auteur qui protège sa thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

ISBN 0-315-77190-9

Canada

UNIVERSITY OF ALBERTA

RELEASE FORM

NAME OF AUTHOR: **SAMUEL OKWUDILI MADUEGBUNA**

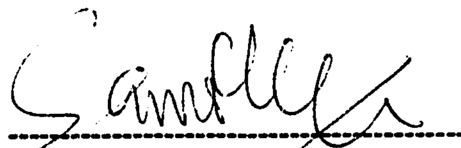
TITLE OF THESIS: **A CRITICAL APPRAISAL OF THE CONTINUED RELEVANCE OF BILLS OF EXCHANGE IN AN INTERNATIONAL ELECTRONIC TRADE ENVIRONMENT**

DEGREE: **MASTER OF LAWS**

YEAR THIS DEGREE GRANTED: **FALL 1992**

Permission is hereby granted to the University of Alberta Library to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only.

The author reserves all other publication and other rights in association with the copyright in the thesis, and except as hereinbefore provided neither the thesis nor any substantial portion thereof may be printed or otherwise reproduced in any material form whatever without the author's prior written permission.



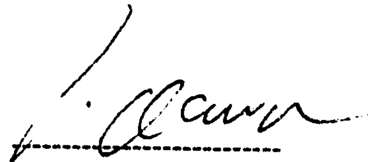
Samuel Okwudili Maduegbuna.
65 New Market Road,
P.O.Box 3165,
Onitsha, Anambra State,
Nigeria.

August 31, 1992

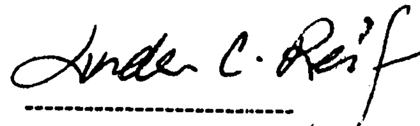
UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommended to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled **A CRITICAL APPRAISAL OF THE CONTINUED RELEVANCE OF BILLS OF EXCHANGE IN AN INTERNATIONAL ELECTRONIC TRADE ENVIRONMENT** submitted by **SAMUEL OKWUDILI MADUEGBUNA** in partial fulfilment of the requirements for the degree of **MASTER OF LAWS.**



Professor Philip M. Raworth



Professor Linda C. Reif

Professor J. A. Lejnieks

Dated-August 5-1992

Dedicated to Ifeanyi, Gbenga, Kole and Jibola whose support made this programme possible.

ABSTRACT.

Bills of Exchange serve a variety of objectives in international trade. They could easily constitute the sole mode of payment or alternatively form one element in a more complex payment and/or financing mechanism. However, electronic banking techniques, with their attributes of speed, reduced cost and efficiency, challenges the use of paper documents such as the bill of exchange in the payment and perhaps financing of international trade. The broad objective of this thesis is therefore to appraise critically the continued relevance of bills of exchange in an international electronic trade environment. In this analysis particular regard is had to the fact that the elimination of paper-based payment and financing mechanisms may have adverse effects on the trade practices of the Less Developed Countries (LDCs) of the world.

This study is introduced in chapter one by a modest attempt at reconciling the true origins of the bill of exchange and by an examination of the reasons that led to the development and early use of the bill of exchange in international trade.

Whilst the second chapter of this thesis sets out the unique aspects of the bill of exchange which lends it easily to a variety of uses in international trade, the third chapter broadly examines the various uses to which the bill has been put in the payment and financing of international trade.

The fourth chapter critically appraises the effects of electronic banking techniques on the use of bills in international trade and the fifth chapter examines the technological, economic political and legal impediments to the development of a truly international electronic trade payment system.

This study is concluded in chapter six with a case for the continued relevance of

the bill in international trade. It is submitted that as electronic banking techniques cannot fully replace the original functions of the bill, the latter remains relevant for the payment and financing of international trade. This concluding chapter also suggests ways and means in which LDCs could be made to achieve the technological capability necessary to participate in a truly international electronic trade payment system.

ACKNOWLEDGEMENT

My gratitude go primarily to my supervisor Professor Philip Raworth for his guidance both in thought and in style. I am also grateful to Professor Linda Reif for her support all through this programme and for agreeing to serve on my examining committee. My thanks also go to Professor J.A. Lejnieks for graciously consenting to serve on my examining committee.

I am most grateful to Dean Mclellan, the Graduate Studies Committee of the Faculty of Law and in particular its Chairman, Professor Richard Bauman, without whose moral and financial support this work would not have been completed.

I am also grateful to Lillian Macpherson and the Staff of John A. Weir Law Library for their assistance in providing materials for this work. I wish to express my immense gratitude to Mike Storozuk, Ann Wynn, and Charlene Playfair for their assistance in the computing and general wordprocessing aspects of this thesis. I also acknowledge, with gratitude, the assistance of Dave Wynn of IBM Canada Ltd on the technical aspects of information technology.

I am indebted to the partners of my associated law firm Ajumogobia, Okeke, Oyebode & Aluko, Barristers & Solicitors, Lagos, Nigeria, for their support and for granting me a leave of absence to pursue this programme.

Finally, I wish to give my sincere thanks, to my research colleagues, Lawrence Atsegbua, Victor Onwaeze and P. Ateh-Afac Fossungu for their moral and suggestive support all through this programme, to Cathy lane for her hospitality, to Marie Power for her kindness and generosity, to Roxton Chukwu for his support and friendship, and to all my friends and well wishers too numerous to mention here for their unalloyed support.

TABLE OF CONTENTS

List of Figures

List of Acronyms

CHAPTER ONE: INTRODUCTION.

1.0 An Overview 1

1.1 History and Development of the Uses of Bills of Exchange in International Trade. 6

1.1.a. Conflicts as to the True Origins of the Bill of Exchange. 6

1.1.b. The Reasons for the Early Use of Bills of Exchange in International Trade. 12

CHAPTER TWO: THE UNIQUE ASPECTS OF THE BILL OF EXCHANGE

2.1 Introduction - The Nature of a Bill of Exchange. 16

2.1.a. The Various Definitions of a Bill of Exchange. 16

2.1.b. The formal Requisites of a Bill of Exchange under the Various Definitions. 24

2.1.c. Conflict of Laws Issues. 34

2.2. Negotiation of a Bill of Exchange. 46

2.2.a. Classes of Holders Under the Act. 49

2.2.b. The Rights and liabilities of Holders Under the Act. 53

2.3. The Unifying Provisions of the CIBN. 55

2.3.a. Holder and Protected Holder. 56

2.3.b. Forged Endorsement and Endorsements Without Authority. 56

2.3.C. Protest of Bills of Exchange. 59

2.3.d. Notice of Dishonour. 60

2.3.e. Guarantees. 61

2.3.f. Conflicts of Laws Provisions in the CIBN. 63

2.4. New Possibilities for Commercial Use of Bills of Exchange 64

2.4.a. Bills with Variable Interest Rates. 65

2.4.b. Bills Denominated and Payable in Foreign Currency 65

2.4.c. Bills Drawn "without recourse" 68

2.5 Conclusion 68

CHAPTER THREE: THE USES OF THE BILL OF EXCHANGE IN INTERNATIONAL TRADE.

3.1. Introduction. 70

3.2. The Concept of Payment Mechanism. 72

3.2.a. Payment on Open and Advance Account Terms 76

3.2.b. Payment Using the Collection Procedure. 85

3.2.c Payment Using the Documentary Credit Procedure. 97

3.3 The Concept of Financing Arrangement. 114

3.3.a. The Acceptance Credit. 115

3.3.b. The Negotiated Trade Bill. 118

3.3.c. Forfaiting. 120

3.4 Conclusion 127

CHAPTER FOUR: THE EFFECTS OF ELECTRONIC BANKING TECHNIQUES ON THE USE OF BILLS OF EXCHANGE IN INTERNATIONAL TRADE.

4.1. Introduction 129

4.2. Informational Nature of The Dynamics of Money and Money History. 134

4.3. The Development of Electronic Variants of Payment and Financing Mechanisms of International Trade Based on Bills of Exchange. 135

4.3.a. Electronic Bills of Exchange. 137

4.3.b. Electronic Variants of the Documentary Collection Procedure. 138

4.3.c. Electronic Variants of the Documentary Credit Procedure. 143

4.4. International Electronic Funds Transfers. 148

4.5. The Attractions and Problems of International Electronic Funds Transfer Systems Relative to the Bill of Exchange. 158

CHAPTER FIVE: PRACTICAL IMPEDIMENTS TO THE DEVELOPMENT OF AN INTERNATIONAL ELECTRONIC TRADE PAYMENT SYSTEM.

5.1. Introduction. 168

5.2. Technological and Economic Impediments. 169

5.2.a. The Technology Transfer Implications of an International Electronic Payment System. 170

5.2.c. The Relevance of an International Electronic Trade Payment System to LDCs. 171

5.2.c. Possible Barriers to the Transfer of Information Technology to LDCs. 179

5.3. Political and Economic Impediments. 186

5.3.a. The Politics of Transborder Data Flows. 187

5.3.b. The Likely Perception of an International Electronic Payment System as a Form of "Informal Colonialism". 192

5.4. Legal Impediments. 196

5.4.a. The formal Impediments to the Use of an Electronic Bill of Exchange. 198

5.4.b. Some Evidential Issues Likely to Arise in an International Electronic Trade Payment System. 201

5.4.c. Some Contractual Issues Likely to Arise in an International Electronic Trade Payment System. 208

5.4.d. Legal Solutions. 210

CHAPTER SIX: GENERAL CONCLUSIONS AND RECOMMENDATIONS: A CASE FOR THE CONTINUED RELEVANCE OF THE BILL OF EXCHANGE IN INTERNATIONAL TRADE.

6.1. General Conclusions. 213

6.1.a. The Continued Relevance of the Bill to the Payment and Financing Needs of International Trade. 214

6.1.b. The Existence of Paper and Electronic Systems of Payment in International Trade and Its Possible Implications for World Trade. 215

6.2. Recommendations 221

Select Bibiliography 227

List of Figures

Figure 1: Flowchart of the Process of Documentary Collection 91

Figure 2: Flowchart of the Documentary Credit Transaction 103

Figure 3: Flowchart of Electronic Collection 142

Figure 4: Routing of Financial Messages through SWIFT 154

Figure 5: Electronic Trade Payments Involvong SWIFT 155

LIST OF ACRONYMS

ATMs	-	Automated Teller Machines
BACS	-	Bankers Automated Clearing Services (U.K.)
BBEA	-	Bankers Book Evidence Act, 1879 (U.K.)
BEA	-	Bills of Exchange Act, 1882 (U.K.)
CEA	-	Civil Evidence Act, 1968 (U.K.)
CIBN	-	Convention on International Bills of Exchange and International Promissory Notes, 1988 (United Nations)
CHAPS	-	Clearing House Automated Payment System (U.K.)
CHIPS	-	Clearing House Interbank Payment System (United States)
CMI	-	Comité Maritime International
D/A	-	Document on Acceptance
DCIC	-	Draft Convention on International Cheques (United Nations)
D/P	-	Document on Payment
EDI	-	Electronic Data Interchange
EEC	-	European Economic Community
EFT	-	Electronic Funds Transfer
EFTS	-	Electronic Funds Transfer Systems
EFTT	-	Electronic Funds Transfer Technology
GUL	-	Geneva Uniform Laws (Conventions) on Bills of Exchange and Promissory Notes, 1930 (League of Nations)
ICC	-	International Chamber of Commerce

IEFT	-	International Electronic Funds Transfer
IGOs	-	Inter-governmental Organisations
IT	-	Information Technology
LDCs	-	Less Developed Countries
MICR	-	Magnetic Ink Character Recognition Cheque Clearing System.
NAFTA	-	North American Free Trade Agreement between United States, Canada and Mexico
SAGITTAIRE	-	Systéme Automatique De Gestion Intergrée par Télétransmission de Transactions Avec Imputation de Réglements Etranger (Automated System for the integrated management and settlement of foreign transactions by teletransmission)
SID	-	SWIFT Interface Device
SWIFT	-	Society for Worldwide Interbank Financial Telecommunications
UCC	-	Uniform Commercial Code (United States)
UCP	-	ICC Uniform Customs and Practice for Documentary Credits (1983) Revision)
UNCID	-	ICC Uniform Rules for Interchange of Trade Data by Teletransmission (1988)
UNCITRAL	-	United Nations Commission on International Trade Law
UNCTAD	-	United Nations Conference on Trade and Development
UNEDIFACT	-	United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport
UNESCO	-	United Nations Educational, Scientific and Cultural Organisation

UNTDED	-	United Nations Trade Data Elements Directory
UNTDID	-	United Nations Trade Data Interchange Directory
URC	-	ICC Uniform Rules for Collection (1978 Revision)

CHAPTER ONE

INTRODUCTION.

1.0 An Overview

International trade has been defined as "an exchange [of goods and services] between members of different nations".[1] This definition of international trade presupposes that "members of [the] different nations"[2] have the means to participate in this exchange, and that what means they have are generally acceptable in the exchange. This simple definition also implies, firstly, that international trade has the necessary medium (payment mechanism) through which the exchange can effectively take place, and secondly, that participants have a ready source of the acceptable medium of exchange (financing mechanism) for their continued participation in the exchange.[3] The existence of effective payment and financing mechanisms for the exchange of goods and services is thus fundamental to international trade.[4]

Accounts of trade between members of different nations, going back almost as far as recorded human history, show that since the demise of the age of barter, various payment and financing mechanisms have been used in the course of trade amongst people

---

[1] *Encyclopedia Britannica* Vol.21 15th ed. (Chicago: Encyclopedia Britannica Inc., 1985) at 825.

[2] *Ibid.*

[3] The Concepts of Payment and Financing Mechanisms are discussed in Chapter 3.

[4] N. Horn, "Foreword" in N. Horn,ed., *The Law of International Trade Finance*, (Deventer: Kluwer Law and Taxation Publishers, 1989) v at v.

of different nationalities at different epochs.[5]

Perhaps the most effective of all payment and financing mechanisms used in the course of international trade is the bill of exchange. The effectiveness of the bill of exchange stems from its unique characteristics, which permit it to serve a variety of objectives at the same time. As a learned commentator has succinctly put it:

> "It is one of the most striking illustrations of mercantile genius that a single type of instrument could serve such diverse purposes: it was, at once, a means of settling a debt, a form of currency, a method of providing short-term finance, and a means of guaranteeing another person's obligations.*No other legal instrument has ever attained such a degree of versatility.*"[6]

It is indeed because "no other legal instrument has ever attained such a degree of versatility" that the bill of exchange remains such a widely used payment and financing mechanism, either constituting on its own the method by which payment is effected, or forming an element in a more elaborate payment and financing mechanism for the international exchange of goods and services.[7]

The widespread use of the bill of exchange has been facilitated by the existence of a special body of rules (initially developed by merchants themselves in the course of trade, and later incorporated by codification into various national laws) to protect the integrity of the bill and to allow its use in varying circumstances without any danger of

---

[5] For a detailed account of the history of the various media and/or mechanisms used in International trade, see, W.S. Holdsworth, *History of English Law*, Vol.8, 2nd ed.,(London: Methuen & Co, 1925) at 113 - 146. [Hereinafter, Holdsworth, *History of English Law*].

[6] J.M. Holden, *History of Negotiable Instruments in English Law* (London: The Athlone Press, 1955) at 297.(Emphasis added).

[7] See M.Rowe, "Bills of Exchange and Promissory Notes - Uses and Procedures in International Trade" in N. Horn, ed., *Supra*, note 4, 243 at 246.

distortion in the legal relationships that it creates.[8]

In recent times, however, electronic banking techniques have come to threaten the relevance (or at least the widespread use) of the bill of exchange in international trade. The advent of these electronic banking techniques has led some eminent scholars[9] to argue (albeit cursorily) that payment and financing mechanisms based on the bill of exchange are now obsolete and should be eliminated and replaced by an international computerised "closed user-group system [that could] deal electronically with promises and orders to pay equivalent to drafts[bills of exchange] and promissory notes".[10]

These scholars, whilst conceding that the practical considerations that brought the bill of exchange into being -avoiding the transport of money in *specie* and the need for a credit and payment instrument- have not altogether disappeared, maintain, however, that new procedures such as electronic transfer of funds have replaced many of the bill's original functions.[11]

These scholars, eminent though they may be, however, fail to take into consideration the relative stages of technological development attained by the different members of the international trading system and thus ignore the probable consequences

---

[8] See, J. Vroegop,"Bills of Exchange and Guarantees"(1986) 2 New Zealand L.J. at 33.

[9] See, W. Vis, "Unification of International Trade Law (with special reference to negotiable instruments and commercial arbitration)" in J.J. Norton ed.,*World Trade and Trade Finance*,(New York: Matthew Bender, 1985) at 6.17-6.20; A.G. Guest, "Current Work of the United Nations Commission on International Trade Law" in C.M. Chinkin, P.J. Davidson, W.J.M. Ricquier, eds.,"*Current Problems of International Trade Financing* (Singapore: Malaya Law Review & Butterworths, 1982) 132 at 140-141; Rowe, *supra*, note 7 at 252.

[10] Rowe, *ibid.*

[11] Vis, *supra*, note 8 at 6.17-6.18

for certain regions of the world of eliminating instruments based on the bill of exchange from the payment and financing mechanisms of international trade. Whilst it may be convenient and perhaps desirable to eliminate the bill in the developed countries of North America, Europe and Asia, the same cannot be said for the less developed countries (LDCs)[12] of Africa, South America and Asia. In these LDCs, payment and financing mechanisms based on the bill of exchange remain "the backbone of export and import business."[13] Traditional financial services involving the use of paper based instruments such as the bill of exchange are the hallmark of their banking industry, principally because they lack the advanced computer and telecommunications technologies necessary for the introduction of these new modes of payment and financing. Accordingly, an elimination of instruments of trade based on the bill of exchange would adversely affect their participation in the international trading system .

The objective of this thesis is therefore to appraise the effect of electronic banking techniques on the use of the bill of exchange and such payment and financing instruments of international trade that are based and in so doing evaluate the validity of these calls for the elimination of these traditional instruments of trade. The rest of this chapter traces the history and development of the uses of the bill of exchange in international trade by attempting to reconcile the conflicts as to the true origins of the bill of exchange and by showing the reasons for the early use of the bill in international trade.

---

[12] The terms "LDCs" and "Third World" shall be used interchangeably in this thesis to refer to those nations of Africa, South America and Asia, that are not technologically sophisticated. In using these terms, it is however, recognised that some of these states are not just less developed but are underdeveloped and thus may belong to a "Fourth world."

[13] Horn, *supra* note 4 at v.

Chapter two shows the unique aspects of the bill of exchange which support the variety of uses to which it has been put in international trade. This chapter also discusses the various international efforts at unification of the laws on negotiable instruments and the uses to which the bill could be put as a result of the latest effort at international unification.

Chapter three outlines, against the background of the concepts of payment and financing mechanisms, the uses to which the bill has been put in the payment and financing of international trade. This chapter briefly examines the major trade instruments that are either based on the bill or of which the bill of exchange is an integral part of their process. Accordingly, the bankers draft, international cheques, the collection of bills and the documentary credit are dealt with in this chapter.

Chapter four examines the effect of electronic banking techniques on the use of bills in international trade. Particular attention is given to the emergence of the electronic collection of bills and the electronic letter of credit. In addition, this chapter traces, by the application of certain principles of money history dynamics, the development of two (paper and paperless) systems of payment in international trade, that is the near absolute dependence, in some regions of the world, on paperless modes of payment and a reliance on a combination of paperless and paper-based modes by some other regions of the world. In this vein, the merits and demerits of International Electronic Funds Transfer relative to instruments based on the bill of exchange are highlighted.

Chapter five makes a case for the continued relevance of the bill of exchange in international trade. This chapter exposes the technological, economic, political and legal

impediments to the development of a fully computerised payment and financing system. The continued relevance of the bill is justified by an application of the principle of functional coexistence of representative money. The conclusion is drawn that the relative stages of technological development attained by the different regions of the world ensures the continued relevance of the bill and instruments based on it for South-South international trade as opposed to North-North international trade. Chapter six is the conclusion.

1.1 History and Development of the Uses of Bills of Exchange in International Trade.

1.1.a. Conflicts as to the True Origins of the Bill of Exchange.

The true origins of the bill of exchange has been the subject of several conflicting accounts.[14] The controversy stems from the fact that most writers tend to isolate the history of the bill of exchange from the history of trade between different nations as a whole.[15]

The history of trade between different nations demonstrates the true origins of most trade practices, and how one trading nation's practices have affected the trading

---

[14] See for example the accounts in: Holdsworth, *History of English Law, supra*, note 5 113-146 at 126-136; W.A.Bewes, *The Romance of the Law Merchant (1923)* (London/Littleton, Colorado: Sweet & Maxwell/Rothman & Co,1986)at 44 - 56; T.A Street, *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law*, Vol.II (Northport, Long Island, New York: Edward Thompson Co.,1906); J.E Read, "The Origin, Early History and Later Development of Bills of Exchange and Certain Other Negotiable Instruments" (1926) 4 Can. Bar. Rev. 440, 665 at 441-447; E.Jenks, "On the Early History of Negotiable Instruments" (1893) 9 L.Q.R. 70-85; A.L. Goodhart ed., "A Note on the Early History of Negotiable Instruments" (1928) 44 L.Q.R. 285-288 [Hereinafter, Goodhart]; W.S. Holdsworth, "The Origins and Early History of Negotiable Instruments" (1915) 31 L.Q.R. 12, 173, 137 & (1916) 32 L.Q.R. 20 [Hereinafter, Holdsworth Articles].

[15] See for example: Holdsworth *History of English Law, supra*, note 5 at 126 - 136.

practices of another. The true origins and development of the uses of the bill of exchange in international trade must therefore be sought in the historical patterns of world trade.[16]

Juristic accounts as to the origins of the bill of exchange can broadly be divided into two groups.[17] The first group consists of writers who hold the view that instruments similar to the modern bill of exchange were first used in the middle ages and were introduced into international trade by the Lombards, who were Genoese Merchants from the north of Italy.[18] The second group of writers assert that it was in the international business practices of Eastern Merchants (Babylonians, Arabs, Phoenicians and even the Chinese) long before the middle ages that instruments similar to the modern bill of

[16] For a similar approach to the history and development of the uses of bills of exchange in international trade, See: Bewes, *supra*, note 14; Read, *supra*, note 14; and Goodhart, *supra*, note 14.

[17] There is yet a third group or view which subscribes to the possibility of a Jewish Origin for the Bill. This group is however made up of writers from the two other groups. They include: Jenks, *supra*, note 14 at 85 and the authorities cited in n6; J.K. Betuel, " The Development of Negotiable Instruments in Early English Law" (1938) 51 Harv. L. Rev. 813-845 at 823-824 and the authorities cited in ns44-47; Read, *supra*, note 14 at 444-445, particularly at 444 where he states "that there is authority for attributing negotiable instruments to a semitic origin in very early times." c.f. Bewes, *supra*, note 14 at 44-45, particularly at 45 where he points out that "it is interesting to note that the articles on bills of exchange in the "Jewish Encyclopedia" suggests a much more probable origin, when it says: "The practice seems to have begun among the Arab traders of the Levant in the eighth century and from them passed to the Italian traders who followed the Crusades"; Goodhart, *supra*, note 14 at 288, also points out that "in reference to the argument ... in favour of a Jewish origin for negotiable instruments, it is only necessary to say that if we accept the tablet of Hammurabi's reign [2088 B.C.] as a negotiable instrument, it is obvious that the notes [and perhaps bills] were known centuries before the Jews were a mercantile people and before they would require such documents."

[18] Writers in this group include the following: Holdsworth, *History of English Law*, *supra*, note 5 at 126 - 136; Street, *supra*, note 14, at 335-342; Jenks, *supra*, note 14; D.A.L. Smout, ed., *Chalmers on Bills of Exchange: A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities*, 13th ed. (London:Stevens & Sons Ltd, 1964) at xli - xlvi [Hereinafter *Chalmers*]; C.M. Schmitthoff, "Strict Law and Equity in the Law Relating to Negotiable Instruments" in C. Cheng ed., *Clive M. Schmitthoff's Select Essays in International Trade Law* (Dordrecht/Boston/London: Martinus Nijhoff Publishers/Graham & Trotman,1988) 81-93 [Hereinafter Schmitthoff, *Select Essays*]. See also the judgment of Cockburn J. in *Goodwin* v. *Robarts* (1875) L.R.10 Exch.at 346-358, affd 1 App. Cas. 476(Eng.H.L.)

exchange were first seen.[19]

The first group of writers are concerned primarily with the development of the law of negotiable instruments in England and as thus may not have considered the true origins of the bill in international trade. This would explain their "erroneous presumption of [the] modernity" of such concepts as "negotiability" and "assignability" and why they seem to ignore the fact that such concepts were probably an essential part of the commercial law of kingdoms in existence long before the christian era.[20]

Holdsworth appears to be the leading member of this group. He states[21] that, as a result of the destruction of the early writings obligatory (which were documents by which a person places himself under a liability to pay or perform something) because of the way lawyers construed them under the influence of the technical conceptions of the Civil Law, merchants were obliged to evolve some other expedient. This other expedient was found in the adaptation of another instrument - the bill of exchange. He then argues that, while there is no agreement as to the probable origin of the instrument, "the most probable hypothesis is that they originated in the method employed by the Italian merchants who had entered into a contract to transport money".[22]

---

[19] Writers in this second group include: Bewes, *supra*, note 14; Read, *supra*, note 14 at 441-445; Goodhart, *supra*, note 14, takes the origin of negotiable instruments similar to modern day promissory notes to the period 2088 B.C during the reign of Hammurabi; Holden, *supra*, note 6 at 1, belongs to this group, although he seems to also suggest that the modern bill of exchange was introduced by the Lombards. It should however be noted that Gillett Brothers, the famous London Discount Company, traces the origin of the bill to its use by the Greeks at about the fourth Century B.C, See, Gillett Brothers Ltd., *The Bill On London*, 3rd ed.(London: Chapman & Hall, 1964) at 15.

[20] Read, *supra*, note 14 at 443.

[21] Holdsworth, *History of English Law*, *supra*, note 5 at 132.

[22] Ibid. at 13[illegible]

There is evidence to suggest that this hypothesis goes against the general trend of world trade history, which point to the fact that instruments similar to the modern bills of exchange may have been introduced well before the Middle Ages and were not introduced by Italian merchants.[23]

Bewes has argued that the course of world history shows that the commercial renaissance of the Mediterranean was partly due to the interactions between the Italian and other merchants with the Arab caravan trade well before the Middle Ages.[24] He asserts that this intercourse ultimately led to the takeover of the caravan trade by European merchants. He then concludes that it seems most reasonable to assume that with this takeover, the European merchants also adopted the customs under which it had been conducted for ages past.[25] This undoubtedly would have included the use of whatever medium of exchange was customary in the trade at that time.[26]

The reason why some writers seem to trace the origins of bills of exchange to the Middle Ages and with the emergence of the Lombards as the dominant trading power of that era, could be explained by the paucity of written records of Eastern trade before the middle ages. As one writer puts it:

"It is obvious that the relics which have come down to us are few since

---

[23] Bewes, *supra*, note 14 at 8.

[24] See, Bewes, *supra*, note 14 at 8 and the authorities there cited. Holdsworth, *History of English Law*, *supra*, note 5 at 133 even admits that "the influence of Arabic conceptions on western commerce especially in the reign of Frederic II (1212-1255 A.D) is undoubted".

[25] Bewes, *ibid.* note 1 at 9.

[26] c.f. Goodhart, *supra*, note 14 at 288, where he opines that "that no doubt the Jews carried this instrument from Babylon to Western Europe in their wanderings after the diaspora."

> every great commercial centre of the East has been thoroughly destroyed more than once and we must await the findings of the enthusiastic digger to recover much of the history of trade."[27]

Perhaps the strongest evidence that the modern bill of exchange may have been invented by Eastern merchants is in the use of Arabic words used in relation to the bills of exchange by the Civil Law countries of Europe. Writing in 1923, Bewes made this point forcefully:

> "That the bill was adopted by the crusading nations from the East can hardly be doubted, and one of the most important proofs of this is to be found in the word "avai" which is an element in the Italian, French and Spanish Commercial codes. It is obviously the Arabic "hawala" and is thus treated in the Dictionary issued under the authority of the Royal Spanish Academy."[28]

Holdsworth even admits that the evidence of language is conclusive of Arabic influence on European commerce.[29] He also concedes that something very much like the modern bill of exchange was known in the eighth century A.D. long before anything like the bill of exchange appeared in Italy. However, he submits that the Arabic bill was far more negotiable than the Italian bill of the 13th century, a quality which (in his opinion) the modern bill of exchange did not acquire until some centuries later.[30] Despite the above concessions, Holdsworth seems to have discarded the possibility of Arabic influence on European trading customs by coming to the conclusion that "the origin of

---

[27] Bewes, *supra*, note 14 at 48.

[28] *Ibid.*

[29] Holdsworth, *History of English Law*, *supra*, note 5 at 133 n5, makes reference to some terms used in international trade as evidence of this influence, such as Traffic from "Taraffuk", Avarie from "Awar", Tariff from "Ta'rif", tare (poids) from "tarha", etc. etc.

the bill of exchange must most probably be sought in the Italian letter of payment."[31]

World trade history does not support this conclusion. The history of the use of representative money in trade between different nations shows that there is strong evidence to conclude that instruments similar to the modern bill of exchange were used in the East long before the Middle Ages.[32] It also shows that, first through the business practices of the Arabs as early as the eighth century A.D. and later in the twelfth and thirteenth centuries due to the activities of the Lombards of Northern Italy who carried on considerable foreign commerce after they captured the Eastern caravan trade, the bill of exchange became widely used in international trade.[33] Holden seems to support this position when he opines that:

> "After the fall of the Roman Empire the Arabs became for a time the leaders of the western commercial world, and it would appear that it is in their business practices that we find the germ of the modern negotiable instruments....The Arabs were replaced by the Lombards as the most powerful trading community, and it is significant that instruments very similar to the modern bill of exchange were employed by the Lombards in the thirteenth and fourteenth centuries."[34]

In the face of the conflicting accounts as to the true origins of the bill and in the

---

[31] *Ibid.* at 133-136.This Italian letter of payment was known as the contract of "cambium" meaning exchange. c.f. Read, *supra*, note 14 at 453-455, who whilst agreeing with Holdsworth, *ibid.* at 133, that the Arabic Bill had been freely negotiable several thousand years before the advent of negotiable instruments in Europe, surmises that the most probable origin of the contract of "cambium" which was introduced into England by the Italian bankers could be ascribed to Arabic influence on the history and customs of the western peoples in the early middle ages.

[32] Bewes, *supra*, note 14 at 44-56; Goodhart, *supra*, note 14; See also Read, *supra*, note 14 at 441, points out that "that negotiable securities and various kinds of securities were commonly in use amongst the eastern people long before the christian era seems certain."

[33] See, Bewes, *ibid.* note 1 at 45 and the authorities there cited, See also Read, *ibid.* at 455; *Encyclopedia Britannica*, Vol. 4, 15th ed., (Chicago: Encyclopedia Britannica Inc., 1990) at 626.

[34] Holden, *supra*, note 6 at 1.

absence of a well documented history of world trade in the ages before Christ, this appears to be the most reasonable conclusion as to the true origins of the bill of exchange. It does not, however, purport to elucidate the primitive origins of this classical instrument of trade, which remains shrouded in antiquity and which will have to be sought by a strong interdisciplinary scholarship of a level far beyond the scope of the present discourse.

1.1.b. The Reasons for the Early Use of Bills of Exchange in International Trade.

Despite disagreements amongst writers as to the exact origins of the bill of exchange, all writers seem to be in complete agreement as to the reasons why the bill of exchange was introduced early in trade between nations. Writers on both sides of the historical divide agree that the introduction of the bill of exchange early in trade was due to "the constant journeying of merchants from one country to another"[35], and that "so soon as commerce between distant nations began to be developed, it became clear that some system of adjusting accounts was a far safer and easier way of making payments in distant places than the primitive method of handing over the actual money due."[36] According to Bewes:

> "It is almost impossible to conceive of caravan traffic after the age of barter without commerce in documentary credit, the distance to be travelled and the dangers of the routes making bills some sort of imperative"[37]

Holdsworth concurs with Bewes when he states that "the earliest bills were

---

[35] Bewes, *supra*, note 14 at 14.

[36] Holdsworth, *History of English Law*, *supra*, note 5 at 128.

[37] Bewes, *supra*, note 14 at 9.

instruments devised to obviate the risks of physical transportation of money."[38] Holden adopts the same position and states that "the generally accepted view is that the earliest bills of exchange were used in connection with long distance trade and enabled funds to be transferred from one fair to another and from one country to another without the risk of carrying money *in specie*."[39]

In addition to being a means of obviating the risks of physical transportation of money, the bill of exchange was also necessary as a means of settling accounts between members of different nations as it was acceptable to merchants of all nations.[40] The use of the bill of exchange also afforded merchants some form of credit, for as Bewes points out :

> "It is obvious that a complete liquidation of debts contracted at any large fair could not conveniently be effected at the time, so it became the custom to arrange balances by means of bills or promises to pay at another road fair by which time the travelling merchant might expect to be in funds, perhaps fresh from sales."[41]

In a period when "each succeeding monarch immortalised himself to having new

---

[38] Holdsworth,*History of English Law*, *supra*, note 5 at 130.

[39] Holden, *supra*, note 6 at 1; W.S. Holdsworth,"The Early History of Banking" (1918) 34 L.Q.R. 11-26 at 11 [Hereinafter Holdsworth, Early Banking]; *Chalmers*, *supra*, note 18 at xlv, states that "a bill of exchange in its origin was an instrument by which a trade debt due in one place was transferred in another.It merely avoided the necessity of transmitting cash from place to place"; see also the succinct words of Read, *supra*, note 14 at 449, that "[t]he simple expedient of the bill permitted the settlement of debts without the transport of coin, which at the time we speak of was (quite apart from possible violations of the money statutes) fraught with the greatest dangers, amongst which was the risk of loss through depredations of the gangs of robbers which infested the highways, not to speak of pirates on the high seas."

[40] Holdsworth, *History of English Law*, *supra*, note 5 at 128-129.

[41] *Supra*, note 14 at 45; See also Holdsworth, Articles, *supra*, note 14 at 27 where he states that "the great fairs afforded such convenient meeting places for the adjusting of accounts that it was a common practice to make debts payable at these fairs."

coinage struck impressed with his effigy - a harmless and usual thing enough - but of size, alloy and value often differing from all coins till then in use",[42] the bill provided a stable medium of exchange amongst merchants. In this connection the bill was also used to avoid "receiving in payment defective or counterfeit coins"[43] which was common in that era.

The bill being safer and less bulky than hard money became very popular amongst merchants[44] and, like all customary practices of the merchants, any dispute arising from the use of bill was subject to the jurisdiction of the fair judges, who ensured that disputes were dealt with expeditiously.[45]

Thus, increasingly from the twelfth century onwards merchants began to use the bill of exchange in their trade relations with one another, and so it became widely used in both domestic and foreign trade.[46] By the nineteenth century, the bill was recognised throughout Europe as a means of payment, and in England this recognition was embodied in the Bills of Exchange Act of 1882.[47]

With the disruption of international trade by the First World War, the use of the

---

[42] *Ibid.* at 53.

[43] Holdsworth, Early Banking, *supra*, note 39 at 11.

[44] Bewes, *supra*, note 14 at 53.

[45] Bewes, *ibid.*; Holden, *supra*, note 6 at 3; Read, *supra*, note 14 at 449, see also, Betuel, *supra*, note 17 at 815-817.

[46] C.J. Gmur, Introduction, *Trade Financing* (London: Euromoney Publications,1981) Introduction at 15.

[47] 45 & 46 Vict., c.6 as amended. [Hereinafter *BEA*].

bill as an international payment and financing instrument declined.[48] However, since the fixing of international currency parities by the Bretton Woods Agreement of 1944[49] and as a result of the international legal codification of the principles on negotiable instruments in 1930,[50] the bill once again came into widespread use. By the recent adoption on December 9, 1988, by the United Nations General Assembly of the *Convention on International Bills of Exchange and International Promissory Notes* (CIBN),[51] the bill of Exchange, despite recent moves towards electronic means, perhaps continue to be an indispensable tool of payment and financing of international trade.

---

[48] See, Holden, *supra*, note 6 at 298 - 303 .

[49] *Articles on International Agreement of International Monetary Fund* done on 1/22 July 1944 in Bretton Woods, New Hampshire, U.S.A. as amended.

[50] *Convention Providing for a Uniform Law on Bills of Exchange and Promissory Notes* [Hereinafter, *GUL*] and *Convention for the Settlement of Certain Conflict of Laws in Connection with Bills of Exchange and Promissory Notes*,Geneva, June 7, 1930, 1933-34,143 L.N.T.S. at 257 & 317.

[51] UN. Doc. A/RES/43/165 (1989) [Hereinafter,*CIBN*]

CHAPTER TWO

THE UNIQUE ASPECTS OF THE BILL OF EXCHANGE.

2.1. The Nature of a Bill of Exchange.

The nature of a bill of exchange has been the subject of a great deal of legal analysis,[1] therefore the following analysis of the nature of the instrument cannot pretend to be exhaustive, but shall simply highlight those features of the bill that make it unique for use in the payment and financing of goods and services in international trade.

When bills of exchange are used in the payment and financing of international trade contractual obligations are imposed on parties in different countries. Accordingly, the various definitions of a bill, the parties to a bill in international trade, the negotiation of a bill and certain conflicts of laws issues that arise are of particular relevance to the present discourse.

2.1.a. The Various Definitions of a Bill of Exchange.

Much has been written about the attempts at the universal unification of the national laws on negotiable instrument, and on the need for such unification.[2] However,

---

[1] For a select reading, see: A.G. Guest, ed., *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes*, 14th ed., (London: Sweet and Maxwell, 1991); F.Ryder & A. Bueno, eds., *Byles on Bills of Exchange: The Law of Bills of Exchange, Promissory Notes, Bank Notes and Cheques*, 26th ed.(London: Sweet & Maxwell,1988) [Hereinafter, *Byles*]; B. Crawford, ed., *Crawford and Falconbridge: Banking and Bills of Exchange- A treatise on the Law of Banks, Banking, Bills of Exchange and the Payment System in Canada*, 8th ed., Vol. 2, (Toronto: Canada Law Book Inc, 1986) [Hereinafter, *Crawford and Falconbridge*] See also. A.G. Guest, et al eds., *Benjamin's Sale of Goods*, 3rd ed.,(London: Sweet and Maxwell, 1987) at ss.2074- 2099 [Hereinafter, *Benjamin*].

[2] See, M.O.Hudson & A.H. Feller, "The International Unification of Laws Concerning Bills of Exchange" (1931) 44 Harv. L. Rev. 333; H. Ynetma, "Unification of the Law Respecting Negotiable Instruments" (1951) 4 Int'l & Comp. L.Q. 178 ; J. Dohm, "Draft Uniform Law on International Bills of Exchange and International Promissory Notes" (1973) 21 Am. J. Comp. L. 474; H.S. White, "The Convention on the Uniform Law of International Bills of Exchange and International Promissory Notes: A Comparison to the Uniform Commercial Code" (1975) 5 Geo. J. of Int'l and Comp. L., 6; R. Blomquist, "The Proposed Uniform Law on International Bills of Exchange and Promissory Notes" (1979) 9 Cal. W. Int'l L. Q., 30;

it would be remiss if a study of this nature simply states the various definitions of a bill of exchange without providing the brief historical reasons for the several definitions.

Since the nineteenth century there have been several attempts on the continent of Europe at providing a uniform law of negotiable instruments for adoption by states.[3] This effort culminated in the signing of two draft Conventions sponsored by the League of Nations at Geneva on June 7, 1930.[4] These Conventions which came into force on January 1, 1934, were ratified or otherwise adopted by states on the continent of Europe, certain South American countries and Japan. However, the Conventions were never ratified by the United Kingdom, the United States of America and the British Dominions. These Conventions and the similar Conventions unifying the law relating to cheques[5]

W. Vis, "Unification of the Law of Negotiable Instruments: The Legislative Process" (1979) 27 Am. J. Comp. L. 608; W. Vis, "Unification of International Trade Law (with special reference to negotiable instruments and commercial arbitration" in J. J. Norton ed. *World Trade & Trade Finance*, (New York: Matthew Bender, 1985) 6-7, W.F. Von Marschall, "UNCITRAL's proposed International Bills of Exchange" (1987) Ariz. J. of Int'l and Comp. L., 6-20; A.G. Guest, "Current Work of the UNCIRTAL" in C.M. Chinkin, P.J. Davidson, W.J.M.Ricquier, eds., *Current Problems of International Trade Financing* (Singapore: Malaya Law Rev. & Butterworths, 1982) 132, 136-140[Hereinafter, Guest (1982)]; A.G.Guest, "Instruments Denominated in a Foreign Currency" (1979) 27 Am. J.Comp. L.533 [Hereinafter, Guest (19-79)]; G. Hermann, "Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes" (1988) 10 U. Pa. J. Int'l Bus. L., 517-577 [Hereinafter, Hermann (1988)]; G. Hermann, "International Bills of Exchange and Promissory Notes: Legal Problems Overcome by new United Nations Convention" in N. Horn, ed. *The Law of International Trade Finance* (Deventer/Boston: Kluwer Law and Taxation Publishers, 1989) 259-274.[Hereinafter, Hermann (1989)]; C. Felsenfeld, "Forged Endorsements Under the United Nations Negotiable Instruments Convention: A Compromise Between Common and Civil Law" (1989) 45 Business Lawyer 397 -413.

[3] Hudson and Feller, *ibid.* at 338-341; Von Marschall, *ibid.* at 7; Hermann,(1988) *ibid.* at 519.

[4] *Convention Providing for a Uniform Law on Bills of Exchange and Promissory Notes* (1933-34) 134 L.N.T.S 257.[Hereinafter, GUL] and *Convention for the Settlement of Certain Conflict of Laws in Connection with Bills of Exchange and Promissory Notes*, (1933-34) 143 L.N.T.S. 317.

[5] *Convention Providing for a Uniform Law for Cheques*, (1933-34) 143 L.N.T.S. 355; *Convention Providing for the Settlement of Certain Conflict of Laws in Connection with Cheques*, (1933-34) 143 L.N.T.S. 407.

dated March 31, 1931,[6] succeeded to a great extent in unifying the law of negotiable instruments as between the states that are party to them, but they also caused a division of national Laws on negotiable instruments into the Geneva and Common Law systems.

Upon the formation of the United Nations, the responsibility for the harmonisation of the national laws of the two groups was given to the United Nations Commission on International Trade Law (UNCITRAL).[7] At its first session in 1968, this Commission decided, as a matter of top priority, to formulate uniform rules applicable to a special negotiable instrument for optional use in international transactions.[8] After nearly twenty years of work by the Commission's working group on international negotiable instruments, the *Convention on International Bills of Exchange and International Promissory Notes* (CIBN) was successfully adopted and opened for ratification by the United Nations General Assembly.[9] This Convention is yet to come into force. It will come into force when it is ratified or acceded to by ten states,[10] but at the time of writing, only four

---

[6] The countries signing the above conventions and the extent to which they have been ratified are given in (1933-34) 143 L.N.T.S.257, 317, 355 and 407.

[7] For the factors that gave rise to the creation of UNCITRAL, see, C.M. Schmitthoff, "The Unification of the Law of International Trade" in C. Cheng, ed., *Clive M. Schmitthoff's Select Essays on International Trade Law*, (Dordrecht/ Boston/ London: Martinus Nijhoff/Graham & Trotman, 1988) 206-218 at 213-218.

[8] *Report of the UNCITRAL on the Work of Its First Session*, 23 UN GAOR Supp.(No.16), UN Doc. No. A/7216, (1968) reprinted in [1968] Y.B.Int'L Trade L. Comm'n para.40. UN Doc. No. A/CN.9/SER.A (1970).

[9] UN. Doc. No. A/RES/43/165 (1989). For a history of UNCITRAL's work in the area of negotiable instruments up to the adoption of the CIBN, see, Guest, (1982), *supra*, note 2 at 136-140; see also, Hermann (1988), *supra*, note 2 at 517 .

[10] art. 89(1) CIBN.

States have so far either signed or acceded to it.[11] Pending its ratification the dichotomy between the Geneva and the Common Law systems persists.

There is thus no uniform international legal definition of a bill of exchange.[12] The Negotiable Instrument Laws of most states are still based either on the Common Law system as adopted from the United kingdom's *Bills of Exchange Act of 1882* (BEA),[13] or on the Geneva system which is founded on the *Uniform Law on Bills of Exchange and Promissory Notes* (GUL) as adopted by the *Geneva Conventions on Bills of Exchange of 1930*.[14]

The definition of the bill of exchange, in the international context, must therefore be sought in the two extant legal regimes of negotiable instruments and the yet to be ratified CIBN.

2.1.a.i. Common Law Definition of a Bill of Exchange.

The most notable common law legislation on negotiable instruments is the *Bills of Exchange Act* (U.K.) of 1882. This piece of Legislation has been referred to by an eminent commercial jurist[15] as "the best drafted Act of Parliament ever passed". The

---

[11] Whilst the United States of America, Canada, Union of the Socialist Republics (as it then was) have signed this Convention, only Guinea has acceded to it, see, *Status of Conventions-Note by the UNCITRAL Secretariat*, UN. Doc. No. A/CN.9/353 (1991) at 9.

[12] See, N.P. Soskin, "Bills of Exchange" in C.J. Gmur, *Trade Financing*, (London: Euromoney Publications, 1981) 29-41 at 29.

[13] 45 & 46 Vict.,c.61 as amended. [Hereinafter, BEA].

[14] *Supra*, note 4.

[15] Mackinnon L.J. in *Banku Polskiego v. Mulder (K.J.) & Co.* [1942] 1 K.B. 497 at 500. (Eng. C.A.)

BEA was the first statute codifying any branch of the English Common Law.[16] The uniqueness of this statute has led to its full or partial adoption as the basis for the laws on negotiable instruments in the United States of America,[17] the former British Dominions[18] and other past or present members[19] of the Commonwealth.[20]

An example of the full adoption by a Commonwealth country[21] of the BEA as its law on negotiable instrument is the *Nigerian Bills of Exchange Act of 1917*,[22] as amended by the *Bills of Exchange Act of 1964*.[23] This Nigerian Act of 1917, which replicates the BEA as drafted by Sir Mackenzie D. Chalmers,[24] is used in this discourse to represent the common law approach to negotiable instruments, accordingly, the

---

[16] *Crawford and Falconbridge*, *supra*, note 1 at 1177.

[17] *The Uniform Commercial Code*, in article 3 (bills of exchange, cheques and promissory notes), article 4 (Bank deposits and collections) and Article 8 (negotiable securities) is in part based on similar principles as the BEA. [Hereinafter, *UCC*] References to the *UCC* shall be to the 1978 Official Text.

[18] See for example, *The Bills of Exchange Act*, (Canada), R.S.C. 1985, c.B-4, as am. [Hereinafter The Canadian Act].

[19] See for example, *The Bills of Exchange Act*,(Australia), (1909-73); *The Bills of Exchange Act*, (New Zealand), 1908

[20] *Byles*, *supra*, note 1 at 3.

[21] This complete adoption was made possible by section 45 of the *Interpretation Act*, (Nigeria),1958, cap. 89, which provides that all Statutes in force in England on the first day of January 1900 shall be in force in Nigeria in so far as they relate to any matter within the exclusive legislative competence of the federal legislature. Banking Matters (including bills of exchange) are matters within the exclusive legislative competence of the Nigerian Federal Legislature.

[22] 1958 cap. 21.[Hereinafter, The Nigerian Act, or The Act]. Reference to sections in this thesis unless otherwise stated shall be to this Act.

[23] This Act of 1964 is based on the *Cheques Act* (U.K.), 1957, 5 & 6 Eliz.2, c.36, and has only four sections providing for the protection of Bankers.

[24] Author of *A digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities*, 1st ed. (1878)

definition of a bill of exchange in the Act is adopted.

The Act in Section 3(1) defines a bill of exchange as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed determinable future time a sum certain in money to or to the order of a specified person or to bearer".[25] By section 3(2) of the Act, an instrument which does not comply with these conditions or which demands that some other conditions be fulfilled is not a bill of exchange.

The implications of this definition will be discussed in conjunction with the formal requisites of a bill as portrayed by the GUL and CIBN definitions.

2.1.a.ii. The GUL Definition of a Bill of Exchange.

The GUL does not define a bill of exchange but rather describes its contents in Article 1 by stipulating that:

> "A bill of exchange contains :
> 1. the term "bill of exchange" inserted in the body of the instrument and expressed in the language employed in drawing up the instrument;
> 2. an unconditional order to pay a determinate sum of money;
> 3. the name of the person who is to pay (drawee);
> 4. a statement of the time of payment;
> 5. a statement of the place where payment is to be made;
> 6. the name of the person to whom or to whose order payment is to be made;
> 7. a statement of the date and of the place where the bill is issued;
> 8. the signature of the person who issues the bill (drawer)"

This description of the contents of a bill of exchange has certain similarities with the definition under the Nigerian Act. These similarities, which will be discussed

---

[25] This definition is a replica of the definition of a bill of exchange in s.3(1) of the BEA, *supra*, note 13.

shortly, relate to the formal requisites of any instrument that purports to be a bill of exchange.

2.1.a.iii. The CIBN Definition of a Bill of Exchange.

Article 1 of the CIBN requires that, for an instrument to constitute an International bill of exchange, both its heading and its text must contain the words "international bill of exchange (UNCITRAL Convention)". Article 2 of the CIBN defines an international bill of exchange as :

> "a bill of exchange which specifies at least two of the following places and indicates that any two places so specified are situated in different states :
> a) the place where the bill is drawn ;
> b) the place indicated next to the signature of the drawer;
> c) the place indicated next to the name of the drawee;
> d) the place indicated next to the name of the payee;
> e) the place of payment;
> Provided that either the place where the bill is drawn or the place of payment is specified on the bill and that such place is situated in a contracting State."

The Convention goes further in Article 3(1) by providing that a bill of Exchange is a "written instrument which:

> a) contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;
> b) is payable on demand;
> c) is dated;
> d) is signed by the drawer;"

The combined effect of Articles 1, 2(1), and 3(1) of the CIBN is thus that an international bill of exchange is an instrument that contains both in its heading and its text the words "International Bill of Exchange(UNCITRAL Convention)", and which incorporates an unconditional order whereby the drawer directs the drawee to pay a

definite sum of money to the payee or to his/her order. The instrument must also be payable on demand or at a definite time and must be dated and signed by the drawer and satisfy the requirements of Article 2(1) by specifying at least two of the places stated in that Article.

2.1.a.iv. The Basic Attribute of the Various Definitions of a Bill of Exchange.

The definitions and/or descriptions set out above, whether of a national or international character, have one attribute - Negotiability. This attribute must adhere to any instrument that seeks to be a bill of exchange, because a bill of exchange is a negotiable instrument, that is to say:

> "A document which itself embodies a cause of action, without more, title to which can be transferred by delivery or by indorsement and delivery, in such a way that a holder for value without notice can obtain good title notwithstanding the defects in the title of his transferor"[26]

The fact of negotiability imbues any instrument with three essential elements. The first is that the "payee or endorsee who is in possession of it or the bearer"[27] can bring an action to enforce it. The second is that the instrument can be transferred from person to person,[28] either by the payee's endorsement completed by delivery to the transferee of the instrument or, if made payable to bearer, by mere delivery. The third and final element is that a *bona fide* transferee who takes an instrument for value, when it is complete and regular on its face, becomes a holder in due course and can enforce the

---

[26] M. Hapgood, *Paget's Law of Banking*, 10th ed., (London & Edinburgh: Butterworths, 1989) at 546. [Hereinafter, *Paget's Law of Banking*].

[27] s.2 of the Act.

[28] This is the act of negotiation discussed *infra* at 2.2.

payment of the instrument notwithstanding any defects in the title of the transferor.[29]

It is this attribute of negotiability that makes a bill of exchange such an indispensable tool for the payment and financing of goods and services in international trade.[30] This attribute of negotiability is achieved by certain formal requisites in the definitions of a bill of exchange both under the Act and under the Conventions. These formal requisites not only accord the transferee of an instrument the above stated three special procedural advantages,[31] but are also designed to ensure the production of an instrument that can be easily recognised as negotiable, so that the risks associated with that form of instrument are obvious to the potential transferee.[32]

2.1.b. The Formal Requisites of a Bill of Exchange under the Various Definitions.

The formal requisites imposed by the GUL and the Act are very similar. However, the CIBN contains certain basic formal requisites on which the GUL and the Act agree and then borrows several other rules from both the GUL and the Act as to which they differ widely.[33] Nevertheless, the definitions of a bill in the Act, the GUL, and the CIBN, contain the basic formal requisites necessary to satisfy the requirement of

---

[29] The Concept of a holder in due Course as under the Act is absent in the GUL and the CIBN. However, as shall be seen *infra.* at 2.3.a. "by a unique blending of common law and civil law concepts", the convention has created the position of a "Protected Holder". See, B. Crawford, "The Definition of a Holder and a Protected Holder in the UNCITRAL Convention on International Bills and Notes", (1990) 4 B.F.L.R. 267 at 269. [Hereinafter, Crawford, Holder and Protected Holder]

[30] N. Penney, "The Draft Convention on International Bills of Exchange and International Promissory Notes: Formal Requisites" (1979) Am. J. Comp. L. 515 at 516; Felsenfeld, *supra*, note 2 at 397.

[31] Penney, *Ibid.* at 515. These three special procedural advantages are not enjoyed by ordinary contract assignees.

[32] *Ibid.* at 515-516.

[33] Penney, *Ibid.* at 516. see also, Crawford, Holder and Protected Holder, *supra*, note 29 at 269; Felsenfeld, *supra*, note 2 at 397.

negotiability. Whilst a comparison of the Act, the GUL and the CIBN is not central to the present study, a discussion of the formal requisites of a bill of exchange under the three legislations[34] is necessary.

2.1.b.i. Unconditional Order.

The Act, the GUL, and the CIBN,[35] all provide that the instrument must be an unconditional order. However only the Act sets out the circumstances in which an instrument will be held to be unconditional.[36] Of particular note in the context of international trade is the provision in the Act[37] permitting the "clausing" of a bill by the inclusion of words indicating the nature of the underlying transaction.[38] Despite this slight difference, the three legislations intend an instrument to be unconditional in the sense that it must not be payable upon a contingency.[39] It thus seems that a statement in an instrument that it is payable out of a specific fund is not a conditional order, nor is a statement in an instrument that it is drawn under a documentary credit or a bank

---

[34] The use of the term "legislation" in reference to the Conventions is not used in the strict technical sense of the word. But is used in this context to denote a set of optional international rules formulated by international agencies, such as the UNCITRAL and the International Chamber of Commerce (ICC), see, C.M. Schmitthoff, "The Law of International Trade" in *Schmitthoff, Select Essays*, *supra*, note 7 219-230 at 223.

[35] s.3(1) of the Act; art. 1(1), GUL; art. 3(1)(a) CIBN.

[36] s. 3(3).

[37] s. 3(3)(b).

[38] Clausing is achieved by the insertion on a bill, of such words as "drawn against shipment of 1000 bags of raw Nigerian cashew nuts from Apapa, Lagos to Brussels, Belgium *Per* M.V. Tara." In *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1918] 2 K.B. 623, the English Court of Appeal held that such a clause does not render a bill conditional.

[39] Penney, *supra*, note 30 at 522 n25; see also, *Benjamin, supra*, note 1 at 1314 and the authorities there cited.

facility covered by an export credit guarantee.[40]

2.1.b.ii. Writing.

The Act and the two Conventions[41] require that the unconditional order must be in writing. Although, neither the Act nor the Conventions contain a definition of "writing", they all seem to understand "writing" to include a handwritten, typed or printed instrument.[42] However, section 18 of the *Interpretation Act* (Nigeria) 1964 provides that "writing and expressions referring to writing include printing, lithography, photography, typewriting and other modes of representing or reproducing words or figures in a *visible form*". The learned author of *Crawford and Falcon-bridge*[43] in discussing the equivalent provision in the *Interpretation Act* (Canada)[44] has rightly surmised that, by the use of the words in *visible form*, it may be possible to express a bill of exchange in electronic or magnetic media so long as it is *visible* or may be rendered *visible* by the use of a computer.[45] It is thus not necessary that the bill be "tangible".[46]

---

[40] *Benjamin, ibid.* and the authorities cited in n74.

[41] s.3(1) of the Act; art.3(1) CIBN. This requirement is implicit in the provisions of Article 1 of GUL.

[42] Penney, *supra*, note 30 at 517. c.f. s.2 BEA, *supra*, note 13, which provides that " written includes printed and writing includes print."

[43] 8th ed., *supra*, note 1 at 1202.

[44] R.S.C.1970, c.I-23, s.28.

[45] The UNCITRAL Working Group perhaps decided to exclude electronic transmission or reproduction of written instruments from the Convention, because the CIBN was not an appropriate place for such a regulation. See, Penney, *supra*, note 30 at 517; see also, *Report of the UNCITRAL Working Group on International Payments on the Work of its Fourth Session*, UN.Doc. A/CN.9/117 (1976) para. 67 vii. c.f. the argument of Penney, *ibid.* at 518, that a cablegram or other electronic transmission which includes all the necessary elements of a negotiable instrument may be valid as a bill of exchange under the 1972 Draft of the CIBN. Professor Guest is, however, of the view that the difficulty would be that the order to pay would not be signed, see, *Chalmers and Guest, supra*, note 1 at 24.

2.1.b.iii. Parties to a Bill of Exchange in International Trade.

The Act and the Conventions[47] contemplate the existence of at least three parties to a bill, namely, the *drawer*, the *drawee*, and the *payee*. The drawer is the person who draws the bill and is usually the exporter in international trade. The drawee is the person on whom the bill is drawn and who is ordered to pay the amount specified on it. The importer usually assumes this role in international trade.[48] The payee is the person to whose order the bill is made payable. In international trade, the bill is usually made payable either to the exporter's order or to the order of the bank who finances the transaction or collects the bill.[49]

In the process of negotiating a bill in international trade, two other persons may become parties to it. These are the *acceptor* and the *endorser*.[50] The drawee becomes the acceptor as soon as he or she marks the bill, thereby signifying assent to the transaction and willingness to pay the bill at maturity. The endorser is the payee or any other person who signs his or her name on the back of the bill. The endorser warrants that the bill will be duly honoured by the drawee. In international trade, the exporter usually endorses the bill which is payable to him or her, though drawn on the importer, when

---

[46] s.1201(46) of the UCC, *supra*, note 17 defines "writing" to include "typewriting or any other intentional reduction to tangible form".

[47] s.3(1); art. 3(1)(a) CIBN; and arts. 1(3),(6)&(8) GUL.

[48] *Benjamin*, *supra*, note 1 at 1313. The bill may at times be drawn on an issuing or confirming bank if a documentary credit is opened.

[49] *Ibid.* at 1313.

[50] art. 5(i) CIBN defines "party" as any person, including the "acceptor" and the "endorser", that signs the bill.

arranging for the discount and/or collection of the bill.[51]

In addition to the above parties, the CIBN makes provision for the infrequent case where a bill is drawn by two or more persons (drawers) and made payable to two or more persons (payees).[52] In this connection the CIBN provides that, if a bill is payable to two or more persons in the alternative, it is payable to any one of them and any one of them in possession of the instrument may exercise the full rights of a holder. In every other case, however, the bill is payable to all of them and the rights of a holder can only be exercised by all of them.[53]

2.1.b.iv. Signature.

The Act and the Conventions[54] provide that the instrument must be signed by the drawer. The instrument may be signed personally or by someone authorised to do so by the drawer.[55] Unlike the Act and the GUL, the CIBN specifies what amounts to a signature. The CIBN provides *inter alia* that "a signature means a handwritten signature, its facsimile or an equivalent authentication effected by other means."[56] This provision accords with some decisions on the Act that uphold the validity of a signature made using

---

[51] For an analysis of the effect of endorsement on discount and collection, see, *Benjamin*, *supra*, note 1 at 1313; Soskin, *supra*, note 12 at 31.

[52] art. 10 CIBN.

[53] art. 10(3) CIBN.

[54] s.3(1) of the Act; art. 3(1)(d) CIBN; art. 1(8) GUL.

[55] s. 91 of the Act; art. 36 CIBN; art. 8 GUL.

[56] art.5(k) CIBN.

the facsimile of a signature.[57] It would seem, however, that under the wide definition of the Nigerian *Interpretation Act*[58], the Act is in the same position as the CIBN.

The signature need not be in the person's name , but may be made using a trade or assumed name.[59] If the signature is forged, whilst the Act considers such a signature inoperative to create liability, the Conventions in varying degrees and depending on the occasion impose no liability on the person whose signature was forged.[60]

The importance of the signature lies in the fact that, by signing the bill, the person signing becomes liable on it unless it can be shown that the signature appearing on the bill is forged or that the bill was signed on the person's behalf without authority.[61]

2.1.b.v. Sum Certain in Money.

The Act and the Conventions[62] provide that a bill must require the payment of a certain sum of money. There is no definition of money under the Act or the GUL, but it seems that to all intents and purposes the two legislations contemplate that money must be legal tender.[63] The CIBN, however, defines money in article 5(l) to include monetary

---

[57] See *Goodman* v. *Eban Ltd.* [1954] 1 Q.B. 550 (Eng. C.A.) which applied the Pre-BEA decisions of *Bennett* v. *Burmfit* (1867) L.R.3.C.P. 28 and *Jenkins* v. *Casford & Thring* (1863) 3 Sw. & T 93. c.f. the dissenting judgment of Denning L.J. at 562 and his dictum in *Lazarus Estates Ltd.* v. *Beasley* [1956] 1 Q.B. 702 (Eng. C.A.) at 710. See also, *Exp. Birmingham Banking Co.* (1886) L.R.3 Ch. 651, (Eng. Chancery Appeals)

[58] *Laws of the Federation of Nigeria,1964*

[59] s. 23(1) of the Act; art. 33(2) CIBN.

[60] art.7 GUL; art.34 CIBN. See, Crawford, Holder and Protected Holder, *supra*, note 29 at 294.

[61] s.23 of the Act; art. 33(1) CIBN; art. 28 GUL.

[62] s. 3(1) of the Act; art. 3(1)(a) CIBN; art. 1(2) GUL.

[63] Penney, *supra*, note 30 at 523.

units of account established by intergovernmental institutions or by agreement between two or more states, such as the IMF Special Drawing Rights (SDRs), the European Currency Unit (ECU), or the Transferrable Rouble.

The sum payable under a bill must be certain in the sense that it must be capable of being ascertained or calculated. However, under the Act and the CIBN, a sum is certain even if it is required to be paid with interest, by stated instalments, by stated instalments at successive dates with a stipulation that upon default the whole sum becomes due or according to an indicated rate of exchange or a rate of exchange ascertained as directed by the bill.[64]

The GUL provisions are different. As regards interest, the GUL permits the stipulation of interest only in the case of bills payable at sight or at a fixed period after sight.[65] However, as practitioners from the Geneva States had no objection to permitting the stipulation of interest on bills payable at other maturities, it was then codified in the CIBN.[66]

With respect to bills payable in instalments, the GUL deems such bills to be null and void. This is one of the major differences between the BEA and the GUL systems.[67] However, the CIBN has successfully resolved this conflict by opting for "instalments at

---

[64] s.9(2) of the Act; art. 7 CIBN. It should however, be noted that the CIBN goes further than the Act by providing in art. 7(e) that a bill is certain though "in a currency other than the currency in which the sum is expressed in the instrument."

[65] art.5 GUL.

[66] Penney, *supra*, note 30 at 523.

[67] For the history of the difference between the Geneva and the Common Law systems on bills payable in instalments, see, Penney, *ibid.* at 523-524 and the authorities cited in ns 32-33.

successive dates".[68]

The provisions of the Act and the CIBN[69] which permit the payment of a bill according to a rate of exchange indicated on the instrument or to be determined as directed by the instrument requires that the person making such a calculation go outside the four corners of the instrument. They thus violate the classical position that bills must be for a sum certain.[70] However, to the extent that commercial practice favours the addition of such rates of exchange, this deviation is permitted, "but that latitude [should not] be stretched beyond its strict limits."[71]

2.1.b.vi. Payable on Demand or at a Fixed Determinable Future Time.

The Act and the Conventions[72] provide that an instrument that purports to be a bill of exchange must be payable either on demand or at a fixed determinable future time.

An instrument is deemed payable on demand if it states that it is payable at sight, on demand, on presentation or if it expresses no time for payment.[73] An instrument may also be made payable after sight or at a fixed period after sight, and in such a case it is payable on acceptance or, if dishonoured, by the date of protest or, if protest is dispensed

---

[68] Arts. 7(a) & (b) CIBN; see, Penney, *ibid.*at 524.

[69] s.9(1)(d) of the Act; art.7(d) CIBN.

[70] See the Nigerian decision of *Daarvhover & Co. Ltd.* v. *Christian & Co. Ltd.* [1967] 1 A.L.R. (Comm.) 434 which followed the Australian case of *Rosentain* v. *Commonwealth Bank of Australia* (1922) 31 C.L.R 46. in holding that two foreign bills with interest clauses were uncertain in sum and accordingly not valid as bills of exchange within the meaning of sections 3(1) and 9(1) of the Act.

[71] C.R. Craigie, "The Collection of Bills in International Trade" in C.M. Chinkin, P.J. Davidson, & W.J.M. Ricquier, eds., *supra*, note 2, 100-133 at 107.

[72] ss. 3(1) & 10(1) of the Act; arts. 3(1)(b) & 9 CIBN; arts. 1(4), 2,5 & 33 GUL.

[73] s.10(1) of the Act; art. 9(1) CIBN ; art. 34 GUL.

with, by the date of dishonour.[74]

2.1.b.vii. Payable to a Named Person.

A bill of exchange must be payable to a specified payee.[75] The person must be named in the instrument with reasonable certainty.[76] Whilst the Act permits a bill to be made payable to bearer[77], the CIBN by requiring the bill to be made payable "to the payee or to his order"[78] eliminates this possibility. Nevertheless, the drawer of a bill under the CIBN may, by drawing it to himself and then endorsing it in blank, transform the bill into a bearer instrument.[79]

2.1.b.viii. Date of the Bill.

The Conventions provide that a bill must be dated, thus making the date of a bill an essential element among their formal requisites.[80] The Act, in contrast, provides that a bill is not invalid by reason only that it is not dated[81] or that it is ante-dated, post-dated or bears a date on a Sunday.[82]

---

[74] s.14 of the Act ; art.9(5) CIBN; art. 35. See also, art. 9(3)-(8) CIBN which makes provisions for an instrument payable at a definite time, and which specifies how to determine the time of payment of instruments generally.

[75] s. 3(1) of the Act; art. 3(1)(a) CIBN; art. 1(3) GUL.

[76] s.7(1) of the Act; art.5(h) CIBN; art. 1(3) GUL.

[77] s. 8(3).

[78] art.3(1)(a) CIBN.

[79] art. 11(a)

[80] art. 3(1)(c) CIBN; art. 1(7) GUL.

[81] s.3(4)(a).

[82] s.13(2)

Despite this difference, the date of a bill is of critical importance in determining when a bill is due and payable,[83] and in calculating the limitation period for an action on the bill.[84] This is particularly so in connection with the CIBN, which in the calculation of dates makes use of fixed time limits rather than the reasonable time concept of the Common Law system.[85]

2.1.b.ix. Designations of "Bill of Exchange" and "International Bill of Exchange (UNCITRAL Convention)".

The definitions of a bill of exchange in the Conventions require the insertion of certain words into the body of any instrument for the instrument to qualify as a bill of exchange for their purposes. In contrast, the Act does not premise the validity of a bill on any such special designation.

Whilst the GUL simply provides that a bill of exchange must contain "[t]he term "bill of exchange" inserted in the body of the instrument and expressed in the language employed in drawing up the instrument,"[86] the CIBN insists that the words "International bill of exchange (UNCITRAL Convention)" must appear both in the heading and in the body of the instrument.[87] The CIBN imposes this condition because the instruments contemplated by the Convention are intended to be used in international transactions and not in domestic transactions. As Bradley Crawford rightly points out:

---

[83] s. 13(1) Act; art. 9(3),(4)&(5) CIBN; Arts. 33-37 GUL.

[84] art. 84 CIBN.

[85] Penney, *supra*, note 30 at 526-527.

[86] art.1(1) GUL.

[87] art. 1(1) CIBN.

> "This is a security measure designed to prevent a heading being added to what was intended by the original parties to be a domestic instrument (and changing the legal regime to which the instrument was subject). It is also designed to prevent instruments that are subject to the international regime being mistakenly processed as domestic instruments as a result of an invocation of the Convention being buried in the text of an instrument and not coming to the attention of a clerk at the appropriate time."[88]

The importance of this designation is further appreciated if it is remembered that the instrument created by the CIBN is a new type of negotiable instrument capable both of commercial acceptance and of free circulation in international commerce.[89] Furthermore, the Convention is applicable only if the parties consciously agree that their instrument, which is intended to circulate between at least two nations, one of which is a Contracting state as shown by the addresses on the face of the instrument, should be governed by the Convention.

These special additions to the definitions of a bill under the two Conventions, do not affect the negotiability of instruments drawn under the different legal regimes. The negotiability of an instrument derives from the fact of the three essential elements discussed above and not from the distinctive formal features of the instrument.

The negotiation of a bill of exchange requires further discussion, but it is perhaps convenient to discuss first, certain conflicts of laws issues that arise from the use of bills of exchange in international trade.

---

[88] B. Crawford, " *Montage* v. *Irvani*: Conflicts or Harmonisation of Laws" (1991) 7 B.F.L.R. 85 at 101. [Hereinafter, Crawford, Conflicts or Harmonisation]

[89] See, J.A. Spanogle, "Introductory Note - United Nations: Convention on International Bills of Exchange and International Promissory Notes" (1989) 28 I.L.M. 170 at 170-171.

2.1.c. Conflict of Laws Issues.

Bills of exchange used in international trade may be drawn in one country, accepted or endorsed in another country and dishonoured or honoured in yet another country.[90] This creates a series of contracts that are each dependent on the original contract between the drawer and the payee. The rights and liabilities of parties to these contracts must thus be determined by reference to more than one law.[91] This calls into play the conflict of law principles applicable to contracts and the express provisions of the Act that deal with conflict of laws issues.

The Act in a single section (section 72) with five subsections makes provision for the conflict of laws issues that arise in the use of bills of exchange in international trade. The section expressly covers such matters as the formal validity of a bill and the supervening contracts, the interpretation of the drawing, endorsement or acceptance of a bill, the duties of a holder with respect to presentment and the necessity for or sufficiency of a protest and a notice of dishonour. It also deals with instruments denominated in foreign currencies and the maturity of a foreign bill. This provision is not exhaustive,[92] accordingly, "the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act"[93] apply to conflict of laws

---

[90] See, L. Collins, ed., *Dicey and Morris on Conflict of Laws*, 11th ed.,(London: Stevens & Sons Ltd, 1987) at 1309. [Hereinafter, *Dicey and Morris*]

[91] *Ibid.* at 1308-1309.

[92] The several other conflict of laws issues not covered by the Act include, Discharge, Capacity, interest, and Measure of Damages for the dishonour of a foreign bill. However, only the discharge of a bill, which brings to and end the life of a bill, will be (albeit briefly) discussed in this thesis.

[93] [illegible]

issues that arise in the use of bills of exchange in international trade.

However, before discussing the relevant conflict of laws issues the characterization, by the Act, of bills drawn in one country and payable in another should first be determined.

2.1.c.i. Inland and Foreign Bills, Bills in a Set and Copies.

Bills used in international trade are considered by the Act to be foreign bills, which are distinct from inland bills. This distinction is drawn by section 4(1) of the Act which states that:

> "an inland bill is a bill which is or on the face of it purports to be-(a) both drawn and payable within Nigeria; or (b) drawn, within Nigeria upon some person resident therein. Any other bill is a foreign bill."

This distinction is particularly important in international trade because the duties of the holder[94] of a foreign bill upon dishonour are much different from those of the holder of an inland bill.[95]

Foreign bills are sometimes drawn in sets, usually in three parts, each part refers to the other and the separate parts constitute one bill.[96] Foreign bills are so drawn in sets to obviate the risk of loss of a single bill in the mail.[97] However, the use of foreign bills drawn in a set appears to be diminishing as the CIBN makes no reference to them.

---

[94] A Holder is normally the person legally entitled to the bill, and is defined in section 2 of the Act as "the payee or endorsee of a bill, who is in possession of it or the bearer thereof".

[95] *Dicey and Morris, supra*, note 90 at 1310.

[96] s. 71(1) of the Act.

2.1.c.ii. Duties of a Holder of a Foreign Bill- Protest.

Under the Act, where a foreign bill appearing on the face of it to be such has been dishonoured either by non-acceptance or by non-payment, it must be duly protested and if not so protested, the drawer or endorsers are discharged.[98] However, where a dis-honoured bill (foreign or inland) has been accepted for honour *supra* protest or contains a reference in case of need,[99] it must nevertheless be protested for non-payment before it is presented for payment to the acceptor for honour or reference in case of need.[100] The Act provides that:

> "[t]he duties of the holder with respect to presentment for acceptance or payment and the necessity for or the sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured." [101]

As regards protest and notice of dishonour, difficulties usually arise with this provision if there are major differences between the law of the place where the bill was dishonoured and the law of the place where the bill was negotiated. This may be the case where the law of the place of payment does not recognise the liability of certain parties

---

[98] s.51(2). For circumstances giving rise to dishonour for non-acceptance and non-payment; see, ss.42-44 & 47 of the Act respectively.

[99] By s.15 of the Act, a reference in case of need is a person to whom the holder of a bill has an option of resorting to in the event of dishonour of the bill.

[100] s.67(1) of the Act.

[101] This subsection, s.72(c),has been criticised as obscure because unless the words of the provision are read discretely and distributively the meaning of the subsection is unintelligible, see, *Dicey and Morris, supra*, note 90 at 1326-1327; see also, *Chalmers and Guest, supra*, note 1 at 585. If the subsection is read distributively, the duties of a holder with respect to the presentment for acceptance or payment of a foreign bill would then be determined by the law of the place where the act is done and the necessity for or sufficiency of a protest or notice of dishonour are determined by the law of the place where the bill is dishonoured. The rules for presentment for acceptance and payment of a bill are set out in sections 39-42

to a bill. For example, whilst the liability of an avaliste in the event of the dishonour of a foreign bill is duly recognised under the Geneva system, the Common Law system does not address such a situation.

Recently in *G. & H. Montage G.m.b.H* v. *Irvani*[102], the English Court of Appeal was confronted with this difficult situation. In this case a set of thirty bills of exchange were drawn by the plaintiffs in West Germany and made payable at a London bank. These bills were accepted by an Iranian company (IDS) and were guaranteed by way of aval by the defendant, the principal shareholder of the Iranian company. Upon the dishonour of fifteen of the bills, they were protested, but no notice of dishonour was given in respect of the bills and only six of the bills were protested within the time required by section 51 of the BEA. The Court of Appeal affirming the Judgment of Saville J.,[103] first held that by section 72(3) of the BEA (*in pari materia* with section 72(c) of the Act) the duties of the holder were to be determined by the law of the place where payment ought to have been made (England). However, since an avaliste was not an endorser within the meaning of section 48 of the BEA, it was further held that the holder owed no duties of notice and protest to the defendant, and that the defendant was therefore not discharged from his liability on the bills.

In Nigeria, a protest in the form of a formal declaration by a Notary Public[104]

---

[102] [1990] 1 W.L.R. 667. particularly the dictum of Muskill LJ at 679H - 680G. For the fuller facts and a detailed commentary on this case, see, Crawford, Conflicts or Harmonisation, *supra*, note 88. See, also *Horn* v. *Roquette* (1878) 3 Q.B.D.514 (Eng. C.A.) for a pre-BEA decision on a similar problem.

[103] *G. & H. Montage G.m.b.H.* v. *Irvani*, [1988] 1 W.L.R. 1285 (Q.B.Div.)

[104] A Notary Public is a Legal Practitioner [illegible]

giving details of the representation of a dishonoured bill and the result of such a representation is sufficient. The foreign bill must first have been noted by the Notary Public, noting in his register the date of the representation, his charges and initials and by attaching to the register the answer given (if any) when the bill was represented. The bill must be noted or protested on the date of its dishonour.[105] However, delay in noting or protesting is excused when it is caused by circumstances beyond the control of the holder, provided that, when the cause of delay ceases to operate, the bill is noted or protested with reasonable diligence.[106] Protest is however, dispensed with in any circumstances where a notice of dishonour is dispensed with under the Act.[107]

Subject to the provisions of the Act,[108] notice of dishonour of a foreign bill either by non-acceptance or by non-payment must be given to the drawers and endorsers, and, if the notice is not so given, the drawer and endorsers are discharged.[109]

Finally, it should be noted that the requirement of protest and notice of dishonour involve real practical problems as it is always difficult to ascertain what are the rules of protest in different countries.

2.1.c.iii. The Formal Validity of a Foreign Bill.

The Act provides that "the validity of a bill [drawn in one country and negotiated,

---

[105] s.51(4) of the Act.

[106] s. 51(9) of the Act. In certain circumstances a householder's protest in the presence of two witnesses may operate as a formal protest in Nigeria - s.54 of the Act.

[107] s.50(6) of the Act.

[108] s.50(2) of the Act.

[109] s.48 of the Act. See also, *African Continental Bank Ltd* v. *Yesufu* [1978] 2 S.C. 93 (S.C. Nigeria)

accepted or payable in another] as regards requisites in form is determined by the law of the place of issue and the validity as regards requisites in form of the supervening contracts, such as acceptance, or endorsement, or acceptance [under] protest, is determined by the law of the place where such contract was made.."[110]

It has been said that the principle which underlies this provision is that of the *lex loci contractus*, i.e. the law of the place of making the contract, from which the parties contemplate that the legal consequences of their contract should be deduced. This is as opposed to the *lex loci solutionis*, i.e. the law of the place where the contract is to be performed.[111]

The place of making each contract on a bill is the place where the instrument is delivered by the party whose contract to pay on the bill is in question.[112] Accordingly, if the form of a bill, its drawing, acceptance or endorsement renders the instrument invalid in the place of its issue,[113] it cannot be valid in the place of payment.[114]

---

[110] s.72(a).

[111] *Dicey and Morris, supra*, note 90 at 1311; *Crawford and Falconbridge, supra*, note 1 at 1712 and the authorities cited in n1; *Byles, supra*, note 1 at 354; J.G. Castel, A.L.C. deMestral, W.C. Graham, *The Canadian Law and Practice of International Trade with Particular Emphasis on Export and Import of Goods and Services*,(Toronto: Emond Montgomery Publications, 1991) at 234.[Hereinafter, *Canadian Law and Practice*]

[112] *Crawford and Falconbridge, supra*, note 1 at 1713. As to the meaning of "Delivery", the Act in section 2 defines it as "the transfer of possession; actual or constructive from one person to another."

[113] The place of issue is the place where the bill is first delivered complete in form and not the place where it is signed, see s.2 of the Act.

[114] *Dicey and Morris, supra*, note 90 at 1314; *Byles, supra*, note 1 at 354. Accordingly, whether a bill is to be regarded as an unconditional order - *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1918] 1 K.B. 43, per Bailhache J., revd on other grounds [1918] 2.K.B. 623 (Eng. C.A.) or whether each endorsement is in proper form - *Koechlin et Cie* v. *Kestenbaum Bros.*, [1927] 1 K.B. 889 (Eng. C.A.) has been determined on the basis of this principle.

Subject to the two practical exceptions in the Act,[115] all questions as to the form of any negotiation of a bill is exclusively determined by the law of the place where the instrument is negotiated.[116] The first exception relates to the stamping of a bill and need not detain us.[117]

The second exception states that where a bill issued outside Nigeria complies with the Act as regards form, it may be treated as valid (for the purposes of enforcing payment) as between all parties who negotiate, hold, or become parties to it in Nigeria. A similar exception in the Canadian Act has been criticised as being anomalous[118] as it holds a bill to be valid in form at the place of payment though invalid according to the law of the place of issue. However, it seems generally accepted[119](provided the bill issued abroad conform, as regards requisites in form to the Act) that the provision serves the limited purpose of enforcing payment between all parties to it in Nigeria and not for the purpose of obtaining a declaration that the holder who has been paid is entitled to retain the money or of preventing the acceptors from recovering money they had paid as

---

[115] s.72(a)(i) & (ii).

[116] *Dicey and Morris, supra*, note 90 at 1307 and the authorities cited in n38.

[117] s.72(a)(i) provides that the omission to stamp a bill issued out of Nigeria does not invalidate the bill.

[118] s. 160(3) of the Canadian Act. See, *Crawford and Falconbridge, supra*, note 1 at 1714; see also, *Dicey and Morris, supra*, note 90 at 1315. However, this subsection seems designed to protect the Nigerian holder of a bill in certain circumstances.

[119] *Dicey and Morris, ibid.*; *Canadian Law and Practice, supra* note 111 at 234; *Crawford and Falconbridge, supra* note 1 at 1714 and the authorities cited in the paragraph containing n22; *Byles supra* note 1 at 355.

such acceptors.[120]

2.1.c.iv. Intrinsic Validity (Interpretation and Legal Effect) of a Foreign Bill.

Section 72(b) of the Act provides that subject to the provisions of the Act, the *interpretation* of the drawing, endorsement, acceptance or acceptance *supra* protest of a bill is determined by the law of the place where the contract is made. There is no doubt that the interpretation of each contract on a bill is governed by its own *lex loci contractus*.[121] What remains debatable is whether the word *interpretation* includes the intrinsic validity and legal effect of the drawing, endorsement or acceptance of the bill.[122]

The preponderance of judicial opinion seems to suggest that "interpretation" extends to the legal effect of the several contracts on a bill.[123] However, some juristic opinions[124] suggest that the word "interpretation" should be restricted to matters of construction, that is to say, the legal interpretation of the words used in the instrument,

---

[120] See, the judgment of Bailhache J. in *Guaranty Trust Co. of New York* v. *Hannay & Co., supra*, note 114.

[121] s.72(a) of the Act; see also, *Dicey and Morris, supra*, note 90 at 1317; *Byles, supra* note 1 at 358.

[122] On this point, see, *Dicey and Morris,ibid.* at 1318; *Crawford and Falconbridge, supra*, note 1 at 1720-1722 and the authorities cited in ns28-39; Chalmer and Guest, *supra* note 1 at 571-575; *Byles, supra*, note 1 at 356-359; *Chalmers supra* note 5 at 241. See also, *Canadian Law and Practice, supra*, note 111 at 235.

[123] *Alcock* v. *Smith* [1892] 1 Ch.238, 256, 263 (Romer J. and Lindley L.J.); *Embiricos* v. *Anglo-Austrian Bank* [1905] 1 K.B.677, 686, 687 (Romer J. and Sterling L.J.); *Koechlin et Cie* v. *Kestenbaum Bros. supra*, note 114 at 899 (Sargant L.J.); *Banku Polskiego* v. *Mulder (K.J.) & Co. supra*, note 15 at 500 (Mackinnon L.J.); *Nova (Jersey) Knit* v. *Kammgarn Spinnerei G.m.b.H.* [1977] 1 W.L.R. 713, 718 (H.L.); *G & H Montage G.m.b.H.* v. *Irvani* [1990] 1 W.L.R 667. See also, *London and Brazilian Bank* v. *Maguire* (1895) 8 C.S. 358 (Quebec S.C.); *Canada Life Assurance Co.* v. *Canadian Imperial Bank of Commerce* (1980) 98 D.L.R. (3d) 670. (S.C. Canada).

[124] *Dicey and Morris, supra*, note 90 at 1318-1320 and the authorities cited in ns34,36, 37; *Canadian Law and Practice, supra*, note 111 at 235.

so that the ordinary conflict of law rules apply.[125] This view is urged because, if the word "interpretation" is literally construed, the law of the place of contracting will be applied to matters that should normally be governed by the law of the place where the obligations of the parties to the bill arise i.e. the *lex loci solutionis*. This solution has however been said to be incorrect, chiefly, because the place of contracting and the place of performance often coincide.[126] If however they differ, as is the case where the bill is accepted in one country and payable in another, it is argued that, as a matter of construction, the law of the place of contracting will apply and not the law of the place of payment.[127]

The scope of this provision remain obscure and as the learned author of *Crawford and Falconbridge* has rightly suggested, it "requires remedial legislation".[128] Happily this suggestion has been met by the CIBN and, upon its ratification, the uncertainty as to the scope of this provision would be a thing of the past.[129]

---

[125] The Act permits the application of the ordinary conflict of law rules in s.96(1).

[126] See, *Byles, supra*, note 1 at 358; *Chalmers and Guest, Supra*, note 1 at 573.

[127] Professor Guest submits that although, resort to the law of the place of contracting may appear old-fashioned and (in some cases at least) inconvenient, it has the merit of simplicity in that, in principle, the same law is applied to matters of formal validity, interpretation and legal effect, see, *Chalmers and Guest, ibid.* at 573.

[128] *Supra*, note 1 at 1722.

[129] In *Montage* v. *Irvani supra*, the opportunity arose for the judicial consideration of the difficult question of the meaning of the word "interpretation" in this subsection, but upon the parties agreement, the trial judge, to the approval of the Court of Appeal, proceeded on the assumption that the word included the rights and obligations of the parties as deduced from such interpretation. For an interesting discussion of how this case would have been decided if the conflict of laws provisions of the CIBN had been in force, see, Crawford, Conflicts or Harmonisation, *supra*, note 88.

2.1.c.v. Instruments Denominated in Foreign Currencies.

In an era in which it has been said that the currencies of the world are floating in the wind,[130] international commerce still demands that bills of exchange continue to be drawn or made payable in currencies other than those of the place where payment is to be made.[131]

In such a case the practice of the banks is to pay the foreign currency and not the national currency of the place of payment. The foreign currency payable is, however, determined by the ruling rate of exchange of the national currency on the date of payment.[132] The Act in section 72(d) makes a practical provision which is in accord with this practice when it stipulates that, where a bill is drawn out as payable in Nigeria and the sum payable is not expressed in Nigerian currency, the amount shall, in the absence of some express stipulation to the contrary, be calculated according to the rate of exchange for sight drafts at the place of payment on the date when the bill is payable.

The effect of this provision has been said to be that, in the absence of an express contrary stipulation, the local currency is treated as the currency of payment, thus reduc-

---

[130] See the dictum of Lord Denning M.R. in *Schorsch Meier G.m.b.H* v. *Hennin*, [1975] 1 All E.R. 152 at 155 (Eng. C.A.) to the effect that: "Why have we in England insisted on a judgment in sterling and nothing else? It is, I think, because of our faith in sterling. It was a stable currency which had no equal. Things are different now. Sterling floats in the wind. It changes like a weathercock with every gust that blows. So do other currencies. This change compels us to think again about our rules."

[131] Guest (1979), *supra*, note 2 at 533; D. Flint, "Some Legal Implications of Fluctuating Exchange Rates" (1980) 54 A.L.J. 211; F.A. Mann, *The Legal Aspects of Money With Special Reference to Comparative Private Law and Public International Law*, 4th ed., (Oxford: Clarendon Press, 1982), at 434; See also, G. Oyebode and S. Maduegbuna, "Legal Problems Often Posed by Exchange Rate Volatility" [unpublished] (Lagos, March 1991.)

[132] Craigie, *supra*, note 71 at 119.

ing the denominated currency to the measure by which the local currency is to be calculated.[133] This is all the more so as bills rarely specify the foreign currency as the medium of payment, thus making the obligations to pay dischargeable by payment in local currency.[134]

The equivalent subsection in the BEA has, however, been repealed,[135] following the decision of the House of Lords in *Miliangos* v. *George Frank (Textiles) Ltd.*[136] which allowed judgments of English Courts to be denominated in foreign currencies. The BEA subsection was repealed because it stood in the way of such foreign currency judgments.[137]

2.1.c.vi. Maturity of a Bill.

By section 72(e) of the Act, the due date of a foreign bill is determined according to the law of the place where the bill is payable. Accordingly, the time for presenting an accepted foreign bill for payment must be in accordance with the law of the place where the bill is payable. The Act, however, allows three days of grace after the date fixed for payment on the bill, unless the instrument itself stipulates otherwise.[138] Similarly, public

---

[133] Guest (1979), *supra*, note 2 at 535. See also the important interpretation of Mocatta J. in *Barclays Bank International Ltd.* v. *Levin Bros. (Bradford) Ltd.* [1977] Q.B. 270, 275 (Eng.Q.B.)

[134] Guest (1979), *ibid.* at 534; see also, *Byles*, *supra* note 1 at 364.

[135] s.72(4) BEA was repealed by s.4 *Administration of Justice Act*, (U.K.), 1977.

[136] [1976] A.C. 443 (Eng. H.L.). c.f. Flint, *supra*, note 131 at 221 n.89 who states that "a practical consequence of this decision is to maintain the preeminence of London as a major international legal forum."

[137] See, *Crawford and Falconbridge*, *supra*, note 1 at 1727.

[138] s. 14(a) of the Act.

holidays may postpone the due date of a bill under the Act.[139]

2.2.c.vii. Discharge of a Foreign Bill.

The Act is silent on the discharge of a foreign bill. Accordingly, the general conflict of laws principles applicable to contracts are used to determine the discharge of such a bill.[140] This means that each contract on a bill is to be discharged in accordance with its proper law,[141] which is the law of the place where the particular contract affecting the party in question was made.[142]

Basically, a bill is discharged when all the rights of action under it are extinguished. The Rules on the discharge of a bill are set out in sections 59-64. Briefly stated, a bill may be discharged either by payment, intentional cancellation, express renunciation by the holder or by prescription.

2.2. Negotiation of a Bill of Exchange.

The uses to which the bill can be put in international trade either as an instrument of credit or payment involve its negotiation, i.e. its transfer from person to person in such a manner that the transferee of the bill gets value for the bill and the transferor, depending on the circumstances, discharges or creates an obligation.

A bill of exchange is negotiated when it is transferred from one person to another

---

[139] s. 14(a)(ii) of the Act.

[140] *Dicey and Morris*, *supra*, note 90 at 1242, 1322.

[141] *Dicey and Morris*, *ibid.*; *Canadian Law and Practice*, *supra*, note 111 at 236.

[142] *Dicey and Morris*, *ibid.* Rule 187 at 1242-1243; Lord Hailsham, ed., *Halsbury's Laws of England*, 4th ed., Vol.4. (London:Butterworths, 1973) at para.498 and the authorities cited in n2; see also *Byles*, *supra*, note 1 at 365 and the authorities there cited.

in such a manner as to constitute the transferee the holder of the bill.[143] Bills may be negotiated either by delivery or by delivery and endorsement.

Delivery is the transfer of possession, actual or constructive.[144] Delivery is actual when the bill is physically transferred with the intention to transfer the rights in the bill to the transferee.[145] Delivery is constructive when a person who holds a bill in one capacity subsequently holds it in some other capacity. This may arise, for example, where a Collecting Banker who originally held a bill on behalf of an exporter/drawer makes an advance against the bill and takes it for himself.[146]

Whilst bearer bills[147] are negotiated by delivery alone[148] order bills[149] are negotiated by the endorsement of the holder and completed by delivery.[150]

Endorsement is the signing of a bill (on the back) by the person transferring the bill[151] with the intention of transferring the entire value of the bill to the transferee.[152]

---

[143] s.31(1) of the Act.

[144] s. 2.

[145] When a bill is handed over to a bank for collection the bill is usually not transferred with an intention to transfer the rights in the bill to the bank, see, J. McLoughin, *Introduction to Negotiable Instruments* (London: Butterworths, 1975) at 75.

[146] This is the collection of bills, which is one of the uses of the bill in international trade. This is discussed *infra*, chapter 3.

[147] Bearer bills are bills made payable to a bearer, and includes bills made payable to a specified person but later endorsed in blank, see, s. 8(3).

[148] s. 31(2).

[149] Order bills are bills made payable to a specified person or to order, and includes bills made payable to bearer, but later specially endorsed, see, s.8(4).

[150] s.31(3).

[151] s.32.

The endorsement may be blank,[153] special,[154] restrictive,[155] conditional[156] or even exclusionary.[157]

The primary effect of an endorsement is to constitute the transferee the new beneficiary. Except where an endorsement is exclusionary, it renders the endorser liable on the bill. This is because, by endorsing the bill, the endorser gives the endorsee "the security of his name and liability on the instrument."[158] The endorser's signature thus imparts a promise that the bill will be paid in due course.

If the bill is dishonoured by non-acceptance, provided the requisite proceedings on dishonour are duly taken,[159] the endorser is liable to compensate the holder and any subsequent endorser who is compelled to pay the bill.[160] However, as the liability of the endorser is secondary to that of the drawer, the endorser is entitled to be indemnified by

---

[152] By s.32(b) a partial endorsement of a bill does not operate as a negotiation of the bill

[153] A bill endorsed in blank is payable to bearer, see, s.34(1).

[154] By s.34(2) such an endorsement is a direction to pay a specified person.

[155] By s.34(4) a restrictive endorsement is one which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof.

[156] By s.33 a conditional endorsement may be disregarded by the payer so that payment to the endorsee is valid whether the condition has been fulfilled or not.

[157] s. 16(1) permits the exclusion of the endorsers liability on the bill.This is done by the inclusion of the words "*without recourse*", "*sans recours*" or words of like effect.

[158] *Per* Erle C.J. in *Keene* v. *Beard* (1860) 141 E.R.1210 at 1213.

[159] Unless waived or dispensed with, notice of dishonour must be duly given and any necessary protest effected. For notice of dishonour and its dispensation or waiver, see, ss.16(b), 48, 49, 50(2) and 51(9). For the necessity of protest, see, s.51.

[160] s.55(2)(a).

the drawer.[161] If, on the other hand, the bill is accepted, the endorser stands as a guarantor of the acceptor. It is thus common under the Common law system of negotiable instruments laws for a person to make himself or herself a party to a bill by endorsement in order to guarantee payment.[162]

2.2.a. Classes of Holders Under the Act.

Negotiation involves a transfer of the bill with an intention to pass the rights in the bill from the transferor to the transferee so as to constitute the latter a holder. It is therefore not every person who obtains the physical possession of a bill, who is a holder. Who then is a holder?, and what are the various classes of holders?.

2.2.a.i Holder.

A holder is" the payee or endorsee of a bill, who is in possession of it or the bearer thereof",[163] and is normally the person legally entitled to the bill. Accordingly, a holder includes a payee, a named endorsee and a person in possession of a bill originally drawn payable to a bearer and subsequently endorsed in blank. A holder also includes a collecting banker, to whom the bill has been endorsed to, and who merely has possession of the bill as agent for the collection of its proceeds.

In all the above circumstances, unless the contrary is proved, a holder of a bill is presumed to have given value for the bill.[164] However, where a bill is obtained under

---

[161] s.55(1)(a).

[162] For illustrations of guarantees by endorsement, see, J. Vroegop, "Bills of Exchange and Guarantees" (1986) 2 New Zealand L.J. at 33.

[163] s.2

[164] s. 30 (2)

a forged endorsement, the endorsee is not a holder.[165]

A holder may be a mere holder, that is, a payee, endorsee or bearer of a bill who has not actually given value for the bill, a holder for value[166] or a holder in due course.[167] However, as will be shown presently, the mere holder can easily become a holder for value. The distinction between a mere holder and a holder for value therefore seems otiose. Thus, reference to a mere holder in this discourse is only for the purpose of making some significant comparisons and unless otherwise stated, reference to holder(s) is to the holder for value.

2.2.a.ii. Holder for Value.

Section 27(2) of the Act provides that "where value has been given at any time for a bill, the holder is deemed a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time".

The effect of this provision is to make the holder who has itself given value, a holder for value as regards all prior parties including those who received no value. Accordingly, it has been held that where a bill is drawn and delivered to a person as a gift, and the donee deposits it with a banker, which gives value for it, the banker becomes a holder for value as regards the drawer even though the drawer received no value for the bill.[168]

---

[165] See, s.24. See also, *Smith* v. *Union Bank* (1875) L.R.10 Q.B. 291 aff'd. (1875) 1 Q.B.D. 31. (Eng. C.A.)

[166] ss.27(2)[illegible](3).

[167] s.29(1).

[168] *Barber* v. *Richards* (1851) 6 Exch. 63, 65; see also *Benjamin.*, *supra*, note 1 at 1322.

Furthermore, if value has at any time been given for the instrument, even though the holder has not himself given value for the bill, such a holder is also a holder for value as regards the acceptor and all parties who became parties prior to such time.[169] It should, however, be noted that as between immediate parties, i.e. between the drawer and acceptor, the payee and the drawer, the endorser and acceptor, the absence of consideration is fatal and renders the bill unenforceable.[170]

2.2.a.iii. Holder in Due Course.

The Act defines a holder in due course as :[171]

> "A holder who has taken the bill complete and regular on the face of it, under the following conditions :
> a) that he became the holder of it ,before it was overdue, and without notice that it had been previously dishonoured, if such was the fact, and
> b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in title of the person who negotiated it".

Implicit in this provision are at least seven requirements that must be satisfied for a person to be deemed a holder in due course. The first is that the person must be a holder within the meaning of the Act. However, a payee though a holder as defined by the Act, cannot be a holder in due course as the holder contemplated by this provision must have taken the bill, i.e negotiated the bill. The bill is issued and never negotiated

---

[169] See, *M.K. International Development Co. Ltd.* v. *Housing Bank*, The Financial Times, January, 22, 1991.

[170] See, *Churchill & Sim* v. *Goddard* [1937] 1 K.B. 92, 109 (Scott L.J.)

[171] s.29(1). For a comparison of a "Holder in due Course and the new category of holder created by the CIBN - the "Protected Holder", see, Crawford, Holder and Protected Holder, *supra*, note 29.

to a payee.[172]

Secondly, the person must have taken the bill when it was complete and regular on its face. A bill drawn without the amount or the name of the payee is, for example, not complete. Similarly, if there is a discrepancy between the name of the payee and the endorsement on the back of the bill, the bill is not regular on its face.[173]

Thirdly, the bill must have been taken before it was overdue. A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time.[174] What is a reasonable length of time is a question of fact. Where a bill is not payable on demand, the day on which it falls due is determined in accordance with Section 14.[175]

Fourthly, the person must have taken the bill without notice that it has been previously dishonoured if such was the case. A bill may be dishonoured either by non-acceptance or by non-payment.[176]

Fifthly, the bill must have been taken in good faith, and "a thing is deemed to have been done in good faith within the meaning of the Act where it is in fact done

---

[172] *R.E. Jones Ltd.* v. *Warring & Gillow Ltd.*, [1926] A.C. 670 (Eng. H.L). For situations in which a payee may be a holder in due course and a criticism of this decision, see, B. Geva, "Reflections on the Need To Revise the Bills of Exchange Act" (1981-82) 6 C.B.L.J. 269 at 289-301. It should however be noted that the reasoning in the case seems inescapable given the fact that the Act contemplates that a holder in due course must be a holder to whom the bill was negotiated. On this point, see, *Chalmers and Guest, supra*, note 1 at 275.

[173] See, *Arab Bank Ltd* v. *Ross* [1952] 2 Q.B. 216 at 226.(Eng.Q.B.)

[174] s.36(3)

[175] This section makes provision *inter alia* for the addition of three days period of grace after the due date of a bill.

[176] For circumstances in which a bill may be dishonoured by non-acceptance and non-payment, see, ss. 43 & 47.

honestly, whether it is done negligently or not."[177]

Sixthly, the person must have also taken the bill for value. In this regard value must be given by the person and not by some prior party as is the case with a holder for value. This is the position, despite the provision in Section 30(1) that every person whose signature appears on the bill is prima facie presumed to have given value for it.

Lastly, the person must have taken the bill without notice of any defects in the title of the person who negotiated the bill to him or her. Notice in this case must be actual notice or knowledge of a fact that should give rise to the suspicion that there may be a defect in the title.[178]

2.2.b. The Rights and liabilities of Holders Under the Act.

The above features of the various classes of holder show that certain rights enure to a person who holds a bill, and that the nature of these rights depend on the capacity in which the person holds the bill.

The mere holder has a right to sue on the bill.[179] But as value has not at any time being given for the bill, it would appear that the suit can always be met by the defence of absence or failure of consideration and it is immaterial that the action is brought against an immediate or remote party.

The holder for value has the same rights as the mere holder, but unlike a mere

---

[177] s.90 of the Act.

[178] s. 29(2) specifically provides that the title of a person who negotiates a bill is defective within the meaning of the Act when he obtains the bill or the acceptance thereof, by fraud, duress, or force and fear or other unlawful means or, when he negotiates the bill in breach of faith under such circumstances as to amount to fraud. See, *Ladup Ltd* v. *Shaikh* [1983] Q.B. 225 (McCowan J.).

[179] s. 38 (1)

holder, the holder for value can enforce the bill notwithstanding the absence or failure of consideration to the person sued. This is so, because the holder for value having furnished consideration to the transferor, the absence of consideration between prior parties to the bill cannot constitute a valid defence to its claim. [180]

However, if the failure of consideration is partial, the chances of a holder for value successfully enforcing the bill depends on whether the action is brought by an immediate or remote party. If the relationship is immediate, the holder for value cannot recover more than the consideration furnished. If however, the relationship is remote, as the holder for value has provided some consideration for the bill, the failure of consideration provided by a prior party is of no relevance at all.[181]

Generally, the claim of a holder for value can be defeated by real or absolute defences, such as forgery, incapacity, lack of delivery, material alteration, cancelation and fraud as to the nature of the instrument. Such a claim will also be met by defects in title of prior parties and by personal defences available to prior parties among themselves. Personal defences include such matters as set-off or counter-claim, general contractual defences and statutory defences.[182] With respect to defects in title of prior parties, the holder for value takes the bill subject to any defects in the bill at the time it was taken from the transferor.

---

[180] s.27(2). See also, *Chalmers and Guest, supra*, note 1 at 226-228 & 249.

[181] A total failure of consideration is a valid defence against all immediate parties including a holder for value but excluding a holder in due course. However, it seems not to be a defence against a holder for value without notice of the failure, see, *Chalmers and Guest, ibid.* at 227; see also, *Benjamin, supra* note 1 at 1326.

[182] See, *Chalmers and Guest, supra*, note 1 at 248-249.

By contrast, the holder in due course holds the bill free from any defects in title of the previous parties as well as from any equities available to prior parties amongst themselves, and may enforce payment against all parties liable on the bill.[183] The holder in due course has full rights to the bill and represents the very essence of negotiability. However, real or absolute defences can be raised against the holder in due course, for in such circumstances there is no bill at all and the requirements of section 29 would not have been met.

2.3. The Unifying Provisions of the CIBN.

In preparing the Convention on negotiable instruments, the primary task before UNCITRAL, was to provide an optional bridge between two widely differing national legal systems on negotiable instrument,[184]so as to meet "the needs of modern commercial and banking practice".[185]

One difference between the two systems, which has a particular impact on the use of bills in international trade, is that the Geneva system stipulates stricter periods for the presentation of bills for payment, giving notice of dishonour and the protest of both inland and foreign bills.[186]

The systems also differ in their approach to the problems of defect in the title of a holder and the nature of the possible defences that avail such a party. A further

---

[183] s.38(2); see also Ss.12, 20(2), 21(2), 54(2) which further safeguards the position of the Holder in due course.

[184] Von Marschall, *supra*, note 2 at 11. see also, Felsenfeld, *supra*, note 2 at 398.

[185] Hermann (1989), *supra*, note 2 at 261. states that even within these two broad systems, there are yet differences which was taken into account in this global attempt at unification.

[186] Ynetma, *supra*, note 2 at 183, Von Marschall, *supra*, note 2 at 11.

difference is in the apportionment of losses in the event of forged or unauthorised endorsements. Moreover, whilst the Geneva system has developed a guarantee system for negotiable instruments independent of the general law of guarantees, the Common Law system has not.

I will discuss the provisions of the CIBN that reflect a compromise between the two systems and which attempt to prevent or overcome "the accompanying difficulties in handling instruments" within the two systems,[187] namely the provisions on holder and protected holder, protest and notice of dishonour, guarantees and forged endorsements.

2.3.a. Holder and Protected Holder.

There is no concept "more fundamental to the efficacy of a law of negotiable instruments than the legal position of the holder."[188] Both the Geneva and the Common Law systems in different ways recognise this fact. Whilst the Geneva system creates a single class of holder -the "lawful holder"- the Common law system *basically* creates two different classes of holders- "holder" and "holder in due course".[189]

Under the Geneva system, the possessor of an instrument is deemed a lawful holder if the person establishes title through a series of uninterrupted endorsements, provided that the bill was not acquired in bad faith and/or with gross negligence.[190]

---

[187] Hermann (1989), *supra*, note 2 at 270.

[188] Crawford, Holder and Protected Holder, *supra*, note 29 at 268. See also, *Chalmers and Guest*, *supra*, note 1 at 14.

[189] As shown at 2.2.a.i. above, the mere holder and the holder for value are basically in the same position in so far as the degree of protection accorded them by the Act are not materially different. Moreover, it is easy for a mere holder to become a holder for value.

[190] s.16 GUL.

Moreover, personal defences founded on other relations with the drawer or the previous possessor can only be set up against the lawful holder if, in acquiring the instrument, he or she knowingly acted to the detriment of the debtor. [191]

By contrast, the Common Law system draws a distinction between a holder and the holder in due course.[192] Whilst, the holder in due course takes the instrument free from all defects in title and is immune to personal remedies on the bill, a holder is open to a great variety of personal defences and claims.[193] Accordingly, whilst a holder under the Common Law system is less protected than the lawful holder under the Geneva system, the holder in due course is accorded special protection. [194]

The CIBN, in recognition of the fundamental difference(s) between the two systems, creates in Articles 28-30 two new classes of holders, namely the "protected holder" and the "holder" who is not protected. In this way, the CIBN reduces the degree of protection accorded to a holder in due course under the Common law system, by permitting certain claims and defences to be raised against the protected holder.[195]

However, the CIBN provides some degree of protection to the holder who is not protected in that claims and defences can only be raised against him or her if he or she

---

[191] s.17 GUL.

[192] See 2.2.b *supra*, for the nature, rights and duties of the holder and the holder in due course.

[193] Hermann (1988), *supra*, note 2 at 526; see also, Spanogle, *supra*, note 89 at 173.

[194] Hermann (1988)*ibid.*; Spanogle, *ibid.*

[195] art. 30 CIBN. Von Marschall, *supra*, note 2 at 16 points out that defences which may be set up against a "Protected Holder" under the CIBN are in essence defences which are absolute in all legal systems.

knew of them or if he or she was involved in a fraud or theft of the instrument.[196]

2.3.b. Forged Endorsement and Endorsements Without Authority.

The Geneva and Common Law systems differ in their attitudes towards a forged endorsement or an endorsement without authority. Under the Common law system, a forged endorsement does not confer rights upon the transferee and thus does not qualify the person as a holder.[197] Accordingly, the transferee of a forged bill bears the risk of loss in the system.[198]

In contrast, the Geneva system confers good title on a person to whom an instrument was transferred by a series of uninterrupted endorsements even where one of such endorsements was forged. It thus places the risk of loss on the person who lost the instrument to the forger.[199]

The CIBN reconciles this difference in Articles 25 and 26. In Article 25, the CIBN takes the Geneva rule which confers title on the transferee of a forged instrument and then adds on to it the Common law rule by placing the risk of loss ultimately on the person who took directly from the forger. [200] However, the CIBN excludes from liability the endorsee for collection and any party who has paid on the instrument, provided that such persons acted in good faith, exercised reasonable care and had no knowledge of the

---

[196] See, art.28(1)(b)&(c) & (2); see also, Hermann (1988), *supra*, note 2 at 527.

[197] s. 24 of the Act.

[198] W. Vis, "Forged Endorsements" (1979) 27 Am . J. Comp. L. 548-553 at 548; Felsenfeld, *supra*, note 2 at 398; Hermann, (1989), *supra*, note 2 at 263; Von Marschall, *supra*, note 2 at 12.

[199] Vis, *ibid.* at 550-551; Felsenfeld, *ibid.*; Hermann (1989), *ibid.* at 264; Von Marschall, *ibid.* at 12.

[200] Vis, *ibid.* at 551; Felsenfeld, *ibid.* at 409; Hermann, *ibid.* at 264.

forgery.[201]

In all the above circumstances the CIBN gives the person whose signature was forged and any person who signed the instrument before the forgery, a right of action (independent of the bill) against the forger, the person who directly took from the forger and any party or drawee who paid on the instrument.[202]

In Article 26, the CIBN subjects the agent who signs without authority to the same legal regime as the forger. However, it would seem that this Article does not apply where the agent acts with apparent or implied authority.[203]

2.3.c. Protest of Bills of Exchange.

Generally, the CIBN improves on the provisions of the Act and the GUL on protest of bills. As Bradley Crawford points out "the formalities of protest have been greatly simplified in the Convention, although the practice itself has been retained due to its continued importance in the laws of evidence of many civil law countries."[204]

Accordingly, the CIBN in Article 60(3) permits the replacement of the formal protest by an informal declaration on instruments signed by the Drawee, acceptor, maker or the person to whom the instrument has been domiciled for payment such as a collecting bank. This declaration must be to the effect that the acceptance or payment is refused. However, protest remains necessary where "the instrument stipulates that protest must be

---

[201] art. 25(2)&(3) CIBN.

[202] art. 25(1) CIBN.

[203] Hermann (1989), *supra*, note 2 at 265.

[204] Crawford, Conflicts or Harmonisation, *supra*, note 88 at 106.

made."[205]

By Article 61, the CIBN allows four days rather than the twenty-four hours provided for under section 51(4) of the Act, during which time a dishonoured bill must be protested.

Furthermore, by Article 63(2), the CIBN provides that "failure to protest an instrument does not discharge the acceptor, the maker and the guarantors, or the guarantor of the drawee, of liability on it." This provision thus removes the holder's dread of losing the right of recourse against subsequent endorsers under s.51(2) of the Act if the bill is not protested on time or at all.

The CIBN in Article 61(2) also permits the express or implied waiver of protest, which is unlike the limited dispensation of protest under sections 50(2) and 51(9) of the Act.

The CIBN thus sets forth a liberal and yet elaborate system of protest which is a great improvement on the provisions of the Act and the GUL.

2.3.d. Notice of Dishonour.

Under the CIBN, notice of dishonour of a bill remains an imperative by virtue of Article 64. However, the CIBN provides a more reasonable time frame within which to give such notice than under the Act. The CIBN also reduces the four days after protest within which the holder of a dishonoured bill must give notice under the GUL.[206]

The Act, in section 49(1), requires that notice of dishonour be given as soon as the

---

[205] Opening paragraph of art.60(3) CIBN.

[206] art. 45 GUL.

bill is dishonoured and at any rate within a reasonable time, which must not exceed a day. In Article 65 of the CIBN, notice of dishonour must be given within the two days that follow the day of protest or if protest is dispensed with, the day of dishonour or the day of receipt of notice of dishonour.

The CIBN, in addition, permits the dispensation of a notice of dishonour in terms similar to the provisions for protest of a bill. These are more practical provisions on notice of dishonour that those under the Act and perhaps the GUL.

2.3.e. Guarantees.

It no doubt gives parties to a bill of exchange greater comfort to note that "the financial strength of another party" has been added "to the promise of payment" by way of a guarantee.[207] However, owing to the substantial differences between the Common law and the Geneva systems as to the nature and consequences of a guarantee on a bill, practitioners on both sides of the legal divide are reluctant to deal with guaranteed bills originating from the opposite system.[208]

The basic difference between the two systems has been said to "lie in the fact that the civil law has developed the concept of an independent guarantee governed by negotiable instruments law and not, as a rule, by the general law of suretyship; [whereas] in the common law , the general law of suretyship remains applicable to the guarantor of a negotiable instrument."[209] This difference means that the giver of an *aval*[210] may not

---

[207] Hermann (1989),*supra*, note 2 at 266.

[208] *Ibid.*

[209] *Ibid.*

raise defences that a surety may raise under the general law of suretyship.[211] Moreover, the creditor of a bill drawn under the Geneva system can easily determine which party has signed as guarantor and who is the person guaranteed, as the system demands that it be specified to whose account the aval is given, failing which it is deemed to have been given to the drawer.[212] By contrast, under the Common Law system, it is difficult to ascertain from the instrument whether the signature on a bill is that of an accommodation party[213] or of another party, and, if so, who is the party guaranteed.

The CIBN, in recognition of the existence of these differences, and desirous of devising a new system that "precludes resort to widely differing national laws of suretyship,"[214] and further recognizing "the existence of ingrained practices relating to the use of certain terms that indicate the type and degree of the guarantee", has, in Articles 46 to 48, created a uniform rule based on a "two-tier system of guarantee," which takes into account the practice in both the Common law and Geneva systems.[215] One aspect of the system allows the creation of simple guarantees by the use of certain words commonly used in Common law jurisdictions, while the other aspect allows the creation of a stronger liability for the guarantor by the use of the words *aval* or "good as *aval*"

---

[210] arts. 30-32 GUL permits the guarantee of bills either in part or in whole by way of *aval*.

[211] By art. 32 GUL the giver of an *aval* is bound in the same manner as the person for whom he or she has become guarantor.

[212] art. 31 GUL.

[213] By s. 28 of the Act an accommodation party is a person who signs a bill merely for the purpose of lending his or her name to some other person so as to enable that other person raise money.

[214] Hermann (1989), *supra*, note 2 at 268.

[215] *Ibid.* at 268-269.

familiar to the Geneva system.[216]

By so doing, the CIBN has provided practitioners "the advantageous option" of choosing "between either of the two different types of guarantees suitable for different commercial purposes."[217] In addition, the guarantee provisions of the CIBN appear to be wider and more flexible than the provisions of the Act in sections 32 to 35 on endorsement and sections 53 to 58 dealing with the liabilities of parties to a bill.[218] For example, the CIBN adopts the Geneva system which accepts the simple signature on the front of an instrument by a person other than the drawer or drawee as a guarantee and which in the absence of any specification, makes the acceptor or the drawee the person guaranteed.[219] This is simpler and far more flexible than the Common Law system that will struggle to construe such a signature as either an endorsement or an accommodation and which in any event may fail to answer the difficult question of who is the person guaranteed.

2.3.f. Conflicts of Laws Provisions in the CIBN.

The CIBN approaches the subject of conflict of laws in an entirely different manner from the Act and the GUL. Whilst the GUL purports to apply only to bills passing between states that are parties to the Convention and have adopted the Convention as their domestic law, the CIBN recognises the autonomy of the parties to the contract

---

216 *Ibid.*

217 *Ibid.*

218 See Craigie, *supra*, note 71 at 127.

219 art. 46(4)&(5).

of an international bill of exchange and permits them to choose the law that would regulate the legal relations that arise between them in the use of their international instrument.[220] Accordingly, the CIBN applies without regard to whether the parties on the bill are nationals or residents of contracting states,[221] provided that the bill shows on its face at least two of the places specified in Article 2.

Once parties choose the CIBN, it operates to regulate their relations with respect to the bill provided, however, that the conflict of laws rules of the forum gives primacy to the express choice of law of the parties. In effect the CIBN ensures that there would be no choice of law problems in such cases,[222] as the domestic laws of the parties are displaced on the points covered by the CIBN.[223]

2.4. New Possibilities for Commercial Use of Bills of Exchange.

The CIBN aims to achieve commercial acceptance by codifying certain novel uses to which the bill has been put in recent times[224] and thereby "open new possibilities for the commercial use of international bills."[225] Accordingly, it permits international bills to be made payable in instalments, in monetary units of account and with variable

---

[220] Spanogle, *supra*, note 89 at 171.

[221] art. 3 CIBN.

[222] Craigie, *supra*, note 71 at 132. But see the views in *Crawford and Falconbridge*, *supra*, note 1 at 1733 that there is still scope for the operation of conflict of laws rules as the CIBN does not purport to deal with all matters that may be material.

[223] The learned author of *Crawford and Falconbridge*, *ibid.* at 1732 points out that the theoretical basis of the CIBN conflicts of Laws approach is to be found in the Privy Council Decision in *Vita Food Products, Inc.* v. *Unus Shipping Co. Ltd.* [1939] 2 D.L.R. 1 especially the Dictum of Lord Wright at 8.

[224] Spanogle, *supra*, note 89 at 171.

[225] Hermann (1989) *supra*, note 2 at 269.

interest rates. We have discussed earlier the provisions on instruments payable in instalments and in monetary units of account, thus only the provisions on bills with variable interest rates, instruments denominated in foreign currencies and the drawing of bills without recourse are dealt with here.

2.4.a. Bills with Variable Interest Rates.

The CIBN in Article 8(6) permits the creation of instruments with variable rates of interest so as to provide banks and commercial people with considerable flexibility in structuring loans and credits according to the changing fortunes of the international financial market.[226]

To ensure that this new facility does not operate to the detriment of debtors, the Convention provides for the stipulation on the instrument of one or more reference rates of interest. These reference rates must be publicly available and, in any event, not subject to a unilateral determination by a person who is named in the instrument at the time it was drawn, unless such a person is named in the reference rate provisions, as, for example, a bank whose rate of interest is the reference rate.

2.4.b. Bills Denominated and Payable in Foreign Currency

Article 75(1) of the CIBN provides that "an instrument must be paid in the currency in which the sum payable is expressed."[227] According to Professor Anthony Guest this provision is justified for two reasons. First, because it eliminates the risk of exchange rate fluctuations and losses which may occur in the interval between payment

---

[226] *Ibid.*

[227] art. 75(2) CIBN contain rules for cases where the sum payable is expressed in a monetary unit of account established by inter-governmental institutions or by agreement between two or more states.

and remittance.[228] Secondly, it is more likely to produce a just result in the event of default by the debtor,[229] as the courts of the debtor's country, when they know that payment of the instrument can be made in the local currency equivalent of the foreign currency sum denominated on the instrument, would tend to give judgment for that former sum at the rate of exchange in effect on the date on which the instrument is payable.

By stipulating that payment is to be made in the denominated currency, the CIBN provides some incentive for the abandonment of the "breach-date" rule in favour of the "judgment-date" rule.[230] Whilst the breach-date rule stipulates that judgment be given for the value of the foreign currency claim converted into the local currency at the date of breach, the judgment-day rule stipulates that judgment be given for the value of the foreign currency claim converted into the local currency at the date of payment or judgment.[231] The judgment-date rule has been said to make "the strength or weakness of the local currency vis-a-vis the denominated currency irrelevant".[232] The CIBN thus complements the U.K House of Lords decision in *Miliangos* v. *George Frank Textiles Ltd*, which in effect entitles the holder of a bill to have judgment for an amount in local currency which, converted at the date of judgment is the equivalent of the foreign currency

---

[228] Guest (1979), *supra*, note 2 at 535.

[229] *Ibid.*

[230] *ibid.* at 537.

[231] For a comparison of the judgment-date rule and the breach-date rule, see, R.C.Effros, "The Legal Nature of Obligations Payable in Foreign Currencies," (1986) 11 N.C.J. Int. L. & Com. Reg. 445.

[232] Guest (1979), *supra* note 2 at 538.

denominated on the bill.[233]

However, the CIBN in Article 75(3) permits the drawer of a bill to stipulate expressly on the instrument, that it shall be paid in a specific currency other than the currency in which the amount of the instrument is expressed, and the amount payable in such circumstances is calculated in accordance with the rules in Article 75(3)(1)(b)(i)-(ii).

Furthermore, if an instrument denominated in one currency but payable in another is dishonoured by non-acceptance the rate of exchange, in the absence of any indication to the contrary on the instrument, is at the option of the holder, who has a choice between the rate of exchange in effect at either the date of dishonour or that of actual payment.[234] However, in the event of dishonour by non-payment, the rate of exchange is that in effect at either the date of maturity or that of actual payment.[235]

The CIBN also provides that any loss suffered by the holder by reason of fluctuations in the exchange rate after the dishonour of a bill, is recoverable in court by an award of damages.[236] This is a bold attempt by the CIBN to take care of the problems often posed by exchange rate volatility which is especially common with the

---

[233] *Supra*, note 136. In this case the House of Lords held, at 468-469, 498-501, 501-502, that the breach-date rule was no longer to be followed by English Courts in cases of money obligations expressed and payable in foreign currency. For an extension of the *Miliangos* Principle to tort and contract cases, see, *Owners of M.V. Eleftherotria* v. *Owners of M.V. Despina R.* [1979] 1 All E.R. 421 (Eng. H.L.) - Tort; *Services Europe Atlantique Sud (SEAS)* v. *Stockholms Rederiaktiebolag SVEA* [1979] 1 All E.R. 421 (Eng. H.L.) - Contract. See also, Flint, *supra*, note 131 at 222.

[234] art.75(3)(c)

[235] art. 75(3)(d). This provision is in complete accord with the views of Professor Guest made at a time the working group on this convention had not reached an agreement on these provisions, see, Guest (1979), *supra* note 2 at 540.

[236] art. 75(4)

currencies of LDCs.[237]

The above rules in Article 75 are in all circumstances subject to the applicable exchange control regulations of the country where the instrument is presented for acceptance or payment.[238]

2.4.c. Bills Drawn "Without Recourse".

An exporter/drawer may discount to a bank a bill that has been already accepted by the importer so as to obtain immediate financing. In transferring the bill to the bank, he or she can rely upon s.16(1) of the Act and exclude or negate their liability on the Bill by the insertion of the words "without recourse" or "sans recours". This provision is lacking under the GUL as the Geneva System does not permit such an exclusion of liability even if the bill has been accepted or an aval given. However, the attraction of such a practical facility appeals to bankers and international traders within jurisdictions that subscribe to the Geneva system. The CIBN in recognition of this fact has codified this practice in Article 38(2) and thus provides international acceptance of *forfaiting* as a financing arrangement.[239]

2.5. Conclusion

This chapter has broadly analysed the unique aspects of the bill and the unifying provisions of the CIBN which justify the continued relevance of this instrument to modern-day international trade. These unique aspects of the bill permits its use in varying

---

[237] For a detailed discussion of the legal problems often posed by exchange rate volatility in an LDC (Nigeria) see Oyebode and Maduegbuna, *supra* note 131.

[238] art.76 CIBN.

[239] *Forfaiting* is discussed *infra*, Chapter Three.

circumstances in the payment and financing of international trade. These uses to which the bill could be put in international trade and which play dominant roles in the facilitation of present-day international trade are elaborately essayed in the following chapter.

CHAPTER THREE.

THE USES OF BILLS OF EXCHANGE IN INTERNATIONAL TRADE.

3.1. Introduction.

The negotiable nature of the bill of exchange lends it easily to a variety of uses in the payment and financing of international Trade.[1] The bill can, on its own, constitute both a payment and a financing medium, as in the situation where an exporter[2] draws a bill payable at a fixed or determinable future time[3] on the importer. Pending its maturity, the importer is provided with some form of credit, and upon its being accepted by the importer, payment is deemed to have been made as the exporter has a straight forward right of recourse in the event of default. The bill can also be the sole basis of a short-term financing package, as is the case where an importer accepts a term bill drawn on it by the exporter and the accepted bill is sold or discounted[4] by the exporter to a bank or

---

[1] International trade in the context of this thesis is restricted to international trade in goods and services. The terms "export trade" and "international trade" are used interchangeably.

[2] The terms "exporter and "importer" are used in this thesis in preference to "buyer" and "seller". This is because in some cases- for example where a confirming house acts as purchasing agent for the overseas buyer - the seller is not the exporter, although the importer is usually the buyer.

[3] This is an after sight bill, see s. 11 of the *Bills of Exchange Act (Nigeria) 1917*.[Hereinafter, *The Act* or the *Nigerian Act*.] An after sight bill is also called a "term", "tenor", or "*usance*" bill. In this thesis "term bills" are used to refer to "bills payable after sight". It should also be noted that a bill of exchange is sometimes called "draft" as in s.3104(2)(a) of the *UCC*, and when accepted, an "acceptance". In commercial usage, the term "draft" refers to an unaccepted bill. A bill bearing the endorsement of a bank is called a "bank bill" and a bill accepted by a bank is called a "bankers acceptance". For clarity the terms "bill" or "bill of exchange" and their circumstantial modific-ations, e.g. "accepted bill" are used in this thesis.

[4] The discounting of a bill is the outright purchase of an accepted bill from the holder by a financial institution. This should be distinguished from negotiation which is merely the advance, on the security of an accepted bill, of a sum less than the full value of the bill. In both cases, however, the bank or financial institution retains the right of recourse against the discounter in the event of dishonour of the bill at maturity.

other financial institution[5] for immediate cash.

Alternatively, the bill may be the foundation of a complex long-term financing package. This may be the case where an importer of capital goods payable in six monthly instalments over a period of three years accepts bills maturing at the agreed monthly intervals, drawn in favour of the exporter and the accepted bills are later discounted for immediate cash by the exporter under a *forfaiting*[6] arrangement. Finally, the bill of exchange can be a functional part of some elaborate payment and financing vehicle, as is the case both under the documentary collection[7] and the documentary credit[8] procedures.

Whatever the use to which the bill is put in international trade, it passes as either a payment mechanism, a financing arrangement or both. As a payment mechanism the bill constitutes either in part or in whole a mechanism through which the exporter is assured of payment either directly by the importer or through a third party such as a financial institution. As a financing arrangement, the bill separates the payment obligation from the performance of the export contract and thereby permits greater flexibility in the ability of the parties to the contract to manage their cash flows.[9] Accordingly, the uses to which

---

[5] The terms "Financial institution", "Bank" and "Other non-bank financial institution" are used colloquially and inter-changeably to refer to all those institutions directly or indirectly engaged in the provision of financial services to the exporter and the importer.

[6] Discussed *infra* at 3.3.c.

[7] Discussed *infra*. at 3.2.b.

[8] Discussed *infra*. at 3.2.c.

[9] M. Rowe, "Bills of Exchange and Promissory Notes-Uses and Procedures in International Trade" in N.Horn ed., *The Law of International Trade Finance* (Deventer/Boston:Kluwer Law and Taxation Publishers, 1989) 243-257 at 246.

the bill can be put in international trade must be prefaced by an analysis of the concepts of payment mechanism and financing arrangement.

3.2. The Concept of Payment Mechanism.

In the exchange of goods and services between members of different nations a debtor-creditor relationship usually arises between parties to the transaction. The debt is in the nature of the price payable to the supplier of goods and services (exporter) by the purchaser of the goods and services (importer). The importer's obligation to pay the purchase is usually[10] discharged by the payment of money[11] to the exporter. This entails the inherently perilous[12] physical transportation of money *in specie* from the debtor/importer to the creditor/exporter.

Benjamin Geva[13] provides a well reasoned and valid construct into which any payment mechanism can be conveniently fitted and the following discussion of the concept of a payment mechanism is based on his model.

Historically, the scarcity of money necessitated the emergence of payment

---

[10] Payment in international trade may be in kind as in the case of Countertrade. For a general analysis of countertrade, see, C.R. Raemy-Dirks, "Countertrade: Linked Purchases in International Trade" in C.J. Gmur ed., *Trade Financing* 1st ed. (London: Euromoney Publications,1981) 17-26.

[11] In economic terms money refers to any medium of exchange which is widely accepted in payment for goods and services or in the final discharge of debts, see, G. David, "Money in Canadian Law" (1986) 65 Can. Bar Rev. 192 at 202-203. See also the judicial definition of money in economic terms by Darling J. in *Moss* v. *Hancock* [1899] 2 Q.B. 111 (Eng. Q.B.D.) at 116. From a purely legal perspective Mann, suggests that "in law the quality of money is attributable to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as a universal means of exchange", see, F.A. Mann, *The Legal Aspect of Money: With Special Reference to Comparative Private Law and Public International Law* 4th ed. (London: Clarendon Press, 1982) at 80.

[12] The physical transportation of large sums of money required in the payment of goods and services sold in international trade is fraught with the dangers of loss, theft and other related hazards.

[13] "The Concept of Payment Mechanism" (1986) Osgoode Hall L.J. 1. [Hereinafter, Geva, Concept of Payment]

mechanisms and the growth and development of payment mechanisms facilitated the reduction or avoidance of the risks and costs incident in the delivery of large quantities of money *in specie*.[14] A payment mechanism is thus broadly described as "any machinery facilitating the transmission of money in the payment of a debt, which enables the debtor to avoid the transportation of money and its physical delivery to the creditor in the discharge of the debt."[15]

A payment mechanism operates to avoid the physical delivery of money *in specie* by transferring the risks and administrative costs involved therein to a third party who is usually but not necessarily in the business of taking such risks such as a bank or other non-bank financial institution.[16] In discharging its duty the financial institution need not deliver money *in specie* to the creditor/exporter. Money consisting of bank notes and coins are fungible chattels[17] easily replaceable by equal quantities and qualities.[18] On the presumption that both the debtor and the creditor have financial accounts[19] with a financial institution, payment to the creditor is accomplished by effecting debit and credit book entries representing the face value of the money in the different financial accounts

---

[14] *Ibid.* at 3 and the authorities cited in n7.

[15] *Ibid.* at 4.

[16] *Ibid.*

[17] For an analysis of this approach of viewing money, see, David, *supra*, note 11 at 205-206. But see, the different characterization of money by A. Nussbaum, *Money in the Law National and International: A Comparative Study in the borderline of Law and Economics*(Brooklyn, New York: Foundation Press, Inc., 1950).

[18] See, Geva, Concept of Payment *supra*, note 13 at 4 and the authorities in n9.

[19] The terms "Financial Accounts" or "Bank Accounts" are used loosely in their ordinary sense as the reader understands them.

of the debtor and the creditor. In this way a payment mechanism discharges the importer's debt by an authorized payment made to the exporter by a financial institution.[20]

By assuming the responsibility of facilitating the payment of the debt, the financial institution becomes the importer's debtor and in carrying out the importer/debtor's instructions the financial institution discharges not only the original debt of the importer/debtor to the exporter/creditor but also its debt to the importer/debtor. A payment mechanism thus facilitates the further reduction of the physical transportation of money *in specie* and the attendant costs and risks.[21]

A payment mechanism serves to reconcile the conflicting economic interests of the exporter and the importer in international trade. Whilst the interest of the exporter is to obtain the purchase price in the right currency and as soon as possible, the interest of the importer is to receive goods of the correct quality on time, at the right place and to defer payment of the price at least until the documents of title are no longer in the hands of the exporter. The financial institution to which the risks and costs of physical delivery of money are transferred interposes itself between the exporter and the importer as a payment channel and with the aid of various payment mechanisms acts to reconcile the conflicting interests.[22]

A payment mechanism is basically a three party arrangement of which further

---

[20] Geva, Concept of Payment, *supra*, note 13 at 4.

[21] *Ibid.* at 5.

[22] For discussions of the nature of the conflicting economic interests of the exporter and the importer, see, C.M. Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 9th ed., (London: Stevens & Sons, 19990) at 379 [Hereinafter, *Export Trade*]. See also, P. O'Hanlon "Documentary Collection and Letters of Credit" in C.J. Gmur ed., *supra*, note 10, 43-61 at 43; A. Watson *Finance of International Trade*, 2nd ed., (London: The Institute of Bankers, 1981) at 149.

extensions are possible.[23] Essentially, it involves the importer/debtor, the exporter/creditor and a third party (usually a financial institution in international trade).

A payment mechanism is either a credit or a debit transfer. It is a credit transfer if the importer's instructions are communicated directly to a financial institution thereby pushing the money directly to the exporter's account.[24] On the other hand, a payment mechanism is a debit transfer if the importer's instructions are communicated to a financial institution through the exporter so that the exporter's communication to the financial institution pulls or draws the money from the importer.[25]

Generally, payment mechanisms are either paper-based or electronic funds transfers. Payment mechanisms are paper-based if the instructions are embodied in a piece of paper. Conversely, they are electronic funds transfers if the instructions are recorded on any electronic media. A paper-based payment mechanism usually circulates to put the holder from time to time in the exporter's shoes and thus has been said to be paper currency.[26] However only papers that are used in a debit transfer payment mechanism operate as paper currency.[27]

It should, however, be noted that a *giro* system is a payment mechanism which may be debit or credit, paper-based or electronic funds transfer and in which the creditor is not paid *in specie* and the debtor's payment instructions are not in the nature of a paper

---

[23] Geva, Concept of payment, *supra*, note 13 at 5.

[24] *Ibid.* at 6.

[25] *ibid.*

[26] *Ibid.*

[27] *Ibid.*

currency.[28] In application, a *giro* system is apt to be a credit transfer[29] in which debtors "initiate funds transfer from their own financial accounts."[30]

Perhaps the most notable payment mechanism in use in international trade is the bill of exchange. Bills of exchange are paper-based payment mechanisms involving the debit of funds from the importer's account to the exporter's account. Bills operate to put the holder from time to time in the position of the beneficiary. Bills of exchange including the cheque are the foremost examples of paper currency. Bills of exchange, as paper currencies, assume a fundamental position in the variety of payment options available to the exporter and the importer in international trade. These payment options are namely: payment on open account or advance terms, payment using the collection procedure and payment using the documentary credit procedure.

3.2.a. Payment on Open and Advance Account Terms.

Depending on the prevailing economic and political circumstances, payment for goods and services sold in international trade may be either on open account or on advance account terms.[31]

Payment on open account terms is primarily adopted in situations where the

---

[28] "Giro" is taken from a greek word "gigros" meaning ring, revolve, cyclical or circular. See, Geva, Concept of Payment, *ibid.* at 7. See generally, E.P. Ellinger, "The Giro System and the Electronic Transfer of Funds" (1986) Ll. M. Com. L.Q. 178. [Hereinafter, Ellinger, Giro System]

[29] *Ibid.* at 7.

[30] D.I. Baker and R.E. Brandel, *The Law of Electronic Fund Transfer Systems*, 2nd ed.,(Boston/New York: Warren, Gorham & Lamont, 1988) with 1991 cum. supp. at 5.37-5.38.

[31] Watson, *supra*, note 22 at 25-26; *Export Trade*, *supra*, note 22 at 380. See also, S. Sarpkaya, *International Finance in a Canadian Context*, 2nd ed.,(Don Mills, Ontario: CCH Canadian Ltd., 1989) at 128.

exporter has trust in the importer's ability to pay for the contract goods at the agreed future time.[32] This trust may be based on some close business relationship, such as that which exists between affiliated companies or between a parent company and its subsidiary, or on a long-standing business relationship between the exporter and the importer.

Payment on open account terms may also be adopted where the exporter can afford to provide the importer with the necessary line of credit[33] and in any event only if the exporter is confident that problems will not arise in the transfer of payments out of the importer's country.[34]

Payment on open account terms favours the importer. It allows the importer to have possession of the documents of title to the goods, to take delivery of the goods and dispose of same and then to pay the exporter at an agreed future date which may range from 30 to 120 days after the date of shipment.[35] The periodic settlement of debts incurred in open account trade could be effected by mail, telegraphic and SWIFT[36] transfers[37] and notably for the present purposes by either the importer sending its cheque

---

[32] Watson, *ibid.* at 25; Sarpkaya, *ibid.* at 308.

[33] Watson, *ibid.* at 25.

[34] *Ibid.* at 25.

[35] Watson, *ibid.* at 25, Sarpkaya, *supra*, note 31 at 308.

[36] SWIFT is an acronym for the "Society for Worldwide Interbank Financial Telecommunications". It operates to transmit financial messages among member banks and is perhaps the greatest challenge to the use of the bill of exchange in the payment of goods and services sold in international trade. This is discussed *infra.* in Chapter 4.

[37] Watson, *supra*, note 22 at 25; see also Sarpkaya, *supra*, note 31 at 309 mentions the same modes of settlement except SWIFT transfers.

to the exporter or by the importer asking its bank to issue a bankers' draft which the importer sends to the exporter.[38]

Similarly, trade on advance payment terms is adopted in situations where the importer is confident that the exporter will deliver the goods, that the government of the exporter's country will not prohibit the export of the contract goods after payment and where both parties know that the exchange control regulations of the importer's country permit advance payments.[39]

Payment on advance account terms favours the exporter. Whilst the exporter has both the goods and the money, the importer has as security only the integrity of the exporter. However, it is usual for the importer to obtain from a bank in the exporter's country a credit status report on the exporter before agreeing to such a payment arrangement. In addition, the importer could procure from the exporter a performance guarantee which enables the importer to obtain payment if the goods are not shipped.[40]

Advance payment could be effected using any of the same payment mechanisms, including the cheque and the banker's draft, that are used in the settlement of debts incurred in trade on open account terms.[41] Accordingly, the legal nature of the cheque and the bankers draft and their role in payment on open or advance account terms are of

---

[38] Watson, *ibid.* at 25.

[39] Watson, *ibid.* at 26, notes that the exchange control regulations of most countries do not permit advance payments.For instance in Nigeria, the approval of the Minister of Finance or its Designate to such a payment must be obtained by virtue of the *Exchange Control (Anti-Sabotage) Decree of 1986.*

[40] Watson, *ibid.* at 26; Sarpkaya, *supra*, note 31 at 129.

[41] Watson, *ibid.* at 26. Other payment mechanisms that could be used in effecting advance payments are mail payment, cable or telex orders and SWIFT transfers.

basic relevance to this discourse.

3.2.a.i. International Cheques.

A cheque is a bill of exchange drawn on a banker payable on demand and, except as otherwise provided in the Act, the provisions of the Act applicable to bills of exchange payable on demand apply to a cheque.[42] Although a cheque is a bill of exchange, not all bills of exchange are cheques. There are some basic differences between cheques and other bills.

A cheque is essentially an instrument of payment. It is a direction to a banker to pay the face value of the instrument to the specified person or to the bearer. Unlike bills of exchange, cheques are rarely negotiated by endorsement by the payee[43] but are merely delivered to the payee's bank for collection. As bills payable on demand, cheques are given for immediate payment. Cheques need not be accepted, accordingly, the rules relating to acceptance of bills do not apply to cheques.[44] If cheques were to be accepted by bankers they would become liable to the holders, even if, in fact they were not put in funds by the drawer to enable them to honour the cheque.

As stated earlier, cheques are employed in the payment for goods and services sold in international trade. Cheques used in the settlement of debts incurred in trade on open account terms and in making advance payments are usually drawn by the importer on its bank and made payable to the exporter in foreign currency. Such a foreign currency

---

[42] s.73 of the Act.

[43] The payee is the person to whom the cheque is payable i.e. the exporter in international trade.

[44] For the rules of acceptance of bills, see, s.17 of the Act.

cheque is a foreign bill, that is to say, "a bill which is or on the face of it purports to be" neither "both drawn and payable within Nigeria", nor "drawn within Nigeria upon some person resident therein."[45] The requirements of protest thus apply to international cheques[46] in order to protect the holder's right of recourse against the drawer.

Due to the wide use of cheques in international trade in years gone by, attempts were made by United Nations Commission on International Trade Law (UNCITRAL) between 1972 and 1984 to prepare a *Draft Convention on International Cheques (DCIC)*.[47] However, because of doubts and reservations expressed by some States, principally Norway and the United States,[48] about the advantages of adopting a Convention on International Cheques at a time when cheques are less frequently used by the business community in international transactions,[49] work on the *DCIC* was suspended in 1984 and it was agreed that a decision on future work on it would be taken after the

---

[45] s.4.

[46] For the rules of protest see, s.51(2).

[47] UN.Doc. No. A/CN.9/212 (1981). [Hereinafter *DCIC*]. For the genesis of the attempts at providing the DCIC, see, *Report of UNCITRAL on the work of its fifth Session, Official Records of the General Assembly, Twenty-seventh session, Supplement No. 17*, UN. Doc. A/8717 (1972) ; *Report of UNCITRAL on the work of its twelfth session Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17*, UN. Doc. No. A/34/17 (1979). For commentaries on the DCIC, see, *Commentary on the Draft Convention on International Cheques*, UN. Doc. No. A/CN.9/214 (1982). .

[48] See, *Draft Convention on International Bills of Exchange and International Promissory Notes and Draft Convention on International Cheques: Major Controversial and Other Issues*, UN. Doc. No.A/CN.9/249 (1984) at 5-6. [Hereinafter, *Major Controversial Issues*]

[49] The United States also expressed reservations about the *DCIC* because it contained no specific collection rules as in Article 4 of the *Uniform Commercial Code (UCC)* and because it contained rules on crossed cheques and cheques payable in account which were unknown in the United States. Moreover, it was felt by the United States and Norway that the DCIC did not do justice to the special function of a cheque as a payment instrument. However, the infrequent use of the cheque in international business transaction was the primary objection of States, see, *Major Controversial Issues*, *ibid.* at 6.

work on the *Convention on International Bills of Exchange and International Promissory Notes* (CIBN) is completed.[50] It is now almost four years since the *CIBN* was adopted by a resolution of the United Nations General Assembly [51] and no move has been made to continue work on the *DCIC*. Perhaps this disregard for the *DCIC* is born out of the dimin[illegible] relevance of cheques in the payment of goods and services sold in international trade.

The fact that cheques are rarely negotiable make them unattractive to international traders. Other than providing a short period of "float" or "transit delay",[52] the cheque does not provide, in the international context, any significant form of credit.[53] Moreover, cheques represent the slowest method of settlement in international trade as the exporter has to wait for the cheque to be returned to the drawer's bank for clearance.[54] Besides, cheques could easily be lost, stolen or destroyed. With the existence of other more facilitative instruments such as bankers' drafts and promissory notes and with the emergence of international electronic funds transfer systems, the importance of cheques in the payment of international trade has waned considerably. However, for international traders from the less developed countries (LDCs), cheques continue to represent an

---

[50] See, *Current Activities of International Organisations Related to the Harmonization and Unification of International Trade Law*, UN. Doc. No. A/CN.9/281 (1986) at 33.

[51] On December 9, 1988, see, UN. Doc. No. A/RES/43/165 (1989).

[52] This is the time it takes a cheque drawn on an account in a bank to be effectively debited by the bank from the account of the person who issued it. This interval may provide an importer with a very short period of credit.

[53] However, where cheques are sent directly to the exporter, it may be negotiated locally by the exporter without recourse, see, Watson, *supra*, note 22 at 31.

[54] *Ibid.*

essential payment and financing instrument in their trading relations among themselves and perhaps with other regions of the world.[55]

3.2.a.ii. Bankers' Draft.

A bankers' draft is an order to pay a sum of money addressed by a bank either to itself or to another bank. If drawn by one bank on another it is both a bill of exchange and a cheque. It is a bill of exchange because it satisfies the statutory requirements of a bill.[56] It is also a cheque because it is "a bill of exchange drawn on a banker payable on demand."[57] But, if drawn by a banker on itself, it appears that it is neither a bill of exchange nor a cheque because as required by the Act it is not "addressed by one person to another."[58] However, by virtue of section 5(2) of the Act, the holder of such a draft may at his option treat it as either a bill of exchange or a promissory note.[59]

Section 5(2) operates to deem the *holder* of such a draft a holder of a negotiable

---

[55] A recent Study by the United Nations Conference on Trade and Development (UNCTAD) Secretariat show that the typical terms of export transactions for LDCs are cash, Sight drafts which includes cheques, and documentary credits, see *Trade financing in Developing Countries: An Assessment and Evaluation of Existing Schemes and Future Requirements*, UN. Doc. TD/B/1300/Supp.1 (1991) at para. 61.[Hereinafter, *Trade Financing in Developing Countries*].

[56] See, s.3(1) of the Act.

[57] s.73.

[58] s.3(1) of the Act. See also *Capital Counties Bank Ltd. v. Gordon* [1903] A.C. 240 (Eng. H.L.) *per* Lord Lindley at 250. c.f. *Ross v. London County Westminster and Parr's Bank Ltd.* [1919] 1 K.B. 678, 687 where Bailhache J. held albeit without any discussion that a bankers' draft is a bill as well as a cheque. See also the lucid arguments of Professor Geva to the effect that a draft drawn by a banker on itself is both a cheque and a bill of exchange, see, B. Geva, "Irrevocability of Bank Drafts, Certified Cheques and Money Orders" (1986) 65 Can. Bar Rev. 107 at 117-120 [Hereinafter, Geva, Irrevocability of Bank Drafts].

[59] See, *Commercial Banking Co. of Sydney Ltd. v. Mann* (1961) A.C. 1 (P.C.) at 7 where a bankers draft drawn by a branch on the head office was described as a promissory note of the bank. See also, *Re British Trade Corporation Ltd.* [1932] 2 Ch. 1 (Eng. C.A.) at 11 where Greer L.J. regarded a document drawn by a branch of a corporation on its head office as a request by the branch to its head office to undertake a liability and held further that save for s.5(2) of the BEA it was neither a bill nor a promissory note. On the latter point. See also the similar position of Romer L.J. at 13-14.

instrument.[60] However, if the draft is not a negotiable instrument, the payee and endorsee in possession of the draft who statutorily [61] are holders cannot exercise the option of treating the draft as a negotiable instrument. This is an anomalous situation. It has thus been rightly submitted[62] with respect to the equivalent provision in the *Canadian Act*[63] that the better view is to read the provisions of section 5(2) as meaning that a bankers' draft drawn by a banker on itself is indeed a bill of exchange notwithstanding the statutory requirement that the drawer and the drawee must be separate persons. This submission finds support in some provisions of the Act. First, section 5(2) itself refers to such a draft as a "bill". Secondly, the Act in section 50(2)(c)[64] explicitly contemplates a bill of exchange drawn by a person on itself by permitting the dispensation of a notice of dishonour as regards the drawer of a bill where the drawer and the drawee are the same person.[65]

As stated above, bankers' drafts are used in the settlement of debts incurred in international trade on open account terms and in making advance payments. Such drafts are drawn by the importer's bank on a bank in the exporter's country. It may be drawn in an agreed foreign currency and is usually made payable outside the importer's country. It is thus a foreign bill as defined in section 4 of the Act. Foreign bankers' drafts must

---

[60] *Re British Trade Corporation, ibid.*

[61] By s.2 of the Act.

[62] Geva, Irrevocability of Bank Drafts *supra*, note 58 at 117-120.

[63] s. 26, *Bills of Exchange Act*, (Canada), R.S.C. 1985, c.B-4 as am.

[64] s.107 of the Canadian Act.

[65] Geva, Irrevocability of Bank Drafts *supra*, note 58 at 119.

therefore be protested in accordance with section 51 of the Act, otherwise the drawer-bank and any endorsers of the draft will be discharged.[66]

Foreign bankers' drafts, though widely used in the settlement of debts incurred in trade on open account terms and in effecting advance payment are not so popular as payments made by mail, cable and more recently by SWIFT transfers. This is because drafts could be lost, stolen or destroyed.[67] If lost, stolen or destroyed, banks are reluctant to place a stop order on a draft they have issued, since this would mean dishonouring their own written obligation, which may tarnish their public image.[68] In practice, however, bankers place a stop order and issue a duplicate draft only if the importer/purchaser furnishes them with an indemnity.[69] Moreover, payment using the bankers' draft is slow as it is normally given to the importer to send by mail to the exporter. However, bankers' drafts remain a major instrument of payment for the LDCs.

In view of the above stated problems associated with cheques and bankers' drafts, parties to an export contract to avoid the obvious lack of protection inherent in payment under an open or advance account terms, may agree that payment be made under the relatively safer collection procedure, which still involves the drawing of a bill of exchange by the exporter on the importer.

---

[66] s.51(2) of the Act.

[67] Watson, *supra*, note 22 at 31. See also, A.G. Guest, et al eds., *Benjamin's Sale of Goods*, 3rd ed., (London: Sweet and Maxwell, 1987) at 1303.[Hereinafter, *Benjamin]*

[68] Watson, *ibid.*; On the legal effect of loss of a bankers draft, see, *Benjamin*, *ibid.*at 1304-1307.

[69] P.K. Oppenheim, *International Banking*, 4th ed., (Washington, D.C.:American Bankers Association, 1983) at 92; see also *Benjamin*, *ibid.* at 1305.

3.2.b. Payment Using the Collection Procedure.

Collection is "a procedure in which a seller and a buyer agree that settlement will be effected when an instrument and/or documents are presented"[70] It is "a method of settlement of payment by a buyer in one country to a seller in another country through bank channels at low cost."[71] It is a three-party payment mechanism involving in essence the exporter, its bank and the importer.[72]

In an environment where the economic interests of the exporter and the importer are in constant conflict, collection affords some degree of security of payment to the exporter, because the documents of title and thus security to the goods are in the custody of the exporter's bank or their agent, at least, until the importer accepts the bill, in which case the exporter's security is transferred from the goods to the bill, which is relatively easily enforceable.

Collection also provides some degree of security for the importer, as the documents of title to the goods could be inspected before making any payment or accepting the bill, and if the documents are satisfactory, the importer's objectives of assurance of quality and quantity are partially satisfied.[73]

---

[70] Royal Bank of Canada,"Foreign Collections and International Trade" in J.C. Castel, A.L.C. deMestral & W.C. Graham eds., *International Business Transactions*,(Toronto: Emond Montgomery Publications Ltd., 1985) 628.

[71] O'Hanlon, *supra*, note 22 at 43.

[72] Despite the fact that several other banks are usually involved in the collection of bills in international trade, the arrangement remains a three party mechanism, as the exporter's bank's instructions to its foreign agents are merely an extension of the exporter's instructions, see, Geva, Concept of Payment, *supra*, note 13 at 12.

[73] See, O'Hanlon, *Supra*, note 22 at 43.

Collection thus serves to provide "the trading parties -buyer and seller - with a compromise between payment on open account terms and payment in advance for the settlement of their transactions".[74]

In addition to the security functions of the collection arrangement, it also provides parties to the transaction with some form of credit - for the exporter this arises upon the discount of the bill by its bank, and for the importer by the deferment of payment to the extent of the tenor of the bill. It is thus one of those instances in which the bill of exchange is used as both a payment mechanism and a financing arrangement. [75]

The successful unification in the practice of Documentary Credits by the International Chamber of Commerce(ICC) *Uniform Customs and Practice for Documentary Credits, 1933 Edition*, "induced the [organisation] to issue similar rules for the collection business of Banks."[76]

Although the ICC rules apply only when incorporated into the contract,[77] they are rarely departed from and, since their introduction in 1979 have been widely used. They are currently adhered to by banks in at least 123 states.[78] The worldwide

---

[74] Watson, *supra*, note 22 at 113.

[75] The other instance is when payment is made under a documentary credit arrangement. This is discussed *infra*. at 3.2.c.

[76] E. Schinnerer, "Collection by Banks and its Documents" in N. Horn *supra*, note 9, 187-201 at 188. The first edition of the rules entitled the *Uniform Rules For the Collection of Commercial Paper* was published in 1956. This was revised in 1967 and in 1978, after a series of consultations and a conference of Bankers from all over the world held in Manila, Philippines, the current revision titled *Uniform Rules For Collection* was issued. This revision is ICC Publication No. 322 of 1978 which became effective January 1, 1979. [Hereinafter, the rules]

[77] See, General provision A of the Rules.

[78] See, Schinnerer *supra*, note 76. The 1967 version was adhered to by only 77 states.

application of the rules could be attributed to the fact that they reflect the commercial practices of banks all over the world in their collection business.[79]

3.2.b.i. Types of Collection.

Collection, according to the rules, is of two kinds, and both may involve:

"the handling by banks, on instructions received, of documents as defined in [the rules] in order to:
a) obtain acceptance and/or, as the case may be, payment, or
b) deliver commercial documents against acceptance and/or as the case may be, against payment, or
c) deliver documents on other terms and conditions."[80]

Collection of bills in international trade may thus be Clean or Documentary.

3.2.b.i.A. Clean Collection

A collection is clean if it consists exclusively of "financial documents", such as "bills of exchange, promissory notes, cheques, payment receipts or other similar instruments used for obtaining the payment of money" without any "commercial documents", such as, "invoices, shipping documents, documents of title or other similar documents, or any other documents whatsoever, not being financial documents", being attached to the "financial documents".[81]

This kind of collection mostly arises when the exporter draws a bill of exchange on the importer and hands the bill over to its bank for the collection of the proceeds, the shipping and other documents to which the bill relates having been probably sent to the

---

[79] *Ibid.* at 189.

[80] Para. 1(i) of General Provision B of the rules.

[81] Para. 1(ii) & (iii) of General Provision B of the rules.
Watson, *Supra*, note 22 at 15, points out that promissory notes are seen less frequently than bills of exchange in clean collections.

buyer already.

This mode of collection is in many respects similar to payment on open account terms except that in this case the importer is to pay upon the presentation of a bill of exchange whereas on open account terms the importer agrees to pay at a predetermined future time without necessarily being presented with a bill of exchange.[82]

3.2.b.i.B. Documentary Collection

A collection is documentary if the documents to be handled by the collecting bank consists of financial documents in addition to commercial documents, or of commercial documents only.[83] This kind of collection allows the importer to gain access to the documents and to the goods themselves, while the goods are still in transit, and after their arrival, only upon the acceptance or payment of the bill drawn by the exporter. The documentary collection procedure gives the exporter "substantial control over the transaction"[84] as the collecting bank - the exporter's bank's agent - has security of the shipping documents. It is therefore a safer payment mechanism than the clean collection procedure. Documentary collection is the usual, if not the common form of collection procedure adopted by exporters and banks all over the world.[85]

When payment is agreed to be made using the documentary collection procedure, the exporter draws a bill on the importer. The bill is usually drawn between 30 to 180

---

[82] Watson,*Ibid.*

[83] See, para.1(iv)(a) & (b) of General Provision B of the rules.

[84] See, J.C. Sargent, "Public and Private Funding in International Trade" in J.D. Lew and C. Stanbrook eds., *International Trade: Law & Practice* (London: Euromoney Publications, 1983) 127-146 at 142.

[85] See, O'Hanlon, *Supra*, note 22 at 44.

days to give the importer time to pay. The Exporter's bank sends the term bill to its correspondent in the importer's country for presentation to the importer. The exporter's bank would usually stipulate in the collection order[86] that the collection basis for the term bill be either on "document on payment" (D/P) basis, or on "document on acceptance" (D/A) basis.[87]

In collection on a D/P basis the collecting bank is instructed to release documents upon payment of the bill and to remit the proceeds to the exporter.[88] In collection on a D/A basis, the term bill is presented to the importer for acceptance, and after acceptance the bill is returned to the exporter. Upon maturity the bill is returned to the bank abroad for presentment to the importer for payment.[89] If the bill is dishonoured either by non-acceptance or by non-payment, the collecting bank must advise the bank from which it

---

[86] Part C of the General Provisions of the Rules stipulates that "[a]ll documents sent for collection must be accompanied by a collection order giving complete and precise instructions. Banks are only permitted to act upon the instructions given in such collection order..."

[87] This is in compliance with Article 10 of the rules which provides that: "In respect of a documentary collection including a bill of exchange payable at a future date, the collection order should state whether the commercial documents are to be released to the drawee against acceptance (D/A) or against payment (D/P)."

[88] Craigie states that conceptually term bills ought not to be used in collection on D/P basis, but in practice and on rare occasions they are so used, see, C.R. Craigie, "The Collection of Bills in International Trade" in C.M. Chinkin, P.J. Davidson, W.J.M. Ricqueir eds., *Current Problems of International Trade Financing* (Singapore: Malaya Law Review/Butterworths, 1982) 100-133 at 101.

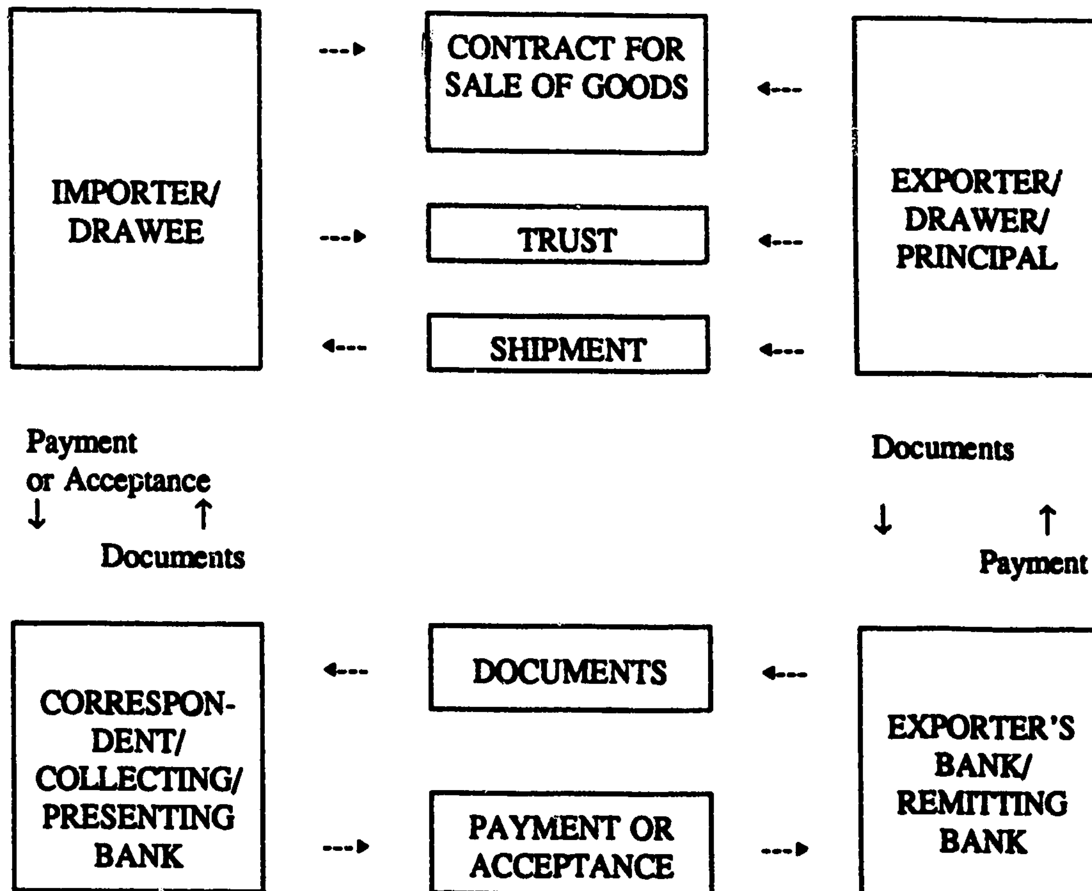
[89] Watson, *Supra* note 22 at 15, explains that the vast majority of term bills are held abroad after acceptance pending payment at maturity and that the few that are returned to the drawer are normally required as security for special export lending. Watson further notes that exporters are usually reluctant to pay double collection charges for handling the same bill twice, as well as for having to hold an accepted bill in the meantime preparatory to its re-presentation for payment. It should however be noted that a clean collection also arises when a term bill sent on D/A basis is accepted and returned to the exporter and at maturity is returned to the importer for payment. In this way only the financial document, i.e. the accepted term bill is sent for collection by the exporter's bank to a collecting bank in the importer's country. In this connection, it should be reiterated that by para. 1(ii) of the ICC rules, a collection is clean if it consists exclusively of financial documents.

received instructions of the fate of the bill and then take necessary steps to protect the exporter's right of recourse against the importer or any other endorsers of the bill.[90] A flow chart of the process of documentary collection would further illustrate the mechanism of documentary collection of bills in international trade.

[90] Art. 20 of the Rules provides elaborate rules on how advice of the fate of documents sent for collection are to be given. In practice, no[illegible] dishonour is usually required to be given by a public telex and in recent times by SWIFT telex. Pr[illegible] usual step taken to protect the exporter's right of recourse on a bill sent for collection.

FIGURE 1.

FLOW CHART OF THE PROCESS OF DOCUMENTARY COLLECTION.



LEGEND: Arrows indicate the flow of responsibilities from party to party.

a) Banks act as collection agents for exporter keeping documents from the importer until acceptance or payment of bill.

b) The relationship between exporter and importer is based on trust in that exporter relies on the fact that importer shall honour bill at maturity, while importer relies on the exporter for genuine and worthy documents of title, and for goods of the contract specifications.

c) The intermediary role of banks neither extends to guaranteeing the genuineness of the documents nor to the enforcement of the responsibilities of the importer and the exporter under their contract.

3.2.b.ii. The Negative and Positive Implications of Payment under the Collection Procedure.

The main purpose of the collection arrangement in international trade is to provide security of payment to the exporter and some security as to the quality and quantity of the goods to the importer whilst at the same time providing some degree of credit to both the exporter and the importer.

This arrangement has at times failed to meet their well-nigh indispensable objectives and has accordingly been criticised for such weaknesses.[91] The degree and intensity of these criticisms vary in relation to the aspects of the transaction called into question, and the party whose aspirations in using the arrangement are left unfulfilled.[92]

3.2.b.ii.A. Implications for the Exporter.

Collection has been said to be inherently risky for the exporter in so many ways.[93] In the main it offers a poor security of payment to the exporter when compared to settlement in advance and payment using the documentary credit procedure.[94]

Furthermore, the exporter does not receive the proceeds of the collection until the remitting bank receives the funds and in countries with tight exchange control measures,

---

[91] See, I.F.G. Baxter, *International Banking and Finance*, (Toronto: Carswell, 1989) at 12; Watson, *supra*, note 22 at 118-120; O'Hanlon, *supra*, note 22 at 48-49.

[92] O'Hanlon, *Ibid* and Watson, *Ibid.* both evaluate the reliability of collection by highlighting its advantages and disadvantages to the exporter and the importer.

[93] Royal Bank of Canada, *supra*, note 70 at 627, warns that the exporter faces both credit and foreign exchange risks in using the collection method.

[94] Watson, *supra*, note 7 at 120.

the receipt of such proceeds takes an unduly long period of time.[95] This makes the system not only time consuming but also expensive, as interest on overdue items in the intervening period has been known to be "staggering".[96]

The exporter is also at the risk of incurring additional losses, if the importer fails to take up the goods, as the goods would have to be warehoused and reshipped.

These negative implications for the exporter could and have been taken care of through the following measures. First, the exporter can obtain a current credit status report of the importer from the remitting bank who, acting through its correspondents in the country of the importer, is in a position to provide such services. The exporter armed with the credit status of the importer is thus in a position to arrange the following practical measures which could cover the risks inherent in the collection method. [97]

Similarly, the exporter can obtain an economic and political status report of the importer's country from its bank. This report enables the exporter decide how best to structure the collection transaction to ensure that delays in remittances do not affect its other commercial commitments.

Moreover, most countries have export credit guarantee schemes which are designed primarily to cover losses that arise in trade with countries with unstable political

---

[95] The delay involved in Collection can be reduced by the *Direct Collection* procedure which is designed to speed up the movement of the documents between the remitting bank and the exporter,see, O'Hanlon, *supra*, note 22 at 48; Baxter, *supra*, note 91 at 12. Royal Bank of Canada, states that they have found that this procedure enables payment to be received about five days earlier than the regular system, see, Royal Bank, *supra*, note 70 at 631.

[96] See, Baxter, *supra*, note 91 at 12, where he reiterates the views of O'Hanlon, *supra*, note 22 in Gmur, *2nd ed.*, *supra*, note 10 at 10.

[97] See, Watson, *supra*, note 22 at 118.

and economic climate.[98] Such guarantee schemes provide up to 90-95% cover for losses such as those that arise in the use of the collection system.[99]

Despite these attendant risks, this mechanism is still being used by exporters because of its inherent advantages. First, it is considered simple and cheap when compared to documentary credit.[100] In addition, it is a relatively safe method of payment where the collecting bank is reputable and the documents are sent on a D/P basis.[101]

Moreover, it could facilitate the financing of the underlying transaction, as the bill drawn by the exporter may be discounted by the exporter's bank, or an advance made against the bill, thereby providing the exporter with some capital for the same transaction.

For the above reasons this mode of payment and financing continues to be adopted in circumstances where the risks incident in the use of the arrangement could be covered by practical banking measures.

3.2.b.ii.B. Implications for the Importer.

It is generally believed that the collection arrangement favours the importer more than the exporter.[102] This view persists for several reasons. Firstly, this payment

---

[98] See, for example, *The Canadian Export Development Corporation*, and *The Nigerian Export Credit Guarantee and Insurance Corporation* which was established pursuant to *Decree No. 15, Laws of the Federation of Nigeria, 1988*. Hugh Cowan points out that "on medium and long-term sales abroad, particularly to third world countries, the involvement of Canadian commercial banks generally has been limited and the involvement of government agencies, such as the Export Development Corporation, is more pronounced", see H.R. Cowan, "Export Trade Finance" (1986) 65 Can. Bar. Rev. 368 at 376.

[99] See, Watson, *supra*, note 22 at 118.

[100] Watson, *Ibid*; O'Hanlon, *supra*, note 22 at 48.

[101] Watson, *ibid*.

[102] See, Watson, *Ibid*. at 120; O'Hanlon, *supra*, note 22 at 49.

mechanism allows the importer to examine the goods and confirm their quality and quantity before paying for them or at least before assuming liability to pay at some future date.[103]

In addition, the arrangement provides the importer with some credit facility until the goods arrive the importer's country and depending on the collection basis the facility may be of such duration that the importer ends up paying for the goods with the proceeds from the sale of the self same goods.

Furthermore, the procedure is more convenient for the importer than the documentary credit procedure, which requires the importer to provide additional security for the further commitment of a local bank to be added to the transaction.

Moreover, this mode of payment lends itself easily to the importer's financial needs, as the importer can easily obtain a loan from a local bank against the security of the goods.

Notwithstanding the above benefits to the importer, the procedure has some fundamental negative implications for the importer depending on the collection basis adopted.

If the collection basis is D/P and the importer has not chosen the documents carefully, it may end up paying for the goods even before their arrival, and thus risk being supplied with goods of a quality and/or quantity not bargained for.

Similarly, the importer, in a D/A collection arrangement, is liable on the bill once the bill is accepted, and even if the goods are defective or non-existent the peculiar nature

---

[103]Watson, *ibid.*; O'Hanlon, *ibid.*

of the bill of exchange relationship foists legal liability on the importer, notwithstanding the breach in the underlying contract.[104]

However evidence of the breach in the underlying contract cannot be precluded in an action brought by the holder against the drawee/importer, as such evidence is a valid defence to the importer's liability on the bill.[105]

Questions of liability on the bill aside, where the importer is from a country with unstable economic conditions and the exporter draws the bill in its own currency, the importer is faced with the risk of exchange rate fluctuations in the use of this payment mechanism. In such circumstances, the risk of fluctuations in the rate of exchange in the interval between acceptance of the bill and the maturity of the bill, is on the importer, because the importer only pays on the due date of the bill.[106] The risk of exchange rate fluctuations may however be on the exporter where the bill is drawn in the importer's currency or where the exporter settles for a currency other its own.

The importer and exporter can, however, take care of the problem posed by exchange rate volatility through a forward transaction, that is, by buying the currency forward so that the rate of exchange is fixed and the importer's liability on the due date is pre-determined.[107]

This payment mechanism therefore also has its disadvantages from the importer's

---

[104]Watson, *ibid.*; O'Hanlon, *ibid.*

[105] See *Barclays Bank Ltd.* v. *Aschaffenburger Zellstoffwerke* [1967] 1 Lloyd's Rep. 387. (Eng. C.A.)

[106] See, Schinnerer, *supra* note 76 at 198. See also, G. Oyebode and S. Maduegbuna, "Legal Problems Often Posed by Exchange Rate Volatility" (Seminar Paper, Lagos-Nigeria March 24, 1991) [Unpublished].

[107] See, Watson, *supra*, note 22 at 124.

perspective. It is perhaps because of its demerits from both the importer and exporter's perspectives that collection is adopted where parties to it has taken the requisite measures to protect themselves and in any event where the importer is a well known business associate of the exporter. However, for greater protection, the importer and the exporter look beyond the collection arrangement to the documentary credit arrangement, which, removes most of the risks incident in the documentary collection of bills in international trade.

3.2.c Payment Using the Documentary Credit Procedure.

In simple terms, the documentary credit procedure, or as generally referred to the letter of credit, is an arrangement that guarantees payment to the exporter, independently of the underlying contract of sale or the financial position of the importer at the time of presentation upon the sole condition that the exporter presents the stipulated documents.[108]

It is a procedure adopted by the parties to an export contract in order to eliminate the possible risk in the documentary collection procedure that the importer might in a falling market refuse to follow through the contract by rejecting the bill and the shipping documents. It thus gives the exporter a greater assurance of payment than the documentary collection procedure. It is arguably the most widely used mode of payment in international trade.

The documentary credit procedure operates both as a payment mechanism and as

---

[108] For a detailed treatment of the Law relating to Documentary Credits, see, H.C. Gutteridge and M. Megrah, *The Law of Bankers' Commercial Credits*, 7th ed.,(London: Europa Publications Ltd., 1984); M. Rowe, *Letters Of Credit* (London: Euromoney Publications, 1985); L. Sarna, *Letters of Credit: The Law and Current Practice*, 3rd ed., (Toronto: Carswell, 1989); M. Kurkela, *Letters of Credit Under International Trade Law: UCC, UCP and Law Merchant* (New York/London/Rome: Oceana Publications Inc., 1985); E. P. Ellinger, *Documentary Letters of Credit:A Comparative Study* (University of Singapore Press, 1970).

a financing arrangement in view of the common "practice of raising money on the documents so as to bridge the period between the shipment and the time of obtaining payment against documents."[109] It has thus been described as "the life blood of international commerce"[110]

The commercial practice relating to documentary credits has been codified into the 1983 Revision of the *Uniform Customs and Practice for Documentary Credits (UCP)*[111] formulated by the International Chamber Of Commerce (ICC). The UCP in Article 2 broadly describes documentary credits[112] as:

> "any arrangement however named or described whereby a bank (the issuing bank), acting at the request and on the instructions of a customer (the applicant for credit),[113]
> (i) is to make a payment to or to the order of a third party (the beneficiary[114], or is to pay or accept bills of exchange(drafts) drawn by the beneficiary, or
> (ii) authorises another bank[115]to effect such payment, or to pay or accept or negotiate such bills of exchange (drafts) against stipulated documents provided that the terms and conditions of the credit are complied with."

The UCP has no force of law. They apply only if incorporated into a particular

---

[109] *Per* Lord Wright in *T.D. Bailey, Son. & Co.* v. *Ross T. Smyth & Co. Ltd.* (1940) 56 T.L.R. 825 at 828. (Eng. H.L.)

[110] *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada* [1982] 2 Q.B. 208 at 222 (Eng. C.A.) *per* Stephenson L.J.; *Intraco Ltd.* v. *Notis Shipping Corporation of Liberia. The Bhoja Trader* [1981] 2 Lloyd's Rep. 256 at 257(Eng. C.A) *per* Donaldson L.J.

[111] ICC Publication No. 400. [Hereinafter, *UCP]*. The UCP is adhered to by practically all banks in the world.

[112] The other major form of credit is the Standby Credit, with all others, such as, the Revolving, Red clause and transfe-reable credits, as variants of it and the documentary credit.

[113] The importer in international trade.

[114] The exporter in international trade.

[115] This is usually the advising bank in the exporter's country.

documentary credit.[116] However, they are of universal application, being used by practically all banks in the world for over half a century now.[117]

3.2.c.i. Types of Documentary Credits.

A documentary credit may be confirmed or unconfirmed, revocable or irrevocable.

3.2.c.i.A. Confirmed and Unconfirmed Credits.

A documentary credit is confirmed if a bank confirms the credit, i.e if the bank agrees to be liable to meet the exporter's request for payment upon the presentation of the stipulated documents.[118] In other words, the confirming bank gives its own independent promise to accept performance from the exporter/ beneficiary and to pay. The advising bank may assume this role in addition to its role of informing or notifying the beneficiary/exporter of the credit. From the exporter's point of view, the unconfirmed credit, though cheaper is a most unsatisfactory mode of payment and perhaps financing in international trade involving importers from countries where the economic and political environment is unstable,[119] or where the issuing bank is unknown or is of ill-repute in the international banking industry. In such a situation, the added undertaking of a local bank is always necessary to allay the fears of the exporter and a prospective holder of the term bill drawn on the importer that payment will be made on presentation of the stipulated documents. The confirmation of the credit by the local advising bank localises

---

[116] art. 1, UCP.

[117] The first Uniform Rules for Documentary Credits was formulated by the ICC in 1933, see, ICC, *UCP 1974/1983 Revisions Compared and Explained-Documentary Credits*, (Paris: ICC Publishing S.A., 1984) Introduction.

[118] art.8 UCP.

[119] *Export Trade, supra*,note 22 at 424.

the payment aspect of the export contract and thus transforms the international transaction into a domestic one.[120] As a rule no advising bank would ever confirm a credit unless the issuing bank has made it irrevocable. [121]

3.2.c.i.B. Revocable and Irrevocable Credits.

A documentary credit is revocable if it can at any moment be amended or cancelled by the issuing bank without prior notice to the beneficiary, the exporter. [122] The revocable credit is obviously more beneficial to the importer. But where it is a seller's market, the importer cannot impose this self serving condition on the exporter. As one writer puts it with regret "only a drastic change in the laws of demand and supply will alter the present lopsided position".[123]

A documentary credit is irrevocable if it cannot be amended or cancelled without the agreement of all the parties.[124] It constitutes a definite undertaking of the issuing bank to pay, accept, or negotiate bills drawn by the beneficiary on the importer provided that the stipulated documents are presented and the terms and conditions of the credit complied with.[125] An irrevocable credit has been said to be "the only true kind of letter

---

[120] *Ibid.* at 428.

[121] Ibid. at 423.

[122] art. 9(a) UCP.

[123] C.K. Agomo, "The Autonomy of the Bankers Documentary Credits: A buyer's Nightmare" (1984-87) 14 Nig. J. Contemp. Law. 62-76 at 65.

[124] art. 10(d). UCP.

[125] art. 10(a) UCP.

of credit."[126] However, if a credit is not specified to be revocable or irrevocable, it is deemed to be revocable.[127]

3.2.c.i.C. Irrevocable and Confirmed Credits.

The confirmed and irrevocable credit is the most favourable to the exporter because it is a direct undertaking by the advising bank to the exporter, that if the stipulated documents are presented within the stipulated time, payment will be made.[128] It is a firm undertaking from which the advising bank cannot retract even if instructed by the importer to cancel the contract.[129]

3.2.c.i.D. Irrevocable and Unconfirmed Credits.

This type of credit is usually issued by leading banks, from North America and Europe which consider a local confirmation unnecessary. Under this type of credit, the issuing bank cannot revoke its undertaking to the beneficiary, but the advising bank is not obliged to pay, accept or negotiate bills drawn by the exporter on the importer. Although these credits are cheaper than confirmed irrevocable credits, they do not localise the payment aspect of the export contract and if the importer refuses for any reason to pay, the exporter will face the rigours of instituting proceedings abroad. A situation which Professor Schmitthoff describes as largely defeating the main purpose of the documentary

---

[126] O'Hanlon, *supra*, note 22 at 51.

[127] art. 7(c) UCP.

[128] See, *Ian Stach Ltd.* v. *Baker Bosley Ltd.* [1958] 2 Q.B. 130. (Eng. Q.B.D.)

[129] See, *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.* [1958] 2. Q.B. 127; see also; *Discount Records Ltd.* v. *Barclays Bank Ltd.* [1975] 1 W.L.R. 315. (Megarry J.)

credit.[130]

3.2.c.ii. The Mechanics of Documentary Credits.

Payment under a documentary credit involves four distinct stages. In the first stage an agreement is reached between the exporter and the importer that payment shall be made using the documentary credit procedure. This agreement is made a term of the underlying contract between the exporter and the importer.

In the second stage the importer instructs a bank (the issuing bank) in its place of business to open the credit for the exporter on terms and conditions prescribed by the importer. The terms and conditions must be complete and precise in order to guard against misunderstanding and confusion.[131]

In the third stage the issuing bank arranges with a bank (the advising bank) in the locality of the exporter to negotiate, accept or pay the exporter's bill of exchange upon the presentation of the correct shipping documents.

In the fourth and final stage, the advising bank informs the exporter/beneficiary that it will negotiate, accept or pay the exporter's bill, upon presentation by the exporter of the correct shipping documents, with or without confirming the credit opened by the issuing bank.[132] The various stages of a documentary credit transaction are better illustrated by a flow chart of the transaction.

---

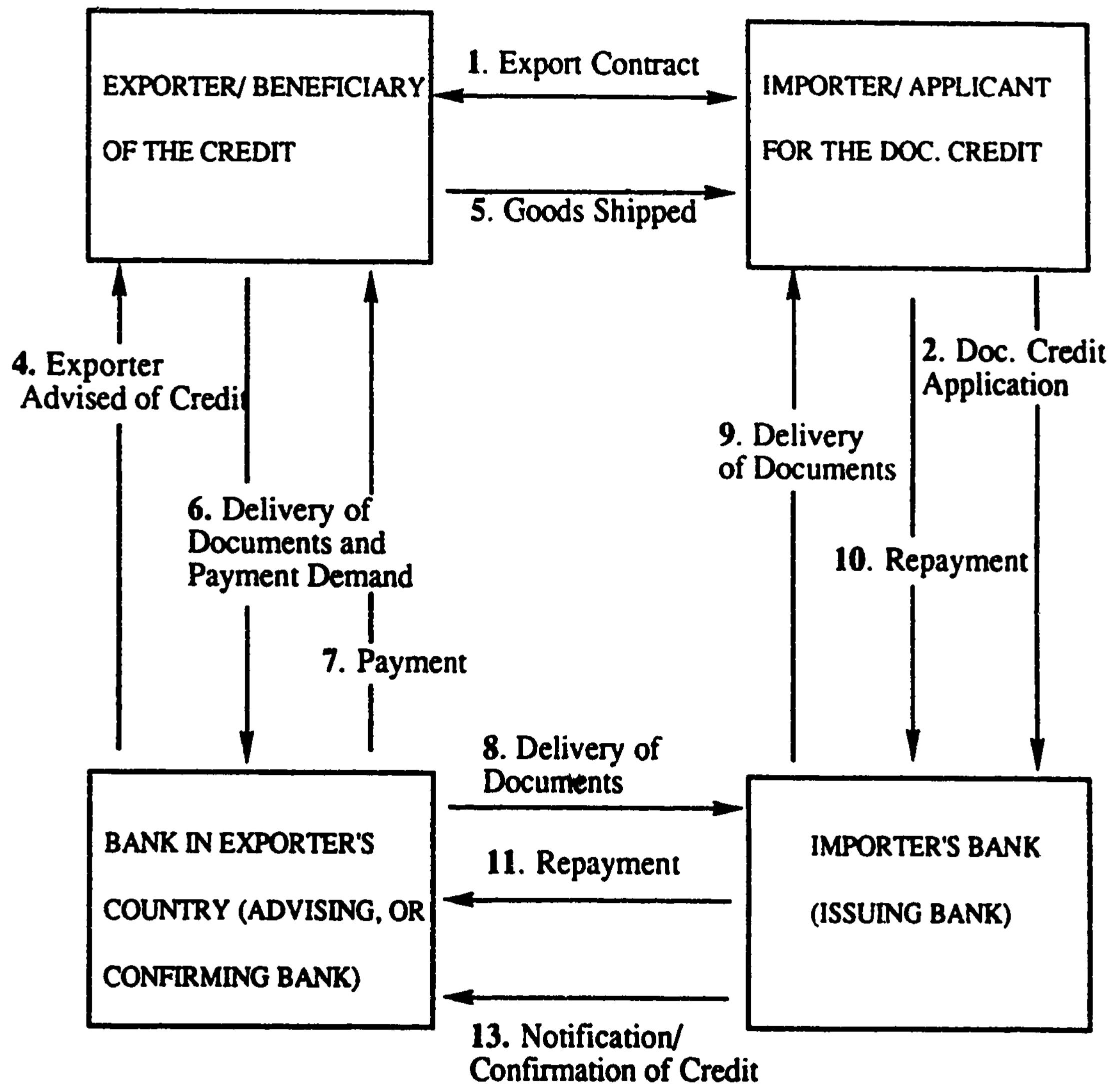
[130] *Export Trade, supra*, note 22 at 426.

[131] art.5 UCP.

[132] art. 8 UCP.

FIGURE 2

FLOWCHART OF THE DOCUMENTARY CREDIT TRANSACTION



* Adapted from L.C. Reif, Unpublished (1992) course materials for Law 565: B1-International Business Transactions, Faculty of Law, University of Alberta, Edmonton, Canada.

There are thus at least four contracts created when parties to an export contract agree that payment is to be made using the documentary credit procedure.[133] As *Lord Diplock* stated in *United City Merchants (Investments) Ltd. and others* v. *Royal Bank of Canada and others*,[134] "it is trite law that there are four autonomous though interconnected contractual relationships involved". The first contract is the underlying contract of sale between the importer and the exporter. The second is the contract between the issuing bank and the importer. The third is the contract between the issuing bank and the advising bank. The fourth is the contract between the advising bank and the exporter.

The opening of the documentary credit has diverse effects on the legal positions of the issuing bank, the importer, the exporter and the advising bank. Whilst as regards the importer, it amounts to a discharge of its payment obligations under the contract of sale, for the exporter, it perfects its obligation to sell and deliver goods of the contract specification. Between the issuing bank and the importer, the opening of the documentary credit creates a principal-agent relationship rather than the debtor-creditor relationship usual between a bank and its customer. However, once the credit is opened and made irrevocable, the issuing bank/agent ceases to be under an obligation to take instructions from the importer, thus leaving the importer only with an action for breach of contract in the event of a loss arising out of the wilful disregard of its instructions.[135] This was

---

[133] The Supreme Court of Nigeria in *Attorney-General of Bendel State of Nigeria* v. *United Bank for Africa (UBA) Ltd.* [1986] 4 N.W.L.R. 547 added a fifth contract, the Contract of Carriage of Goods. It is however doubtful if the contract of carriage of goods is part of the documentary credit arrangement.

[134] *Supra* note 110 at 725.

[135] Agomo, *supra*, note 123 at 68 argues that buyers would rather have a preemptive right as opposed to the present "medicine after death" situation.

the position in *Discount Records Ltd.* v. *Barclays Bank Ltd.*[136] In that case an attempt by the importer to stop payment under a documentary credit was met with a reply by the bank that the credit was an irrevocable confirmed credit which did not admit of an importer's intervention.

The relationship between the issuing and advising bank is also one of agency. But as between the advising bank and the importer there is no privity of contract. However, the issuing bank is responsible to the importer for the actions of the advising bank.[137]

The ordinary contractual consequences of payment under the documentary credit procedure has been swept aside by certain fundamental principles of the law relating to bankers' documentary credits.

3.2.c.iii. Fundamental Principles of Documentary Credits.

Two fundamental principles underlie the legal relations that arise between parties to a documentary credit arrangement. These principles are *the autonomy of the documentary credit* and *the doctrine of strict compliance.*

3.2.C.iii.A. The Autonomy Principle.

This principle which separates the documentary credit from the underlying contract between the exporter and the importer is enshrined in Articles 3 and 4 of the UCP.

The UCP provides in Article 3 that "credits by their nature are separate transactions from the sales or other contract(s) on which they may be based and banks

---

[136] *Supra*, note 129.

[137] The maxim *delegatus non potest delegare* does not apply in this case as the custom of the trade admits of delegation, see, Agomo, *supra*, note at 68.On this point, see also, *Michael Doyle & Associates Ltd.* v. *Bank of Montreal* (1982) 140 D.L.R. (3d) 596 (B.C.S.C.) *Affirmed* (1984) 11 D.L.R. (4th) 496.

are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the credits." The UCP further in Article 4 provides that "[i]n credit operations all parties concerned deal in documents and not in goods, services and/or other performances to which the documents may relate."

The validity of the autonomy principle has been judicially recognised by the courts of most common law jurisdictions.[138] The Supreme Court of Canada in *The Bank of Nova Scotia* v. *Angelica-Whitewear Ltd. and Angelica Corporation* [139] described the principle as "the fundamental principle governing documentary letters of credit and the characteristic which gives them their international commercial utility and efficacy." Similarly, the English House of Lords in *United City Merchants* v. *Royal Bank of Canada*[140] upheld the validity of this principle when it stated that "the whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods and that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment." [141] The autonomy principle is, however, excepted and the banks obliged to refuse payment to the beneficiary if the importer proves to the satisfaction of the banks that the documents though apparently in order are

---

[138] See, *Attorney-GenerAl of Bendel State of Nigeria* v. *United Bank for Africa Ltd*,(S.C. Nigeria) *supra*, note 133.

[139] [1987] 1 S.C.R. 59 at 70.

[140] *Supra* note 110 at 725, *per* Lord Diplock

[141] This decision has been criticised for its apparent disregard for the position of the importer, see, Agomo, *supra*, note 123 at 68.

fraudulent and that the beneficiary was involved in the fraud. This is the fraud exception.[142] If fraud is successfully proven by the importer, a most onerous burden, the courts may, by an order of interlocutory injunction, restrain the banks from paying the beneficiary.[143]

3.2.c.iii.B. The Doctrine of Strict Compliance.

This principle entitles a bank to reject documents which do not strictly conform with the terms of the credit. This principle is premised on the fact that the advising bank is the agent of the issuing bank and that the issuing bank is the agent of the importer.[144] Based on this agency relationship the advising bank is enjoined to reject documents that do not strictly comply with the terms and conditions of the credit. If the advising bank accepts discrepant or irregular documents and pays the beneficiary, the issuing bank is entitled by the law of agency to disclaim liability for the payment, and leave the advising bank liable for the entire loss.[145]

The UCP does not expressly provide for the doctrine of strict compliance.

---

[142] For a detailed treatment of the Fraud Exception, see, E.P. Ellinger, "Documentary Credits and Fraudulent Documents" in C.M. Chinkin, P.J. Davidson and W.J.M. Ricquier eds., *supra*, note at 185-234 [Hereinafter, Ellinger, Fraudulent Documents]; H.P. Kee, "The Fraud Rule in Letters of Credit Transactions" in C.M. Chinkin, P.J. Davidson and W.J.M. Ricquier eds. *ibid.* 235-259. See also, E.P. Ellinger, "The Law of Letters of Credit" in N. Horn ed., *supra*, note 203-226 at 218-223 [Hereinafter, Ellinger, Letters of Credit] and the dictum of Shientag J. in *Sztejn* v. *J. Henry Schroeder Banking Corporation* (1941) 31 N.Y.S. 2d 631 at 633-634.

[143] In the *Bank of Nova Scotia* v. *Angelica-Whitewear supra*, note 139 at 84 the Supreme Court of Canada, *per* Le Dain J., surmised that a strong *prima facie* case would have to be shown on an application for an interlocutory injunction.

[144] *Export Trade, supra*, note 22 at 406.

[145] On this point ,see, C.M. Schmitthoff, "Discrepancy of Documents in Letter of Credits Transactions" (1987) J.B.L. 94. See also, *Export Trade ibid.*; *Michael Doyle & Associates v. Bank of Montreal* [1984] 5 W.W.R. 193 (B.C.C.A.).

Although Article 15 of the UCP provides that "banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit", the UCP provides no guidance as to what amounts to compliance. Recourse is thus had to case law. The case law position is that the documents must be strictly in accordance with the description in the terms of credit.[146] Documents which appear to be the same or as good as those required by the credit does not satisfy the rule and the advising bank is obliged in the circumstances to refuse payment. In the very incisive words of Viscount Sumner in *Equitable Trust Co. of New York* v. *Dawson Partners*[147], "there is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines."

The doctrine of strict compliance makes the maxim *de minimis non curat lex* inapplicable to documentary credit transactions.[148] Accordingly, it was held in *J.H. Rayner and Co. Ltd.* v. *Hambro's Bank Ltd.*[149] that a bill of lading referring to "machine

[146] *Equitable Trust Co. of New York* v. *Dawson Partners* [1927] Lloyd's Rep. 49 (Eng. H.L.); *Gian Singh & Co. Ltd* v. *Banque de l'Indochine* [1974] 1 W.L.R. 1234 (P.C.); Angelica-Whitewear case, *supra*, note 139.

[147] *Ibid.* at 52.

[148] *Moralice (London) Ltd.* v. *Man* [1954] 2 Lloyd's Rep. 526 (McNair J.); *Soproma S.p.A.* v. *Marine and Animal By-Products Corporation* [1966] Lloyd's Rep. 367 at 390 (McNair J.)

[149] [1943] 1 K.B. 37.(Eng. C.A.). Professor Schmitthoff, suggests that the *Rayner's case* should no longer be followed in cases to which the UCP apply because McNair J. have rightly distinguished it in *Soproma's case ibid.* on the grounds that the UCP applied to the latter and not to the former, see, *Export Trade, supra*, note 22 at 408n44. It is however submitted that *Rayner's case* reflects the spirit, if not the intent, of Article 15 which states that banks are not to pay where the documents *appear on their face to be inconsistent with one another*.(Emphasis mine) In support of this position, see, the *dictum* of Le Dain J. in *The Bank of Nova Scotia* v. *Angelica-Whitewear supra* note 139 that *Rayner's case* is an "often cited example of the application of the rule of strict documentary compliance, particularly because of its holding that in determining whether tendered documents appear on their face to be in accordance with the terms of

shelled groundnut kernels" did not satisfy the requirement of one specifying "Coromandel ground nuts" even though it was known in the trade that these two descriptions referred to the same product. Professor Ellinger[150] has argued that the severity of the strict compliance doctrine is in certain cases relaxed by some provisions[151] of the UCP which allows for tolerance in amount and quantity. Whilst this view is acceptable, the less rigid approach called substantial compliance favoured by most United states courts[152] and sanctioned by Professor Ellinger[153] overlooks that to allow for such half way approach would be to leave the importer at the complete mercy of the exporter. It is bad enough as it is.[154]

3.2.c.iv. The Payment and Financing Functions of the Bill in a Documentary Credit Transaction.

By Article 11(a) of the UCP, a documentary credit must clearly indicate whether it is available by sight payment, by deferred payment, by acceptance or by negotiation. Bills are the usual if not the common means of payment, acceptance or negotiation under a documentary credit arrangement.

---

a letter of credit an issuing or confirming bank cannot be assumed to have knowledge of the meaning given to a particular terms or expressions in a particular trade." See also, the June 7, 1991 unreported decision of the Supreme Court of Singapore in the *United Bank Ltd.* v. *Banque Nationale De Paris* which relied mainly on *Rayner's Case* in holding that there the discrepancy between P.S."Pte" Ltd in the invoice and P.S. Ltd in the credit was sufficient to render the documents defective. Agomo, *supra*, note 123 at 74 is also of the same view.

[150] Ellinger, Letters of Credit, *supra*, note 142 at 224.

[151] arts. 43 and 41(b).

[152] See, the authorities cited in Ellinger, Letters of Credit *supra*, note 142 at n71.

[153] *Ibid.* at 226.

[154] Agomo, *supra*, note 123 at 75.

3.2.i.c.iv.A. The Payment Functions of the bill in a Documentary Credit Procedure.

Although the documentary credit can stand on its own as an independent payment mechanism without the need for a negotiable instrument,[155] bills of exchange almost always form part of the payment mechanism under the arrangement.[156] Payment under a documentary credit may be at sight or deferred.

Documentary credits payable at sight demand that immediate payment be made to the beneficiary upon the presentation of documents without the use of bills of exchange. However, for largely historical reasons and to no practical purpose, sight documentary credits continue to demand the presentation of sight bills payable immediately the other documents are checked and found to be as stipulated in the credit.[157]

Payment under deferred payment credits does not involve the presentation of term bills. It simply is an undertaking by the issuing or any confirming bank to pay or ensure payment at the stipulated future time upon the presentation of the stipulated documents. It is a device adopted to avoid the incidence of high stamp duties existing in some countries.[158]

---

[155] As is the case when documentary credit is on payment against documents, see, *Export Trade*, *supra*, note 22 at 421.

[156] Rowe, *supra*, note 9 at 249.

[157] Rowe, *ibid.*; O'Hanlon, *supra*, note 22 at 51.

[158] Rowe, *ibid.* at 250. In such countries deferred payment credits may also be a form of credit as it may be discounted for immediate cash before the deferred payment date. On this point see, *Export Trade*, *supra*, note 22 at 421; see also , E.P. Ellinger, "Discount of Letter of Credit" (1984) J.B.L 379.

3.2.c.iv.B. The Financing Functions of a Bill in a Documentary Credit Procedure.

In addition to ensuring that settlement is made between the exporter and the importer against the tender of specified documents in compliance with its terms and conditions, a documentary credit also functions as a financing arrangement for both the applicant/importer and the beneficiary/exporter. This objective is achieved by drawing a term bill on either the applicant, the issuing bank or the advising bank and the subsequent acceptance or negotiation of the bill by parties to the credit. Whilst the negotiated credit provides only the beneficiary with immediate cash, the documentary acceptance credit is designed to provide finance to both the applicant and the beneficiary.[159]

Documentary credits available by negotiation demands that the bill be drawn on the issuing bank or less usually on the applicant for credit, the importer.[160] The issuing bank in effect agrees to pay not just the beneficiary but also any bona fide holder of bills presented with the stipulated documents. A negotiated documentary credit thus enables the advising bank, if restricted, or any nominated bank, if freely negotiable by any bank, to check the documents and if they are in order to pay the credit less its commission and interest and obtain reimbursement from the issuing bank. The negotiating bank usually pays with recourse to the beneficiary unless the credit has been confirmed by an advising/negotiating bank.[161]

---

[159] Watson, *supra*, note 22 at 183.

[160] It should be noted that because of the high stamp duties in some countries a credit may state that it is negotiable although no bill is called for, see, Watson, *ibid.* at 161.

[161] As this is the negotiation of an unaccepted bill it is subject to a right of recourse against the drawer, the beneficiary, see, *Export Trade*, *supra*, note 22 at 423; Watson, *ibid.* at 161.

A documentary credit is available for acceptance where the exporter has agreed to provide the importer with a short term credit facility, but still requires a bank undertaking to pay. The exporter then draws a term bill on a designated bank. The bank upon acceptance of the bill returns it to the beneficiary who may either hold onto it until maturity or discounts it for immediate cash.[162]

This sort of credit may also arise where the term bill is to be accepted either by the importer or the issuing bank. If the credit is issued as irrevocable, by Article 10(a)(iii) of the UCP the issuing bank holds itself responsible to ensure that the bill is accepted and paid by the importer. If on the other hand the credit is confirmed, a similar obligation is placed on the advising bank by Article 10(b)(iii) of the UCP. Thus, even if only the importer has to accept the bill once the credit is irrevocable and confirmed, the exporter has a considerable degree of security as the issuing and/or confirming banks guarantees both acceptance and payment by the importer.

3.2.c.v. The Negative and Positive Implications of Payment under a Documentary Credit Procedure.

The documentary credit procedure aims to reconcile the conflicting interests of the importer and the exporter by providing for payment against documents representing the goods. However, its underlying principles, particularly the autonomy principle, tilt the procedure in favour of the exporter thereby casting doubts on the fairness of the arrangement.

---

[162] See, Rowe, *supra*, note 9 at 250, *Export Trade*, *ibid.* at 423.

3.2.c.v.A. Implications for the Exporter.

The documentary credit provides immediate finance to the exporter by the payment or acceptance of a bank. It provides the exporter with an effective guarantee of payment against the proper documents regardless of the importer's ability to pay. Once the stipulated documents are presented to the bank, payment must be made. A documentary credit that is confirmed and irrevocable has no negative implications for the exporter. However, for the exporter, a documentary credit arrangement is not as good as payment in advance because it does not enable the exporter obtain payment of the goods sold before they are available to the importer.

3.2.c.v.B. Implications for the Importer.

The importer is exposed to a great variety of risks in the use of the documentary credit procedure. The procedure ensures that the importer gets the documents it seeks but not necessarily the goods. If the goods are defective or not shipped at all, the importer can only rely on the underlying contract for the recovery of the ensuing loss having already paid the issuing bank. The autonomy principle constitutes a major hindrance to the importer's ability to stop payment if there is a breach in the underlying contract of sale. Even where there is fraud the arrangement puts the very heavy burden of establishing a strong *prima facie* case on the importer.

Moreover, the documentary procedure is expensive and involves the importer in more expenses than is the case under the documentary collection procedure. On the whole, the arrangement is designed to favour the exporter. However, to the extent that the doctrine of strict compliance is held rigid, the documentary credit procedure offers a

limited protection to the importer in a "sellers' market".

3.3 The Concept of Financing Arrangement.

A financing arrangement "implies a credit extended to one of the parties to an export contract".[163] Basically, financing arrangements are of two types, those on which the parties to an export contract themselves extend the credit and those in which the parties to such a contract request the support of a third party, usually a bank or other non-bank financial institution in the extension of the credit.

Under the first type of financial arrangement the exporter and the importer satisfy their credit needs by making the financing arrangement a function of the payment clause of their contract. This may arise in either of two ways. First, if the importer, as is often the case, is desirous of deferring payment of the purchase price pending the resale of the goods or their profitable utilization, the exporter may satisfy this desire by agreeing to the insertion of a deferred payment clause in the contract. Similarly, the exporter may, in the interval between the commencement of the contract and its discharge, require some financing for the production of the contract goods or for the procurement of some services allied to the contract. In such an event, the importer may be in a position to provide the needed financing by conceding to the insertion of either an advance payment clause or an instalment payment clause.

The second type of financing arrangement arises out of the fact that neither the exporter nor the importer is prepared to bear the liquidity burden and/or the credit risk inherent in any financing arrangement. In such a case, the parties completely avoid the

---

[163] N. Horn, "Payment and Financing Arrangements in International Trade" in N. Horn ed., *supra*, note 9, 1-21 at 5 [Hereinafter, Horn, Financing Arrangements].

financing aspects of their contract by soliciting the support or the assistance of a financial institution in the handling of the liquidity burden and credit risk involved in the finance of international trade.[164] It is to this latter category of financing arrangements that the various uses to which the bill is put in international trade belong.

Generally, all financing arrangements connected with the use of the bill of exchange involve the negotiation of a bill payable at a fixed or determinable future time.[165] However, it should be noted that in a "sellers' market" such as exist today, a substantial part of international trade is financed by means of sight bills.[166] Typically, an exporter who has agreed to the deferred payment of an export contract will cover the inherent liquidity burden through the negotiation of a bill by way of an acceptance credit extended by a banker or by way of a *forfaiting* arrangement. Similarly, an importer who has conceded to an advance payment may finance the advance payment through the negotiation to a financial institution of a bill of exchange drawn on the exporter for the amount advanced or to be advanced.

It is to these arrangements, namely, the acceptance credit, the negotiation of a trade bill and *forfaiting*, that attention is directed in this thesis as prime examples of the uses to which the bill can be put in the financing of international trade.

3.3.a. The Acceptance Credit.

The bill of exchange performs its most useful role in the financing of international

---

[164] Horn, Financing Arrangements *ibid.* at 5.

[165] Baxter, *supra*, note 91 at 40.

[166] N.P. Soskin, " Bills of Exchange" in Gmur, *supra* note 10, 29-41 at 31.

trade when used in the financing device of "acceptance credit".[167] Acceptance credit is the export trade financing facility most frequently offered by banks in LDCs.[168] The acceptance credit is a financial facility extended by a bank or other non-bank financial institution (acceptance house) to an international trader whereby the financial institution agrees to accept bills of an agreed tenor (usually 90 days after sight) drawn on it by an international trader up to a specified maximum amount.[169] The accepted bills (or bankers' acceptances) are then discounted by the trader with a bank or a discount house for immediate cash.[170] This arrangement may occur independently or as discussed above as part of a documentary credit transaction.[171]

The acceptance credit allows the trader to benefit from the name and high credit rating of the financial institution in gaining access to lower cost funds through the sale of the bills. The financial institution is thus in effect an accommodation party. At common law the liabilities of an accommodation party to a bill is secondary and in any event such a party has a right to be indemnified by the drawer/trader.[172] However under

---

[167] Rowe, *supra*, note 9 at 250; A.G. Guest, ed., *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* 14th ed., (London: Sweet and Maxwell, 1991) at 262. [Hereinafter, *Chalmers and Guest*]

[168] *Trade Financing in Developing Countries*, *supra*, note 55 at para. 59.

[169] Soskin, *supra*, note 166 at 33, Rowe, *supra*, note 9 at 249; Horn, Financing Arrangements, *supra*, note 163 at 1. See also, Gillett Brothers Ltd., *The Bill on London* (London: Chapman & Hall, 1964) at 29.[Hereinafter, Gillett,*The Bill on London*]

[170] Gillett, *The bill on London ibid.* at 31; *Chalmers and Guest*, *supra*, note 167 at 262.

[171] See, M. Sandler and B. Di Ferante, " Primer on Trade Finance: Export Drafts Letters of Credit and Bankers Acceptances" (1986) 11 N.C.J.Int'l & Comm. Reg. 635.

[172] An accommodation party is defined in s.28 of the Act. See, *Chalmers and Guest*, *supra*, note 167 at 262-263. See also, E. Razin, "Two Are Better Than One:Bankers Acceptance Participation Financing in Canada" (1992) 7 B.F.L.R. 217 at 221-222; Sarpkaya, *Supra*, note 31 at 143-146.

an acceptance credit arrangement, the financial institution as acceptor of the bills is primarily liable to the holder of the bill upon maturity and the drawer/trader merely has a secondary obligation to put the financial institution in funds prior to or upon the maturity of the bills. In effect, the liability of the trader on the bill arises only if the financial institution fails to pay the holder.[173] Accordingly, in practice the financial institution consents to this arrangement after a careful assessment of the trader's credit worthiness as evidenced by the trader's annual export business.[174] In addition, the financial institution takes as security the relative shipping documents to any goods financed by this arrangement. However, if the trader is of good repute, the financial institution may enter the arrangement without taking any form of security or grant the facility against the collection of bills drawn by the trader against its overseas customer and duly assigned to the financial institution.[175]

The acceptance credit may be granted until further notice or for a fixed period of time such as a year. During the agreed period any bills that mature are paid off and upon proof of outstanding export business the bills may be replaced or "rolled over". In such a case the arrangement is a revolving credit facility subject however to a stipulated credit limit. The amount of the bill paid off becomes available to finance further bills unless the period of credit has expired and/or has not been extended.[176]

---

[173] *Chalmers and Guest, ibid.*; Razin, *ibid.* at 221.

[174] *Chalmers and Guest, ibid.*; Razin, *ibid.*; Gillett, *The Bill on London*, *supra*, note 169 at 47.

[175] Gillett, *The Bill on London*, *ibid.*. This is also called a bank export credit.

[176] *Chalmers and Guest*, *supra*, note 167 at 263; Soskin, *supra*, note 166 at 33.

The above is a very broad description of the principal method of the acceptance credit arrangement. It is a very flexible financing arrangement susceptible to the varying financing needs of international traders and different methods may be adopted by a financial institution.

3.3.b. The Negotiated Trade Bill.

A trade bill is a bill drawn directly by one international trader on another against an export trade transaction and which has not been accepted by a bank.[177] For instance bills drawn by an exporter on an importer when payment is agreed to be made using the documentary collection procedure or bills drawn by an importer on the exporter when advance payment has been made by the importer are trade bills and, when accepted by a trader, they are called "trade acceptances".[178]

Trade acceptances are not as readily negotiable as bills drawn on a bank (bankers' acceptances). However, trade acceptances can be discounted by an international trader either to a discount house or preferably to its bankers who have intimate knowledge of its business.[179] The cash return on the discount is a function of several factors notably, the credit standing of the international trader and its customer, the volume of trade bills in circulation carrying the name of the trader and drawn against the same type of goods.[180] The negotiation of trade bills in this simple manner is one mode of financing

---

[177] Gillett, *The Bill on London*, *supra*, note 169 at 47; *Chalmers and Guest ibid.* at 19.

[178] Sandler and Di Ferante, *supra*, note 171 at 634-635; Sarpkaya, *supra*, note 31 at 142..

[179] Gillett, *The bill on London*. *ibid.* at 47.

[180] *Ibid.*

export trade provided by the bill.

Trade bills may be negotiated in a more complex manner. This may be illustrated with the following fictitious example. A Ghanaian importer has agreed with a Nigerian exporter, that the latter shall draw sight bills on it for the sale of motor vehicle spare parts cost, insurance and freight (c.i.f.) Accra, Ghana. However, the Ghanaian importer does not want to pay for the goods until they reach Ghana or until some later time. The Ghanaian importer then requests its bank, Ecobank[181] Accra, Ghana to authorize Ecobank Lagos, Nigeria to negotiate bills drawn on it by the Nigerian exporter in Naira at say 90 days sight to cover the c.i.f. value of the goods.

The Nigerian exporter draws the bill on the Ghanaian importer and presents it with all the relative shipping documents attached to the Ecobank Accra which negotiates it i.e. buys it from the exporter at the bank's buying rate of exchange for 90 days sight drafts in Nigeria. Ecobank, Lagos pays the exporter in Naira and forwards the bill and the documents to Ecobank, Accra. Ecobank, Accra presents the bill to the importer for acceptance and afterwards holds it with the documents until maturity.

Meanwhile the exporter having been paid in Nigeria ships the goods to Ghana and the importer does not have to pay for them until maturity of the bills. If however, the importer wishes to obtain earlier delivery of the goods, it may pay the bill before maturity and in that case the bank may allow the importer a rebate on the bill amount. If the importer does not wish to take delivery of the goods before the maturity of the bill,

---

[181] Ecobank is the bank of the Economic Community of West African States (ECOWAS). It has branches in the capital cities of all the member states of the economic community. Nigeria and Ghana are leading members of this economic community.

Ecobank, Accra on arrival of the goods arranges for its proper storage in a warehouse named by the importer as the acceptor of the bill. The importer is also obliged to provide adequate insurance cover upon which Ecobank has a lien. All landing and warehouse charges are to the account of the importer.

Based on the importer's credit standing with Ecobank, Accra, the shipping documents may be released upon acceptance of the bill i.e. on D/A terms. In such a case, Ecobank, Accra may continue to hold the bill until maturity or sell it in the commercial market for bills.

This is a typical method of financing international trade in consumer goods.[182] The relative experience of the bank, the shippers, the warehousemen, the traders themselves and all other parties responsible for aspects of this elaborate arrangement determines the extent of the legal problems that may arise in any particular transaction. On the other hand international trade in capital goods may be financed using buyer credits, export leasing, foreign currency credits, government export credit schemes, private sector credit insurance or of particular relevance to the present discourse *Forfaiting*.[183]

3.3.c. Forfaiting.

Forfaiting is a "term generally used to denote the purchase of obligations falling due at some future date arising from deliveries of goods and services-mostly export

[182] Gillett, *The Bill on London ibid.* at 43; Soskin, *supra*, note 166 at 37. See also, *Trade Financing in Developing Countries*, *supra*, note 55 at para. 59, specifically notes that this arrangement is a common pre-shipment finance technique in LDCs.

[183] For modes of financing international trade in Capital goods, see, R.H. Miller, "Financing Trade in Capital Goods" in Gmur, *supra*, note 10, 83-89.

transactions- without recourse to any previous holders of the obligation"[184] The word *forfaiting* is derived from the french word *à forfait* which implies the waiver or surrender of rights. The exporter is not only giving up its right to receive immediate payment from the importer but is also waiving its right of recourse against the importer in the event of non-payment of a debt instrument.[185]

Forfaiting was developed by the Zurich banking community in the late fifties and the early sixties as a medium and long term financing arrangement, in response to the demands by importers for longer credit periods following the change in the nature of the capital goods market from a sellers' to a buyers' market.[186] Forfaiting was also developed as a result of the scepticism of Western European exporters and financial institutions towards credit demands from the newly emergent trading states of Eastern Europe and the third world whose credit rating were difficult if not impossible to assess in the late fifties and early sixties.[187]

3.3.c.i. The Mechanics of *Forfaiting*.

The bill of exchange and the promissory note are the most frequently used

---

[184] C.J. Gmur, "*Forfaiting*"in Gmur, *supra*, note 117 -132 at 117 [Hereinafter, Gmur, Forfaiting]. See also the definition in H. Jaeger, "Export Factoring and Forfaiting" in N. Horn, *supra*, note 9, 277-315 at 285. See generally, R. Scallon. "Forfaiting" in M. Knight et al eds., *Export Finance* 3rd ed., (London: Euromoney Publications, 1988) 193-204.

[185] Scallon, *ibid.* at 193.

[186] Gmur, Forfaiting, *ibid.* at 117; Jaeger *ibid.* at 278.

[187] Gmur Forfaiting, *ibid.* at 117.

financing instruments in *forfaiting*.[188] Bills of exchange and promissory notes are used because by their negotiable nature they embody the forfaitable rights and claims in easily comprehensible and transferable forms.[189] Besides, "their long history as a means of trade financing, their inherent simplicity and the existence of a broadly internationalized legal framework rules out many uncertainties."[190] However, promissory notes are preferred because as two-party instruments they do not need to be accepted and thus are simpler for the guarantee purposes of *forfaiting*.[191]

A typical *forfaiting* transaction involving bills of exchange follows this pattern. The exporter and the importer agree that the former will supply the latter with some specialized capital goods, the delivery of which is to take place by a series of consignments spread over a period of say four years. Payment is also agreed to be made by a series of bank guaranteed or *avalised* term bills drawn by the exporter on the importer with maturity dates related directly to the consignment dates. The importer makes an arrangement with a bank in its country that it will guarantee or *avalise* the bills which ever is appropriate given the negotiable instruments legal regime of the country in question. The exporter also makes an arrangement with a bank in its own country that the term bills will be *forfaited* i.e. discounted without recourse to the exporter. The importer and the exporter then execute an export contract (which also evidences the forfaiting

---

[188] Charles J. Gmur, one of the originators of Forfaiting, points out that book debts, deferred payments arising out of a documentary credit and other forms of obligation could be used in forfaiting, *ibid.* at 117.

[189] Gmur, *ibid.*; Jaeger, *supra*, note 184 at 299.

[190] Gmur Forfaiting, *Ibid.*

[191] Gmur Forfaiting, *ibid.* at 119, Jaeger, *supra*, note 184 at 299, Baxter, *supra*, note 91 at 44.

arrangement) for the sale of the specialized capital goods. The exporter's bank may then sell or re-discount the bills to another financial institution in the developed secondary forfaiting market in order to improve the *forfaiter's* risk distribution. Forfaiting should however be distinguished from the traditional discount of bills in international trade.

3.3.c.ii The Basic Distinctions Between *Forfaiting* and Discounting of Bills in International Trade.

Although *forfaiting* is based on the discounting of bills as is the traditional business of bill discounting, it differs from the discount of bills in several important respects. Firstly, unlike the discount of bills, *forfaiting* assumes the risks of international lending in the same way as governmental export schemes or international insurance. In addition, *forfaiting* assumes the currency and political risks which the traditional discount of bills does not address at all. Furthermore, whilst the discount of bills could be used to finance both consumer and capital goods, *forfaiting* is mainly used in the finance of capital goods. Finally, whilst *forfaiting* is basically a structured medium-term financing arrangement involving a series of half-yearly maturing bills or notes, the discount of bills is a relatively unstructured short-term financing arrangement involving bills maturing at 30-90 days after sight.[192]

3.3.c.iii The Attractions of *Forfaiting*.

Forfaiting is an attractive device for the short, medium or long term finance of the importation of capital goods especially when government sponsored finance is not available as is the current situation in most LDCs. A recent UNCTAD sponsored study

---

[192] See, Gmur, Forfaiting, *ibid.* at 118 for a comparison of Forfaiting and other means of finance including discount of bills in international trade.

on the feasibility of establishing an interregional trade financing facility (ITTF) for the exports of non-traditional goods of developing countries has therefore recommended the greater use of the *à forfait* market by the proposed ITTF as a means of increasing its activities and effectiveness.[193]

Forfaiting is a simple and quick procedure which provides the exporter with immediate cash to the extent of the face value of the bill or note less the financial institution's commission and the interest for the whole period of credit.[194] *Forfaiting* arrangements can be of any size and duration usually of three to five years or even up to seven years.[195] As a medium or long term financing facility and to reduce to a minimum exchange rate risks, the main currencies in use are those of the Euromoney market accompanied by the respective national currencies of the *forfaiter*.[196] However, where it is a short term financing of only a year other currencies may be used.[197] As noted above, *forfaiting* is of the greatest attraction because it assumes the political (political upheaval in the country of the guarantor), transfer (inability or unwillingness of countries or official bodies to effect payment in agreed currency) and currency (exchange rate volatility) risks of international trade from the exporter in the same way as a govern-

---

[193] Multinational Strategies Inc., *Feasibility Study for an Interregional Trade Financing Facility For the Exports of Non- Traditional Goods of Developing Countries*, UN. Doc. No. UNCTAD/TD/B/1300/Supp.2 (1991) at 27. This report points out that the *à forfait* market provides the ITTF with a source of liquidity beyond the ordinary lines of credit and ensures the diversification of the portfolio risk of the ITTF.

[194] Gmur, Forfaiting *supra*, note 184 at 118; Scallon, *supra*, note 184 at 198-199.

[195] Gmur, Forfaiting, *ibid.* points out that forfaiting can range from SwFr 100,000 up to SwFr 100 million.

[196] *ibid.*

[197] *Ibid.* at 117.

mental or private export insurance schemes.[198]

3.3.c.iii Some Legal Problems Arising from the use of Bills of Exchange in *Forfaiting.*

Due to differences in the laws of negotiable instrument of most countries certain legal problems that arise in the use of the bill of exchange in a forfaiting transaction. Three of such legal problems are dealt with here.[199] The first problem arises out of the fact that the forfaiter must expressly exclude its legal right of recourse against the drawer. This is permissible by section 16(1) of the Act, but by Article 9 of the GUL, the drawer of a bill issued under the GUL cannot exclude its own liability for the payment of a bill.

In practice , this problem is taken care of by the financial institution/forfaiter waiving its right of recourse against the drawer/exporter in a separate written undertaking.[200] However, as the undertaking operates only as between the forfaiter and the exporter, a third party, who purchases the bill later from the secondary market, cannot be precluded from exercising its right of recourse against the exporter.[201] In such circumstances, the exporter will then be indemnified by the primary forfaiter. The ease at which the exporter is indemnified depends on if the primary forfaiter is a first class financial institution.[202]

---

[198] Gmur, Forfaiting, *ibid.*; Scallon, *supra*, note 184 at 199.

[199] For other problems that arise in the use of negotiable instruments in forfaiting, see, Jaeger, *supra*, note 184 at 300, 301, 304-306.

[200] Gmur, Forfaiting *supra*, note 184 at 121; Jaeger, *ibid.* at 300.

[201] Jaeger, *ibid.* at 300.

[202] Gmur, Forfaiting, *supra*, note 184 at 121.

The CIBN in Article 38(2) permits the drawing of bills without recourse. Accordingly, the ratification of the Convention will remove this obstacle to the smooth operation of forfaiting transactions in circumstances where the exporter cannot avoid drawing a bill of exchange on an importer instead of taking a promissory note.

The second problem relates to the increasing use of the European Currency Unit (ECU) in forfaited bills. From the Common Law position this raises the question of whether an ECU is "a sum certain in money" as required by section 3(1)of the Act. The ECU is "a basket of specified amounts of the currencies of the member states of the European Community". [203] It is thus not a currency and if used in a document that satisfies all other requirements of a bill, the document is not a bill of exchange.[204]

Perhaps it is to encourage the practice of forfaiting bills drawn in the ECU and other monetary units of accounts that the CIBN in Articles 5 and 75 permits the drawing of bills in monetary units of account established by intergovernmental organisations or by agreement between two or more states. The timeous ratification of this Convention will thus augur well for the practice of forfaiting.

The third problem stems from the difference in the legal interpretation of the guarantee and the aval in the Geneva and common law systems of negotiable instruments.[205] On the basis of the GUL a bank guaranteeing the payment of a bill for the purposes of forfaiting may do so by the mere use of the words "per aval" or "as good as

---

[203] Jaeger, *supra*, note 184 at 302.

[204] Jaeger, *ibid.* at 302. See also, *Chalmers and Guest*, *supra*, note 167 at 26.

[205] Jaeger, *ibid.*; Scallon, *supra*, note 184 at 202.

aval". However, such an *aval* will not be recognised under the common law system. As the forfaiter bases its credit judgment on the liability of the bank that issued a guarantee for the importer, another guarantee instrument outside the bill must be obtained and transferred to the forfaiter. This will involve the forfaiter in the difficult task of determining whether this independent guarantee is equivalent to an aval. Furthermore, as the concept of a negotiable guarantee is alien to the common law, the terms and conditions of the transfer of the guarantee to the forfaiter further complicates the problem.[206]

The existence of these differences and the need to ensure certainty in the guarantee aspects of forfaiting demands that the CIBN which in Articles 46-48 satisfactorily reconciles the differences between the Geneva and the Common Law systems, be ratified in earnest.

Despite these legal impediments, forfaiting remains a veritable source of export finance especially for the less developed countries and the operations of the à forfait market relies heavily on the availability of negotiable instruments such as the bill of exchange.

3.4. Conclusion

The uses of the bill of exchange in international trade whether as a payment mechanism or as a financing arrangement depends on its negotiable character which is facilitated by its paper-based nature. Today, the advent of electronic banking techniques challenge the use of bills of exchange and instruments based on them (in their tangible

---

[206] Jaeger, *ibid.* at 302-303. In this connection Scallon points out that Algerian Bank Guarantees are not negotiable at all, see, *ibid.* at 203.

form). This is evident in the attempts at transforming these paper-based instruments into electronic impulses. A detailed discussion of the effect of this transformation on the use of bills of exchange in international trade forms the subject of the next chapter of this thesis.

CHAPTER FOUR

THE EFFECTS OF ELECTRONIC BANKING TECHNIQUES ON THE USE OF BILLS OF EXCHANGE IN INTERNATIONAL TRADE.

4.1. Introduction

Computers first entered banking as efficient tools of prime necessity to tackle the ever growing volume of paper work incident in banking operations. In its early stages, the use of computers in banking was confined to the back office operations of banks but after the back room operations had been fully automated, computers were applied to the more visible aspects of banking operations.[1] Furthermore, the emergence of information technology[2] - the dynamic convergence of computer and telecommunication technologies - which not only pushes forward the frontiers of data-processing in the handling, storage and eventual retrieval of information but significantly modifies the operations of organisations and the society as a whole,[3] provided banks with the means of expanding

---

[1] *UNCITRAL Legal Guide on Electronic Funds Transfer*, UN. Doc. A/CN.9/SER.B/I UN. Sales E.87.V.9 (1987) [Hereinafter, *UNCITRAL Legal Guide*] at para. 6.; see also, M. Rowe, *Electronic Trade Payments: A Practical Guide to Electronic Banking and International Trade* (London: International Business Communications Ltd., 1987) at 1. [Hereinafter, Rowe, *Electronic Trade Payments*].

[2] Information technology is the result of the digitalization of information. Digitalization is the representation of information in digits. Digitalization represents a shift from electro-mechanical to electronic data processing systems. Electronic data processing systems use the binary system rather than the traditional decimal system. The Binary system provides for only two digits "0" and "1". These digits are called bits, which is a hybrid term derived from the technical term : "Binary Digits". All kinds of information (data, text, voice and image) can be represented by a combination of bits. Digitalization also represents a departure from analog (non-digital) data representation earlier in use for telecommunications. By the fact of digitalization, computers can now store, process and retrieve data, graphs, images and voice in digital form and with the aid of a telecommunications equipment transfer the information locally or internationally. On this point, see, German International Institute for Legal and Administrative Terminology, *Information Technology* (Berlin, Germany: Carl Heymanns Verlag KG, 1990) at 21, 23, 25. [Hereinafter, *Information Technology*].

[3] Y. Valcin, ed., *Electronic Banking in Canada: Posturing the Players* (Quebec, Montreal: Centre for Research and Analysis on Electronic Money, 1988) at 8. See also, Rowe, *Electronic Trade Payments*, *supra*, note 1.

and speeding up a customer's accessibility to its account.[4] With increased reliance on information technology (IT) applications, banks became technologically-driven organisations and the generic term "electronic banking" was ascribed to their technologically sophisticated operating methods.[5] This term has been described as "an array of data-processing, electronic and telematic techniques and infrastructures that make it possible to exchange funds in a paperless fashion within a two-way and sometimes three-way relationship between merchants and consumers."[6]

At the domestic level and in developed societies, electronic banking techniques appeared in the form of self-service banking, which one commentator has described as the most important innovation in the banking industry.[7] By self service banking is meant "a mechanism whereby the financial institution passes on to the customer the human interaction or effort that its personnel at the counter customarily provides in traditional banking practice".[8]

At the international level and for banks in economies[9] where their communication infrastructures are adequate to provide the necessary technical support, the application of

---

[4] Rowe, *Electronic Trade Payments*, *ibid.*

[5] Valcin, *supra*, note 3 at 17..

[6] *La Monnaie Electronique*, Mémorandum to the President of the Republic, Economic and Social Council, July 11, 1982, Paris, France *quoted* in Valcin, *ibid.* at 3.

[7] Valcin, *ibid.* at 5.

[8] *Ibid.*

[9] Landis is of the view that the international banking market is divided not only along country lines but also along technological lines, see, K. Landis, "The Perfect Passport to Global Electronic Banking" (1990) 107 Bankers Monthly 47 at 48.(Oct.)

information technology to international banking practices has resulted in a shift away from the slower traditional documentary banking practices to the faster, efficient and more convenient electronic banking techniques. It is now possible for banks in developed economies to exchange instructions for the transfer of international funds in electronic form either by the physical exchange of computer devices or by telecommunication.[10] The larger banks have installed their own communications network linking branches and subsidiaries worldwide. Furthermore banks have pooled their resources together and set up electronic payment[11] and clearing networks[12] that speed up the movement of money and reduce the bundle of paperwork that hitherto attended the international transfer of funds. Increasingly, therefore, international traders from developed countries began to pay for and buy their goods and services using electronic impulses transmitted from one bank's computer terminal to another's rather than paper-based instruments such as bills of exchange, international cheques and bankers drafts.

---

[10] *UNCITRAL Legal Guide, supra*, note 1 at para. 3.

[11] SWIFT the acronym for Society for Worldwide Interbank Financial Telecommunications was formed by a group of banks in the developed countries. The history and operations of this payment network is further discussed below.

[12] For the U.S. "Clearing House Interbank Payment Systems (CHIPS)", see, generally D.I. Baker and R.E Brandel, *The Law of Electronic Funds Transfer*, 2nd ed., (Boston/New York: Warren, Gorham & Lamont, Inc, 1988) with 1991 Cum. Supp.Chapter 3; see also, B.Geva, "CHIPS Transfer of Funds" (1987) J. Int'l Banking L. 208. The U.K. systems are called the "Clearing House Automated Payment System (CHAPS)" and "Bankers Automated Clearing Services (BACS)", see B.Geva, "CHAPS Transfer of Funds" (1988) Lloyds Mar. Com. L.Q. 477. see also, on "BACS" and "CHAPS" D. Robinson, "The Structure and Characteristics of the Principal Electronic Banking Systems" in R.M. Goode, ed., *Electronic Banking: The Legal Implications* (The Institute of Bankers and Centre for Commercial Law Studies, Queen Mary College, University of London, 1985) 5-14 at 9-10. The French system is called SAGITTAIRE which is the acronym for *"Systéme Automatique de Gestion Intégrée par Télétransmission de Transactions Avec Imputation de Réglements Etranger"* - Automated system for the integrated management and settlement of foreign transactions by teletransmission. On SAGITTAIRE, see, Rowe, *Electronic Trade Payments, supra*, note 1 at 19.

Apart from the existence of the technological means for the international transfer of funds by electronic means, there are a number of economic reasons for the greater reliance placed by traders in the developed countries on electronic means for the payment of goods and services sold in international trade.

In the main, patterns of trade financing have changed in developed countries.[13] Exporters in developed countries now have available to them much more readily accessible long-term credit facilities.[14] This has led them to place relatively less reliance on the finance of their exports by bills of exchange and by the hypothecation of the bill of lading relative to the goods exported.[15]

Additionally, the availability of new forms of export guarantees and their increased mastery of documentary credit procedures in the finance of international trade has taken care of the financing aspect of their international trade.[16] The credit aspect of their trade thus taken care of, the commercial need for rapid payment is nicely filled by electronic money transfers through sophisticated interbank computer networks.[17]

Moreover, the cost of funds has driven banks to place greater reliance on the use of electronic means to effect their international payments. International electronic funds

---

[13] B. Crawford, "The UNCITRAL Model Law on International Credit Transfers" [Unpublished] (A Paper Presented to an International Trade Law Conference at Canaberra, Australia on October 18-19, 1991) at 1. [Hereinafter, Crawford, International Creditr Transfers].

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] A. Arora, "Future Developments in Money Transfers" (1981) Lloyds Mar. & Com. L.Q. 56; see also, Crawford, International Credit Transfers, *ibid.* at 1-2.

transfer systems were found to be a veritable means of reducing the cost of float, that is the loss of the use of the funds during the transfer process.[18] In order to obviate the extremely high interest rates that are known to accrue due to the delay in paper-based international funds transfer processes, banks in developed countries felt justified in investing in information technology.[19]

Generally, the decision to move towards electronic funds transfer systems was in defence of profitability in domestic banking operations and in order to remain competitive in both the domestic and international aspects of banking.[20] Once this technology was in place, there was no end to the means to which it could be exploited in international payments.[21] It made possible the replication of traditional paper-based payment mechanisms such as the bill of exchange, the documentary credit and collection procedures in electronic forms. In this manner information technology intensified the progressive dematerialisation of money.[22] This dematerialisation is in tune with the dynamics of money history and the informational nature of money.[23]

---

[18] Crawford, International Credit Transfers, *ibid*. at 2.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] Valcin submits that regardless of the form in which money has appeared, it has evolved according to one constant trend that is still in evidence toady: progressive dematerialisation, Valcin, *supra*, note 2 at 4. According to Professor Brian Napier dematerialisation "connotes the movement away from paper and towards electronic means as the favoured medium of trade and record." See, B.W. Napier, "The Future of Information Technology Law" (1991) 2 Computers and Law 8 at 8.(Nov.)

[23] See, Valcin, *ibid.* at 15-16; see also, L.J. Brown, "Implications of the Informational Nature of Payments" (1980) 2 Computer L.J. 153.

4.2. Informational Nature of Money and the Dynamics of Money History.

Ever since mankind evolved beyond barter as a means of settling interpersonal obligations, money has been adopted as the principal transmitter, exchanger and measure of value.[24] Whatever form money has taken it was and still is a representation of value. As a representation of value, money is a widely acceptable medium in any given society. Conceptually, money is a symbol that merely substitutes one thing for another, thereby facilitating the exchange of goods and services.[25] Money is thus informational in nature. The informational nature of money accounts for the dynamic trends in money history.

The dynamics of money history are evident in the fact that the evolution of money in any given society has been generally characterised and sustained by some basic and permanent underlying trends and principles.[26] These principles and trends are enshrined in the principle of progressive dematerialisation and the principle of economic and commercial necessity.[27]

The principle of progressive dematerialisation of money derives from the long evolutionary process of money, during which period money evolved from coins to paper currency, from paper currency to credit cards and from credit cards to the electronic funds

---

[24] Brown, *ibid.* at 154.

[25] Brown, *ibid.* shows that money in any of the various forms it has taken is merely a symbol representing some measure or standard of value. In a similar vein, it has been suggested that electronic funds transfer is a process of value exchange achieved through the use of electronic devices, see, R.M. Katskee & A.L. Wright, "An Overview of the Legal Issues Confronting the Establishment of Electronic Funds Transfer Services" (1980) 2 Computer L.J. 7.

[26] Valcin, *supra*, note 3 at 18.

[27] *Ibid.*

transfer systems of today.[28] The progressive dematerialisation of money has in all ages been driven by the principle of economic and commercial necessity,[29] which accounts for the development of new representative forms of money directly related to any society's given stock of technology.[30]

The development and use of bills of exchange in the payment and financing of domestic and international trade was in consonance with the foregoing principles.[31] The same is true of the increasing use of electronic funds transfer systems in the payment for goods and services sold in domestic and international trade.

4.3. The Development of Electronic Variants of Payment and Financing Mechanisms of International Trade Based on Bills of Exchange.

Perhaps the most fundamental effect of information technology on the paper-based payment systems of international trade has been to transform them from tangible to intangible symbols of value.[32] With information technology the symbolic physical instrument of value is transferred from the immediate possession of parties to an export

---

[28] Valcin, *ibid.* at 15-16; see generally, Brown, *supra*, note 23.

[29] Valcin, *ibid.* at 18; see also Brown, *ibid.* at 154.

[30] Valcin, *ibid.* at n10.

[31] For an analysis of the reasons for the early use and development of the use of the bill in international trade, see Chapter One of this thesis. On a different but related matter, Professor Ellinger points out that the development of new commercial paper instruments such as Negotiable Certificates of Deposits (NCDs) were dictated by largely historical and structural considerations, see, E.P. Ellinger, "Legal Problems of Modern Commercial Paper" (1990) 6 B.F.L.R. 65. [Hereinafter, *Ellinger, Modern Commercial Paper*]

[32] Brown, *supra*, note 23 at 157 points out that the truly unique aspect of electronic funds transfer systems lies in the elimination of the tangible symbols of value in which money has been represented over time. Similarly, Graham Rowbotham notes that in an EFT environment payment of money is usually not the physical delivery of tangible property but communication of data and movement of data messages, see, G. Rowbotham, "EDI and the Corporate Treasury:The Legal Background" (1990) 7 Comp. L. & P. at 40.

contract to the funds transfer instruction of either of them.[33] In this manner only an information of value is passed from the importer to the exporter.[34]

The emergence of information technology has made possible the development of electronic variants of paper-based payment mechanisms of international trade. Electronic variants of paper instruments of trade were first seen in the international banking practices of banks that had developed their own international networks and were therefore able to put these expensive networks to the profitable ends of reducing their document processing costs.[35] These electronic variants attempt to eliminate the production of paper information concerning the goods and their shipment which characterises the traditional instruments of trade.[36] This meant the substitution of paper flow by electronic transmission of trade data or information from computer terminals linked by telecommunications networks.[37]

Electronic variants of paper instruments replace the paper work in the traditional procedures at four main points in international trade.[38] The first is at the point of

---

[33] Brown, *Ibid.* submits that the use of electronic funds transfer systems not only reduces the transferred value to a symbolic form, but also removes the symbolic form entirely from the immediate possession of the parties to the transfer instruction.

[34] Brown, *ibid.*

[35] Rowe, *Electronic Trade Payments*, *supra*, note 1.

[36] See, M. Rowe, "Bills of Exchange: Uses and Procedures in International Trade" in N.Horn ed., *The Law of International Trade Finance* (Deventher/ Boston:Kluwer Law and Taxation Publishers, 1989) 243 at 251.[Hereinafter, Rowe, Bills of Exchange].

[37] *Ibid.*

[38] Rowe, *Electronic Trade Payments*, *supra*, note 1 at 2.

processing the customers' instructions within the bank. The second is at the point of communicating the instructions and transferring the funds between the banks. The third is at the point of linking the banks, the customers and other instrumental parties. The fourth is at the point where the exporter presents data to show that the goods has been shipped in accordance with the importer's specifications in order to claim payment. Prime examples of how information technology has reduced the paper incident in traditional payment mechanisms can be seen in the electronic variants of the bill of exchange, the documentary collection and credit payment procedures.

4.3.a. Electronic Bills of Exchange.

Although an unconditional order to pay in purely electronic form will not qualify as a bill of exchange under the current national negotiable instrument laws, the use of electronic bills of exchange is technologically feasible.[39] Such an electronic bill of exchange called a *"Lettre de change relevé"* already exists in France.[40]

Electronic bills of exchange note their details, namely the parties, the amount and the tenor of the bill, on a magnetic tape and could be transmitted by electronic means from one computer terminal to another computer terminal.[41] Interbank dealings with the

---

[39] *Rowe, Electronic Trade Payments,Ibid.* at 25. Professor Ellinger submits that the question is not whether an electronic funds transfer network can acquire the network necessary to transmit bills of exchange electronically, but that the advantage of transmitting a bill of exchange by electronic means is limited, E.P. Ellinger, "Electronic Funds Transfer As A Deferred Settlement System" in Goode, ed., *supra*, note 12, 29-43 at 39. [Hereinafter, Ellinger, EFT and Deferred Settlement Systems.]

[40] Michael Rowe points out that the instrument was introduced in 1974, see, Rowe, *Electronic Trade Payments, ibid.*, see also, M. Rowe, *Letters of Credit* (London: Euromoney Publications, 1985) at 89. [Hereinafter, *Rowe, Letters of Credit*].

[41] Rowe, *Electronic Trade Payments, ibid.*

electronic instrument are then settled through an interbank automated clearinghouse.[42]

It should however be noted that the paper element is not completely eliminated in this electronic variant of a bill of exchange.[43] Once the electronic instrument reaches its destination, it has to be reproduced in paper form or is deposited in a central electronic registry.[44] Such an electronic registry dealing with commercial papers, including bills of exchange, already exists in England.[45]

As a condition of access and because computers create their own locked-in world, banks and traders wishing to deal with electronic orders to pay in the form of bills of exchange must subscribe to uniform operating rules.[46]

4.3.b. Electronic Variants of the Documentary Collection Procedure.

Electronic variants of payment using the documentary collection procedure were developed in response to criticisms as to the time-consuming nature of the traditional documentary collection procedure.[47] Documentary collection in its traditional form is now considered more or less obsolete.[48] On short journeys when goods arrive before the

---

[42] *Ibid.*

[43] Rowe, *Electronic Trade Payments*, ibid. at 26; Ellinger, EFT and Deferred Settlement System, *supra*, note 39 at 39.

[44] Rowe, *Letters of Credit*, *supra*, note 40 at 89; Rowe, *Electronic Trade Payments* , *ibid.*; Ellinger, EFT and Deferred Settlement Systems, *ibid.*

[45] Rowe, *Electronic Payments*, *ibid.*

[46] *Ibid.*

[47] Rowe, Bills of Exchange, *supra*, note 36 at 247. See also, Rowe, *Electronic Trade Payments*, *ibid.* at 159.

[48] Rowe, *Electronic Trade Payments*, *ibid.*

documents, the traditional procedure completely breaks down.[49] In such circumstances, expensive goods are detained at the ports, demurrage charges accumulate, time is lost, opportunities for pilferage of the goods presents itself and, if perishable, the goods may deteriorate. To deal with this fact, i.e. that goods may move faster than financial and commercial documents relative to them, a number of European banks have been experimenting with electronic variants of the documentary collection arrangement.[50] In broad terms, one such electronic variant operates by consigning the goods to the collecting bank and by noting the fact of such a consignment on a non-negotiable bill of lading.[51] Whilst all the other documents are sent to the importer by post, a computerised collection order, such as those provided by the Society for Worldwide Interbank Financial Telecommunication (SWIFT),[52] is teletransmitted to the collecting bank in the importer's country, using SWIFT or any other convenient telecommunications network including telex.[53]

The essence of this procedure is not only to speed up the process of collection but also to ensure that the importer does not get hold of the goods without the authorization

---

[49] Rowe, Bills of Exchange, *supra*, note 36 at 247.

[50] Rowe, Bills of exchange, *ibid.* at 247-248 sets out the broad details of one such experiment by Scandinavian banks which is hereby reproduced with some additions. On this point, see also, Rowe, *Electronic Trade Payments*, *supra*, note 1 at 160.

[51] Rowe, Bills of Exchange, *ibid.* at 248 notes that this technique cannot easily be used if a negotiable bill of lading is issued.

[52] SWIFT provides message formats for the transmission of collection instructions. In 1987, the society drafted the MT 405 collection order for such purposes, see, Rowe, *Electronic Trade Payments*, *supra*, note 1 at 160.

[53] *Ibid.*

of a bank to which the goods has been consigned.[54] Accordingly, where the electronic documentary collection arrangement is made subject to the *ICC Uniform Rules for Collection (1978 Revision)*[55] the express agreement of the collecting bank to act as consignee must be obtained. This is necessary because Article 6 of the Rules provides that:

> "Goods should not be despatched directly to the address of a bank or consigned to a bank without prior agreement on the part of the bank."
> In the event of goods being dispatched directly to the address of a bank or consigned to a bank for delivery to a drawee against payment or acceptance or upon other terms without prior agreement on the part of the bank, the bank has no obligation to take delivery of the goods which remain at the responsibility of the party dispatching the goods."

Having agreed to act as a consignee of the goods, the collecting bank informs the importer by electronic means that the goods will be released either against payment or against acceptance. Where the goods are to be released against acceptance, the importer makes a promissory note in favour of the exporter before the documents are released by the collecting bank.[56] This is in contrast to the traditional situation where the exporter draws a bill of exchange on the importer and sends it through its bank to a bank in the importer's country for the collection of the proceeds of the instrument.[57]

In this electronic procedure, the collecting bank, using a telecommunications network, advises the remitting bank that payment has been made or that the note has been

---

[54] *Ibid.*

[55] ICC Publication No. 322.

[56] Rowe, Bills of Exchange, *supra*, note 36 at 248.

[57] *Ibid.*

drawn up and signed and that the goods have been released to the importer. In the same manner the collecting bank advises the remitting bank of the maturity of the note.

The basic difference between the electronic and the traditional variants of the documentary collection procedure can thus be said to be that, whilst the former is heavily dependent on the electronic transmission of information relating to the payment and shipment of the contract goods,[58] the latter relies primarily on paper-based information for most if not all of its aspects.[59] It should, however, be noted that a significant proportion of electronic banking techniques will continue for the immediate future to have a paper-based original instruction.[60] A flow chart of the electronic documentary collection procedure is set out in Figure 3 below.

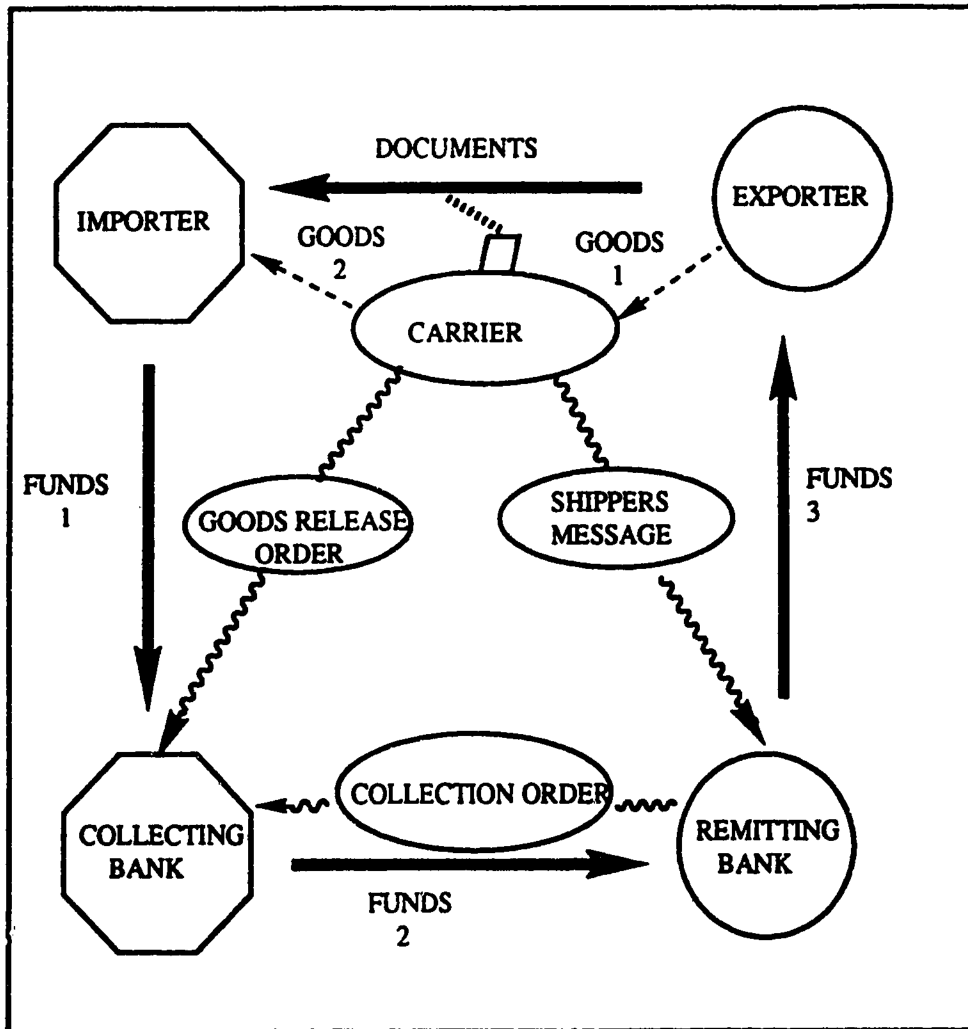
[58] See, J. Lass, "Fraud, Error and System Malfunction: A Banker's Viewpoint" in Goode, ed., *supra*, note 12, 57-66 at 59.

[59] It must be noted that even in the traditional collection procedure aspects of it may be carried out using electronic media. For instance, advice of fate as to whether the bill has been honoured or dishonoured is made using telex and in some cases using the SWIFT network.

[60] Lass, *supra*, note 58; see also, Rowe, *Electronic Trade Payments*, *supra*, note 1 at 2.

FIGURE 3

FLOWCHART OF THE PROCESS OF ELECTRONIC COLLECTION



* Adapted from M. Rowe, *Electronic Trade Payments: A Practical Guide to Electronic Banking and International Trade* (London: IBC Ltd, 1987).

LEGEND

Arrows indicate flow of responsibility from party to party.

Wire Messages ~ from CARRIER to BANKS ensure that GOODS are released as per EXPORTER'S instructions.

Wire Messages ~ between Remitting Bank and Collecting Bank transmits the collection instructions.

4.3.c. Electronic Variants of the Documentary Credit Procedure.

The physical necessity of writing on paper is an essential component of payment using the documentary credit procedure. The documentary credit relies implicitly on the presentation of paper documents for the fulfilment of its role as a payment and financing mechanism in international trade. It is for this reason that it is provided in Article 4 of the *Uniform Customs and Practice for Documentary Credits (UCP) 1983 Revision* that parties to a documentary credit arrangement deal in documents only. The concept of dealing in documents only is thus at the basis of documentary credit operations.[61]

Notwithstanding the above situation, the *UCP* in Article 12 implies that, in certain circumstances a teletransmission may be the operative credit. This will be the case where a teletransmission of a credit is sent and a mail confirmation is not stated to be the operative credit,[62] or where though a mail confirmation is stated to be the operative credit, it is not sent without delay to the advising bank.[63]

In addition to the provisions of Article 12 of the *UCP*, several practical aspects of the documentary credit procedure are electronically executed.[64] These non-documentary aspects of the documentary credit procedure, which however are not reflected in the *UCP*, include the interbank communications respecting notification of the

---

[61] International Chamber of Commerce (ICC), *UCP 1974/1983 Revisions Compared and Explained* (Paris: International Chamber of Commerce (ICC),1984) at 14.

[62] Article 12(a) & (b), *UCP*.

[63] *Ibid.*

[64] For an analysis of these non-documentary elements of the documentary credit procedure, see, F. Schwank, "Electronic Documentary Credits and Guarantees: Emerging Legal Problems" (1988) 7 Int'l Bus. Law. 19.

issuance of the credit and the advice of the credit. Typically, such interbank communications are done using SWIFT or other telecommunications networks including telex.

Furthermore, the application of information technology to international trade through the concept of *electronic data interchange (EDI)*[65] has made possible the electronic transmission of trade data between international traders.[66] With EDI, it is now possible to replicate in electronic form key instruments such as the bill of lading used in the documentary credit procedure.[67] Although doubts have been expressed as to whether certificates of quality and origin could replaced by some reliable electronic means,[68] it is without doubt technically possible to teletransmit these certificates through a telecommunications network such as SWIFT.[69]

Despite the benefits that flow from the use of electronic means in the facilitation

---

[65] EDI has been defined as "the transmission of business data in a structured format between computers," see, B. Petre, "Network Providers" (1990) 7 Computer L. & P. 8 at 10. For a similar definition, see, I. Walden & N. Savage, "The Legal Problems of Paperless Transactions" (1989) J.B.L. 102 and the authority cited in n2. It should be noted that EFT is the tool used by banks and that within the environment of an EDI network EFT is an integral part of the EDI trading cycle.

[66] Professor Eric Bergstein points out that with the widespread development of public data transmission capability, it is now technically feasible for many domestic and international trade transactions to be documented completely by electronic means with no paper retained by the buyer, seller, carrier or other intermediaries, see, E.E. Bergstein, "Introduction to the Legal Value of Computer Records" (1985) 1 Comp. L. & P. 205.

[67] For an analysis of the operational rules for the replication of bills of lading electronically, see, H.M. Kindred, "Trading Internationally By Electronic Bills of Lading" (1992) 7 B.F.L.R. [illegible].

[68] On this point, see, L. Sarna, "Letters of Credit: Electronic Credits and Discrepancies" (1990) 4 B.F.L.R. 149 at 155.

[69] SWIFT now provides subscribers with a secure way of transmitting large volumes of information that previously had to travel by mail, facsimile or telex, see, Comment, "S.W.I.F.T. Outlines Its Strategies and Its New Services" (1991) 10 World of Banking 16-18.

of the documentary credit procedure, they are likely to present problems similar to those which arise in the use of the telex or mechanically produced non-originals of documentary credits or its supporting documents.[70] These problems relate to the authenticity of the documents, proof of lack of material alteration of the documents and the admissibility in evidence of these electronic components of the documentary credit procedure by a court of law operating in a paper-oriented legal environment.[71]

Lazar Sarna[72] suggests that in an ideal electronic banking world, an electronic credit procedure would operate in the following manner: The importer/customer sends, by facsimile or from a computer terminal, an application for the issuance of a credit. Upon acceptance by the issuing bank through a return message, the text of the credit is electronically communicated to the beneficiary.[73] Before the expiration of the credit, the beneficiary electronically sends the invoices covering the shipment and, at the same time and in the same electronic manner, the exporter/beneficiary requests all other instrumental parties to the underlying transaction, such as the shipper, the insurers and the pre-shipment inspectors, to direct their electronic messages to the issuing bank which then

---

[70] Sarna, *supra*, note 68 at 155.

[71] Sarna, *ibid.*; For a general analysis of the legal problems of paperless transactions, see, Walden & Savage, *supra*, note 65; see also. I. Walden, ed., *EDI and the Law* (London: Blenheim Online Publications, 1989).

[72] *Ibid.* at 155-156; see also, the outline of electronic documentary credit provided in M. Rowe, "Grinding the Competitive Edge: Banks and Electrons" (1987) 7 Arab Banker 24. [Hereinafter, Rowe, Banks and Electrons]. For a more detailed examination of electronic documentary credits, see, Rowe, *Electronic Trade Payments*, *supra*, note 1 at 133-155.

[73] Rowe, Banks and Electrons, *ibid.* points out that SWIFT offers standardised formats for the notification of credits by electronic means. The learned writer however notes that such electronic notifications accounted for only 6% of SWIFT traffic in 1987.

transmits it to the advising bank. Once the authenticity of the electronic messages has been determined or if, with the consent of all the parties, the authenticity of the messages is presumed and the parties have agreed to allocate the risks involved in the inaccurate transmission of their messages, the advising bank proceeds to examine the messages re-created in paper form in order to confirm their compliance with the terms of the electronic credit.[74] If the advising bank finds any discrepancies in the messages it will electronically notify the beneficiary accordingly.[75] If the messages conform to the terms of the credit, payment will be made by the electronic transfer of funds to the beneficiary's account. In the same electronic manner, the appropriate debit is made to the applicant's account.[76]

For the protection of the beneficiary, Lazar Sarna submits that a time log of messages should be established by the banks to show the presentation of all the stipulated messages before the expiry date of the credit.[77] Similarly, to protect the applicant, he suggests that copies of the messages be made available to the applicant.[78] In this way, the applicant will take the electronic messages as appropriately reproduced and claim the goods, provided that the electronic messages are recognised as authentic by the possessor

---

[74] Sarna, *supra*, note 68 at 156 points out that the normal task of examining the documents to ensure their strict compliance with the terms of the credit by the advising/paying bank is retained in this electronic variant.

[75] *Ibid.*

[76] *Ibid.* at 155-156.

[77] *Ibid.* at 156.

[78] *Ibid.*

of the goods.[79]

Lazar Sarna further points out that the development of a uniform international electronic communications system capable of ensuring, to the same extent as an original document can, that users of the system who are strangers to one another and who are engaged in dissimilar commercial pursuits can transfer electronic messages which are not only reliable and provable but also negotiable, will not probably be established in this century.[80] This writer shares Lazar Sarna's sentiments. However, it should be pointed out that the technology to achieve such a system exists and the only impediment to its installation is its acceptance by the international business community.[81]

Operational rules for such a system has been formulated and, upon their adoption by states and their favourable consideration by international organisations such as the ICC, the framework for the operation of such a system will be established.[82] The less

---

[79] *Ibid.*

[80] *Ibid.*

[81] See, Kindred, *supra*, note 67 at 282.

[82] At its last session in New York, the United Nations Commission on International Trade Law (UNCITRAL) on May 15, 1992 adopted the *UNCITRAL Model Law on International Credit Transfers*, thus suggesting the text of the Model Law for adoption by States. As regards Bills of Lading, the *Comité Maritime International (CMI)*, an international association of national maritime law associations, in June 1990 prepared *Rules for Electronic Bills of Lading* which has since been released to the international business community for consideration. The *CMI Rules* attempt to replicate the three main functions of the bill of lading, namely, receipt, contract and negotiation. For an analysis of how the *CMI Rules* aim to replicate the above-stated functions, see, Kindred, *ibid.* at 267. On EDI generally, international agreement on uniform standards of equipment and procedures has largely been put in place, primarily as a result of the efforts of the United Nations Economic Commission for Europe's Working Party on Facilitation of Trade Procedures. The U.N. Economic Commission for Europe (ECE) has also provided a comprehensive set of international standards for the use of EDI in the form of a set of syntax rules embodied in the *United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT)*. The *UN/EDIFACT* rules which are set out in *United Nations Trade Data Interchange Directory (UNTDID)* establish the required structure and format for electronic messages and complement the *ICC Uniform Rules for Interchange of Trade Data by Teletransmission (UNCID)*, ICC Publication No.

developed countries (LDCs) of Africa, Asia and Latin America, given their weak technological capabilities, will find it difficult to participate in this sophisticated EDI system. Perhaps, the inability of LDCs to trade using EDI heralds the division of the international trading community along technological lines. Each group, to a greater or lesser extent and depending on their technological capability, will rely on a paper or electronic medium for the facilitation of their international trade, including payment and financing. This point will be further illustrated by a descriptive analysis of the existing modes of international electronic funds transfers.

4.4. International Electronic Funds Transfers.

An electronic funds transfer system is "a funds transfer system in which one or more steps in the process that were previously done by paper-based techniques are now done by electronic techniques."[83] An electronic funds transfer system constitutes a payment mechanism that is well suited for credit transfers.[84] According to the recently

---

452 of January, 1988. The *UNCID* sets out the minimum level of technical requirements and security procedures that an EDI user must observe in order to communicate effectively using the *UN/EDIFACT* syntax. There is also the *United Nations Trade Data Elements Directory (UNTDED)*, which provides a common terminology for trade communications. The UNTDED is updated on a regular basis. In a similar development, the United Nations Conference on Trade and Development has worked jointly with the U.N. Economic Commission for Europe to produce a permanent trade facilitation programme called FALPRO. FALPRO provides a layout key for trade documents. This FALPRO layout key, by providing a common format for all trade documents, aims to eliminate the time used by clerks in checking trade documents and thereby to reduce documentary errors in trade.

[83] *UNCITRAL Legal Guide*, *supra*, note 1 para.6 at 12.

[84] It should be noted that debit transfers could be made using electronic means, in which case there may be instant debiting of the originator's account, see, R.C. Effros, "A Primer on Electronic Funds Transfers" in N. Horn ed., *supra* note 27, 161-186 at 162. However, debit transfers are usually not international. This is perhaps the main reason why the *UNCITRAL Model Law on International Credit Transfers* was restricted to Credit Transfers, see, *UNCITRAL*, 2nd edition [A Forthcoming Publication of the United Nations on the activities of UN Commission on International Trade Law] at para.98.

adopted *UNCITRAL Model Law on International Credit Transfers*,[85] the terminology of which is adopted in the following analysis, a credit transfer is "a series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of the beneficiary. The term includes any payment order[86] issued by the originator's bank or any intermediary bank[87] intended to carry out the originator's payment order."[88] In effect, in a credit transfer, the originator[89] by a payment order instructs its bank[90] to debit its account and to cause the account of the beneficiary[91] at the same or another bank[92] to be credited.

---

[85] This Model Law was adopted during the twenty-fifth session of the United Nations Commission on International Trade Law (UNCITRAL) held at New York on May 15, 1992. [Hereinafter, *UNCITRAL Model Law*]. For a History of the UNCITRAL Model Law, see, *UNCITRAL*, *ibid.* at para. 95-99. see also, E. Patrikis, "UNCITRAL Payment Efforts" (1989) 15 Brooklyn J. Int'l L. 45.

[86] By Article 2(b) of the *UNCITRAL Model Law* a payment order is "an unconditional instruction, in any form, by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money if: (i) the receiving bank is to be reimbursed by debiting an account of or otherwise receiving payment from, the sender, and (ii) the instruction does not provide that payment is to be made at the request of the beneficiary." The proviso to the same Article further states that: "Nothing in this paragraph prevents an instruction from being a payment order merely because it directs the beneficiary to hold, until the beneficiary requests payment, funds for a beneficiary that does not maintain an account with it."

[87] An intermediary bank is "any receiving bank other than the originator's bank and the beneficiary's bank", see, Article 2(g) of the *UNCITRAL Model Law*.

[88] Article 2(a).

[89] According to Article 2(c) of the *UNCITRAL Model Law*, the originator is "the issuer of the first payment order in a credit transfer."

[90] This is the originator's bank. The *UNCITRAL Model* Law does not provide a definition of this bank but the position of this bank is apparent from its name and the various contexts in which the term "originator's bank" is used in the model Law, see, for example, Article 2(g) which defines an "intermediary bank as any receiving bank other than the originator's bank and the beneficiary's bank."

[91] By Article 2(d) of the *UNCITRAL Model Law*, the beneficiary is the "person designated in the originator's payment order to receive the funds as a result of the credit transfer.

[92] This is the beneficiary's bank or a receiving bank, that is, "a bank that receives the payment order". This appears to be the combined effect of Articles 2(b)(i) and 2(f) of the *UNCITRAL Model Law*.

A funds transfer is international either if the sending[93] and receiving[94] banks are in different countries or if the transfer is in a currency other than that of the originator or the beneficiary.[95] An international funds transfer can be made by telegraph, telex or by teletransmission from computer to computer through SWIFT.[96] A typical international funds transfer using any of the above electronic modes is executed by the originator's bank debiting the originator's account and the receiving bank crediting the beneficiary's account.[97] Settlement between the sending bank and the receiving bank then takes place through a correspondent account maintained by one bank for the other;[98] a network settlement account maintained by participating banks; or domestically, on the books of

---

[93] By Articles 2(a) & (f) of the *UNCITRAL Model law*, it seems that a sending bank is the originator's bank when issuing a payment order on behalf of the originator. Patrikis submits that strictly speaking that thee is no such thing as international electronic funds transfer. According to him a "payment" does not start out in Deustche Marks and ends up in French Francs. Two national regimes are involved; see, Patrikis, *supra*, note 85 at 47.

[94] A receiving bank is "a bank that receives a payment order", see, Article 2 (f) of the *UNCITRAL Model Law*.

[95] See, Petre, *supra*, note 65 at 10. For a detailed analysis of international electronic funds transfers, see, B. Geva, "International Funds Transfers-Performance by Wire Payment" (1990) 4 B.F.L.R. 111. [Hereinafter, Geva, International Funds Transfers].

[96] Telegraph and Telex are electronic funds transfer systems because they rely primarily on electronic techniques, see *UNCITRAL Legal Guide*, *supra*, note 1 at 23 paras. 47-48. See also, Geva,International Funds Transfers, *ibid*. at 113-114. It should however be noted that telegraph and telex when operating in analogue forms are inadequate to support real time operations of a such that make for high speed transfer of funds.

[97] Baker and Brandel, *supra*, note 12 at 29.4 points out that international funds transfer by cable and by SWIFT follow the same basic pattern but that the arrangements differ only in the method of transmission. The leaned authors further state that where SWIFT is used banks effect payment according to the rules of the SWIFT network rather than in accordance with their agreements with individual networks.

[98] Geva,International Funds Transfers, *supra*, note 98 at 112 points out that where the sending and the receiving banks are in a correspondent relationship one bank (depositor) maintains an account at another (fundsholder). On the depositor's books the account is nostro (ours) and on the fundsholder's books, it is vostro(yours). In the United States, the Nostro account is known as the "due from" account and the vostro account is known as the "due to" account; see also, Baker and Brandel, *ibid*. at 29.2.

the central bank.[99] Where however the receiving and the sending banks are not linked by any of these settlement facilities, the sending bank has to employ a correspondent to transmit the payment message either directly to the receiving bank or through another intermediary if a mutual settlement facility does not exist between the correspondent bank and the receiving bank.[100] In any event a bank common to the sending and receiving bank must be identified so that settlement may be by way of instructions to that bank to make the necessary adjustments in order to reflect the value of the amount transferred.[101]

Telex used to be the most popular form of international funds transfer, but, with the emergence of SWIFT (Society for Worldwide Interbank Financial Telecommunications) in 1973, telex services have largely been replaced by a more specialised data-processing and telecommunications systems for the processing of large-value interbank transactions.[102] Telex has technical limitations which inhibits its utility in the transmission of high speed financial messages.[103] Messages sent by telex are in linear form and therefore cannot be used to send information that is required in a particular format.[104] In contrast, international funds transfer using sophisticated electronic

---

[99] Geva,International Funds Transfers, *ibid.* at 112.

[100] *Ibid.* at 112.

[101] Crawford, International Credit Transfers *supra*, note 13 at 4.

[102] J. Bienkowski, "Old Reliable" (1990) 107 Bankers Monthly 52. See also, *UNCITRAL Legal Guide*, *supra*, note 1 at paras. 47-48; Geva, International Funds Transfers, *supra*, note 95 at 112.

[103] Walden & Savage, *supra*, note 65 at 104.

[104] *Ibid.*

networks, such as SWIFT, provides its subscribers with the operational benefits of high speed transmission of financial messages in a structured text and in a uniform language (English), thereby decreasing confusion and enhancing efficiency.[105]

SWIFT is a non-profit cooperative society established under Belgian law by 239 banks from 15 developed countries.[106] The society controls a substantial part of the global payment-related transactions of banks.[107] SWIFT operates to transmit financial messages for member financial institutions.[108] SWIFT does not ordinarily serve customers as the term is ordinarily defined, rather it facilitates the movement of large value financial messages between financial institutions for the payment of a wide variety of international transactions entered into by customers of the financial institutions.[109] In 1990, SWIFT recorded 332 million messages from the 3049 banks and non-bank financial institutions in 72 countries, which were users of the society's network.[110] SWIFT uses a combination of cables and satellites to form its network. To hook up with SWIFT, users require dedicated interfaces (such as a SWIFT Interface Device (SID) or

---

[105] E.P. Ellinger "The Giro System and Electronic Transfer of Funds" (1986) Lloyds Mar.& Com. L.Q. 178 at 195 [Hereinafter, Ellinger, Giro System and EFT] ; see also, D.W. Ambrosia, "New SWIFT Rules on the Liability of Financial Institutions for Interest Caused by Delay in International Funds Transfer" (1980) 13 Cornell Int'l L.J. 311 at 313.

[106] For a summary of the history of SWIFT, see, Petre, *supra*, note 65 at n8. For an overview of SWIFT transfers, see, Geva, International Funds Transfers, *supra*, note 95 at 116-119; Ellinger, Giro System and EFT, *ibid.* at 194-195. See also, Baker and Brandel, *supra*, note 12 at 29.5-29.9.

[107] T.L. Hock, "SWIFT Eyes Asia's Emerging Markets" (1991) 17 Asian Finance 14.

[108] Petre, *supra*, note 65 at n8.

[109] Baker and Brandel, *supra*, note 12 at 11.2.

[110] Hock, *supra*, note 107.

some other interface device that meets SWIFT's technical requirements) linked by personal computer-based work stations that run on specialized software provided by SWIFT.[111]

SWIFT has operating centres in the Netherlands and in the United States, and regional centres presumably in all countries whose banks are SWIFT users.[112] A SWIFT transaction is completed by a bank sending a message from its terminal to one of the operating centres through its country's regional processor. Messages are of a structured format and are transmitted in a fixed, usually small number of characters, called "packet switching". This mode of transmission is adopted in order to permit different terminal speeds and equipment with minimum standardization.[113] The operating centre after acknowledging the message sends it to the regional processor in the country of destination. Communication between each bank and its regional processor is conducted over public or private leased lines.[114] Graphic illustrations of the routing of financial message through SWIFT and of an electronic trade payment involving SWIFT are set out below in figures 4 & 5.

---

[111] Hock, *ibid.*; see also, Robinson, *supra*, note 12 at 13. Rowe, *Electronic Trade Payments*, *supra*, note 1 at 14 points out that 70% of the equipment used by SWIFT subscribers are supplied by SWIFT or its subsidiaries.

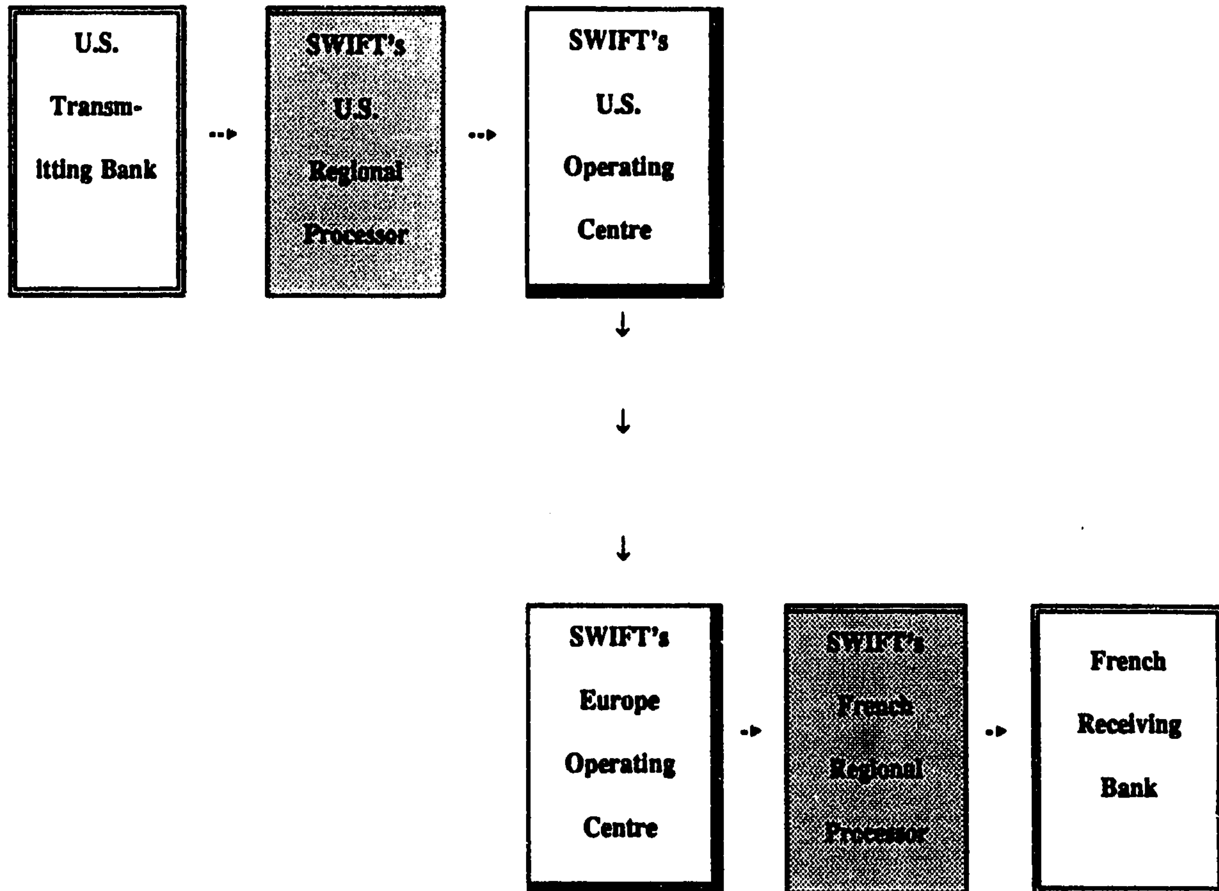
[112] See, Geva, International Funds Transfers, *supra*, note 95 at 117. This writer could not ascertain the extent to which banks in the LDCs use SWIFT facilities. Efforts to obtain information from SWIFT on its operations in Sub-Saharan Africa and possibly in other LDCs were curiously fruitless.

[113] Geva, International Funds Transfers, *ibid.* at 117. See also, Rowe, *Electronic Trade Payments*, *supra*, note 1 at 16.

[114] Geva, International Funds Transfers, *ibid.* at 117-118.

FIGURE 4.

ROUTING OF FINANCIAL MESSAGES THROUGH SWIFT.



LEGEND:

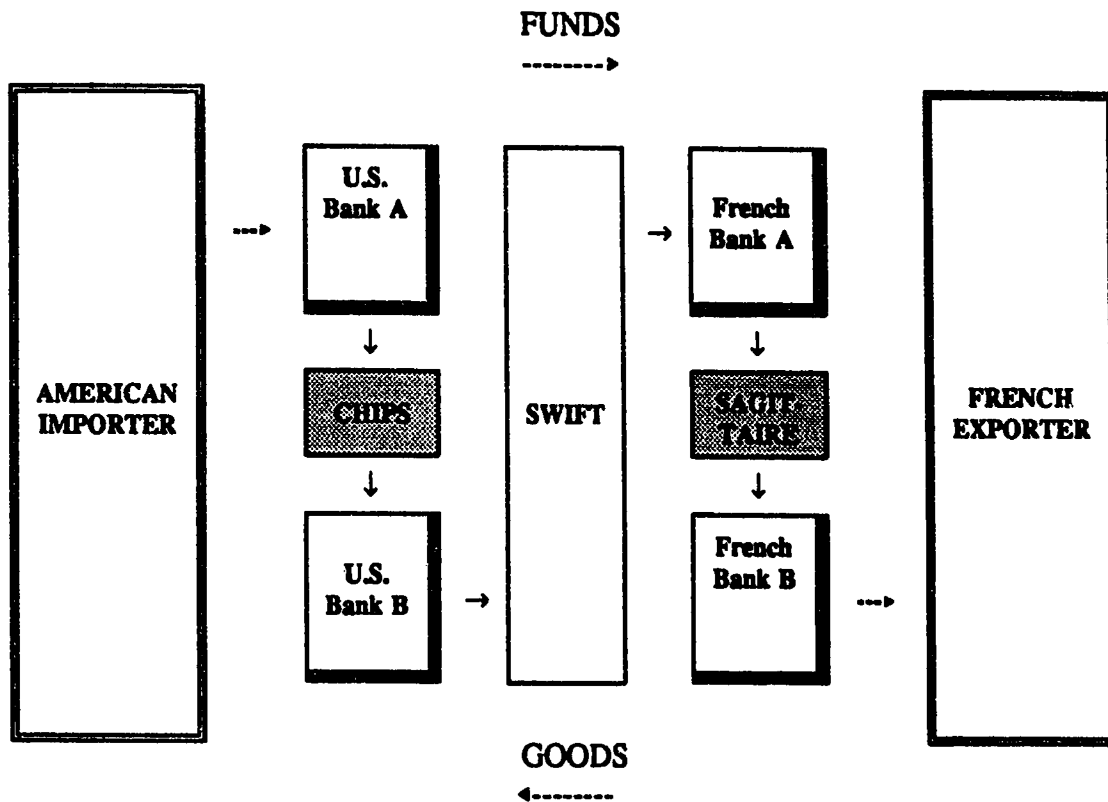
1. Arrows indicate the routing of finacial messages from a United States bank to a French bank.

2. SWIFT has two operating centres in the Netherlands and in the United States.

3. Messages from the United States to France thus passes first through the respective countries' regional processors and then through the operating centres to the bank in France.

FIGURE 5.

ELECTRONIC TRADE PAYMENT THROUGH SWIFT



LEGEND:

1. Arrows indicate the movement of funds teletransmitted from the American importer through its bank and ultimately to the French importer.

2. It is assumed that U.S.Bank A is not in a correspondent relationship with banks in France, so through CHIPS (the New York Automated clearinghouse) it transfers the responsibility for the transmission of the funds to U.S.Bank B that has correspondent relationship with French Bank A.

3. U.S. Bank B then through SWIFT remits the money to French Bank A.

4. French Bank A through SAGITTAIRE (the Automated Clearing-house for French banks) sends the money to the exporter's bank (French Bank B)

SWIFT operates under heavy security. Messages are encrypted, and access to the system is by a secret password only. Very strict message validation and authentication procedures are adopted in the use of the system.[115] SWIFT is responsible for any loss arising out of events occurring in its part of the system, and the users are responsible for losses that arise out of events occurring in their own systems.[116] Accordingly, SWIFT accepts liability for interest and principal losses caused by its own system failure.[117] SWIFT also accepts liability if it negligently fails to provide services set out in its user handbook or to maintain stipulated security procedures.[118] SWIFT, however, limits its liability to 300 million Belgian Francs for any loss or series of losses arising out of the same event, and in any event will only accept an aggregate liability of 600 million Belgian francs in any one year.[119] Similarly, SWIFT's liability for loss of interest for late payment is limited to 50 million Belgian Francs per year.[120] SWIFT totally disclaims liability for consequential damages that may arise from its negligence.[121]

It should be noted that, as the liability of SWIFT is determined by an agreement

---

[115] Geva, International Funds Transfers, *ibid.* at 119; Baker and Brandel, *supra*, note 12 at 29.9.

[116] The responsibility and liability of SWIFT and its subscribers are set out in the SWIFT User Handbook. See, Petre, *supra*, note 65 at n18. For a detailed treatment of allocation of losses and liability under SWIFT, see, H. Lingl, "Risk Allocation in International Interbank Electronic Funds Transfer" (1981) 22 Harv. Int'l L.J. 632. See also, Ambrosia, *supra*, note 105.

[117] Petre, *ibid.*; Rowe, *Electronic Trade Payments*, supra, note 1 at 16-17.

[118] Rowe, *Electronic Trade Payments*, ibid. at 17; Petre, *ibid.*

[119] Petre, *ibid.*

[120] *Ibid.*

[121] Rowe, *Electronic Trade Payments*, *supra*, note 1 at 17.

between it and its subscribers, it covers only losses suffered by members or users and not those suffered by customers of such members.[122] The customers must thus look to the financial institution for compensation, and the financial institution in turn will seek to recover from SWIFT or the participating financial institution that caused the loss.[123] This is not to suggest that the customer cannot proceed against SWIFT in some tort action for non-contractual liability arising out of a negligent act or omission by the network, including acts or ommisson of its personnel.[124]

Competition has driven SWIFT to diversify its services.[125] A new SWIFT II system has been developed under which slice processors called system control processors functioning as independent networks stand between regional processors and the operating centres.[126] Already 39 banks have moved to the new SWIFT II system and many more banks from the developed economies are expected to follow suit.[127]

Having set out the essentials of an international electronic funds transfer system, it is apt to examine the problems and attections of this payment mechanisms relative to

---

[122] *Ibid.*

[123] *Ibid.*

[124] *Ibid.*

[125] S. Timewell, "Global Custody: Last of the Dinosaurs" (1991) 141 Banker 34-39; see also, "S.W.I.F.T. Outlines Its Strategies and Its New Services" (1991) 10 World of Banking 16. SWIFT's new services are matching and netting systems, Electronic Data Interchange and an Interbank File Transfer service that provides subscribers with a secure way of transmitting large volumes of information that previously had to travel by mail, facsimile or telex.

[126] B.D. Kok and J. Peter-Cerveau, "A Report on the Status and Future of S.W.I.F.T." (1990) 9 World of Banking 14-17, 28-29; see also, Geva, International Funds Transfers, *supra*, note 95 at 117.

[127] Kok and Peter-Cerveau, *ibid.*; Baker and Brandel, *supra*, note 12 at 11.6-11.7 state that as of July 1990 36 Banks in 6 countries had migrated to SWIFT II network.

its paper-based counterparts such as the bill of exchange, international cheques and bankers' drafts.

4.5. The Attractions and Problems of International Electronic Funds Transfer Systems Relative to the Bill of Exchange.

Funds transfer by electronic means is arguably the most efficient way - resource, cost, energy and time wise - of effecting payments for goods and services sold in international trade.[128] The computer and telecommunications technologies that facilitate electronic funds transfer are one of the few areas where operating costs continue to decline dramatically as a consequence of technological advances.[129] Technological developments in the area of information technology have made for relatively cheaper and faster international electronic funds transfer services.[130] Due to its relative low cost, international electronic funds transfers through networks, such as SWIFT, are now an important means of settling financial obligations arising out of trade between members of different nations. In the past, because international electronic funds transfers using telex were expensive, they were reserved for emergency payments and large value payments.[131] Today, with technological advances, SWIFT boasts of a cost-effective

[128] G.W. Mitchell, "Introduction [Electronic Funds Transfer Systems]" (1980) 2 Computer L.J. at 2 makes a similar point in relation to domestic electronic funds transfer systems.

[129] Mitchell, *ibid.* at 2; see also, L.J. Pierce, "Competitive Implications of EFT" (1980) 2 Computer L.J. c.f. E. Pollock, "EFT Profits are Hard to Find" (1990) May Bankers' Monthly at 65.

[130] Baker and Brandel, *supra*, note 12 at 29.3.

[131] *Ibid.* at 29.3.

international funds transfer system that costs a fraction of a similar telex transmission.[132]

From a technological standpoint, paper-based payment instruments of international trade are functionally obsolete. They are slow, insecure in many respects and expensive to process. Cheques and bankers' drafts issued in settlement of financial obligations arising out of international trade have to be sent by mail, which is often slower than the goods. As noted above, the documentary collection procedure not only breaks down where goods move faster than the commercial and financial documents relative to them, but also exposes the parties to an export contract to a great deal of loss. Electronic trade payments appear to obviate such risks.

Moreover, international electronic funds transfer systems such as SWIFT may be less susceptible to theft and fraud, given the high security operating conditions of the system. Besides, international electronic funds transfers as credit transfers are initiated by the originators and moved directly to the beneficiary's bank without any intervening holders. In this manner, the risk of forgery and fraud that usually attend the transfer of bills of exchange from person to person may be completely eliminated.[133]

Furthermore, the cost of processing paper payment instruments can be very high. The documentation necessary to support the use of cheques in the payment of goods and services sold in international trade will no doubt be more expensive than the cost of

---

[132] A SWIFT flier reproduced in Geva, International Funds Transfer, *supra.* note 95 at 119 makes this claim. As at 1987, payment for the use of basic SWIFT service was 18 Belgian Franc per message unit of 325 characters. Additional charges apply for longer messages or for messages dealt with on a priority basis. For these figures, see, Rowe, *Electronic Trade Payments, supra*, note 1 at 15.

[133] As shall be shown presently, although the risk of fraud and forgery that are incident in the negotiation of bills of exchange are eliminated in the use of electronic funds transfers systems, fraud and forgery of a different character are inherent in electronic funds transfer systems.

processing a transaction by electronic means. For example, whereas the cost of processing a single paper item in the United States in 1980 was 55 cents,[134] the cost of an equivalent transaction by electronic means was estimated at 5 cents.[135] It is generally assumed that paper documentation and procedures in international trade represent as much as 10 percent of the value of the goods.[136] It is expected that electronic funds transfers will save more than half the transaction costs involved in paper transfers.[137] Additional savings are thought possible where direct communication between computers displaces all elements of the paper system.[138]

Despite these perceived benefits of international electronic funds transfer systems, paper-based payment systems retain the advantages of predictability and stability arising out of their long usage.[139] The predictability of paper-based payment mechanisms arises from the fact that parties to the system can predict to a reasonable degree the relative risks that may arise in the use of the various documentary procedures. Similarly, the stability of paper mechanisms is evident in the existence of well-established legal regime under which liabilities for losses that arise in the system could be effectively apportioned.

---

[134] Mitchell, *supra*, note 128 at 3.

[135] A Report prepared for the United States Federal Communication Commissions in 1978 established this average 5 cent processing cost for a domestic electronic funds transfer transaction, see, V.G. Cerf and A. Curran, "The Future of Computer Communications" (1977) 5 Datamation 105-114.

[136] See, *ICC, Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission, Introductory note* at 7 quoted in Walden and Savage, *supra*, note 65.

[137] Mitchell, *supra*, note 128 at 3.

[138] *Ibid.*

[139] Walden and Savage, *supra*, note 65 at 104.

Apart from their predictability and stability, paper-based payment systems fulfil both a payment and financing role in the discharge of obligations arising out of international commercial transactions. International electronic funds transfer systems in contrast can only take care of the payment aspects of international trade. The credit function of paper-based instruments cannot be fulfilled by any electronic media.[140]

The inexpensive nature of payments using international electronic funds transfer systems appear to be of doubtful validity. Benjamin Geva has submitted that the alleged low-cost feature of electronic funds transfer systems may be only in relation to the amount of average electronic payments and not as compared to other payment systems.[141] Current trends in the banking industry of developed countries seem to support this position. For instance, the much-vaunted 5 Cents average processing cost of an electronic funds transfer transaction is yet to be attained.[142] The cost of electronic funds transfer systems represent over 50 % of the annual after tax profits of banks in developed countries.[143] This cost is naturally transferred to the customer by banks which continue to invest in information technology as a means of maintaining their competitiveness.[144] Similarly, and as Bradley Crawford point out, the fact that large damages are awarded against banks for tort or contract liability arising out of electronic

---

[140] On this point, see, Ellinger, EFT and Deferred Settlement Systems, *supra*, note 39 at 29-44.

[141] B. Geva, "The Evolving Law of Payment by Wire Transfer-An Outsiders View of Draft UCC Article 4A" (1988) 14 Can. Bus. L.J. 186 at 188.[Hereinafter, Geva, Payment By Wire Transfers]

[142] Pollock, *supra*, note 129 at 65.

[143] M. Klein, "Keeping Information Technology Costs Under Control" (1990) 4-5 Bankers' Magazine at 5.

[144] *Ibid.*

funds transfer operations exerts a strong upper pressure on the fees charged by banks for electronic funds transfer services.[145] The relative high cost of international funds transfer services is perhaps reflected in the fact that international electronic funds transfer systems including SWIFT are still largely used in making large-value payments.[146]

With particular reference to the situation in LDCs, the cost of hooking up with SWIFT nodes may prove to be to exceed the capacity of most banks in the LDCs. The cost of an interface device that meet SWIFT's technical standards may also prove to be prohibitive for banks in LDCs foreign exchange.

It remains debatable as to which of the two - paper and electronics - provide better security against losses from fraud and error. Although international electronic funds transfer systems such as SWIFT are effected under great security, there are a number of risks incident in the system. In addition to the usual risks of fraud, error and system malfunction common to any electronic funds transfer system, the international character of SWIFT transfers brings in the risks of *force majeure* and insolvency of some key participants in the funds transfer system.[147]

Perhaps the most intractable of these risks is that of fraud. The *UNCITRAL Legal Guide* defines fraud as "an unauthorised instruction, alteration of the account to which an entry is to be made or the alteration of the amount of the entry".[148] The possibilities of

---

[145] Crawford, International Credit Transfers, *supra*, note 13 at 30.

[146] Geva, International Funds Transfer, *supra*, note 95 at 114 and the authority in n10.

[147] Baker and Brandel, supra, note 12 at 29.9.

[148] *Supra*, note 1.

fraud in the international electronic transfer of funds are many and arise in the same circumstances as in a paper-based payment system. For instance, fraud could arise in an electronic funds transfer system where the originator's employee, perhaps with the connivance of a staff of the originatinf bank or network provider,[149] activates an unauthorised transfer of funds from the account of the originator.[150] Fraud could also be perpetrated in an electronic funds transfer environment by communications interference, that is, the interception and subsequent change of the transfer instructions to the detriment of the originator.[151] Whatever form fraud takes in an electronic funds transfer system, it is likely to involve an amount far in excess of any fraud possible under a paper-based payment mechanism such as the bill of exchange.[152]

It has been submitted that another major risk in the use of electronic payment systems in international trade is that of error by the sending bank, the network provider or the receiving bank.[153] Such errors, it is further stated, take several forms. It may take

---

[149] Although to ensure maximum privacy SWIFT's staff are not aware of messages flowing through the system, it is possible foe such personnel to be in a position to alter payment instruction.On this point , see, Geva, International Funds transfers, *supra*, note 95 at 119. This is perhaps why SWIFT accepts liability to subscribers, albeit, to a limited extent of losses arising from the fraud of its staff.

[150] Lass, *supra*, note 58 at 59.

[151] Lass, *ibid.* at 60; see also, Baker and Brandel, *supra*, note 12 at 29.9.

[152] Like all computer frauds, frauds that may arise in the transfer of funds by electronic means involve enormous amounts of money. Baker and Brandel, *supra*, note 12 at 11.7 shows that a US$10.2 million attempted electronic bank fraud in the United States brought worldwide attention to this problem. See also J.K. Taber, "A Survey of Computer Crime Studies" (1980) 2 Computer L.J. at 275. Michael Rowe notes that in a well publicised 1983 case the Colombian M19 terrorist group siphoned off US$13.7 million from the Colombian National Bank by manipulating the local telex system to instruct a London bank to make electronic funds transfers to other countries, see, Rowe, *Electronic Trade Payments*, *supra*, note 1 at 172.

[153] Baker and Brandel, *ibid.* at 29.9. It has been suggested that the most common disputes arising from international electronic funds transfers involve failures or delays in transfers or a combination of both, see, J.S. Santa-Lucia, "Exchange Losses from International Electronic Funds Transfers: Time to Unify the Law"

the form of delay in payment resulting in the loss of interest or loss due to the depreciation in the value of the foreign currency.[154] It may also take the form of payment before the authorised date or premature transfer of the funds.[155] Such errors could also arise where payment is made to the wrong person or in the wrong amount or not made at all.[156] In all of the above circumstances enormous losses are likely to be incurred by parties to the international electronic funds transfer transaction.

The insolvency of either the sending bank or the receiving bank in the interval between the transmission to the receiving bank of instruction to transfer the funds and their receipt has also been identified as an additional risk in international electronic funds transfers.[157] In such an event complex legal problems arise as to which of the banks involved in the international transfer is liable to the originator. This was the situation in the American case of *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*,[158] which arose out of the failure of the Herstatt bank in Germany in 1974. The facts of this case

---

(1988) 8 Nw. J. Int'l & Bus. 759.

[154] see, Baker and Brandel, *ibid.*; Santa-Lucia, *ibid.*

[155] Baker and Brandel, *ibid.*

[156] *Ibid.*

[157] *Ibid.*

[158] 464 F.Supp. 989 (SDNY 1979), aff'd, 609 F2d 1047 (2d Cir. 1979).c.f. *Momm v. Barclays Bank International* [1977] Q.B. 790. This case also arose out of the Herstatt Bank Failure. In this case the defendant-bank initiated a transfer to the plaintiffs at the request of Herstatt bank, but argued that the following morning was to be treated as an extension of the value date because the final balances from the computer showing the state of Herstatt account with them would not appear until then so that any initiation of a transfer from the Herstatt account should be treated as provisional and reversible. The Trial court (Kerr J.) rejected this argument and held that a day was a day ending at midnight and that a credit transfer once initiated could not be held in suspense for a further period and treated the next morning as never having been made. The court further held that it would have been permissible to reverse the transfer before the close of business on the day it was made as it was the practice in the banking industry.

can be summarised as follows: A German banking partnership ordered by telex its New York bank to transfer US$12.5 million to Chase Manhattan for the account of Herstatt. The transfer was to be effected the following day, June 26, 1974. On that day, Manufacturers Hanover released the transfer order for US$10 million and US$2.5 million through the interbank settlement network six minutes after an officer in an another department of the bank learned of the failure of Herstatt bank in Germany. In the next twenty-four hours, efforts were made by both Manufacturer's Hanover and Chase Manhattan Bank to cancel the transfers without success. Delbrueck sued both Manufacturers Hanover and Chase Manhattan for their alleged negligence in making the transfers. Both the trial court and the appellate court held that the defendants were not liable as transfers through the CHIPS interbank network are made final and irrevocable once the sending bank makes or releases the transfer message into the network.

Payments using international electronic funds transfer systems may be frustrated by acts of God, war, riots and civil or political unrest in either the sending or receiving bank's country.[159] Although paper-based payment mechanisms also carry this risk, the intangible nature of the electronic funds transfer instructions make it more vulnerable to these unforeseen calamities.

Finally, the operational failure of a network is a potential risk in the use of international electronic funds transfer systems.[160] System malfunction of this nature may arise out of equipment failure or incompatibility. The risk of system malfunction has been

---

[159] Baker and Brandel, *supra*, note 12 at 29.9.

[160] Lass, *supra*, note 58; Baker and Brandel, *ibid.*

reasonably taken care of by technological advances. For example, through the concept of open systems integration (OSI), differences in equipment configurations can be completely eliminated. Similarly, the development and use of fault-tolerant computer systems in the transmission of financial messages has reduced the likelihood of equipment failure. Despite these technological advances, the risks of system malfunction remain a factor to be reckoned with in the use of any electronic funds transfer system.

It should, however, be noted that where the risks incident in the use of electronic funds transfer systems in the payment for goods and services sold in international trade have not been addressed by technological developments, network agreements and standards of procedure are usually formulated with reference to them. Moreover, with the recent adoption of the *UNCITRAL Model Law on International Credit Transfers*, a framework for the resolution of disputes that are likely to arise in the use of international electronic transfer of funds systems is now available for adoption by states that lack well-defined rules for international credit transfers.

Notwithstanding, its untoward aspects, the electronic discharge of financial obligations arising out of international trade retains the advantages of speed and efficiency over paper-based payment systems. This makes international electronic funds transfer systems a veritable means of satisfying the commercial needs of rapid payments. It is for this reason that, in societies where the technological infrastructure exists and the financing aspects of their international trade has been well taken care of, greater reliance is placed on electronic funds transfer systems. But the development of an international electronic trade payment system could be impeded by the several practical factors which are

discussed in the next chapter.

CHAPTER FIVE

PRACTICAL IMPEDIMENTS TO THE DEVELOPMENT OF AN INTERNATIONAL ELECTRONIC TRADE PAYMENT SYSTEM.

5.1. Introduction.

In addition to the problems with international electronic funds transfer systems themselves, there are several practical impediments to the development of a truly international electronic trade payment system. These impediments are of a technological, legal, political and economic nature. In different ways, these factors stand in the way of the installation of an international electronic trade payment system in which the participation of all members of the international trading community is guaranteed. These factors thus hinder the enjoyment by all members of the international trading community of the benefits of convenience, speed and reduced costs which electronic payment systems offer. These impediments exist by virtue of the peculiar developmental experiences of the different members of the international trading community.

In essence, all these impediments could be ascribed to the relative stages of technological development attained by the different countries. The existing stock of technology in any given society is directly related to the economic development of the society. To a great extent, the economic development of any society is a function of its political development. In the same vein, the legal impediments to the development of an international electronic trade payment system are symptomatic of the existing technological state of affairs in the respective trading countries. Typically, the legal regime of any society reflects the level of economic development or under-development of the society.

The paper-oriented nature of the laws of most trading nations is an indication of the novelty or absence of electronic payment systems in their societies.

The near impossibility of removing these impediments is perhaps the strongest reason in favour of the continued relevance of the bill of exchange and other paper instruments of payment in international trade. The inability of the international trading community presently to overcome these impediments perhaps lends the greatest credence to any case for the continued relevance in international trade of paper payment instruments based on the bills of exchange. Of these impediments the technological and the economic, i.e. the absence, primarily due to their economic under-development, in a large number of trading nations of the necessary technological infrastructure necessary to support electronic trade payments, is perhaps the most difficult to overcome.

5.2. Technological and Economic Impediments.

The successful installation of an international electronic trade payment system depends, to a large extent, on the presence in all participating trading countries of the telecommunications and computer technologies necessary to support the high speed transmission of funds in settlement of obligations arising out of international trade.[1] In the absence of such a near-universal capability in information technology any attempt at developing an electronic trade payment system that is truly international is likely to come to nought. If thus the availability of technology is crucial to the development of an international electronic trade payment system that will replace paper instruments of payment, the appropriateness of this technology to the present or current needs of the

---

[1] M. Rowe, *Electronic Trade Payments: A Practical Guide to Electronic Banking and International Trade* (London: IBC Ltd., 1897) at 4. [Hereinafter, Rowe, *Electronic Trade Payments*]

countries that lack it is directly at issue. If however, it is appropriate to their needs, can the technology be, acquired by, or made available to, countries that lack the technology. In other words what are the technology transfer implications of an international electronic trade payment system.

5.2.a. The Technology Transfer Implications of an International Electronic Payment System.

Although the effects of information technology has diffused from the North to the South in the form of some rudimentary forms of Electronic funds transfers systems (EFTS) that are in use in some of the more "affluent" less developed countries (LDCs) of the world,[2] the continued utilisation of these systems and the development of an international electronic trade payment system presents difficult problems for these less developed economies.

The development of an international electronic trade payment system calls for a serious consideration of the technology transfer debate. As a recent United Nations Conference on Trade and Development (UNCTAD) study rightly points out:

"The IT revolution means that IT applications form a set of strategic

---

[2] For example EFTS are in use in the Nigerian banking industry in the form of a Magnetic Ink Character Recognition (MICR) Cheque Clearing system, the use of Automated Teller Machines (ATMs) and Bank Credit Cards. Other information technology (IT) applications in use in LDCs. However, these applications are in use by the grace of certain international organisations and agencies of the United Nations which are charged with the development of LDCs. For example IT is being used by the United Nations Conference on Trade and Development (UNCTAD) in the development of the African transport sector through the Advance Cargo Information System (ACIS), an electronic data interchange system designed to integrate the transport industry of land-locked Sub-Saharan African countries. See, UNCTAD "Information Technology For African Transport" (1991) July-August *UNCTAD Bulletin* at 3-5. Also, worthy of note is the use of Computer technology in the Insurance sector of most African Countries, see, J. F. Outreville, "The Use of Computer Technology in the Insurance Sector of Developing Countries" *UNCTAD Discussion Paper No.38* (April, 1991) reviewed in (1991) May-June *UNCTAD Bulletin* at 13.[Hereinafter, *Computer Technology in African Insurance Sector*]

technologies whose successful transfer is at issue [and] to the extent to which these developments are materializing their implications for technology transfer require investigation".[3]

Principally, the development of an international electronic payment system calls into question the appropriateness of electronics funds transfer technology for economies that are beset with problems of high population growth, low levels of investment and savings, inefficient allocation of resources, weak institutional capacity and a declining standard of living and income.[4] Determining the appropriateness of a target technology is the first step in the process of acquiring foreign technology. If the technology is inappropriate, there is no need to seek its transfer. The appropriateness of electronics funds transfer technology for the less developed members of the international trading community must thus be examined against their present economic and political conditions.

5.2.c. The Relevance of an International Electronic Trade Payment System to LDCs.

The development of an international electronic trade payment system raises several challenging questions for LDCs. Primarily, the relevance of electronics funds transfer technology, given the current needs of LDCs, is seriously in issue. In other words, it raises the question: are these a set of technologies that are inappropriate to the current needs of these countries, expensive to other priorities, detrimental to job creation and

---

[3] UNCTAD,*Technological Change in Services and International Trade Competitiveness*, UN. Doc. UNCTAD/ITP/TEC/29 (1991) at para. 10. [Hereinafter, *Technological Competitiveness*]

[4] The World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, (Washington D.C.: The World Bank, 1989) at 17. [Hereinafter, *From Crisis to Sustainable Growth*]

vulnerable to external exploitation?

Moreover, it challenges the future development of LDCs with such questions as the following:

(i) Can LDCs afford to ignore technologies such as electronic funds transfer technology?

(ii) Would they by neglecting these technologies condemn themselves to being perpetual peripheral parts of the global economy ?

(iii) Can these countries effectively participate in international trade without the acquisition of electronic funds transfer technology ? In fact can they afford to close their eyes to the gradual but steady move towards the dematerialisation of the international payment system ?

These are indeed weighty questions, all of the answers to which this dissertation cannot provide. However, an attempt will be made to assess the relevance of electronic funds transfer technology to the development objectives of LDCs.

There are several elements that make the development of an international electronic trade payment system seem irrelevant to the current needs of LDCs. First is the effect the highly capital intensive electronic funds transfer technology will have on the poor foreign exchange earning capacity of LDCs. LDCs will invariably have to use foreign exchange to purchase the necessary supporting computer and telecommunication technologies thus aggravating their poor economic situation. For example a recent *Euromoney* Special Supplement on international telecommunications shows that the total bill for redeveloping an efficient telecommunication system for Eastern Europe is well

over US$100 billion.[5]

The depletion of foreign exchange does not only arise by the purchase of the technology, but also by the continuing costs of utilization and maintenance. Even in the developed economies the cost of installing and maintaining electronic funds transfer systems is staggering. A report prepared for the United States Federal Communications Commission in 1977 put the exclusive cost of terminals and other computing equipment necessary to achieve by 1986 a national integrated EFTPOS network linking all the banks in the United States at US$80 billion.[6]

The costs of establishing the technological structures for the use of an international electronic trade payment system in LDCs also extends to per unit costs of communications equipment and fees. For instance, the annual rental for a set of high speed leased telecommunications lines between a banking centre and an automated teller machine (ATM) in Canada is in the region of Cdn$5,000 to Cdn$6,000. These figures which represent the position in the domestic environment of the producers of electronic funds transfer technology, will, of course, be far higher for a foreign importer in an LDC. From an economic point of view, the technological structures necessary for the utilization of an international electronic trade payment system is bound to be a heavy drain on the foreign exchange earnings of LDCs.

The adoption of electronic banking techniques by banks in LDCs may lead to a

---

[5] See, P.Moore, "A Nice Line of Business" in Euromoney, *Getting the Message: A Guide to International Telecommunications Regulations* (London: Euromoney Publications Plc, 1992) 1-6 at 4. [Hereinafter, *Getting the Message*]

[6] V.G.Cerf and A. Curran, "The Future of Computer Communications" (1977) 5 Datamation 105-114.

reduction in the staff strength of banks, thus aggravating the already poor unemployment situation in LDCs. Electronic banking techniques are of limited relevance to societies where labour is relatively cheap and abundant. It rather complicates the problem of job creation.[7]

The inappropriateness of an international electronic trade payment system to societies that lack the telecommunications facilities to support the provision of electronic banking services cannot be over emphasised. The telecommunications industry of most LDCs are in a dismal state. In an era in which telecommunication systems are digi-that or opti-this, the telecommunications systems of most LDCs remain largely analogue. In an international electronic trade payment system, there will be the constant need to convert and re-convert data from digital to analogue forms prior to entry into and upon exit from the analogue public packet switched data network (PPSDN) of LDCs. This will no doubt impair the efficiency of such systems in LDCs. Besides, most LDCs are yet to attain the telephone density of one line to 100 people recommended for them by the International Telephone Union (ITU)[8] Furthermore, the ability of LDCs to upgrade their telecommunications infrastructure depend largely on the availability of external financial

---

[7] A. Mazrui, "The Computer Culture and Nuclear Power: Political Implications for Africa" in T.M. Shaw ed., *Alternative Futures for Africa* (Boulder,Colorado: Westview Press, 1982) 237 at 244 -245 argued in the same vein with respect to computer technology in Sub-Saharan Africa.

[8] The ITU is a specialized agency of the United Nations. For example Nigeria requires at least 800, 000 telephone lines to meet the ITU recommendation. This is derived from the fact that a 1991 census conducted put the population of the country at 88.8 million people. The current number of telephone lines in this LDC is approximately 427,000, see, *Nigerian Telecommunications Limited (NITEL) Corporate Plan 1991-2000* at 4, 6-7 and 13.[Hereinafter, *NITEL Corporate Plan*]. c.f. the European average is 44 telephones lines per a hundred persons, see, *Getting the Message*, *supra*, note 5 at 5.

resources,[9] which given the present high degree of external indebtedness of most LDCs would be difficult to procure.[10]

Given the foregoing it seems possible to conclude that an industry that strains to provide basic telecommunication services to its public, cannot be further burdened with the demands of sophisticated applications such as an international electronic trade payment system.[11]

Seen from this perspective, the development of an international electronic trade payment system will have no positive impact on the economies of LDCs but portends external exploitation by the waste of scarce foreign exchange earnings. It amounts to an aggravation of the structures of technological dependence between LDCs and the developed countries that produce the computer and telecommunications technologies. Such a sophisticated payment system may thus be said to be irrelevant to the immediate needs of LDCs.

However, if the development of an international electronic trade payment system is seen from the wider perspective of modernization, it is, perhaps, an appropriate technology. Modernization in this sense is not "a struggle to catch up with the west" which carries with it a considerable risk of imitation and dependency, but is one that is

---

[9] R.U. Akwule, "Telecommunications Policy in Nigeria" (1991) 15 Telecommunications Policy 241-247 (June); see also, *NITEL Corporate Plan ibid.* at 7.

[10] For example the external indebtedness of the public carrier in Nigeria is over US$400 million, see, *NITEL Corporate Plan* at 28.

[11] *Technological Competitiveness*, *supra*, note 3 at paras. 171-176. See also, *Getting the Message*, *supra*, note 5 at 4. which states that "a region can for instance wave goodbye to a decent banking system, a developed credit card market and the growth of familiar western facilities such as ATMs until it gets its telecommunications house in order."

geared towards the development of the "endogenous capacity" of LDCs in the area of information technology.[12]

There is no doubt that banking services play a pivotal role in the function of economies since a great many transactions are linked to their use. The banking sector is thus a powerful instrument for influencing production and other aggregates.[13] Accordingly, with the development of such an electronic system, the ability of banks in LDCs to provide faster and more convenient services would cut down their transaction costs. This would in turn create a multiplier effect on other aspects of the economies of LDCs. For example, the usual cost and loss that arise due to the delay in the payment for goods and services sold by international traders from LDCs will be saved and put to better uses. The overall effect of such a system on the economies of LDCs would thus be one of efficiency.

In addition, the development of such an international electronic trade payment system would mean the development of the telecommunications industry of LDCs. The telecommunications industry is universally recognised as highly strategic for national development.[14] An international electronic trade payment system would demand that the

---

[12] Mazrui, *supra*, note 7 at 238 calls this "modernization minus dependency". M.B.E. Feyaz, "Technological Transformation For Developing Countries: Some Factors and Prerequisites" in UNCTAD/Islamic Development Bank, *Technology Selection Acquisition and Negotiation*,UN.Doc. UNCTAD/ITP/TEC/22,(1991) UN Sales No. E.91.II.D.5 x at x. [Hereinafter, *Technology Selection*] at para. 17 defines "endogenous capacity" as "the ability in essence to take and implement autonomous decisions for the solution of national problems and the strengthening of national independence."

[13] See, "Notes on a Possible Multilateral Framework for International Trade in Banking Services" (1990) Sept-Oct *UNCTAD Bulletin* at 11. It is also for this reason that Banking Services is a key component in the Uruguay Round Talks for a General Agreement on Trade Related Services (GATS)

[14] *Technological Competitiveness*, *supra*, note 3 at para. 35.

telecommunication facilities of LDCs be upgraded. This would enable LDCs to skip generations of telecommunications equipments and "leap frog" into electronic equipment which is often cheaper, more powerful, robust, and flexible than the electromechanical systems that it would be replacing.[15] This certainly complements the commercialisation of the public utilities by the governments of most LDCs.[16] Moreover, EFTS will generate more revenue for the public telecommunications authorities in LDCs as banks will lease more private circuits from the public carriers. The increased leasing of private circuits will in turn decongest their public network and lead to the improved performance of the public network.

If accompanied by measures that encourage local research and development (R&D) and the formulation of a general information technology (IT) policy, the development of an electronic trade payment system could play a vital role in the training of electronic, telecommunications and software engineers. However, the aim of LDCs at this juncture, should not be to attain technological independence in information technology, a goal few developed countries can now sustain, but should be oriented towards improving and adapting telecommunications, computers, and other components of the electronic trade payment system to fit in with local conditions. It should also be directed towards identifying components of the digital hardware and software which can be sourced

---

[15] *Ibid.* at para. 179.

[16] For example, the Nigerian Government is currently commercializing the operations of its Public Telecommunications Company the *Nigerian Telecommunications Ltd (NITEL)*, under the Privatisation and Commercialization Programme as established by the *Privatisation and Commercialization Decree No. 25 of 1989*. Other LDC governments in Latin America are in the process of privatising or have privatised their Telecommunications Industry. Notable in this regard are Argentina and Mexico.

locally.[17] The existence of an international electronic trade payment system may thus propel LDCs to develop an efficient basic telecommunications system. As a World Bank Report noted:

> "[LDCs'] prospects for competing effectively will depend on greater efforts to create an efficient basic telecommunications structure and to obtain access to global information networks by building links with the international partners".[18]

The development of an efficient telecommunications infrastructure would provide LDCs with the distribution system upon which an increasing number of other services depend including those of a strategic importance for economic, social and cultural objectives as well as for trade in goods and services.[19]

Besides, the ability to man such a system is not a problem for some of the LDCs. In the "more developed" LDCs the requisite human resources for the operation of such a system may be adequate. In fact the EFTS systems currently in use in these States are manned by natives. For instance, although,the Nigerian MICR System was set up with the expert support of *NCR U.K.* and *Thomas De La Rue,(U.K.) Plc*, it is fully manned by Nigerians.[20] The many departments of computer science in the universities and polytechnics in Nigeria provide this LDC with a large labour force upon which to draw in the development of its information technology industry. The problem of the more

---

[17] See, *Technological Competitiveness, supra*, note 3 at paras. 186-187.

[18] *From Crisis to Sustainable Growth, supra*, note 4 at 30.

[19] *Report by UNCTAD Secretariat on Issues Raised in the Context of Trade in Services*, UN. Doc. No. TD/B/1197 (1988) at para. 50.[Hereinafter, *Trade in Services*]. In a corresponding manner, the recent *Euromoney* Supplement points out that the development of a telecommunications network is an urgent priority because it is from the basic telephone line that so many things grow, see, *Getting the Message, supra*, note 5 at 4.

[20] See, M.A.O. Ajayi, "MICR: Operations, Security and Advantages" [Unpublished Lecture Paper Delivered at the Financial Institutions Training Centre to Nigerian Bank Inspectors, Bank Examiners, Internal Auditors and Training Officers, 1990]

fortunate LDCs is not one of human resources but that of sustained commitment by their elites to their countries' development.

Notwithstanding that the system would in the meantime be maintained by the supply of spare parts and software which are not manufactured or developed in LDCs, the long-term effect of this negative implication would be to develop an indigenous technological capacity in this area, provided that rational R & D policies are put in place by governments of LDCs in close concert with their banking sector.[21]

Finally, to ensure their continued participation in the near paperless international trade of today, LDCs must consider seriously their capability in this area. The increasing reliance on information technology in international trade and the continued globalization of the financial markets necessitate that LDCs, where they can afford it, assess critically the possibility of acquiring this technology.

For the above reasons the technologies necessary to support the utilisation of an international electronic trade payment system may be of some relevance to the current needs of the more fortunate LDCs. However, for a variety of other reasons the successful transfer of these technologies to such LDCs is likely to be a more serious obstacle to the development of an international electronic trade payment system.

5.2.c. Possible Barriers to the Transfer of Information Technology to LDCs.

There is abundant evidence to suggest that in any attempt to transfer technology, the directly opposing economic interests of LDCs and exporters of technology from developed countries impede the effective transfer of any technology.[22]

---

[21] *Technological Competitiveness*, *supra*, note 3 at 47.

[22] For a fairly recent analysis of these conflicting economic interests, see, M. Blakeney, "Transfer of Technology and Developing Nations", (1989) 11 Fordham Int'l L.J. 690 at 693; K. Kuruk, "Controls on Technology Transfer: An Analysis of Southern Response to Northern Technological Protectionism" (1989) 13 MD. J.Int'l L. & Trade 302 at 302. See also, L.B. Mackey, "Exploiting Innovative Technology in Offshore Markets: A United States Perspective" (1989) U.S.-Can. L.J. at 179.

LDCs aim to receive the maximum access to the latest technology with little or no restrictions on its use by its nationals and at minimum cost. LDCs take the position that technology is the common heritage of mankind and should be made available at nominal cost.[23] Transnational corporations (TNCs) are seen as having received the full benefit from exploiting a technology in its home market before licensing a technology in a less developed country.[24]

LDCs emphasise the cost implications of the technology transfer process because a large payment will adversely affect their poor economies.[25] Furthermore, LDCs are concerned with the social costs of a technology, the severity of the restriction imposed by owners of the technology and the possible loss of research development due to these restrictions.[26] The concerns of LDCs are reflected in local legislation that attempts to control the transfer of technology.[27] This control may take the form of government participation in the negotiations for the transfer of a technology and the subsequent review and registration of the technology transfer agreement.[28]

The cost considerations of the LDCs when pitted against the profit-maximising goals of multinational entities from the developed countries challenge the very concept

---

[23] Blakeney, *ibid.* at 696; Mackey, *ibid.* at 179.

[24] Mackey, *Ibid.*

[25] J.G. Castel, A.L.C. deMestral, W.C. Graham, *The Canadian Law and Practice of International Trade with Particular Emphasis on Export and Import of Goods and Services*,(Toronto: Emond Montgomery Publications, 1991) at 206. [Hereinafter, *Canadian Law and Practice*]

[26] *Ibid.*

[27] For an overview of the nature of these local legislations, see, Kuruk, *supra*, note 22. see also, O. A. Osunbor, "Law and Policy on the Registration of Technology Transfer Transactions in Nigeria" (1987) 21 J.W.T.L.5 at 13.

[28] See, Kuruk, *ibid.*; Osunbor, *ibid.* see also, M. Cortes & P. Bocock, *North-South Technology Transfer: A Case Study of Petrochemicals in Latin America*, (Baltimore/London: World Bank/John Hopkins University Press, 1985) at 3-4.

of technology transfer.[29] The developed countries as market economies take the stand that new technology would not be produced if it is meant to be free.[30] Innovations are made because they generate profit. If, therefore, a technology has to be transferred, the price charged must include not only the price of the technology but also the future profits that are to be foregone by the owner/exporter of the technology.[31] This profit-maximising stance presents a serious problem for the transfer of technology to LDCs. The situation is aggravated when the technology exporter, in order to maximise the profits accruing from its invention, introduces onerous and at times unfair conditions into the technology transfer agreement between it and an LDC technology importer.[32]

Effective transfer of technology from the developed countries to the LDCs is also impeded by the policies of the governments of technology exporting countries. These governments at times place restrictions on the transfer of a particular technology because of the potential loss of employment, the security implications of the technology and the possible loss of competitive edge in the area by its nationals.[33]

LDCs have responded to these initiatives by developed countries in several ways. With particular reference to the imposition of onerous clauses by technology exporting TNCs, LDCs are the proponents of an international code of conduct for the transfer of

---

[29] See, Mackey, *supra*, note 22 at 179; see also, Blakeney, *supra*, note 22 at 696.

[30] Mackey, *ibid.*

[31] Mackey, *ibid.*, *Canadian Law and Practice*, *supra*, note 25 at 209.

[32] For the manner in which Transnational Corporations (TNCs) impose these onerous or unfair conditions on LDCs, see, Kuruk, *supra*, note 22 , Blakeney, *supra*, note 22 at 708-710.

[33] On this point, see, Kuruk, *ibid*, see also, Blakeney, *ibid.*; *Canadian Law and Practice*, *supra*, note 25 at 206.

technology.[34] Whilst developed countries seem to support the development of such a code of conduct, they insist that the code should not be legally binding as the LDCs advocate.[35] Developed countries favour a set of non-binding guidelines for adoption by private corporate entities that export technology to LDCs.[36] The debate over the status of this code of conduct has been going on now for well over twenty years and it seems that no acceptable middle ground will ever be found in the near future.[37]

The conflicting economic interests of LDCs and developed countries must be taken into consideration in any attempt to determine whether the transfer to LDCs of the computer and telecommunications technologies necessary to support the operation of an international electronic trade payment system is in any way feasible. This is more so the fact given the nature of the technologies that has to be transfered to LDCs.

The computer in the form and nature necessary to support EDI is a freely transferable technology not prone to be the subject of severe restrictions by governments of technology exporters.[38] Similarly, basic digitalized telecommunications is not a highly restricted technology.[39] However, both technologies are very expensive. Of the two, telecommunications has more serious economic implications. Perhaps this is because it lies in the public rather than the private domain. An assessment of the present ability of

---

[34] For a history of the efforts of the United Nations Conference on Trade and Development (UNCTAD) at establishing an *International Code of Conduct on the Transfer of Technology*, see, Blakeney, *ibid.* at 690-693; see also, J.L. Farcus and L.W. Falk, "Transfer of Technology between the United States and LDCs" (1983) 16 Law and Technology J. 3-28 .

[35] Farcus, *ibid.*; Kuruk, *supra*, note 22.

[36] Farcus, *ibid.*; Kuruk, *ibid.*; *Canadian Law and Practice*, *supra*, note 25 at 211

[37] For the status of the *Draft International Code on the Transfer of technology*, see, UNCTAD/TD/CODE TOT/56 (1991).

[38] Mazrui, *supra*, note 7 at 238.

[39] See, Mackey, *supra*, note 22 at 180 points out that ITT Ltd. sells its products to telecommunications administrators all over the world.

LDCs to improve their telecommunications capability to a level where they can participate in an international electronic trade payment system will highlight the serious economic implications of telecommunications.

Given the the present state of indebtedness of most LDCs it is difficult for them to afford the transfer of this technology.[40] Indeed, over the yaers the transfer of telecommunications technology to LDCs has in most cases been financed by loans, grants and aid from the World Bank, Intergovernmental organisations formed by developed countries and Transnational Corporations (TNCs) from the developed countries.[41] The inability of LDCs to repay the loans given in support of the development of their telecommunications system seriously deter the continued financial support of such projects by these entities.

Moreover, the present deteriorating state of the world economy will most probably force these organisations into a position where they can no longer afford to provide such developmental aids. Apart from the poor state of the global economy, a number of current international developments has diverted the attention of the developed countries from the LDCs as a whole to specific regions of the world. Of these developments three deserve special mention in this context.

The first is the economic and political situation in the Commonwealth of Independent States and Eastern Europe. For largely selfish reasons, most developed countries, especially those of Europe and North America, are particularly interested in

---

[40] *Supra*, note 10.

[41] For example the recent expansion of the north-west telecommunications network of Nigeria was financed by a loan of DM 500 million from SIEMENS - the German Telecommunications Giant. Similarly, the Lagos telecommunications network was expanded and rehabilitated by a US$225 million from the World Bank. The Organisation for Economic Co-operation and Development (OECD) has also made available a loan of Y12.3 billion for the expansion of the south-east telecommunications network of Nigeria. For these figures, see, *NITEL Corporate Plan*, *supra*, note [illegible] at 25.

supporting the economic rehabilitation of these States. Perhaps, the reason for this is to ensure that the States do not out of despair revert to the socialist system of government from which they have only recently departed. Despite assurances by developed countries that the support to Eastern Europe will not diminsh their determination to give high priority to the development operations of the third world, an analytical report submitted to the eight session of the of the United Nations Conference on Trade and Developemnt (UNCTAD) by the Secretariat of the Conference shows that official developemnt assistance (ODA) provided to LDCs has been drastically reduced or abandoned, whilst the substantial economic assistance provided in the form of large important trade subsidies has virtually disappeared.[42]

The second is the increasing importance of South-East Asia as a manufacturing haven. Due to the low cost of labour in this region, many industries from the developed countries find it economical to site their manufacturing plants in this region. This has meant a lot of investment in this area by developed countries. The strategic economic importance of this region has elevated it to a major area to which development aid are channelled in order to ensure or guarantee the safety of the investments of these industries.

The third is the fact that some LDCs, particularly those of Africa, are of a very low economic significance to the developed countries. Even, the LDCs of Latin America are of greater economic importance to the developed countries than the LDCs of Africa. The importance of the Latin American region is perhaps evident in the move towards the establishment of a North America Free Trade Agreement (NAFTA) between the United States, Canada and Mexico. The combination of the economic recession in the developed

---

[42] *UNCTAD VIII Analytical Report by the UNCTAD Secretariat to the Eight Session of the Conference*, U.N.DOC. NO.TD/358 (1992); U.N. Sales No. E. 92.II.D.3. at para. 145.

economies and these international developments will ensure that other LDCs will no longer receive aid from developed countries in sums sufficient to import advanced technologies such as telecommunications and computers.

Given this bleak scenario, it is difficult to imagine how most LDCs will in the near future be technologically capable to "do EDI". LDCs cannot on their own afford to upgrade their telecommunications capacity to a level where they can "do EDI". A change of attitude on the part of technology exporters and producers is critical to the development of the telecommunications infrastructure of LDCs. The ability of the international trading community to achieve the objective of using cheap, convenient and fast communications systems in the discharge of financial obligations arising out of all their export trade is thus closely intertwined with a change in the profit maximising attitude of their members from the developed countries. This change, it appears, may not be forthcoming because it is the same maximising attitude that nurtured these electronic systems. Furthermore, there appears to be no reason why this attitude should be changed in order to accommodate LDCs in this area. Raw materials which are the prime exports of LDCs to developed countries are increasingly becoming irrelevant to the manufacturing needs of developed countries.[43] The volume of trade between LDCs and the developed economies has declined over the years. As their new major trading partners are already kitted out with this technology, there appears to be no incentive for the developed world to bother

[43] A recent UNCTAD Study points out that the declining raw materials intensity of finished products is the direct result of technological innovation, see, *Technology Selection supra*, note 12 x at para. 2. In a similar vein, though from a different perspective, Samir Amin laments that "today the system that confines Africa to specializing in agriculture and mining based upon the extensive exploitation of its land to exhaustion, along with the technological revolution which saves on certain raw materials are already excluding the continent from the international division of labour", see, "The Social Movements in the Periphery: An End to National Liberation?" in S. Amin et al eds.*Transforming the Revolution:Social Movements and the World System.*(New York: Monthly Review Press, 1990) at 122. See also, Comment, "Technology: A determinant of International Trade and Economic Development" (1989) January *UNCTAD Bulletin* 1.

with establishing the structures necessary to trade electronically with LDCs.[44] Traders from the developed countries may thus be content to continue to trade with LDCs using traditional paper procedures and instruments of trade.

It thus seems that if an international electronic trade payment system is ever to be installed and used all over the world, the ability, of the inventor/exporter of information technology, the government of such an inventor/exporter and governments of the LDCs to work out a meaningful and effective transfer of information technology agreement is crucial. Given the above-stated current priorities of most developed countries it may be difficult, if not impossible, for this sort of agreement to be established. However, whatever may be the attitude of developed countries on this matter, it is clear that in the absence of assistance to enable LDCs acquire or develop some modest capability in information technology, the international trading community, assuming that they are so interested, will have to wave goodbye to the use of EDI applications in their trade with LDCs and accept the continued use of the bill of exchange and such other paper-based instruments in their trade with LDCs.

5.3. Political Impediments.

Apart from the technological impediments to the development of a truly international electronic trade payment system, there are political factors that are likely to impede the successful development of such a system. These political impediments, unlike the technological impediments, are not peculiar to LDCs. They emanate from the information processing activities of both the developed and less developed countries which is

---

[44] The Newly Industrializing Countries of South East Asia have joined in this paperless international trade. A sophisticated international payment and clearing system in the mould of the New York CHIPS already exists in Singapore as SHIFT and in Hongkong as CHATS, see, B. Crawford, "The UNCITRAL Model Law on International Credit Transfers" [Unpublished] A paper presented at the International Trade Law Conference Canberra, Australia October 18-19, 1991 at 2-3 and the authorities cited in ns11-12. [Hereinafter, Crawford, International Credit Transfers]

reflected in the politics of transborder data flows. By transborder data flows is meant "the transmission from one nation to another of units of information coded electronically for processing or storage by one or more digital computers".[45]

Another factor of a political nature that is likely to be an obstacle to the development of an international electronic trade payment system is the fact that LDCs, due to their current technological incapability, will come to view any attempt to install such a system as a form of "informal colonialism" and thus take positive steps politically to resist its development.

5.3.a. The Politics of Transborder Data Flows.

The politics of transborder data flows manifest themselves in the tendency of states, both developed and yet to be developed, to protect the export of data from their respective countries. LDCs and developed countries alike have in place a number of regulations that seek to control the flow of computerised data in and out of their borders.[46] These restrictions, which are usually in the form of privacy laws, place limits

---

[45] M.B. Feldman & D.R. Garcia, "National Regulation of Transborder Data Flows" (1981) 7 N.C.J.Int'l L.J. 1 at n1. This definition however excludes transborder data flows resulting from media products, news broadcasts, telephone calls, television programming and telex services. Accordingly, if computers are employed solely to control the transmission of data without any data processing involved it is not a transborder data flow. However as an international electronic trade payment system is bound to involve the processing of large amounts of data it is subsumed under this definition. On these points see, E.J. Novotny, "Transborder Data Flows and International Law: A framework for Policy-Oriented Inquiry" (1980) 16 Stan. J. Int'l L. at 144. see also, C. Edwards, N. Savage & I. Walden, *Information Technology & The Law*, 2nd ed. (United Kingdom: Macmillan Publishers Ltd.,1990) at 121 which defines transborder data flow as the transfer of data across a national border by any one of a variety of media. Literally speaking, transborder data flow is the "international flow of information", see, H.P. Lowry, "Transborder Data Flow: Public and Private International Law Aspects" (1984) 6 Houston J. Int'l L. at 159.

[46] Feldman and Garcia, *ibid.* at 2.; see also, A. Bequai, *The Cashless Society: EFTS at the Crossroads* (New York: John Wiley & Sons, 1981) at 139. Rowe, *Electronic Trade Payments*, *supra*, note 1 at 3 points out that both Germany and Brazil have in place regulations restricting the transborder transfer of computerised data. Rolf Wigand has rightly submitted that "since distance, time of day and the crossing of national boundaries are no longer issues for today's advanced technology, it is apparent that access to and dissemination, c[illegible] and control of information ... can become a major national and international policy issue", quoted i[illegible]*ation Technology & the Law*, *ibid.* at 122.

on the transmission of corporate and personal data out of their borders.[47] However, where a corporate entity can demonstrate that the country of destination has similar stringent privacy laws it will be allowed to export the data.[48] Difficulties are, however, encountered where, as in the case of LDCs, there are inadequate local laws to protect imported data or where, even if adequate, they operate to regulate only public and not private data. In this connection, most traders from the developed economies may be reluctant to transmit financial information into LDCs where the local laws are largely incapable of protecting their privacy.

LDCs are more concerned with the regulation of export data from their countries.[49] They are so concerned because they are becoming increasingly dependent on the developed economies for the processing of their strategic social, economic and even political data.[50] They therefore encourage the processing and storage of data within their country.[51]

The rationale for the restriction of transborder data flows by all countries is perhaps to ensure the country's economic and political independence, cultural identity and individual privacy.[52] Information is a powerful political tool and unless information, particularly financial data, is well regulated a country may find its economic development

---

[47] Bequai, *ibid.* at 139. For a fairly detailed list of Data Protection Laws in different States, see, Lowry, *supra*, note 45 at n26.

[48] Bequai, *ibid.* at 140.

[49] see, Bequai, *ibid.*, Novotny, *supra*, note 45 at 152.

[50] See, Bequai, *ibid.*, Novotny, *ibid.*

[51] See, Bequai, *ibid.* at 140, see, also Feldman and Garcia, *supra*, note 45 at 10. *Information Technology & the Law*, *supra*, note 46 at 123 notes that there is fear within LDCs that information technology may simply serve to widen the gap between the rich and the poor States.

[52] Feldman and Garcia, *ibid.* at 2. See also, *Information Technology & The Law*, *ibid.* at 122-123. Houston Lowry is however of the view that "often privacy is just a convenient club with which to beat to death the freedom to exchange information", see, *supra*, note 45 at 166.

plans undermined. Restrictions on the transfer of financial data through computer systems could inhibit trade substantially, with serious economic consequences.[53] Conversely, the free flow of financial data permits convenient financial arrangements and flows of capital.[54] However, free flow of financial data contributes to such rapid movement of funds that national governments may find it increasingly difficult to control currency speculation or arbitrage.[55]

For largely political and economic reasons most countries through their privacy laws require that computerised data be stored only in the country in which they are produced.[56] National security and sovereignty are often touted as reasons for these restrictions. Certainly, national security and sovereignty are vulnerable to being jeopardised when important data processing resources are located outside national boundaries. There is the constant fear that nationally sensitive information may be removed from a country without permission.[57] The primary motivation for the restriction of transborder data flows seems to be the desire of States to ensure that their national sovereignty is not undermined through an erosion of their decision-making capacities.[58]

Houston Lowry is however of the view that national security claims are exaggerated as States have a great deal of control over the import and export of

---

[53] Novotny, *supra*, note 45 at 157.

[54] Novotny, *ibid.*

[55] See, Novotny, *ibid.* at 145. Crawford, International Credit Transfers, *supra*, note 44 at 3 points out that international telecommunications "[has] made possible the practice of arbitrage in international foreign exchange markets."

[56] Bequai, *supra*, note 46 at 140; Novotny, *ibid.* at 157, see also, Y. Poullet, "Privacy Protection and Transborder Data Flow: Recent Legal Issues" in G.P.V. Vandenberghe ed. *Advanced Topics of Law and Information Technology* (Deventer: Kluwer Law and Taxation Publishers, 1989) 29-41. [Hereinafter, *Law and Information Technology*]

[57] *Information Technology and The law*, *supra*, note 46 at 124.

[58] *Information Technology & The law*, *ibid.*

information into and out of their countries. Lowry refers to various Articles of the *International Telecommunications Convention* and submits that there is no reason to give nations greater power as the extant international legal regime is sufficient.[59] This writer respectfully disagrees with this position. The degree of technological sophistication attained in telecommunications today makes it far more difficult for states to control the import and export of data into their countries. The words of Rolf Wigand are instructive in this regard: "It is almost impossible to control an entire nation's inflow and outflow of data and information transmitted via conventional telephone lines and to identify which data and information are subject to control, duty, and taxes."[60] Besides whilst it may be very easy for developed countries relying on the provisions of this Convention to control transborder data flow, the less developed countries will find it exceedingly difficult to regulate transborder data flow in and out of their countries. Regulation of transborder data flow cannot therefore be accomplished under existing public international law.

The reasons for the regulation of transborder data flows are also economic. With reference to developed countries, the fear of incurring economic disadvantages from external processing looms equally large for them.[61] The location of data processing operations can have considerable economic consequences for nations since high-paying technical jobs are generally concentrated in the State which carries out the processing, while low key punching operations are concentrated in the data exporting States.[62] Countries are thus concerned with the impact of transborder data flows on national

---

[59] See, Lowry, *supra*, note 45 at 167.

[60] Quoted in *Information Technology & The Law*, *ibid.* at 129.

[61] Novotny, *supra*, note 45 at 170.

[62] *Information Technology & The Law*, *supra*, note 45 at 129.

economic indicators such as employment and balance of trade.[63]

Whatever the reasons behind the restriction of the free flow of data, it is certainly an impediment to the development of an international electronic trade payment system.[64] In the absence of free flow of data between countries a truly international electronic trade payment system will never come to fruition and even if it is embarked upon it may run foul of various national legislations.

Are there any solutions to this impasse? The answer to this question appears uncertain. It seems that international cooperation could be worked out in this area.[65] Already there are efforts in that regard.[66] A number of intergovernmental organisations (IGOs) are now directly involved in transborder data flows questions.[67] These IGOs include the Organisation for Economic Co-operation and Development (OECD),[68] the International Telecommunications Union (ITU), the Intergovernmental Bureau of

---

[63] *Information Technology & The Law*, *ibid.* states that in Canada the Clyne Committee (Consultative Committee on the implications of Telecommunications for Canadian Sovereignty) reported that the increasing levels of data flowing from Canada to the United States, for processing and storage, was likely to lead to a loss of sovereignty. The report also estimated that this meant a loss to Canada of US$300 million to the US for data services as well as a predicted loss of some 23,000 directly related jobs.

[64] Bequai, *supra*, note 46 at 140.

[65] Graham Rowbotham takes a rather disputable stance when he suggests that: "If a particular jurisdiction creates any undue difficulties for EDI, then the development of EDI in or affecting that country may be inhibited. Any such inhibition should be well publicised and pressure will inevitably be brought to bear on the country's legislature to remove the difficulty or accept the consequences of placing its trading economy in a technological backwater", see, G. Rowbotham, "EDI and the Corporate Treasury:The Legal Background" (1990) 7 Comp. L. & P. at 40. This is a most unacceptable view. It flies in the face of the real problems confronting the international community in this area. It in fact neglects the differing political and economic agenda of States.

[66] For a summary of international initiatives, see, Novotny, *supra*, note 45 at 174-177, see also, *Information Technology & The Law*, *supra*, note 45 at 126-127; Poullet, *supra*, note 56 at 34.

[67] The EEC is also involved in the regulation of transborder data flow. The Council of Europe in 1981 issued a treaty on Transborder data flows titled *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, EEC Doc. No.Europ. T.S.108 (1981).

[68] The efforts of OECD in this area is reflected in OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, OECD Doc. No. ISBN 92-64- 12155-2 (1980).

Informatics (IBI)[69] and even payment networks such as SWIFT.[70] But the effectiveness of these organisations in promoting law is circumscribed by their membership and by their limited ability to act as authoritative law making bodies.[71] But the major obstacle to any agreement in this area is politics. A State, whether developed or under-developed, will resist any attempt by other States to undermine its integrity by allowing the free flow of strategic business or even governmental information out of its borders. Legislation in this area may be a long-term solution,[72] but it remains the only way to go if there is to exist an environment for transborder data flow that does not impede the development of an international electronic trade payment system.

5.3.b. The Likely Perception of an International Electronic Payment System as a Form of "Informal Colonialism".

It has been submitted that, in the absence of the technological infrastructure for the use of this system by LDCs, the latter are likely to perceive this sophisticated payment system as a form of "informal colonialism".[73] The pressure that is likely to be placed on LDCs to acquire technology necessary to support such a system may come to symbolize for LDCs a ploy for their continued dependence on the West.[74] This appears to justify

---

[69] IBI is affiliated to the United Nations through the United Nations Educational Scientific and Cultural Organization (UNESCO). IBI is an international organisation composed of approximately 30 member countries who are primarily less developed countries, although Italy, France and Spain are members. UNESCO on its part is involved in transborder data issues particularly as it relates to LDCs. The efforts of UNESCO is set out in UNESCO, *Report of the Secretariat, Strengthening the Negotiating Capacity of Developing Countries, Transnational Corporations and Transborder Data Flows: An Overview*, U.N. Doc. E/C.10/87 (1981) .

[70] Novotny, *supra*, note 45 at 170, see also, Feldman and Garcia, *supra*, note 45 at 2.

[71] Novotny, *ibid.* at 154 at n40.

[72] Rowbotham, *supra*, note 65 at 39.

[73] Bequai, *supra*, note 46 at 140.

[74] *Ibid.*

the view that the dialectics between technology transfer and technological monopoly deepens the relationship of dependency between the developed and less developed countries.[75] The development of this system may also be seen as a grand design by TNCs, with the strong support of their home governments, to ensure the existence in the LDCs of a ready market for their computer and telecommunications products.

In sum, the development of an international electronic trade payment system is bound to be viewed by LDCs as a plan by developed countries to perpetuate their control of their economies. LDCs will thus use all established and existing diplomatic channels at their disposal to resist the development of such a system.

The nature of this resistance by LDCs may perhaps be akin to the support given in the 1980s by a number of LDCs to the statement of the representative of Nigeria to UNCITRAL that the harmonisation of rules of international electronic funds transfer was not a problem of any interest to LDCs and in consequence should be afforded low priority by the Commission.[76]

This low priority was in fact given to the formulation of the *UNCITRAL Model Law on International Credit Transfers*.[77] However, given the interest of the developing countries in the formulation of such a Model law, the low priority status of the project did not sufficiently deter the UNCITRAL Working Group on International Payments from having the draft model law completed and adopted within a record period of only seven

---

[75] Mazrui, *supra*, note 7.

[76] A.G. Guest, "Current Work of the United Nations Commission on International Trade Law" in C.M. Chinkin, P.J. Davidson & W.J.M. Ricquier eds., *Current Problems of International Trade Financing* (Singapore: Malaya Law Review & Butterworths, 1983) 134-144 at 140.

[77] See, *Report of the United Nations Commission on International Trade Law on the Work of its 19th Session to the General Assembly*, U.N. Doc. A/41/17 para. 45-47. The task of preparing the Model Law was assigned by UNCITRAL to the "Working Group on International Negotiable Instruments", which the Commission renamed the "Working Group on International Payments".

years.[78]

However, to safeguard their interests LDCs participated actively in the preparation of the Model Law and thereby ensured that it was drafted to cater for both electronic and paper-based international credit transfers.[79] This all-medium embracing feature of the Model Law was found unsatisfactory by developed countries such as the United States that have in place high speed funds transfer systems.[80] The objection of the United States was that the Model Law did not reflect the prevailing standards of technology in their technologically advanced banking industry.[81] Happily the objection of the United

---

[78] The UNCITRAL at its 19th session in 1986 entrusted the task of preparing the Model Law to the Working Group on International Payments and by December 1990 the Working Group had completed its work by adopting the Draft Model Law at its 22nd working session. The Draft Model Law was then sent to all States and international organizations for their comments. The Draft Model Law and the comments were placed before the UNCITRAL at its 24th session in 1991 and during the 25th session of the Commission in May 1992, the Draft Model Law was adopted by the Commission. This effort should be contrasted with the same Working Group's work on the *Convention on International Bills of Exchange and International Promissory Notes* which took them seventeen years to complete.

[79] At the 18th session of the Working Group on International Payments in 1989, it was decided that the Model Law should only deal with international credit transfers i.e. transfers in which the originator of the transfer and the bank of beneficiary are located in different States and that the Model Law should apply to all international credit transfers, without regard to whether they were in electronic or paper-based form, see, *Report of the Working Group on International Payments on the Work of its 18th Session*, U.N. Doc. A/CN.9/318 (1989) at para.10-19.

[80] The objection of the United States is contained in a proposal annexed to *Note by the UNCITRAL Secretariat, International Credit Transfers-Proposal of the United States of America*, U.N. Doc. No. A/CN.9/WG.IV/WP.47 (1990). This proposal suggested the possibility of restructuring the Model Law into two parts: one applicable to high-speed systems and another applicable to slower systems.

[81] The position of the United States was that the Model Law run counter to their existing Article 4A of the *Uniform Commercial Code (UCC)* which was "written with greater appreciation of their peculiar commercial reality and which relied more on the advice and guidance of those intimately involved with the workings of electronic funds transfer systems than the deliberations on the Model Law", see, U.N. Doc. A/CN.9/329 (1990) at para. 195-197. In effect the United States sought a Model Law that will reflect their peculiar aspirations without regard to the needs of other members of the international community. In essence the United States sought to impose on the international Community their Article 4A of the *UCC*. This selfish position of the United States was reechoed by Ernest Patrikis when he surmised as follows: "We must be cognizant, of course, that the dollar is currently the international medium of exchange and will probably remain so for years to come, if not for ever. Therefore, the United States has a paramount interest in international EFT. Accordingly, how an international Law parses with our domestic law is a matter of more than passing interest.... The Concern may be that the United States document represents the position of a developed country and its acceptance could put less developed countries which may not have

States was overriden by the decision to set out the Model Law in such a manner that any State, no matter its level of technological development, should be able to adopt it as a basis for its national law.[82]

The politics that attended the formulation of the *Model Law on International Credit Transfers* and the positions taken by the United States and LDCs on the scope of the Model Law is perhaps a pointer to the nature of the resistance that will follow the introduction of an international electronic trade payment system. How well LDCs will fare in this political confrontation is difficult to predict. But if previous experiences at the harmonisation of international trade procedures is any thing to go by, their resistance is most unlikely to be successful.[83] Besides, the elites in LDCs are likely to be well disposed to such a payment system. If this disposition is born out of a genuine desire to modernise their international payment system and thereby remain competitive in

---

participated in its drafting at a disadvantage. However a document which treats parties fairly in a domestic context would likely also be fair in an international context",see, E.T. Patrikis, "UNCITRAL Payment Efforts"(1989) 15 Brooklyn J. Int'l L. 45 at 57. With this attitude it seems almost certain that the United States will never adopt this Model Law.

[82] *See, Report of the Working Group on International Payments on the Work of its 18th Session, supra,* note 77.

[83] The harmonisation of international trade practices and procedures by international organisations is usually carried out in such a manner as to secure the dominant interests of the major trading countries who invariably are also the dominant users of the rules. The interests of LDCs are usually secondary and are only reckoned with in an attempt to introduce some semblance of fairness into the harmonisation effort. Harmonisation efforts directed specifically to the needs of LDCs has at times been found unnecessary and discontinued or prepared in a watered down form due to lack of support by the developed countries. One such remarkable example was the recent efforts of the International Chamber of Commerce (ICC) at providing banks with rules for interbank transfer instructions. The rules were intended for LDCs which predominantly have no transfer system of their own and as a first step to enable such countries, without the necessary systems for harmonised interbank transfers and compensation procedures in the event of loss, to process transfers in an internationally acceptable manner. Even with the support of twenty countries for the draft Rules, there was strong opposition by major countries many of which are responsible for the highest volume of traffic in interbank funds transfers. Members of the ICC Working Party on International Interbank Fund transfers thus felt that the Rules would not be viable without the support of the major countries and for that reason the commission decided that the text should be issued as Guidelines, see, *Report of the Secretary-General of UNCITRAL to the 23rd Session of the Commission on the Current Activities of International Organisations Related to the Harmonisation and Unification of International Trade Law*, U.N. Doc. A/CN.9/336 (1990).

international trade, then LDCs may perhaps benefit from it. But if it is merely to imitate the more opulent circumstances of the developed countries, which is usually the case, then it will hurt their weak economies.

LDCs are rocked by political instability. Coups, assassinations and incessant border wars are rife in most LDCs. In such an environment, the development of an international electronic trade payment system must be low on their agenda. In the same vein, it seems doubtful whether a world torn by economic and political instability is conducive to the development of an international cashless society.[84]

5.4. Legal Impediments.

There is an overall consensus that the application of information technology to international trade procedures (including payment) poses several legal problems.[85] These legal problems arise out of the fact that electronic trade procedures are being employed in a legal environment that is largely paper-oriented.[86] These problems are possible impediments to the development of an international electronic trade payment system. The severity of these legal problems are greater in some countries than others. In countries of the world where electronic payment systems are being used to a considerable extent, their

---

[84] Bequai, *supra*, note 46 at 140.

[85] For a select reading of the analysis of the legal problems of paperless international trade, see, Rowe, *Electronic Trade Payments*, *supra*, note 1 at 149-155; I. Walden & N. Savage, "The Legal Problems of Paperless Transactions" (1989) J.B.L. 102; I. Walden, "EDI and the Law" in *Information Technology and the Law*, *supra*, note 45 at 239-252; P. Ellinger, "Electronic Funds Transfer as a Deferred Settlement System" in R.M. Goode, ed., *Electronic Banking: The Legal Implications* (London: Institute of Bankers & Centre for Commercial Law Studies, 1985)at 29-44; I. Walden, *EDI and the Law* (London: Bleinheim Online Ltd, 1989) Part 1 at 7-62 [Hereinafter, *EDI & The Law*]; B. Wright, "Authenticating EDI: The Location of a Trusted Recordkeeper" (1990) 6 Comp. L. & P. 80; C. Reed, "EDI - Contractual and Liability Issues"(1989) 6 Comp. L. & P. 36; S. Castell, "Evidence, Authorisation and Security: Is the Technology "Legally Reliable"?" (1989) 6 Comp. L. & P. 46; C.G. Miller, "Computer-Generated Evidence- Implications for the Corporate Computer User, Part 1" (1990) 6 Comp. L. & P. 178.

[86] See, B.S.Wheble & H. Konig, Foreword, ICC, *Uniform Rules for the Conduct of Trade by Teletransmission (UNCID Rules)* (Paris, ICC, 1988) at 4; see also, R.E. Wiley & R.M. Neustadt, "Electronic Funds Transfer: New Technology Needs New Law" (1982) National L.J. 28.

laws have been amended to reflect this new technology. In other less technologically endowed countries, the laws remain paper-oriented in nature and in keeping with their peculiar state of affairs. In these countries, electronic trade procedures are very much ahead of their laws.

Information technology challenges traditional legal concepts in many ways.[87] Although existing national legislations do not explicitly demand the use of paper, the terminology implies it. Most domestic statutes speak in terms of documents in writing and signed. Information technology applications on the other hand are paperless and cannot, for instance, be signed or authenticated in the same way as a paper transaction. Accordingly, an international electronic trade payment system must overcome a number of legal problems that arise from the paper-oriented laws of evidence of most countries. Unlike paper-based records, computer records are not trusted because they cannot be authenticated by signature or by the oral evidence of the compiler of the records.[88] An international electronic trade payment system must thus satisfy the evidential requirements of all legal systems if it is to completely supplant the existing largely paper-based system of payment in international trade.

An international electronic trade payment system also raises the question of when a contract, or say, an electronic credit, is entered into and concluded. The ability or inability of the existing legal regimes to determine the contractual issues that arise in such a system is equally key to its use and acceptance by the international trading community.

Relatively speaking, these legal impediments are not as difficult to overcome as their technological and political counterparts. Legal solutions can easily be found in legislative action propelled by commercial practice in the respective states in which users

---

[87] I. Walden, Introduction *EDI & The Law*, *supra*, note 85 at 1.

[88] R. Bradgate, "Evidential Issues of EDI" in *EDI & The Law*, *supra*, note 85, 9-42 at 9.

of the system operate. Legislative action at the international level, though more difficult, is also feasible.

The legal impediments to the installation of an international electronic trade payment system are analysed against the background of the legislations of a common law country. Perhaps, the most convenient starting point in this analysis is an examination of whether an electronic bill of exchange satisfies the formal requirements of a bill of exchange under the negotiable instruments laws of most countries. For convenience and by way of example, the formal requirements of a bill under the *Bills of Exchange Act (Nigeria) of 1917*[89] is adopted.

5.4.a. The formal Impediments to the Use of an Electronic Bill of Exchange.

By section 3(1) of the Act a bill of exchange must be an unconditional order in writing and signed by the person giving it. The requirements of writing and signature under the Act presents limited problems to the introduction of an electronic bill of exchange into national and international commercial practice. It has been submitted that the definition of a bill of exchange under the *Bills of Exchange Act (U.K.) of 1882*[90] is wide enough to cover an electronic bill of exchange.[91] This view is equally tenable under the Act because a purposive interpretation of section 2 of the Act and section 18 of the *Interpretation Act (Nigeria) of 1964* will lead to the conclusion that an electronically transmitted instrument is a written instrument and could thus be a bill of exchange if it satisfies all other formal requirements for a bill under the Act. Whilst section 2 of the Act merely defines writing to include print, section 18 of the *Interpretation Act* provides that "expressions referring to writing include printing, lithography, photography

---

[89] *Laws of the Federation of Nigeria, 1958, Cap. 21.* [Hereinafter, *The Act*]

[90] 45 & 46 Vict., c. 61 as amended. [Hereinafter, *BEA*]

[91] Ellinger, *supra*, note 85 at 39.

and other modes of reproducing words and figures in visible form."[92]

Similarly, the requirement of signature does not pose any serious practical problem. Conceptually, a signature involves the manual writing of the signatory's name on to a document.[93] An electronic bill of exchange cannot be signed in this way, but it could be signed or authenticated in such a manner that the essential elements of a signature are satisfied.[94] These essential elements are that some sign, symbol or mark unique to the signatory is affixed to the document with the intention of assenting or authenticating its contents.[95] An electronically transmitted instrument can thus be signed by encryption of the teletransmission.[96] In fact it has been held that a lithographed signature is sufficient to create a bill of exchange.[97]

It is submitted, however, that out of an abundance of caution and to avoid possible protracted litigation, it is prudent that national negotiable instrument laws be amended to accommodate electronic bills of exchange by making explicit provisions as to what constitutes writing and signature for the purposes of the legislations. The *United Nations Convention on International Bills of Exchange and International Promissory Notes*

---

[92] It has been rightly argued with respect to the *Interpretation Act (Canada) 1970* that by the use of the words in *visible form*, it may be possible to render a bill of exchange in electronic media so long as it is visible or may be rendered visible by the use of computer, see, B. Crawford, ed., *Crawford and Falconbridge: Banking and Bills of Exchange - A Treatise on the Law of Banks, Banking, Bills of Exchange and the Payment System in Canada*, 8th ed., Vol. 2, (Toronto: Canada Law Book Inc.,1986) at 1202. [Hereinafter, *Crawford and Falconbridge*]. See also, Ellinger, *ibid.*; Bradgate, *supra*, note 88 at 40, Reed, *supra*, note 85 particularly the authorities cited in n30.

[93] Bradgate, *ibid.* at 33.

[94] *Ibid.*

[95] *Ibid.*

[96] Rob Bradgate points out that a single encryption can provide either an electronic signature identifying the sender or security so that only the intended recipient can decode it, *ibid.* at 35.

[97] *Ex. p. Birmingham Banking Co.* (1868) L.R. 3 Ch. App. 651.

(CIBN) [98] appear to have done that in relation to signature,[99] although the UNCITRAL Working Group on International Payments decided to exclude electronic transmission or reproduction of written instruments from the Convention.[100]

A more serious practical impediment to the introduction of electronic bills of exchange in international trade is the question of negotiability of such an instrument. For an electronic bill of exchange to be negotiable it must be capable of being transferred by endorsement and delivery. It has to be presented for acceptance and/or payment and if dishonoured might have to be protested. An electronic bill of exchange cannot be put to these uses in the manner contemplated by the existing national and international negotiable instrument laws.[101] As Professor Ellinger points out an electronic bill of exchange must surmount four legal problems before it could replace traditional paper-based bill of exchange.[102] He identifies the first problem as the contractual nature of a bill, i.e., the fact that a bill is a string of contracts. The second is the transferability of the instrument which imbues the instrument with the quality of negotiability. The third problem is the possessory nature of a bill which makes it an item of property capable of ownership. The fourth and last problem emanate from the procedural aspects of the instrument,i.e., the presentment, acceptance and if need be the protest of a bill. Professor Ellinger further surmises that these problems can only be overcome by a suitable

---

[98] U.N. Doc. A/RES/43/165 (1989)

[99] Article 5(k) defines signature in terms comprehensive enough to encompass encryption and electronic authentication. The article provides that "a signature means a handwritten signature, its facsimile or an equivalent authentication by any other means."

[100] *Report of the Working Group on International Payments on the work of its Fourth Session*, U.N. Doc. A/CN.9/117 (1976) at para. 67.

[101] Ellinger, *supra*, note 85 at 39; see also, Bradgate, *supra*, note 88 at 40.

[102] Ellinger, *ibid.* at 40.

legislative amendment that permits the electronic processing of bills of exchange.[103] It is however submitted that such an amendment will only be forthcoming if commercial practice so dictates. Legislation should not be ahead of the needs of its users.

The creation of an international electronic trade payment system that admits of the teletransmission of instruments is bound to run into problems in jurisdictions where the national laws strain to construe electronic instruments as bills of exchange. This remains the position even if the *CIBN* is ratified by the requisite number of States.[104] Although the *CIBN* in some of its aspects reckon with electronic authentication and reproduction of bills of exchange, it was not drafted to accommodate the electronic transmission of instruments.

5.4.b. Some Evidential Issues Likely to Arise in an International Electronic Trade Payment System.

Most national laws of evidence are likely to pose serious obstacles to the development of an international electronic trade payment system.[105] An electronic trade payment system will reduce the volume of paperwork involved in effecting the payment of goods and services sold in international trade. Documents serve a wide range of purposes in the payment and financing of international trade. But of all the purposes, their evidential value appear to be the most valuable.[106] They record the terms of a particular aspect of the payment mechanism and in the event of a dispute could be used to show the

---

[103] *Ibid.* at 43.

[104] By article 89 of the Convention the ratification or accession of ten States are necessary for the *CIBN* to come into force. Only four States has signed or acceded to the Convention.

[105] Rowe, *Electronic Trade Payments*, *supra*, note 1 at 77. See also, J.E. Trapper, "Technical Solutions" in *EDI & The Law*, *supra*, note 85 97-113 at 107.

[106] Bradgate, *supra*, note 88 at 10.

performance or breach of the aspect called into question.[107] Documents thus provide security not only to parties to an international transaction but also to third parties who may rely upon them to commit themselves to the principal parties in a commercial transaction.[108]

Electronic trade procedures are paperless and thus cannot provide the high degree of evidential security provided by documentary procedures. However, if electronic trade procedures are to make any serious claims to commercial acceptance, they must be able to satisfy the evidential requirements of international trade.[109] How far the existing common law principles of evidence admit of electronic data will hereby be used to show some of the evidential issues that will face international traders in the use of a paperless system of payment.

5.4.b.i. Admissibility of Electronic Data.

It is a cardinal principle of the common law of evidence that evidence which is relevant either to the proof of a fact in issue, to the credibility of a witness or to the reliability of another evidence is admissible unless excluded by particular rules of law or statute.[110]

At common law, the main obstacle to the admissibility of electronic data is the hearsay rule which requires facts to be proved by the testimony of witnesses with

---

[107] *Ibid.*

[108] *Ibid.*

[109] *Ibid.*

[110] Bradgate, *ibid.* at 11; see generally, R. Cross & C. Tapper, eds., *Cross on Evidence* 7th ed., (London: Butterworths, 1990) Chapter XIV at 508-536; see also, T.A. Aguda, *The Law of Evidence in Nigeria*, 2nd ed. (London: Sweet & Maxwell, 1974) at 60.

personal knowledge of those facts.[111] Thus an output from a computer which is a record of data stored on the computer is prima facie hearsay.[112] The various exceptions to this rule and the different applications of the rule to criminal and civil trials need not detain us.[113] However, it may suffice to note that in the absence of a specific legislative or common law exception an electronic data may be hearsay.[114]

In some common law jurisdictions, specific legislative exceptions have been enacted to allow computer output to escape the hearsay rule and become legally admissible evidence. One such statutory exception is found in section 5 of the *Civil Evidence Act (U.K.) of 1968* (CEA)[115] which provides that "in any civil proceedings a statement contained in a document produced by a computer shall, subject to the rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible." For this provision to apply, the document must have been produced during a period over which the computer was used regularly, and information of the kind contained in the document or from which it is derived was over that period regularly supplied to the computer in the ordinary course of those activities.[116]

---

[111] Bradgate, *ibid.* at 12; Miller, *supra*, note 85 at 179. see also, R. Bradgate, "The Evidential Status of Computer Output and Communications" (1990) 6 Comp. L. & P. 142.

[112] Miller, *supra*, note 85 at 179; c.f. Bradgate, *ibid.* at 13 who notes that it is assumed that the rule against hearsay would normally exclude computer records of EDI transactions, but submits that this is not the case and that even where the rule appears to exclude such records a number exceptions to the hearsay rule are recognised at common law and more have been created by statute so that most documentary evidence, including that produced or stored in computers should now be admissible in civil and criminal proceedings.

[113] See, Bradgate, *ibid.* at 11-24 for these exceptions and their different applications to civil and criminal proceedings; see also, Miller. *ibid.*

[114] Bradgate, *ibid.* at 13; Miller, *ibid.* at 179.

[115] (17 *Statutes* 155). Cross, *supra*, note 110 at 538 notes the provisions of this Statute as a specific exception to the hearsay rule.

[116] s.5(2).

Furthermore by section 5(3) of the same CEA the "combination of computers" and "different computers operating in succession" in the storing and processing of information are treated as one for the purposes of the Act. Accordingly, electronic data from a value added network such as SWIFT is covered by this provision[117] and though when transmitted to the computer of an entity such evidence is legally hearsay, it is admissible by virtue of the provisions of this section.[118]

In the absence of such specific legislative exception to the hearsay rule, it may be difficult to ascertain when computer-generated data is legally admissible or hearsay.[119] Legislative action in most States is necessary if electronic trade payment data is to be readily admissible in evidence as proof of aspects of a paperless payment transaction.[120]

Apart from the problems likely to be presented by the hearsay rule to the admissibility of electronic data, another obstacle exists in the form of the "best evidence rule".[121] This rule prohibits the use of copies of an original as evidence. A party who wishes to put in evidence the contents of a document is enjoined to produce to the court the best evidence of the document and the best evidence of a document is the document itself and not a copy thereof.[122]

With particular reference to trade payments, the best evidence of a banking transaction is, for example by virtue of the *Bankers' Book Evidence Act (U.K.) of 1879*

---

[117] Bradgate, *supra*, note 88 at 19; Walden, *supra*, note 85 at 107.

[118] Bradgate, *ibid.*

[119] Miller, *supra*, note 85 at 179; Bradgate, *ibid.*

[120] Trapper, *supra*, note 105 at 107.

[121] Bradgate, *supra*, note 88 at 24.

[122] See, Cross, *supra*, note 110 at 680.

(BBEA)[123] the record of it in the bank's original book of account. In order to remove the obvious difficulties that are likely to result from requiring a bank to produce its original book in court whenever a transaction was in issue, the BBEA allows transactions to be proved by any ledgers, daily books, cash books and all other books used in the ordinary course of business of the bank.[124] In the United Kingdom, this proviso has been extended to cover modern electronic banking practices by the addition of the words "whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism."[125] By contrast, in LDCs with a common law heritage, the requirements of a banker's book remain as in the *BBEA*;[126] although judicial interpretation has mellowed the strict application of the Act, it has not been to the extent that an electronic data retrieval mechanism is a bankers' book.[127]

Generally, the application of the best evidence rule raises two problems in relation to electronically generated data.[128] The first problem relates to the storage on magnetic media, of data originally on paper.[129] The best evidence in this case is the paper and unless it is proved that the paper has been destroyed in the ordinary course of business,

---

[123] (17 *Statutes* 103) as amended.[Hereinafter, *BBEA*]

[124] ss.4 & 5 BBEA.

[125] *Banking Act, 1979* (4 *Statutes* 457) Sch. 6. See, Cross, *supra*, note 110 at 688-689.

[126] The *Bankers Books Evidence Act (U.K.) of 1879* being a statute in force in England on the first day of January 1900 is a Statute of General Application in Nigeria.On this point, see, s.45 of the *Interpretation Act (Nigeria)*, 1958.

[127] For the judicial relaxation of the rigours of this Statute in Nigeria, see, *Ibrahim Khalil Yassin v. Barclays Bank D.C.O.* (1968) N.M.L.R. at 380; see also, *The State v. David Olomo* (1970) S.C.N. 170.

[128] Bradgate, *supra*, note 88 at 25.

[129] *Ibid.*

the computer-stored data is legally inadmissible.[130] The second problem relates to the time of making computer print outs.[131] Most legal systems admit of computer print outs made specifically for court proceedings.[132] However, a computer print out produced a long period of time after the event to which it relates for use in court proceedings may be of weak probative value[133] and thus its accuracy may be easily challenged.[134] Testimony as to the accuracy of the stored data and to the fact that it has not undergone any alteration is in such circumstances essential.[135]

The application of the general common law principles of admissibility of evidence shows that the admissibility of electronic data generated from an international electronic trade payment system depends on the existence of national laws of evidence and a judicial system that is receptive to the nature of electronic trade data. The situation in most countries, especially the LDCs, is unfortunately not this receptive and thus presents potential impediments for the use of electronic trade payment systems in such countries.

It should however be noted that the *UNCITRAL Report on the Legal Value of Computer Records* [136] reached two important conclusions. The first is that "there are no serious problems arising out of the rules regarding the use of computer records as evidence in litigation that should impede the general use of automated data-processing

---

[130] *Ibid.*

[131] Bradgate, *ibid.*; Rowe, *Electronic Trade Payments*, *supra*, note 1 at 82.

[132] Rowe, *Electronic Trade Payments*, *ibid.*

[133] Bradgate, *supra*, note 88 at 25; Rowe, *Electronic Trade Payments*, *ibid.*

[134] Bradgate, *ibid.*

[135] Bradgate, *ibid.*

[136] U.N. Doc. No. A/CN.9/265 (1985). See, para 82 for these conclusions. See also, E.E. Bergstein, "Introduction to the Legal Value of Computer Records" (1985) 1 Comp. L. & P. 205.

including the teletransmission of documents in international trade and for customs clearance".[137] The second is that "legal provisions requiring particular documents to be in writing or to be signed in a manual or equivalent manner are a substantial impediment to the full use of automated data processing in many countries".[138]

5.4.b.ii Authenticity, Weight and Probative Value of Electronic Data.

As discussed earlier in relation to electronic bills of exchange, the authenticity of electronic data may be achieved by its encryption.[139] However, in circumstances where there are specific legislative requirements for written signatures, doubts may arise as to the authenticity of an electronic data which is not signed in the traditional manner.[140] This raises the issue of proof of computer-generated data.

At common law, proof of a sale transaction, for example is established if the party alleging it shows that the order was placed and that it was placed by the party charged.[141] In an electronic environment, there may be no human intervention in the transaction and as such the transaction cannot be proven in the same way as a paper transaction.[142] In such circumstances, the electronic data generated is the only proof of the transaction and unless it satisfies the requirements of admissibility it will be excluded.[143]

However, even if such a computer record is admitted in evidence, the weight that

---

[137] Bergstein, *ibid.*

[138] *Ibid.*

[139] Bradgate, *supra*, note 88 at 32.

[140] *Ibid.*

[141] Bradgate, *ibid.* at 10.

[142] *Ibid.*

[143] *Ibid.*

may be attached to it as the sole evidence of a transaction is likely to be weak.[144] The fact that computer evidence is readily susceptible to both deliberate and accidental alterations, which may be impossible to trace, may be responsible for the low probative value accorded to such evidence.[145] The reliability of computer evidence in the largely paper-oriented legal regime of most States is thus in the main responsible for the judicial attitude.[146] The weight and probative value of any evidence is a function of how reliable the source of the information is.[147] The computer remains a judicially unreliable source of information and until there is a change in public confidence, courts in most jurisdictions will continue to be sceptical of computer generated evidence.[148] This is a major impediment to the development of an international electronic trade payment system.

5.4.c. Some Contractual Issues Likely to Arise in an International Electronic Trade Payment System.

An international electronic trade payment system will involve several contractual relationships. For example, the usual four underlying contracts in a documentary credit arrangement must be replicated in an electronic credit arrangement.[149] The existence of these electronically created contractual relationships will challenge traditional principles of contract. For example, it raises the question of how, where and when the contract between the importer/applicant and the issuing bank is made.

---

[144] *Ibid.*

[145] Bradgate, *ibid.* at 42; Miller, *supra*, note 85 at 182.

[146] Bradgate, *ibid.*

[147] Miller, *supra*, note 85 at 182-183; Bradgate, *ibid.*

[148] Bradgate, *ibid.*

[149] The four contracts are: (1) The contract between the exporter and the importer; (2) The contract between the issuing bank and the applicant/importer; (3) The contract between the issuing bank and the advising or confirming bank; and (4) The contract between the advising or the confirming bank and the exporter/beneficiary.

In order to have a legally enforceable contract, the traditional contract requirements of offer, acceptance, consideration and an intention to enter into legal relations must be satisfied. In the context of electronic trade payments, it has been held in *Entores Ltd. v. Miles Far East Corporation*[150] that an electronic communication could be the basis of an offer and acceptance. In that case, it was held that the instantaneous nature of electronic communication means that acceptance of a contract occurs when the message is received. However, where the message is sent instantaneously and the recipient is not at a suitable terminal to receive it at that instant, problems may arise as to when the offer was made and accepted.[151] This becomes particularly important for the purposes of determining whether an offer is still revocable and in determining where and when a contract was made.[152] The place of making a contract is a crucial consideration in determining the governing law of the transaction in the absence of an express choice of law by the parties.[153] Furthermore, the quantum of damages may depend on the length of time which has elapsed since the obligation arose.[154]

There seems to be no practical difficulty in relation to the contractual requirement of consideration.[155] However as an international electronic trade payment system will involve importers, exporters, banks, carriers and insurers spread across national boundaries

---

[150] [1955] 2 Q.B. 327; see also, *Brinkinbon Ltd. v. Stahl und Stahlwarenhanelsgesellschaft* [1982] 2 W.L.R. 264.

[151] Walden, *supra*, note 84 at 107.

[152] C.J. Millard, "Contractual Issues of EDI" in *EDI & The Law*, *supra*, note 85, 43-48 at 44; see also, Reed, *supra*, note 85 at 38.

[153] Millard, *ibid.*; Reed, *ibid.* at 38.

[154] Millard, *ibid.*

[155] *Ibid.*

there are bound to be jurisdictional problems.[156] Most of these contractual issues will perhaps be taken care of by the increasing use of interchange agreements and the development by the International Chamber of Commerce (ICC) of the *Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (UNCID Rules).*[157]

As regards the form of contracts, it seems that apart from bills of exchange, there are no statutory requirements as to form in relation to EDI applications to international trade payment.[158] However, where such requirements exist it seems that the extent to which the requirement could be met by electronic means is dependent on the wording of the statutory requirement.

Generally, the contractual problems likely to arise in an international electronic trade payment system are not serious impediments to the use of such a system.[159] However, the problems must be taken into consideration in any assessment of the legal environment into which a sophisticated electronic system is sought to be introduced.

5.4.d. Legal Solutions.

As earlier stated, of all the impediments to the development of an international electronic trade payment system, the legal appear to be the easiest to overcome. Legal solutions in the form of legislative action at both the national and international level is feasible for all the legal aspects of EDI.[160] Legislative action by way of amendment to the various national laws on negotiable instruments, evidence and contract is fundamental

---

[156] Walden, *supra*, note 84 at 108.

[157] ICC Publication No.452 of 1988; On this point, see, Walden, *ibid.*

[158] For a general analysis of the requirements if form in contracts and contractual issues raised in EDI,see, Millard, *supra*, note 151 at 46-48; see also, Reed, *supra*, note 85 at 39-40.

[159] Reed, *ibid.* at 39.

[160] I. Walden, "Introduction" *EDI & The Law supra*, note 85, 1-3 at 3.

to the development and successful installation of this system.[161] In the absence of such amendments, an international electronic trade payment system will run into serious problems. It is for this reason that the *UNCITRAL Report on the Legal Value of Computer records* called on "governments and international organisations elaborating legal texts related to trade to review the existing legal rules with a view to permitting, where appropriate, the use of computers and automated data processing in the preparation, transmission and storage of trade documentation".[162]

International efforts at legislation have been successful in most areas of EDI. An international messaging standard has been established in the form of the *United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT)* and the *UNCID Rules*. The *UNCITRAL Model Law on International Credit Transfers* has been adopted by the Commission which has also recommended it to States for adoption as national laws. However attempts to unify national laws of evidence may face serious difficulties. It is partly for this reason that the *UNCITRAL Report on the Legal Value of Computer Records* concluded that there is no need for unification of the rules relating to the admissibility of computer generated data.[163] It is submitted that this conclusion is right and that what is needed at this stage is the amendment of local laws of evidence to reflect the incidence of computer records. It is further submitted that, until these amendments are put in place, any attempt to introduce an international electronic trade payment system will face considerable difficulties not only in terms of acceptance but also in the utilisation of the system.

For these and other reasons given in this chapter a case can be made for the

---

[161] *Ibid.*

[162] *Supra*, note 136 at para. 82.

[163] *Supra*, note 134 at para. 82

continued relevance of the bill of exchange and paper instruments, of which it is an integral part of, in the payment and financing of international trade.

CHAPTER SIX

GENERAL CONCLUSIONS AND RECOMMENDATIONS: A CASE FOR THE CONTINUED RELEVANCE OF THE BILL OF EXCHANGE IN INTERNATIONAL TRADE.

6.1. Conclusions.

This thesis has broadly, but critically, appraised the continued relevance of bills of exchange (including paper-based instruments of which it is an essential aspect of) to an international trading community that is increasingly relying on electronic banking techniques in the payment and perhaps financing of their trade. This thesis has also examined in some great detail the unique aspects of the bill which permits its use in varying situations for the payment and financing of export trade. This broad analysis has in several ways shown that the increasing reliance on electronic banking techniques by traders from the developed countries of the world threatens the continued use of paper-based bills of exchange in international trade. It has also been shown that there are several practical impediments to the development of an international electronic trade payment system. Accordingly, nothing now remains but to generally conclude this thesis.

Two main conclusions can be drawn from this broad analysis. The first is that the bill is still very much relevant to modern-day international trade as its original functions - the avoidance of the inherently risky physical transportation of money and the need for a payment and financing instrument - cannot be fully replaced by electronic banking techniques. The second and perhaps the more profound of the two conclusions, is that the application of information technology to the payment aspects of international trade has meant a division of the international trading community into two undefined technological

lines, one part relying largely on electronic means and the other part relying almost entirely on paper instruments in the payment of their international trade. These two themes require some elucidation.

6.1.a. The Continued Relevance of Bills of Exchange to the Payment and Financing Needs of International Trade.

The unique aspects of the bill permits it to serves the needs of international traders in the payment and financing of their business in ways in which no other instrument can attempt to rival. A few examples will suffice. The bill continue to play a fundamental role in the very facilitative financing arrangement of *forfaiting* which is widely accepted by traders from both sides of the international trading community as a most reliable all-purpose financing scheme.[1] The bill also continues to be the bedrock of the documentary credit procedure which is perhaps universally acknowledged as the most efficacious mode of payment and financing in present-day international trade.[2]

The bill, even, forms an essential part of the various electronic modifications of the popular payment and financing arrangements. For instance, the bill assumes a fundamental position in the electronic variants of the documentary credit and collection

---

[1] On the acceptance of *Forfaiting* in the developed countries, see, C.J. Gmur, "*Forfaiting*"in C.J. Gmur, ED., *Trade Financing* 1st ed. (London: Euromoney Publications, 1981) 117 -132; H. Jaeger, "Export Factoring and Forfaiting" in N. Horn, ed., *The Law of International Trade Finance* (Deventer/Boston: Kluwer Law and Taxation Publishers, 1989) 243-257; R. Scallon. "Forfaiting" in M. Knight et al eds., *Export Finance* 3rd ed., (London: Euromoney Publications, 1988) 193-204. On its acceptance by LDCs, see, Multinational Strategies Inc., *Feasibility Study for an Interregional Trade Financing Facility For the Exports of Non- Traditional Goods of Developing Countries*, UN. Doc. No. UNCTAD/ TD/B/1300/Supp.2 (1991) at 27.

[2] On this point, see, C.M. Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade* 9th ed., (London: Stevens & Sons, 1990) at 400; see also, M. Rowe, *Electronic Trade Payments: A Practical Guide to Electronic Banking and International Trade* (London: International Business Communications Ltd, 1987) at 4.

procedures.[3] Despite the development of international electronic trade payment mechanisms, such as SWIFT, the bill remains a dominant facilitative instrument in these partly electronic payment and financing arrangements. In these semi-electronic procedures, the bill continue to be used for the more important function of financing the underlying transaction and obligating the importer to pay at an agreed future date.[4] It is only when the time for payment comes, that international electronic funds transfer systems are used for the sole purpose of remitting the proceeds of the bill to the exporter.[5] This is so because all the electronic systems currently in use in international trade exist solely for the transfer of funds from party to party at high speed.[6] None of them is designed to facilitate the financing of the export trade.[7] Reliance therefore continue to be placed on bills and other paper negotiable instruments for export trade financing. Trade financing for the small and medium-size trader, even, in the largely electronic trading environment of the developed countries, is therefore usually structured to ensure the ready financing of the underlying export transaction using paper negotiable instruments, but immediately the paper instrument is honoured by payment, electronic means are then used to remit the

---

[3] See, Rowe, *ibid.* at 138, 142 & 156.

[4] *Ibid.* at 142.

[5] Rowe, *ibid* at 142.

[6] B. Crawford, "The UNCITRAL Model Law on International Credit Transfers" [Unpublished] A Paper Presented to an international Trade Law Conference at Canberra, Australia on October 18-19 1991 at 2. [Hereinafter, Crawford, International Credit Transfers]

[7] See, Crawford, International Credit Transfers, *ibid.*; see also, E.P. Ellinger, "Electronic Funds Transfer As A Deferred Settlement System" in R.M. Goode, ed., *Electronic Banking: The Legal Implications* (London: The Institute of Bankers/Centre for Commercial Law Studies, 1985) 39-43.

proceeds of the transaction.[8] The negotiable character of the bill which lends it easily to the financing of international trade cannot effectively be replicated in electronic form.

The bill and instruments based on it, thus remain relevant to the payment and financing needs of the international trading community and even in the unlikely event of the development of an international electronic trade system, the bill will continue to be relevant, if not to the payment needs, at least to the financing needs of all international traders.

6.1.ii. The Principle of Functional Co-existence as a Justification for the Continued Relevance of Bills of Exchange in International Trade.

In addition to the above-stated reasons for the relevance of the bill in international trade, there is an underlying principle in the history of representative money which lends support to a case for the continued relevance of the bill in international trade. This is the principle of functional co-existence.[9]

This principle is evident in the fact that all through the evolution of the various forms of representative money, new means of payment have never totally, if at all, replaced the old ones.[10] Barter is still very much in use in international trade as a form of counter trade.[11] Gold, silver and other precious stones are still measures of value and

---

[8] See, Crawford, International Credit Transfers, *supra*, note 6 at 1-2; see also, A. Arora, "Future Developments in Money Transfers" (1981) Lloyds Mar. & Comm. L.Q. at 56.

[9] Y. Valcin, ed., *Electronic Banking in Canada: Posturing The Players*, (Quebec, Centre for Research and Analysis on Electronic Money, 1988) at 17.

[10] *Ibid.* at 18.

[11] For a fairly recent analysis of the use of Barter in modern international trade, see, S.C. Carey & S.A. Mclean, "The United States, Countertrade and Third World Trade" (1986) 20 J.W.T.L 441.

media of exchange in international trade. Similarly, coins, bank notes and international cheques are still in use and will continue to be used international trade. The only threat these non-electronic payment mechanisms face is perhaps, that with time, less and less of them will be used in the payment of goods and services sold in international trade.

However, the unique features of the bill of exchange which is reflected in its ability to operate simultaneously as a payment and financing mechanism ensures that, in accordance with the principle of functional co-existence, it remains a functional part of international trade payment and financing, if not for all international traders, at least for traders from States where technological incapacity makes it impracticable for them to adopt electronic trade payment procedures. Relying on this time-tested principle, it could thus be argued that, contrary to the hoped for international cashless society, the international payment and financing system will rather be half documents and half electronic. Practical considerations of the existing state of affairs in the international trading community supports this position. This brings us to the second main conclusion of this thesis.

6.1.b. The Existence of Paper and Electronic Systems of Payment in International Trade and Its Possible Implications for World Trade.

The technological conditions propitious for the development and use of electronic funds transfer systems exist in the developed countries and not in the less-developed countries. As has been shown above, for a variety of reasons the technological infrastructures necessary to support the operation of electronic funds transfer systems are

absent in most LDCs.[12] In the technologically unsophisticated environment of LDCs payment for goods and services sold in international trade continue to be made using mainly paper-based payment instruments. In fact a recent *United Nations Conference on Trade and Development (UNCTAD)* survey show that LDCs effect the payment and financing of their international trade using mainly cash and sight instruments such as cheques and bankers' drafts.[13] Although no precise figures are available, it is estimated that 50 percent of payments in trade with LDCs are made using the documentary credit procedure.[14]

Due to considerations of cost and the fact of the low value of the payment obligations of most international traders from LDCs, very few banks[15] operating from LDCs offer, on an on-going basis, services for the electronic transmission of financial messages. Accordingly traders from LDCs rarely make use of electronic modes of international payment such as SWIFT for the remittance of funds to exporters from the

[12] The economies of most LDCs are beset with problems of high population growth, low levels of investment and savings, inefficient allocation of resources, weak institutional capacity and a general decline in standards of living and income which make it difficult for them to afford the technological infrastructures necessary for the use of Electronic Funds Transfer systems, see,The World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, (Washington D.C.: The World Bank, 1989) at 30. [Hereinafter, *From Crisis to Sustainable Growth*].

[13] See *Trade financing in Developing Countries: An Assessment and Evaluation of Existing Schemes and Future Requirements*, UN. Doc. TD/B/1300/Supp.1 (1991) at para. 61.[Hereinafter, *Trade Financing in Developing Countries*].

[14] Rowe, *Electronic Trade Payments, supra*, note 2 at 4.

[15] In fact the services are offered only by those banks with strong international connections arising from their affiliation with banks in developed countries and in some cases from the fact of a parent-subsidiary relationship between them and banks in developed countries.

developed countries.[16] However, where payment is agreed to be made using either the documentary collection procedure or the documentary credit procedure, the traditional paper-based procedures are adopted because the absence of the technological capability necessary to apply EDI procedures make impracticable the adoption by traders and bankers from LDCs, of electronic variants of the traditional payment procedures. As Michael Rowe succinctly puts it, "to make electronic trade payments work, banks at both ends of the operation has (sic) to be kitted out with the necessary technology".[17]

There thus exist two, albeit, undefined systems of payment for goods and services sold in international trade. One system is largely electronic and operates mostly in trade between developed countries and in isolated cases between traders from the LDCs and traders from the developed countries. The other system is largely paper-based and operates mostly between traders from the LDCs themselves, between traders from LDCs and traders from the developed countries and to an increasingly lesser extent between traders from the developed countries themselves. For example, South-East Asia is an example of one region of the world that combines a traditional reliance on paper-based payment systems with an advanced technological infrastructure.[18]

What are the likely implications of this trend towards a paperless international

---

[16] Statistics from SWIFT Secretariat in La Hulpe, Belgium show that only 7 African countries (Cote d'Ivoire, Algeria, Morocco, Muritus, Tunisia, Namibia, and South Africa) are connected to the network and that presently the society is in the process of preparing a connection for Madagascar, Botswana and Lesotho. The same source also point out that compared to the number of users within the SWIFT community the volume of traffic/messages sent and received by banks from LDCs is marginal.

[17] *Electronic Trade Payments, supra*, supra, note 2 at 4. Michael Rowe further points out, at 128, that if documentary payment procedures go electronic they rely on sophisticated electronic networks for their operation which cannot be supported by the poor technological infrastructures of LDCs.

[18] *Ibid.*

trade for countries that lack the technological infrastructure to support the operation of electronic trading systems ?. Will the development of a system of paperless international trade have a negative impact on trade relations between the LDCs and the developed countries? The answers to this question in the absence of any verifiable or empirical data are not easily ascertainable. However, there is evidence to support the fact that traders from developed countries are reluctant to do business with traders from countries that cannot, as it is said in business circles, "do EDI". For this reason, a 1988 *United Nations Conference on Trade and Development (UNCTAD) Report on Issues Involved in Trade in Information Services* submits that electronic Data Interchange (EDI) of customs documents such as bills of lading may be essential in maintaining market shares, as importers may be reluctant to deal with suppliers not possessing such capacities.[19] How far this reluctance will affect the balance of trade between countries that can do EDI and those that cannot do EDI remains to be seen. But it is not be too farfetched to suggest that this reluctance will have serious negative implications for the international trade competitiveness of LDCs. This is, however, not to suggest that where a trader from a developed country has no alternative market for the sale or purchase of certain goods, it will avoid an available source for the "scarce" good solely because that trader operates from a country that cannot do EDI. Nothing can be farther from the truth than this. The fact of the matter is that the international trade competitiveness of states is no longer

---

[19] *Report by UNCTAD Secretariat on Issues Raised in the Context of Trade in Services*, UN. Doc. No. TD/B/1197 (1988) at para. 50.n38.[Hereinafter, *Trade in Services*].

determined by inherited natural advantages but by their relative technological capabilities.[20] The ability to maintain trading links and accordingly a state's share of the world market depends now more than ever on the State's ability to offer technologically fast and efficient modes of doing business (including payment) with all regions of the world.[21] In this regard, LDCs who, because of their very weak economies, cannot provide this technology are in a most vulnerable position. The lack of technological capability necessary to do EDI by LDCs is perhaps the strongest reason why the elimination of the bill as an instrument of trade and its replacement by a fully computerised and technologically sophisticated payment and financing system which is truly international (in the sense of being capable of application and utilization by traders from all regions of the world) cannot be attained in the very near future.

6.2. Recommendations

In a work of this nature a number of recommendations are apt for its conclusion. The first recommendation of this study is that, as the bill of exchange has been shown to be of continued relevance to modern-day international trade, the *United Nations Convention on International Bills of Exchange and International Promissory Notes*[22] must be urgently ratified by States so that the use of the instrument will be against the background of a sound but uniform legal regime. In this wise, it is particularly sad to note that LDCs who stand to benefit most by the coming into force of this Convention has not ratified

---

[20] See, UNCTAD, *Technological Change in Services and International Trade Competitiveness*, UN Doc. No. UNCTAD/ITP/TEC/29 (1991)

[21] *Ibid.*

[22] U.N. Doc. A/RES/43/165 (1989).

it in sufficient number to achieve that beneficial end.[23]

The second recommendation of this thesis is that if an international electronic trade payment system is ever to be established and used by traders from all parts of the world, assistance must be given to LDCs to enable them acquire or develop the technological capability necessary for participation in the system.[24] The absence of the technological capability in some regions of the world has the effect of depriving all countries of the benefits of the less costly and more efficient electronic trade payment procedures.[25]

It cannot be assumed that the inability of some states to use these efficient procedures is simply a regional affair which will not affect the rest of the international trading community. affects the entire world economy. The attendant high cost of transacting business with traders from some regions of the world will affect every trader that has cause to do business with them.

If appropriate international impetus is therefore mustered in this area, advanced computer and telecommunications technologies could be made to benefit all trading

---

[23] Of the four States that has ratified the Convention, Guinea is the only LDC. The Convention requires the ratification of only 10 states to come into force, see, *Status of Conventions-Note by the UNCITRAL Secretariat* U.N. Doc. A/CN.9/353 (1991).

[24] See, *Accelerating the Development Process: Challenges for National and International Policies in the 1990s (Report by the Secretary-General of the United Nations Conference on Trade and Development to the Eighth Session of the Conference)* U.N. Doc. No. TD/354.Rev.1 (1992); U.N. Sales No. E.91.II.D.17 at paras. 236-247 [Hereinafter, *Accelerating the Development Process*); see also; *UNCTAD VIII Analytical Report by the UNCTAD Secretariat to the Eight Session of the Conference*, U.N. Doc. TD/358 (1992), U.N. Sales No. E.92.II.D.3 at paras. 610-624 [Hereinafter, *UNCTAD VIII Analytical Report*].

[25] See, *Accelerating the Development Process, ibid.* at para.19.

partners.[26] If these technologies are combined with the relatively low cost of skilled labour in LDCs, new areas of economic activity will be opened up for these less privileged members of the international trading community.[27] The end result of this trend will be the improved performance of their economies, their better ability to meet their obligations to their developed country creditors and ultimately a general improvement on the present poor state of the world economy.[28]

Solving the problems of technological incapability in LDCs is perhaps the best route to their economic development.[29] Improved access to technology on concessional terms is therefore vital.[30] Greater assistance by developed countries to research and development and in the strengthening of technological training and research institutions in LDCs is equally fundamental.[31] Increased technology flows, through foreign direct investment, imports of machinery and equipment must also be intensified.[32]

In sum, without a serious commitment to the technological development of LDCs by the developed countries, traditional, costly and inefficient procedures must as of necessity continue to be adopted by all parties that wish to trade with them.

---

[26] *Ibid.*

[27] *Ibid.*

[28] *Ibid.*

[29] See, *Accelerating the Development Process, ibid.* at para. 19; see also, *UNCTAD VIII Analytical Report supra*, note 24 at para. 624.

[30] *Accelerating the Process of Development Ibid.* at para. 22.

[31] *Ibid.*

[32] *Ibid.*

The third recommendation of this thesis is that, although the assistance of developed countries to LDCs for the improvement of their technological capabilities seem imperative, the LDCs themselves must seek ways to improve their technological capability. It cannot be denied that, with better and sustained commitment on the part of the political elites in most LDCs, sound basic technology development policies could be put in place. Due to corruption and the very selfish attitude of political leaders in most LDCs, their countries continue to suffer despite the abundance of natural resources. The ability of political leaders in LDCs to lead by examples and become genuinely interested in the development of their societies is equally key to their technological development and *a fortiori* economic development. As the analytical report of the UNCTAD secretariat to the eight session of the Conference noted: "Good governance is essential for economic and social progress for all countries."[33]

LDCs should also realise that their success in international trade lie very much in their ability to intensify economic cooperation amongst themselves. There is no doubt that strong economic co-operation amongst LDCs will promote economic growth, technological capabilities and accelerate their development in the world.[34] Co-operation amongst LDCs could enable them to exploit more effectively the latent complementarities in their economies, gain access to additional resources and knowledge and enhance the negotiating weight necessary to advance their common interests.[35] Certainly, this would expand

---

[33] *UNCTAD VIII Analytical Report, supra*, note 20 at para. 160.

[34] *Accelerating the Development Process, supra*, note 20 at para. 20.

[35] *Ibid.*

trading opportunities and make for a fuller mobilization of their resources which in itself could be a major stimulus to worldwide economic growth. In the context of the development of an international electronic trading system, strong trading co-operation will mean that LDCs will trade amongst themselves using procedures which their level of technological development could sustain. In this wise the bill and all other paper-based instruments of international trade will continue to be used in the payment and financing of intra-LDC-trade .

On a final note, given the existing technological inequality between members of the international trading community this thesis calls for a re-assessment of the clamour for the complete dematerialisation of the international trading system. It is however not been suggested that progress be sacrificed in order to accommodate all parties. But it must be realised that what affects one segment of the international community invariably affects the others. The international trading community cannot afford to ignore the backwardness of some of its parts. A lot can be said for the marginalization of a large chunk of mankind due to their technological inefficiency. It should be borne in mind that despite the decreasing relevance of their prime exports, LDCs continue to represent a potentially large market which, with adequate infrastructures, will be in a position to contribute in no small measure to world production. International efforts are therefore necessary to kit out these less technologically endowed members of the international trading community with the necessary technologies to use the more efficient and robust electronic trade procedures. The extent to which this is done will determine how soon LDCs will be in a position to participate fully in an international electronic trading system

and their ability to participate will no doubt be to the benefit of all trading parties. Until this difficult, but attainable, objective is realised, the bill of exchange and payment and financing mechanisms of which it is an integral part of, will continue to be relevant in international trade , if not for ever, at least for many years to come.

SELECT BIBILIOGRAPHY.

Books and Monographs.

Aguda, T.A., *The Law of Evidence in Nigeria*, 2nd ed. (London: Sweet & Maxwell, 1974).

Baker D.I. and Brandel, R.E, *The Law of Electronic Funds Transfer*, 2nd ed., (Boston/New York: Warren, Gorham & Lamont, Inc, 1988) with 1991 Cumulative Supplement No. 2.

Baxter, I.F.G., *International Banking and Finance*, (Toronto: Carswell, 1989).

Bequai, A., *The Cashless Society: EFTS at the Crossroads* (New York: John Wiley & Sons, 1981).

Bewes, W.A., *The Romance of the Law Merchant (1923)* (London/Littleton, Colorado: Sweet & Maxwell/Rothman & Co, 1986).

Bocock, P. & Cortes M., *North-South Technology Transfer: A Case Study of Petro chemicals in Latin America*, (Baltimore/London: World Bank/John Hopkins University Press, 1985).

Castel, J.G., deMestral, A.L.C., Graham, W.C., *The Canadian Law and Practice of International Trade with Particular Emphasis on Export and Import of Goods and Services*,(Toronto: Emond Montgomery Publications, 1991).

Cheng, C., ed., *Clive M. Schmitthoff's Select Essays on International Trade Law*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers/Granham & Trotman, 1988)

Chudson, W., *The International Transfer of Technology to Developing Countries*, (New

York: UNITAR, 1971).

Collins, L., ed., *Dicey and Morris on Conflict of Laws*, 11th ed.,(London: Stevens & Sons Ltd, 1987).

Crawford, B. ed., *Crawford and Falconbridge: Banking and Bills of Exchange - A treatise on the Law of Banks, Banking, Bills of Exchange and the Payment System in Canada*, 8th ed., Vol. 2. (Toronto: Canada Law Book Inc, 1986).

Cross R. & Tapper, C. eds., *Cross on Evidence* 7th ed., (London: Butterworths, 1990).

Edwards, C. Savage N. & Walden, I., *Information Technology & The Law*, 2nd ed. (United Kingdom: Macmillan Publishers Ltd.,1990).

Ellinger, E. P., *Documentary Letters of Credit: A Comparative Study* (University of Singapore Press, 1970).

Encyclopedia Britannica Vol.21 15th ed. (Chicago: Encyclopedia Britannica Inc., 19 85).

German International Institute for Legal and Administrative Terminology, *Infor mation Technology* (Berlin, Germany: Carl Heymanns Verlag KG, 1990).

Gillett Brothers Ltd., *The Bill On London*, 3rd ed.(London: Chapman & Hall, 1964).

Guest, A.G., ed., *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes*, 14th ed., (London: Sweet and Maxwell, 1991).

Guest, A.G., et al eds., *Benjamin's Sale of Goods*, 3rd ed., (London: Sweet and Maxwell, 1987).

Gutteridge H.C. and Megrah, M., *The Law of Bankers' Commercial Credits*, 7th ed., (Lo- ndon: Europa Publications Ltd., 1984).

Halsbury's Laws of England, 4th ed., Vol.4. (London:Butterworths, 1973).

Hapgood, M., *Paget's Law of Banking*, 10th ed., (London & Edinburgh: Butterworths, 1989).

Holden, J.M., *History of Negotiable Instruments in English Law* (London: The Athlone Press, 1955).

Holdsworth, W.S., *History of English Law*, Vol.8, 2nd ed.,(London: Methuen & Co, 1925).

International Chamber of Commerce (ICC), *UCP 1974/1983 Revisions Compared and Explained-Documentary Credits*, (Paris: ICC Publishing S.A., 1984).

Kurkela M., *Letters of Credit Under International Trade Law: UCC, UCP and Law Merchant* (New York/London/Rome: Oceana Publications Inc., 1985).

Mann, F.A., *The Legal Aspects of Money With Special Reference to Comparative Private Law and Public International Law*, 4th ed., (Oxford: Clarendon Press, 1982).

McLoughin, J., *Introduction to Negotiable Instruments* (London: Butterworths, 1975).

Nigerian Telecommunications Limited (NITEL) Corporate Plan 1991-2000.(Lagos, Nigeria: NITEL, 1991).

Nussbaum, A., *Money in the Law National and International: A Comparative Study in the borderline of Law and Economics* (Brooklyn, New York: Foundation Press, Inc., 1950).

Oppenheim, P.K., *International Banking*, 4th ed., (Washington, D.C.: American Bankers Association, 1983).

Rowe, M., *Electronic Trade Payments: A Practical Guide to Electronic Banking and International Trade* (London: International Business Communications Ltd., 1987)

--------- *Letters Of Credit* (London: Euromoney Publications, 1985).

Ryder F. & Bueno A., eds., *Byles on Bills of Exchange: The Law of Bills of Exchange, Promissory Notes, Bank Notes and Cheques*, 26th ed.(London: Sweet & Maxwell, 1988).

Sarna, L., *Letters of Credit: The Law and Current Practice*, 3rd ed., (Toronto: Carswell, 1989).

Sarpkaya, S., *International Finance in a Canadian Context*, 2nd ed., (Don Mills, Ontario: CCH Canadian Ltd., 1989).

Schmitthoff, C. M., *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 9th ed., (London: Stevens & Sons, 1990) at 379.

Smout, ed., D.A.L., *Chalmers on Bills of Exchange: A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities*, 13th ed. (London: Stevens & Sons Ltd, 1964).

Street, T.A., *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law*, Vol.II (Northport, Long Island, New York: Edward Thompson Co.,1906)

The Conference Board Of Canada, *Technology and Financial Services: Challenges for Financial Institutions and Policy Makers*, (Ottawa: The Conference Board, 1990).

The World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, (Washington D.C.: The World Bank, 1989).

Valcin, Y. ed., *Electronic Banking in Canada: Posturing the Players* (Montreal, Quebec: Canadian Payments Association, 1988).

Walden, I. ed., *EDI and the Law* (London: Blenheim Online Publications, 1989).

Watson, A., *Finance of International Trade*, 2nd ed., (London: The Institute of Bankers, 1981).

Articles.

Ademuni-Odeke, "The United Nations Convention on International Bills of Excha nge and International Promissory Notes" (1992) 5 J.B.L. 281.

Agomo, C.K., "The Autonomy of the Bankers Documentary Credits: A Buyer's Night mare" (1984-87) 14 Nig. J. Contemp. Law. 62.

Akwule, R.U.,"Telecommunications Policy in Nigeria" (1991) 15 Telecommunications Policy 241.

Ambrosia, D.W., "New SWIFT Rules on the Liability of Financial Institutions for Interest Caused by Delay in International Funds Transfer" (1980) 13 Cornell Int'l L.J. 311.

Arora, A., "Future Developments in Money Transfers" (1981) Lloyds Mar. & Com. L.Q. 56.

Bergstein, E.E., "Introduction to the Legal Value of Computer Records" (1985) 1 Comp. L. & P. 205.

Betuel, J.K., "The Development of Negotiable Instruments in Early English Law" (1938) 51 Harv. L. Rev. 813.

Bienkowski, J., "Old Reliable" (1990) 107 Bankers Monthly (Aug.) 52.

Bienkowski, J., "The Communications Grand Plan" (1990) 107 Bankers Monthly (Oct.) 54.

Blakeney, M., "Transfer of Technology and Developing Nations" (1989) 11 Fordham Int'l L.J. 690.

Blomquist, R., "The Proposed Uniform Law on International Bills of Exchange and Promissory Notes" (1979) 9 Cal. W. Int'l L. Q. 30.

Bradgate, R., "The Evidential Status of Computer Output and Communications" (1990) 6 Comp. L. & P. 142.

Brown, L.J., "Implications of the Informational Nature of Payments" (1980) 2 Com puter L.J. 153.

Carey S.C. & Mclean, S.A., "The United States, Countertrade and Third World Trade" (1986) 20 J.W.T.L 441.

Castell, S., "Evidence, Authorisation and Security: Is the Technology "Legally Reli able"?" (1989) 6 Comp. L. & P. 46.

Cerf V.G.and Curran, A., "The Future of Computer Communications" (1977) 5 Datamation 105.

Comment, "S.W.I.F.T. Outlines Its Strategies and Its New Services" (1991) 10 World of Banking 16.

Comment, "SWIFT Selects Stratus for Data Service on Its Global Network" (1990) 16 Computing Canada 65.

Comment, "Notes on a Possible Multilateral Framework for International Trade in

Banking Services" (1990) Sept-Oct UNCTAD Bulletin at 11.

Cowan, H.R., "Export Trade Finance" (1986) 65 Can. Bar. Rev. 368.

Crawford, B., " *Montage* v. *Irvani*: Conflicts or Harmonisation of Laws" (1991) 7 B.F. L.R. 85.

------------ "The Definition of a Holder and a Protected Holder in the UNCITRAL Convention on International Bills and Notes", (1990) 4 B.F.L.R. 267.

David, G., "Money in Canadian Law" (1986) 65 Can. Bar Rev. 192.

Doerner, W.R., "The French Connector" *Time Magazine* (20 January 1992) 30.

Dohm, J., "Draft Uniform Law on International Bills of Exchange and International Promissory Notes", (1973) 21 Am. J. Comp. L. 474.

Effros, R.C., "The Legal Nature of Obligations Payable in Foreign Currencies," (1986) 11 N.C.J. Int. L. & Com. Reg. 445.

Ellinger, E.P., "Legal Problems of Modern Commercial Paper" (1990) 6 B.F.L.R. 65.

------------"The Giro System and Electronic Transfer of Funds" (1986) Lloyds Mar.& Com. L.Q. 178.

Falk L. W. and Farcus J.I., "Transfer of Technology between the United States and LDCs" (1983) 16 Law and Technology J. 3.

Feldman M.B. & Garcia, D.R., "National Regulation of Transborder Data Flows" (1981) 7 N.C.J.Int'l L.J. 10.

Felsenfeld, C., "Forged Endorsements Under the United Nations Negotiable Instru ments Convention: A Compromise Between Common and Civil Law" (1989) 45 Business Lawyer 397.

Flint, D., "Some Legal Implications of Fluctuating Exchange Rates" (1980) 54 A.L.J. 211.

Geva, B., "CHAPS Transfer of Funds" (1988) Lloyds Mar. Com. L.Q. 477.

---------- "CHIPS Transfer of Funds" (1987) J. Int'l Banking L. 208.

---------- "The Evolving Law of Payment by Wire Transfer-An Outsiders View of Draft UCC Article 4A" (1988) 14 Can. Bus. L.J. 186.

----------"International Funds Transfers-Performance by Wire Payment" (1990) 4 B.F.L.R. 111.

----------"Irrevocability of Bank Drafts, Certified Cheques and Money Orders" (1986) 65 Can. Bar Rev. 107.

----------"Reflections on the Need To Revise the Bills of Exchange Act" (1981-82) 6 C.B.L.J. 269.

----------"The Concept of Payment Mechanism" (1986) Osgoode Hall L.J. 1.

Guest, A.G., "Instruments Denominated in a Foreign Currency" (1979) 27 Am. J. Comp. L.533.

Hermann, G., "Background and Salient Features of the United Nations Convention on International Bills of Exchange and International Promissory Notes" (1988) 10 U. Pa. J. Int'l Bus. L. 517.

Hock, T.L., "SWIFT Eyes Asia's Emerging Markets" (1991) 17 Asian Finance 14.

Holdsworth, W.S., "The Early History of Banking" (1918) 34 L.Q.R. 11.

---------------- "The Origins and Early History of Negotiable Instruments" (1915) 31

L.Q.R. 12, 173, 137 & (1916) 32 L.Q.R. 20.

Hudson, M.O. & Feller A.H., "The International Unification of Laws Concerning Bills of Exchange" (1931) 44 Harv. L. Rev. 333.

Jenks, E., "On the Early History of Negotiable Instruments" (1893) 9 L.Q.R. 70.

Kindred, H.M., "Trading Internationally By Electronic Bills of Lading" (1992) 7 B.F.L.R. 265.

Klein, M., "Keeping Information Technology Costs under Control" (1990) 4-5 Bankers Magazine 5.

Kok, B.D. and Peter-Cerveau, J. "A Report on the Status and Future of S.W.I.F.T." (1990) 9 World of Banking 14.

Kuruk, K., "Controls on Technology Transfer: An Analysis of Southern Response to Northern Technological Protectionism" (1989) 13 MD. J.Int'l L. & Trade 302.

Landis, K., "The Perfect Passport to Global Electronic Banking" (1990) 107 Bankers Monthly (Oct.) 47.

Layton, D.W., "Japan and the Introduction of Foreign Technology: A Blue print for LDCs" (1982) 18 Stan. J.Int'l. L. 171.

Llal, S., "The Patent System and the Transfer of Technology to Less Developed Countries" (1976) J.W.T.L. 1.

Lowry, H.P., "Transborder Data Flow: Public and Private International Law Aspects" (1984) 6 Houston J. Int'l L. at 159.

Mackey, L.B., "Exploiting Innovative Technology in Offshore Markets: A United States Perspective" (1989) U.S.-Can. L.J. 179.

Miller, C.G., "Computer-Generated Evidence- Implications for the Corporate Computer User, Part 1" (1990) 6 Comp. L. & P. 178.

Mitchell, G.W., "Introduction [Electronic Funds Transfer Systems]" (1980) 2 Com puter L.J. 1

Napier, B.W., "The Future of Information Technology Law" (1991) 2 Computers and Law 8.

Note, "Information Technology For African Transport" (1991) July-August UNCTAD Bulletin 3.

Note, "The Early History of Negotiable Instruments" (1928) 44 L.Q.R. 285.

Note, "Technology: A determinant of International Trade and Economic Develop ment" (1989) January UNCTAD Bulletin 1.

Note, "The Use of Computer Technology in the Insurance Sector of Developing Countries" by J. F. Outreville, UNCTAD Discussion Paper No.38 (April, 1991) reviewed in (1991) May-June UNCTAD Bulletin 13.

Novotny, E.J., "Transborder Data Flows and International Law: A framework for Pol icy-Oriented Inquiry" (1980) 16 Stan. J. Int'l L. 144.

Osunbor, O. A., "Law and Policy on the Registration of Technology Transfer Transactions in Nigeria" (1987) 21.5. J.W.T.L. 13.

Patrikis, E.T., "UNCITRAL Payment Efforts"(1989) 15 Brooklyn J.Int'l L. 45.

Penney, N., "The Draft Convention on International Bills of Exchange and Interna tional Promissory Notes: Formal Requisites" (1979) Am. J. Comp. L. 515.

Petre, B., "Network Providers" (1990) 7 Computer Law & Practice 8.

Pierce, L.J., "The Competitive Implications of EFT" (1980) 2 Computer L.J. 133.

Pollock, E., "EFT Profits Are Hard To Find" (1990) 5 Bankers Monthly at 5.

Razin, E., "Two Are Better Than One: Bankers Acceptance Participation Financing in Canada" (1992) 7 B.F.L.R. 221.

Read, J.E., "The Origin, Early History and Later Development of Bills of Exchange and Certain Other Negotiable Instruments" (1926) 4 Can. Bar. Rev. 440.

Reed, C., "EDI - Contractual and Liability Issues"(1989) 6 Comp. L. & P. 36.

Rowbotham, G., "EDI and the Corporate Treasury:The Legal Background" (1990) 7 Comp. L. & P. 40.

Rowe, M., "Grinding the Competitive Edge: Banks and Electrons" (1987) 7 Arab Banker 24.

Sandler M. and Di Ferante, B., " Primer on Trade Finance: Export Drafts Letters of Credit and Bankers Acceptances" (1986) 11 N.C.J.Int'l & Comm. Reg. 635.

Santa-Lucia, J.S., "Exchange Losses from International Electronic Funds Transfers: Time to Unify the Law" (1988) 8 Nw. J. Int'l & Bus. 759.

Sarna, L. "Letters of Credit: Electronic Credits and Discrepancies" (1990) 4 B.F.L.R. 149.

Savage I. and Walden N., "The Legal Problems of Paperless Transactions" (1989) J.B.L. 102.

Schmitthoff, C.M., "Discrepancy of Documents in Letter of Credits Transactions" (1987) J.B.L. 94.

Schwank, F., "Electronic Documentary Credits and Guarantees: Emerging Legal

Problems" (1988) 7 Int'l Bus. Law. 19.

Souza, C., "Exploiting Innovative Technology in Off Shore Markets: The LDC View" (1989) 15 Canada-U.S. L.J. 199.

Spanogle, J.A., "Introductory Note - United Nations: Convention on International Bills of Exchange and International Promissory Notes" (1989) 28 I.L.M. 170.

Taber, J.K., "A Survey of Computer Crime Studies" (1980) 2 Computer L.J. 275.

Timewell, S., "Global Custody: Last of the Dinosaurs" (1991) 141 Banker 34.

Uyimadu, S.O., "Determining the Feasibility and Viability of Establishing a New Computer Centre in Idah, Benue State, Nigeria." (1989) 5 Engineering Mgt International (Netherlands) 309.

Vis, W., "Unification of the Law of Negotiable Instruments: The Legislative Process" (1979) 27 Am. J. Comp. L. 608.

Von Marschall, W.F., "UNCITRAL's proposed International Bills of Exchange" (1987) Ariz. J. of Int'l and Comp. L. 6.

Vroegop, J., "Bills of Exchange and Guarantees"(1986) 2 New Zealand L.J. 33.

White, H.S., "The Convention on the Uniform Law of International Bills of Excha nge and International Promissory Notes: A Comparison to the Uniform Commercial Code," (1975) 5 Geo. J. of Int'l and Comp. L. 6.

Wiley R.E. & Neustadt, R.M., "Electronic Funds Transfer: New Technology Needs New Law" (1982) National L.J. 28.

Wright, B., "Authenticating EDI: The Location of a Trusted Recordkeeper" (1990) 6 Comp. L. & P. 80-83;

Ynetma, H., "Unification of the Law Respecting Negotiable Instruments", (1951) 4 Int'l & Comp. L.Q. 178.

Articles in Books.

Amin, S. "The Social Movements in the Periphery: An End to National Liberation?" in Amin, S. et al eds.,*Transforming the Revolution : Social Movements and the World System* (New York: Monthly Review Press, 1990).

Bradgate, R.. "Evidential Issues of EDI" in I. Walden, ed., *EDI & The Law* (London: Bleinheim Online Ltd., 1989) 9.

Cameron, I.,"The Technical Evolution of MICR- A Historical Perspective" in Nigerian Security Printing and Minting Company (NSPMC) Ltd. ed., *Introduction of MICR Technology in the Nigerian Banking Industry* (Victoria Island, Lagos:NSPMC Ltd.,1990) 11.

Craigie, C.R., "The Collection of Bills in International Trade" in C.M. Chinkin, P.J. Davidson, & W.J.M. Ricquier, eds., *Current Problems of International Trade Financing*, (Singapore: Malaya Law Review & Butterworths, 1982) 100.

Ellinger, E.P., "Documentary Credits and Fraudulent Documents" in C.M. Chinkin, P.J. Davidson and W.J.M. Ricquier eds., *Current Problems of International Trade Financing* (Singapore: Malaya Law Review & Butterworths, 1982) 185.

Ellinger, E.P. "The Law of Letters of Credit" in N. Horn ed., *The Law of Internation al Trade Fiance*, (Deventer/Boston: Kluwer Law and Taxation Publishers, 1989) 203.

Ellinger, E.P., "Electronic Funds Transfer As A Deferred Settlement System" in R. M. Goode, ed., *Electronic Banking: The Legal Implications* (London: The Institute of Bankers/Centree for Commercial law Studies, Queen Mary College, University of London, 1985) 29.

Feyaz, M.B.E, "Technological Transformation for Developing Countries: Some Fac tors and Prerequisites" in UNCTAD/Islamic Development Bank, *Technology Selection, Acquisition and Negotiation*, (Geneva: UNCTAD, 1991) 1.

Gmur, C.J., "*Forfaiting*"in C.J. Gmur, *Trade Financing* (London: Euromoney Publications, 1981) 117.

Guest, A.G. "Current Work of the United Nations Commission on International Trade Law" in C.M. Chinkin, P.J. Davidson, W.J.M. Ricquier, eds., *Current Problems of International Trade Financing* (Singapore: Malaya Law Review & Butterworths, 1982) 134.

Hermann, G., "International Bills of Exchange and Promissory Notes: Legal Prob lems Overcome by new United Nations Convention" in N. Horn, ed. *The Law of International Trade Finance* (Deventer/Boston: Kluwer Law and Taxation Publishers, 1989) 259.

Horn, N., "Payment and Financing Arrangements in International Trade" in N. Horn ed., *The Law of International Trade Finance*, (Deventer/Boston: Kluwer Law and Taxation Publishers, 1989) 1.

Jaeger, H., "Export Factoring and Forfaiting" in N. Horn ed., *The Law of Internation al Trade Finance*, (Deventer/Boston: Kluwer Law and Taxation Publishers, 1989)

277.

Kee, H.P., "The Fraud Rule in Letters of Credit Transactions" in C.M. Chinkin, P.J. Davidson and W.J.M. Ricquier eds., *Current Problems of International Trade Financing*, (Singapore: Malaya Law Review & Butterworths, 1982) 235.

Lass, J., "Fraud, Error and System Malfunction: A Banker's Viewpoint" in R.M. Goode, ed., *Electronic Banking: The Legal Implications* (London: The Institute of Bankers/ Centre for Commercial Law Studies, 1985) 57.

Mazrui, A., "The Computer Culture and Nuclear Power: Political Implications for Africa" in T.M. Shaw ed., *Alternative Futures for Africa* (Boulder,Colorado: Westview Press, 1982) 237.

Moore, P., "A Nice Line of Business" in Euromoney Plc., *Getting the Message: A Guide to International Telecommunications Regulations* (London: Euromoney Publications Plc, 1992) 1.

Oduyemi, O.S., "Evolution and Implementation of MICR Project in the Banking Industry in Nigeria" in Nigerian Security Printing and Minting Company (NSPMC) Ltd. ed., *Introduction of MICR Technology in the Nigerian Banking Industry* (Victoria Island Lagos: NSPMC Ltd., 1990) 25.

O'Hanlon P., "Documentary Collection and Letters of Credit" in C. J. Gmur ed., *Trade Financing*, 1st ed. (London: Euromoney Publications, 1981) 43.

Poullet, Y., "Privacy Protection and Transborder Data Flow: Recent Legal Issues" in G.P.V. Vandenberghe ed. *Advanced Topics of Law and Information Technology* (Deventer: Kluwer Law and Taxation Publishers, 1989) 29.

Raemy-Dirks, C.R., "Countertrade: Linked Purchases in International Trade" in C.J. Gmur ed., *Trade Financing* 1st ed. (London: Euromoney Publications, 1981) 17.

Robinson, D., " The Structure and Characteristics of the Principal Electronic Banking Systems" in R.M. Goode, ed., *Electronic Banking: The Legal Implications* (London: The Institute of Bankers and Centre for Commercial Law Studies, Queen Mary College, University of London, 1985) 5.

Rowe, M., "Bills of Exchange and Promissory Notes: Uses and Procedures in International Trade" in N. Horn ed.,*The Law of International Trade Finance* (Deventher/Boston: Kluwer Law and Taxation Publishers, 1989) 243.

Royal Bank of Canada,"Foreign Collections and International Trade" in J.C. Castel, A.L.C. deMestral & W.C. Graham eds., *International Business Transactions*, (Toronto: Emond Montgomery Publications Ltd., 1985) 628.

Sargent, J.C., "Public and Private Funding in International Trade" in J.D. Lew and C. Stanbrook eds., *International Trade: Law and Practice*, (London: Euromoney Publications, 1983) 142.

Scallon, R., "Forfaiting" in M. Knight et al eds., *Export Finance* 3rd ed., (London: Euromoney Publications, 1988) 193.

Schinnerer, E., "Collection by Banks and its Documents" in N. Horn ed., *The Law of International Trade Finance*, (Deventer/Boston: Kluwer Law and Taxation Publishers, 1989) 188.

Schmitthoff, C.M., "Strict Law and Equity in the Law Relating to Negotiable Instruments" in C. Cheng ed., *Clive M. Schmitthoff's Select Essays in International*

Trade Law (Dordrecht/Boston/ London: Martinus Nijhoff Publishers/Graham & Trotman,1988) 81.

---------- "The Unification of the Law of International Trade" in C. Cheng, ed., *Clive M. Schmitthoff's Select Essays on International Trade Law*, (Dordrecht/ Boston/ London: Martinus Nijhoff/Graham & Trotman, 1988) 206.

--------- "The Law of International Trade" in C. Cheng, ed., *Clive M. Schmitthoff's, Select Essays on International Trade*.(Dordrecht/Boston/London: Martinus Nijhoff/Graham & Trotman, 1988) 221.

Soskin, N.P., "Bills of Exchange" in C.J. Gmur, *Trade Financing*, 1st ed. (London: Euromoney Publications, 1981) 29.

Trapper, J.E., "Technical Solutions" in I. Walden, ed., *EDI & The Law* (London: Bleinheim Online Ltd., 1989) 97.

Vis, W., "Unification of International Trade Law (with special reference to negotiable instruments and commercial arbitration)" in J.J. Norton ed., *World Trade and Trade Finance* (New York: Mathew Bender, 1985) 6.1.

Unpublished Papers and Monographs.

Ayo-Ajayi, M.A.O., "MICR: Operations, Security and Advantages" [Unpublished Lec ture Paper Delivered at the Financial Institutions Training Centre to Nigerian Bank Inspectors, Bank Examiners, Internal Auditors and Training Officers, 1990].

Crawford, B., "The UNCITRAL Model Law on International Credit Transfers" [Unpublished] A paper presented at the International Trade Law Conference held

at Canberra, Australia on October 18-19, 1991

Oyebode G. and Maduegbuna, S., "Legal Problems Often Posed by Exchange Rate Volatility" [unpublished] (Lagos, March 1991)

Reif L.C., "Course Materials for International Business Transactions" [Unpublished] (Faculty of Law University of Alberta, Edmonton, Canada, 1992)

International Documents, Conventions, Model Laws, Uniform Rules and Reports.

Accelerating the Development Process: Challenges for National and International Policies in the 1990s (Report by the Secretary-General of the United Nations Conference on Trade and Development to the Eighth Session of the Conference) U.N. Doc. No. TD/354.Rev.1 (1992); U.N. Sales No. E.91.II.D.17.

Articles on International Agreement of International Monetary Fund (July 1/22 1944).

Bank for International Settlements, *Payment Systems in Eleven Developed Countries: A Report Prepared by the Group of Experts on Payment Systems of the Central Banks of the Group of Ten Countries*, (1989).

Comité Maritime International (CMI) *Rules for Electronic Bills of Lading* (June 1990).

Commentary on the Draft Convention on International Cheques, UN. Doc. No. A/CN .9/214 (1982).

Convention on International Bills of Exchange and International Promissory Notes UN. Doc. A/RES/43/165 (1989).

Convention Providing for a Uniform Law on Bills of Exchange and Promissory Notes

(1933-34) 134 L.N.T.S 257.

Convention Providing for a Uniform Law for Cheques (1933-34) 143 L.N.T.S. 355.

Convention Providing for the Settlement of Certain Conflict of Laws in Connection with Cheques (1933-34) 143 L.N.T.S. 407.

Convention for the Settlement of Certain Conflict of Laws in Connection with Bills of Exchange and Promissory Notes (1933-34) 143 L.N.T.S. 317.

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, EEC Doc. No.Europ. T.S.108 (1981).

Current Activities of International Organisations Related to the Harmonization and Unification of International Trade Law, UN. Doc. No. A/CN.9/281 (1986)

Draft Convention on International Bills of Exchange and International Promissory Notes and Draft Convention on International Cheques: Major Controversial and Other Issues, UN. Doc. No.A/CN.9/249 (1984)

Draft Convention on International Cheques UN.Doc. No. A/CN.9/212 (1981).

Draft Model law on international Credit Transfers annexed to the Report of the Working Group on International Payments on the Work of its 22nd Session, UN. Doc. A/CN.9/344 (1990)

Draft international Code on the Transfer of technology, UN.Doc.No. UNCTAD/TD/CODE TOT/56 (1991)

International Chamber of Commerce (ICC) *Uniform Customs and Practice for Documentary Credits*, (1983 Revision) ICC Publication No.400.

------------ *Uniform Rules for Collection*, (1978 Revision) ICC Publication No. 322.

--------------*Uniform Rules for Interchange of Trade Data by Teletransmission (UNCID)*, (January 1988) ICC Publication No. 452.

International Telecommunications Convention, Oct. 25, 1973, 28 U.S.T. 2510, T.I.A.S. No. 8572.

Feasibility Study for an Interregional Trade Financing Facility For the Exports of Non-Traditional Goods of Developing Countries, UN. Doc. No. UNCTAD/ TD/B/1300-/Supp.2 (1991).

Note by the UNCITRAL Secretariat, International Credit Transfers-Proposal of the United States of America, U.N. Doc. No. A/CN.9/WG.IV/WP.47 (1990).

OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, OECD Doc. No. ISBN 92-64- 12155-2 (1980).

Report by UNCTAD Secretariat on Issues Raised in the Context of Trade in Services, UN. Doc. No. TD/B/1197 (1988).

Report of the United Nations Commission on International Trade Law (UNCITRAL) to the General Assembly on the Work of Its First Session, 23 UN GAOR Supp.(No.16), UN Doc. No. A/7216, (1968).

Report of UNCITRAL Working Group on International Payments on the Work of its fourth Session, UN.Doc. A/CN.9/117 (1976).

Report of UNCITRAL on the work of its fifth Session, 27 UN GAOR Supp. (No. 17), UN. Doc. A/8717 (1972).

Report of UNCITRAL on the work of its twelfth session , 34 UN GAOR Supp. (No.17), UN. Doc. No. A/34/17 (1979).

Report of the Secretary-General of UNCITRAL to the 23rd Session of the Commission on the Current Activities of International Organisations Related to the Harmonisation and Unification of International Trade Law, U.N. Doc. A/CN.9-/336 (1990).

Report of the Working Group on International Payments on the Work of its 18th Session, U.N. Doc. A/CN.9/318 (1989)

Report of the United Nations Commission on International Trade Law on the Work of its 19th Session to the General Assembly, U.N. Doc. A/41/17.

Report of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Secretariat, Strengthening the Negotiating Capacity of Developing Countries, Transnational Corporations and Transborder Data Flows: An Overview, U.N. Doc. E/C.10/87 (1981).

Trade financing in Developing Countries: An Assessment and Evaluation of Existing Schemes and Future Requirements, UN. Doc. TD/B/1300/Supp.1 (1991)

UNCITRAL Legal Guide on Electronic Funds Transfer, UN. Doc.A/CN.9/SER.B/1 (1987).

UNCITRAL Model Law on International Credit Transfers.

UNCITRAL Report on the Legal Value of Computer Records U.N. Doc. No. A/CN .9/265 (1985)

UNCITRAL Secretariat, *Status of Conventions*, UN. Doc. No. A/CN.9/353 (1991)

UNCTAD/Islamic Development Bank, *Technology Selection, Acquisition and Negoti ation*,UN.Doc. UNCTAD/ITP/TEC/22 (1991).

UNCTAD,*Technological Change in Services and International Trade Competitiveness*, UN. Doc. UNCTAD/ITP/TEC/29 (1991).

------- *Technology Indicators and Developing Countries*, UN. Doc., No/ UNCTAD/ITP/TEC/19 (1991).

UNCTAD VIII Analytical Report by the UNCTAD Secretariat to the Eight Session of the Conference, U.N.DOC. NO.TD/358 (1992); U.N. Sales No. E. 92.II.D.3.

United Nations Centre on Transnational Corporations(UNCTC), International Trade and Foreign Direct Investment in Data Services: Transborder Data Flows in the Context of Services and the Development Process,UN. Doc. UNCTAD TD/B/1016 (1984).

Domestic Legislations and Other Government Documents.

Australia.

The Bills of Exchange Act,(1909-73).

Canada.

Interpretation Act (Canada) R.S.C.1970, c.I-23, s.28.

The Bills of Exchange Act, (Canada), R.S.C. 1985, c.B-4, as am.

Report to the Province of Ontario on Policy and Legislative Responses to Electronic Funds Transfer in Canada, *Electronic Funds Transfer Technology: A Canadian Perspective* (Working Paper #4) by S.Paula Mitchell, (Ontario: Interministerial Committee on EFT, 1977).

New Zealand.

The Bills of Exchange Act, 1908

Nigeria.

Banks and other Financial Institutions Decree #25 of 1991.

Bills of Exchange Act 1917 Cap. 21 Laws of the Federation 1958.

Bills of Exchange Act, 1964.

Central Bank of Nigeria, *Annual Reports and Statements of Accounts for 1990.*

Central Bank of Nigeria, *Annual Reports and Statements of Accounts for 1988.*

Central Bank of Nigeria, *Annual Reports and Statements of Accounts for 1987.*

Central Bank of Nigeria Decree #24, 1991.

Exchange Control (Anti-Sabotage) Decree, 1986.

Export Credit Guarantee and Insurance Corporation Decree #15, 1988.

Interpretation Act, Cap. 89 Laws of the Federation 1958.

Privatisation and Commercialization Decree #25, 1989.

Notary Public Act cap.141 Laws of the Federation, 1958.

United Kingdom.

Administration of Justice Act, 1977.

Bills of Exchange Act of 1882 45 & 46 Vict., c.6 as am.

Cheques Act 1957, 5 & 6 Eliz.2, c.36.

Civil Evidence Act, 1968 (17 *Statutes* 155).

Bankers' Book Evidence Act, 1879 (17 *Statutes* 103) as am.

United States.

The Uniform Commercial Code (1978 Official Text).

Judicial Decisions.

Australia.

Rosentain v. *Commonwealth Bank of Australia* (1922) 31 C.L.R 46.

Canada.

Canada Life Assurance Co. v. *Canadian Imperial Bank of Commerce* (1980) 98 D.L.R. (3d) 670. (S.C.C.).

London and Brazilian Bank v. *Maguire* (1895) 8 C.S. 358 (Quebec S.C.)

Michael Doyle & Associates Ltd. v. *Bank of Montreal* (1982) 140 D.L.R. (3d) 596 (B.C.S.C.) *Affirmed* (1984) 11 D.L.R. (4th) 496. (B.C.C.A.).

The Bank of Nova Scotia v. *Angelica-Whitewear Ltd. and Angelica Corporation* [1987] 1 S.C.R. 59 (S.C.C.)

Nigeria.

Attorney-General of Bendel State of Nigeria v. *United Bank for Africa (UBA) Ltd.* [1986] 4 N.W.L.R. 547 (S.C.N.)

African Continental Bank Ltd v. *Yesufu* [1978] 2 S.C. 93 (S.C.N.)

Daarvhover & Co. Ltd. v. *Christian & Co. Ltd.* [1967] 1 A.L.R. (Comm) 434 (High Court, Lagos State, coram: Kazeem J.).

Ibrahim Khalil Yassin v. Barclays Bank D.C.O. (1968) N.M.L.R. 380.

The State v. David Olomo (Unreported) S.C.N. 1/70.

United Kingdom

Alcock v. *Smith* [1892] 1 Ch. 238. (C.A.).

Arab Bank Ltd v. *Ross* [1952] 2 Q.B. 216. (Q.B.).

Banku Polskiego v. *Mulder (K.J.) & Co.* [1942] 1 K.B. 497. (C.A.)

Bennett v. *Burmfit* (1867) L.R.3.C.P. 28 (Common Pleas).

Barber v. *Richards* (1851) 6 Exch. 63. (Exch. Div.)

Barclays Bank Ltd. v. *Aschaffenburger Zellstoffwerke* [1967] 1 Lloyd's Rep. 387. (C.A.)

Barclays Bank International Ltd. v. *Levin Bros. (Bradford) Ltd.* [1977] Q.B. 270.(Q.B.).

Brinkinbon Ltd. v. Stahl und Stahlwarenhanelsgesellschaft [1982) 2 W.L.R. 264. (H.L.)

Capital Counties Bank Ltd. v. Gordon [1903] A.C. 240 (H.L.)

Churchill & Sim v. *Goddard* [1937] 1 K.B. 92. (C.A.).

Commercial Banking Co. of Sydney Ltd. v. Mann (1961) A.C. 1 (Privy Council).

Discount Records Ltd. v. *Barclays Bank Ltd.* [1975] 1 W.L.R. 315. (Ch.D.)

Embiricos v. *Anglo- Austrian Bank* [1905] 1 K.B.677. (C.A.).

Entores Ltd. v. Miles Far East Corporation [1955] 2 Q.B. 327. (C.A.)

Equitable Trust Co. of New York v. *Dawson Partners* [1927] Lloyd's Rep. 49 (H.L.).

Exp. Birmingham Banking Co. (1886) L.R.3 Ch. 651 (Chancery Appeals)

G. & H. Montage G.m.b.H v. *Irvani* [1988] 1 W.L.R. 1285 (Q.B. Div.) aff'd [1990] 1 W.L.R. 667 (C.A.).

Gian Singh & Co. Ltd v. *Banque de l'Indochine* [1974] 1 W.L.R. 1234 (Privy Council)

Goodman v. *Eban Ltd.* [1954] 1 Q.B. 550 (C.A.).

Goodwin v. *Robarts* (1875) L.R.1O Exch. 346 (Exchequer Chambers)

Guaranty Trust Co. of New York v. *Hannay & Co.* [1918] 1 K.B. 43 (K.B.) rev'd [1918] 2 K.B. 623 (C.A.).

Hamzeh Malas & Sons v. *British Imex Industries Ltd.* [1958] 2. Q.B. 127 (Q.B.D.).

Horn v. *Roquette* (1878) 3 Q.B.D.514 (C.A.).

Ian Stach Ltd. v. *Baker Bosley Ltd.* [1958] 2 Q.B. 130. (Q.B.D.).

Intraco Ltd. v. *Notis Shipping Corporation of Liberia. The Bhoja Trader* [1981] 2 Lloyd's Rep. 256 at 257 (C.A).

Jenkins v. *Casford & Thring* (1863) 3 Sw. & T 93.

Keene v. *Beard* (1860) 141 E.R.1210 (H.L.).

Koechlin et Cie v. *Kestenbaum Bros.*, [1927] 1 K.B. 889 (C.A.).

Ladup Ltd v. *Shaikh* [1983] Q.B. 225 (Q.B.).

Lazarus Estates Ltd. v. *Beasley* [1956] 1 Q.B. 702 (C.A.).

M.K. International Development Co. Ltd. v. *Housing Bank*, The Financial Times, January, 22, 1991. (Q.B.).

Momm v. Barclays Bank International [1977] Q.B. 790.

Moss v. *Hancock* [1899] 2 Q.B. 111 (Q.B.D.)

Miliangos v. *George Frank (Textiles) Ltd* [1976] A.C. 443 (H.L.).

Moralice (London) Ltd. v. *Man* [1954] 2 Lloyd's Rep. 526 (Q.B.D.).

Nova (Jersey) Knit v. *Kammgarn Spinnerei G.m.b.H.* [1977] 1 W.L.R. 713. (H.L.).

Owners of M.V. Eleftherotria v. *Owners of M.V. Despina R.* [1979] 1 All E.R. 421 (H.L.).

R.E. Jones Ltd. v. *Warring & Gillow Ltd.*, [1926] A.C. 670 (H.L).

Re British Trade Corporation Ltd. [1932] 2 Ch. 1 (C.A.). *Ross v. London County Westminster and Parr's Bank Ltd.* [1919] 1 K.B. 678. (K.B.)

Schorsch Meier G.m.b.H v. *Hennin*, [1975] 1 All E.R. 152 (C.A.)

Services Europe Atlantique Sud (SEAS) v. *Stockholms Rederiaktiebolag SVEA* [1979] 1 All E.R. 421 (H.L.).

Smith v. *Union Bank* (1875) L.R.10 Q.B. 291 aff'd. (1875) 1 Q.B.D. 31. (C.A.)

Soproma S.p.A. v. *Marine and Animal By-Products Corporation* [1966] Lloyd's Rep. 367 (Q.B.D.)

T.D. Bailey, Son. & Co. v. *Ross T. Smyth & Co. Ltd.* (1940) 56 T.L.R. 825 (H.L.).

United City Merchants (Investments) Ltd. v. *Royal Bank of Canada* [1982] 2 Q.B. 208 (C.A.).

Vita Food Products, Inc. v. *Unus Shipping Co. Ltd.* [1939] 2 D.L.R. 1 (Privy Council).

United States.

Sztejn v. *J. Henry Schroeder Banking Corporation* (1941) 31 N.Y.S. 2d 631.

Delbrueck & Co. v. *Manufacturers Hanover Trust Co.* 464 F.Supp. 989 (SDNY 1979), aff'd, 609 F2d 1047 (2d Cir. 1979).

Singapore.

United Bank Ltd. v. *Banque Nationale De Paris* (S.C. June 7, 1991 Unreported).