

Nova Law Review

Volume 9, Issue 1

1984

Article 3

Comparative Analysis: Agents' Personal Liability on Negotiable Instruments

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Abstract

Negotiable instruments receive similar treatment in many developed nations.

KEYWORDS: Comparative, Liability, Negotiable

Comparative Analysis: Agents' Personal Liability on Negotiable Instruments

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I. Introduction

Negotiable instruments receive similar treatment in many developed nations. Justice Story noted one hundred and forty years ago that “[t]he law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield . . . to be in great measure, not the law of a single country only, but of the commercial world.”¹ Nevertheless, three major commercial law systems remain in the western world: the United States Uniform Commercial Code,² the English Bills of Exchange Act,³ and the Geneva Conventions on negotiable instruments.⁴ This article compares these systems of negotiable instruments law by discussing the formal requirements for negotiable in-

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1. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842).

2. This article only discusses such negotiable instruments as checks, drafts which are governed by article 3 of the Uniform Commercial Code, promissory notes, and certificates of deposit. See U.C.C. § 3-104(2). All states have now adopted article 3 of the U.C.C. J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 5 (2d ed. 1980). All citations to the U.C.C are to the 1972 official text unless otherwise indicated. Scholars have written excellent treatises and commentaries analysing United States law on negotiable instruments. See, e.g., J. WHITE & R. SUMMERS, *supra*; Holland, *Corporate Officers Beware—Your Signature on a Negotiable Instrument May Be Hazardous to Your Health*, 13 *IND. L. REV.* 893 (1980). A thorough discussion of United States law is beyond the scope of this article. The writer will identify significant legal provisions, issues, and policies only to the extent necessary for comparison with law of foreign jurisdictions.

3. Bills of Exchange Act of 1882, 45 & 46 Vic., ch. 61, reprinted in 3 *HALSBURY'S STATUTES OF ENGLAND* 186 (3d ed. 1968) [hereinafter cited as Bills of Exchange Act]. See also Cheques Act of 1957, 5 & 6 Eliz. 2, ch. 36, reprinted in 3 *HALSBURY'S STATUTES OF ENGLAND* 238 [hereinafter cited as Cheques Act].

4. June 7, 1980, 143 L.N.T.S. 259. The Geneva Conventions are the basis for commercial practices in several civil law jurisdictions in continental Europe. See *infra* note 181. French legal practices will be utilized to illustrate the effects of the Geneva Conventions on the law of a ratifying country.

struments, the effects of negotiability, the rudiments of agency law, questions of conflict of laws, and proposals for reform, addressing the question: How may an agent avoid personal liability on a negotiable instrument he signs in his principal's behalf?

II. United States

A. Negotiable Instruments

A negotiable instrument⁵ is a written⁶ and signed promise or order to pay a sum certain in money to order or to bearer on demand or at a specific time.⁷ These instruments include drafts, checks, certificates of deposit, and promissory notes.⁸ A negotiable instrument confers legal rights on a holder⁹ separate from a party's rights on any underlying obligation.¹⁰ An obligor may be subject to suit either on or off the instrument.¹¹ No one is liable on a negotiable instrument, however, unless

5. Whether an instrument is negotiable may determine whether a person obligated on the instrument may present personal defenses against a holder. *See* U.C.C. § 3-305. This note will, therefore, devote substantial attention to definition of negotiable instruments.

6. U.C.C. § 1-201(46) defines "writing" to include "printing, typewriting, or any other intentional reduction to tangible form."

7. U.C.C. § 3-104(1).

8. U.C.C. § 3-104(2).

9. U.C.C. § 1-201(20) defines "holder" as "a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or his order or to bearer or in blank." A holder in due course is a holder who has purchased the negotiable instrument for value (defined in U.C.C. § 3-303 as a significant economic interest), in good faith, and without notice of any claim or defense to the instrument or of any violation of its provisions. U.C.C. § 3-302.

There can only be a holder in due course if the instrument is negotiable. *See* U.C.C. § 3-805. A holder in due course takes the instrument free from most defenses, including failure of consideration. U.C.C. § 3-305.

The Code distinguishes between real defenses, which an obligor may assert against a holder in due course (U.C.C. § 3-305), and personal defenses such as failure of consideration (U.C.C. § 3-408), which an obligor may not assert against a holder in due course. An agent may also escape liability on the instrument if his principal ratifies the signature; the agent then may be liable to the principal. U.C.C. § 3-404 official comment 3.

10. U.C.C. § 3-301.

11. U.C.C. § 3-802 qualifies this concept of obligations both on and off the instrument:

(1) unless otherwise agreed where an instrument is taken for an underlying obligation

his signature¹² appears on the instrument¹³ or is firmly attached on an allonge.¹⁴

The Code defines "signature" broadly. A signature may be "any symbol executed or adopted by a party with present intention to authenticate a writing."¹⁵ The word "adopted" implies that after a mark is executed, a party may cause that mark to become his valid signature. The Official Comment advises courts to use "common sense and commercial experience" to determine whether a given mark constitutes a signature.¹⁶ Although a letterhead may be a signature for purposes of the Code,¹⁷ the finder of the fact should be loath to find a "signature" in such an improbable place.

B. Signature by Agent

Commercial practice requires, and article 3 affirms, that agents may obligate their principals without binding themselves on negotiable instruments if the agents are authorized to sign instruments and they sign according to the rigid forms prescribed by the Code. An agent may present the same defenses that his principal could assert in an action to enforce payment on a negotiable instrument. If the agent deviates from the Code's requirements, he may find himself personally obligated and unable to assert a defense against a holder in due course.

(a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.

(2) The taking in good faith of a check which is not post dated does not of itself so extend the time on the original obligation as to discharge of surety.

Id.

12. See U.C.C. § 3-401(2), defining "signature" broadly as "any name, including any trade or assume name . . . or by any word or mark used in lieu of a written signature."

13. U.C.C. § 3-401.

14. U.C.C. § 3-401(1) and official comment 1, referring to U.C.C. § 3-202(2), which provides that an allonge is deemed to be part of the instrument to which it is attached.

15. U.C.C. § 1-201(39).

16. U.C.C. § 1-201 official comment 39.

17. *Id.*

1. Form of Signature

An agent must satisfy stringent requirements for the form of his signature in order to obligate his principal and to escape personal liability on the instrument.¹⁸ Professor Arthur E. Sutherland summarized the effect of these provisions on signatures executed in both proper and improper form:

3-403(2) contemplates at least three different types of signatures:

- (1) X. Inc. _____ A. E. Brown
- (2) X. Inc. _____ by A. E. Brown, V.P.
- (3) _____ A. E. Brown, Vice President

Under 3-403(2), in case (1), as Mr. Brown did not indicate his representative capacity, both he and X Inc. are bound. In case (2), only X Inc. is bound because the instrument names the representative capacity. In the third case, although the unfortunate signer added words indicating a representative capacity, he failed to disclose his principal. Under these circumstances, X Inc. not being named, is not bound; and Brown is individually bound.¹⁹

The signer of a negotiable instrument generally will be personally

18. U.C.C. § 3-403 provides:

- (1) A signature may be made by an agent or other representative, and his authority to make it may be established as in any other cases of representation. No particular form of appointment is necessary to establish such authority.
- (2) An authorized representative who signs his own name to an instrument
 - (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;
 - (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

Id.

The language "or other representative" in U.C.C. § 3-403 was added to show that trustees and executors or administrators of estates, in addition to technical agents, may affect legal relations between legal entities. See U.C.C. § 1-201(35).

19. Letter of Professor Arthur E. Sutherland to New York Law Revision Commission, August 9, 1954, reprinted in 1 LAW REVISION COMMISSION REPORTS OF HEARINGS ON THE UNIFORM COMMERCIAL CODE, 240, 251 (1954) [hereinafter cited as LAW REVISION COMMISSION REPORTS].

liable unless the instrument indicates that he signed in a representative capacity and the instrument also identifies the principal.²⁰ The introductory phrase "except as otherwise established between the immediate parties" indicates that this rule is not conclusive. An agent who appears obligated on a negotiable instrument may in some cases escape liability by presenting parol evidence showing the parties did not intend to bind him. Courts will only admit parol evidence, however, if the instrument contains an ambiguity placing the holder on notice that the intended obligor may be someone other than the person who signed. A substantial body of precedent has established that the requisite ambiguity may exist anywhere on the face of the instrument; the form of the signature need not place the holder on notice that the signer did not intend to be bound.

In *St. Croix Engineering Corp. v. McLay*,²¹ the Minnesota Supreme Court admitted parol evidence as it held that the agent was not personally obligated on the instrument.²² The court considered facts indicating that the plaintiff knew initially that the defendant signed in a representative capacity: the name, address, and logo of Mitronics, Inc., were printed in the upper left corner of each check; a check cutting machine imprinted the written sum on each check; St. Croix knew McLay did business as a corporation; St. Croix initially sued Mitronics, Inc., rather than McLay; the plaintiff complained to Mitronics after the checks were dishonored.²³ The court found that section 3-403 required acknowledgement of agency on the instrument, but not necessarily in the signature.²⁴ The opinion recognized that the fact finder may consider business practice and custom.²⁵ The court also indicated in dicta that it would be more likely to find an agent personally liable on a corporate note than on a corporate check.²⁶

The Court of Appeals for the District of Columbia admitted parol

20. See U.C.C. § 3-403, *supra* note 18.

21. 304 N.W.2d 912 (Minn. 1981).

22. *Id.* at 915. Gerald McLay, president of Mitronics, Inc., issued checks to St. Croix Engineering Corp. St. Croix sued Mitronics when the checks were dishonored, and Mitronics entered Chapter 11 bankruptcy. St. Croix then sued the estate of McLay, who had died after Mitronics entered bankruptcy. St. Croix claimed that McLay's failure to indicate he signed on behalf of Mitronics caused McLay to be personally liable on the instrument under U.C.C. § 3-403. *Id.* at 913-14.

23. *Id.* at 914-15.

24. *Id.* at 914.

25. *Id.* at 915, citing J. WHITE & R. SUMMERS, *supra* note 2, at 405.

26. *McLay*, 304 N.W.2d at 915.

evidence to exonerate the defendant in *Chidakel v. Blonder*.²⁷ Plaintiff sued Harvey and Florence Blonder on a note that provided:

For Value Received Discount Car Wash Number Five, A Va. Corp. promise [sic] to pay to the order of Pauline P. Chidakel the sum of One Hundred Thousand (\$100,000.00) Dollars.

Attest: _____ Discount Car Wash Number 5
(Initials "H.B.") _____ by (signature
of Florence Blonder).²⁸

The court found that Harvey was not bound because the face of the instrument revealed that he signed only as a witness.²⁹ The opinion next recognized that this promissory note did not fall within any category in U.C.C. section 3-403; the note was a hybrid of sections 3-403(2)(b) and 3-403(3).³⁰ Florence's title did not follow her name, but her name followed the word "by" and was immediately below the name of the business. The opinion recognized that the face of the note indicated the person represented (Discount) and provided some evidence that Florence signed in a representative capacity.³¹ The court noted a split of authority over whether the word "by" may be evidence of representative rather than personal capacity,³² and held that parol evidence was admissible in this case to show the agent signed only in a representative capacity.

The *St. Croix Engineering Corp.* and *Chidakel* courts based their holdings on findings that the face of the instrument did not show clearly whether the agent signed in a representative capacity. The courts admitted parol evidence to resolve the dispute. The Alabama Supreme Court elaborated on this view in *Wurzburg Bros. Inc. v. Coleman*.³³ The opinion noted that the Code³⁴ allows parol evidence to re-

27. 431 A.2d 594 (D.C. Cir. 1981).

28. *Id.* at 595.

29. *Id.*

30. *Id.* at 596.

31. *Id.*

32. *Compare* Southeastern Financial Corp. v. Smith, 397 F. Supp. 649 (D. Ala. 1975), *rev'd on other grounds*, 542 F.2d 278 (5th Cir. 1976); and *Dynamic Homes, Inc. v. Rogers*, 331 So. 2d 326 (Fla. Dist. Ct. App. 1976) (holding that "by" and other factors indicate representative rather than personal capacity) *with* Giacalone v. Bernstein, 348 So. 2d 679 (Fla. Dist. Ct. App. 1977), *cert. denied*, 354 So. 2d 980 (Fla. 1977).

33. 404 So. 2d 334 (Ala. 1981). Defendant was president of Coleman American Moving Services, Inc. Plaintiff sold supplies to Coleman American on an open account.

solve a dispute between initial parties to the instrument if there is a partially disclosed principal,³⁵ or if the instrument names the person represented, but does not indicate the agent signed in a representative capacity.³⁶ The *Wurzburg Bros. Inc.* court next found it could look beyond the signature on the instrument to determine representative capacity,³⁷ but noted that defendant had the burden of proof to establish he was not liable.³⁸ The opinion emphasized the policy of promoting certainty and predictability in the law of negotiable instruments.³⁹ Holders of instruments "should be able 'to tell at a glance whose obligation they hold' ".⁴⁰

In their debates about the Uniform Commercial Code, the New York Law Revision Commission devoted surprisingly little attention to the policies behind U.C.C. section 3-403.⁴¹ The dearth of discussion may have resulted from the similarity between the New York Negotiable Instruments Law then in effect and U.C.C. section 3-403.⁴² The

Coleman American paid with checks that the bank dishonored. Plaintiff's credit manager feared Coleman American would become insolvent. He therefore had defendant sign a note to secure the debt. The note provided: "Coleman American Moving Services, Inc. promises to pay . . . \$44,419.68." The note was signed "James H. Coleman" and did not indicate that Coleman signed in a representative capacity. The Alabama Supreme Court admitted parole evidence and found defendant personally liable on the instrument. *Id.* at 335-37.

34. U.C.C. § 3-403(2) provides "except as otherwise established. . .," implying that parole evidence is admissible in the situations described.

35. *Wurzburg Bros, Inc.*, 404 So. 2d at 336. A person acts for a partially disclosed principal if he acknowledges the representative capacity of his signature but he does not identify the persons he represents. RESTATEMENT (SECOND) OF AGENCY § 4 (1958), [hereinafter cited as RESTATEMENT].

36. *Wurzburg Bros, Inc.*, 404 So. 2d at 336.

37. *Id.* The court recognized opposing authority. See, e.g. *St. Regis Paper Co. v. Wicklund*, 24 Wash. App. 552, 597 P.2d 926 (1979).

38. *Wurzburg Bros, Inc.*, 404 So. 2d at 336 (citing *Byrd Co. v. Tolbert*, 286 Ala. 465, 241 So. 2d 840 (1971)); *Fanning v. Hembree Oil Co.*, 245 Ark. 825, 434 S.W.2d 822 (1968). Defendant failed to meet this burden; the court placed little weight on his self serving statements because another court had recently convicted him of securities fraud. *Wurzburg Bros, Inc.*, 404 So. 2d at 337.

39. *Wurzburg Bros, Inc.*, 404 So. 2d at 336, citing *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 23, 385 N.E.2d 1068, 413 N.Y.S. 2d 141 (1978).

40. *Wurzburg Bros, Inc.*, 404 So. 2d at 336, quoting *J. WHITE & R. SUMMERS*, *supra* note 2, at 489.

41. See generally LAW REVISION COMMISSION REPORTS, *supra* note 19.

42. Section 38 of the New York Negotiable Instrument Law (1877) was adopted from section 19 of the Uniform Negotiable Instruments Law (1896). 1 LAW REVISION COMMISSION REPORTS, *supra* note 19 at 223 (1955). This section provided: "Signature

Law Revision Commission noted that both the U.C.C. and the Negotiable Instruments Law imposed a potentially severe burden on an agent who intended to act on behalf of another.⁴³ The Commission concluded, however, that “[t]he requirements of certainty and definiteness of commercial paper are thought to call for this unfortunate’s [the agent’s] sacrifice if he has not signed in the correct form. That is the rationale of the harsh rule, as described in Comment 3 to Section 3-403.”⁴⁴ The Commissioners observed that New York followed the minority rule which admitted parol evidence in a suit between initial parties but refused to admit it as a defense to suit by a holder in due course.⁴⁵ The Commission concluded that adoption of the U.C.C. would change this practice.⁴⁶ The Code, however, may achieve a similar result in a less direct manner because an obligor may assert personal defenses, including failure of consideration,⁴⁷ against anyone other than a holder in due course.⁴⁸

In *Havatampa Corp. v. Walton Drug Co., Inc.*,⁴⁹ a Florida District Court of Appeals noted that the presumption in favor of agent’s personal liability promotes certainty and predictability in negotiable in-

by agent; authority; how shown.—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.” *Id.*

43. *Id.* at 225.

44. *Id.*

45. *Id.* at 226-27.

46. *Id.* at 227.

47. U.C.C. § 3-408.

48. U.C.C. § 3-305. The Commission recognized policies supporting the minority rule and the U.C.C.:

A holder in due course should not be required to inquire what was meant by that form of signature [words of agency alone]. Such inquiry would slow up the ready transfer of negotiable instruments as a substitute for money. Hence the agent should not be allowed as against a holder in due course to show by parol evidence that he did not intend to bind himself personally. But as against a plaintiff who is the payee and who has dealt directly with the agent, it does not seem to make sense to say that the agent will not be permitted to show that such payee plaintiff knew that the agent did not intend to be bound personally, for the payee could not have been misled by such form of signature.

2 LAW REVISION COMMISSION REPORTS, *supra* note 19, at 227 (quoting F. WHITNEY, BILLS AND NOTES 19 (1943)).

49. 354 So. 2d 1235 (Fla. Dist. Ct. App. 1978). Defendants executed a note stating “We promise to pay . . .” and signed

the Code except when these principles are clearly inconsistent with the Code's provisions.⁵⁵ This is fortunate; article 3 does not delineate the possible sources of an agent's authority to bind his principal. The official Comment to section 3-403 provides some insight but does not clarify adequately the possible sources of authority.⁵⁶ The Code directs the practitioner to other legal sources, particularly the common law, for interpretation of agent's authority.⁵⁷

The second Restatement of Agency recognizes five sources of an agent's power to bind his principal: express authority,⁵⁸ implied authority,⁵⁹ apparent authority,⁶⁰ inherent power,⁶¹ and ratification.⁶²

a. Express Authority

Express authority is easy to recognize and, if written, is easy to prove.⁶³ The essential requirement is a communication by the principal to the agent indicating that the agent may act on the principal's behalf.⁶⁴ Courts will only consider the statement by the principal; the principal's unexpressed intent is irrelevant.⁶⁵ An agent who relies on an express conferral of authority by the principal and who signs according to the form provided in U.C.C. section 3-403 will bind the principal but will not obligate himself on the instrument.⁶⁶

b. Implied Authority

The Restatement of Agency defines implied authority as actual

55. U.C.C. § 1-103.

56.

The power to sign for another may be an express authority, or it may be implied in law or in fact, or it may rest merely upon apparent authority. It may be established as in other cases of representation, and when relevant parol evidence is admissible to prove it or deny it.

U.C.C. § 3-403 official comment.

57. See U.C.C. § 1-403.

58. RESTATEMENT § 7.

59. *Id.* at § 35.

60. *Id.* at §§ 8, 159.

61. *Id.* at § 8A.

62. *Id.* at § 82; U.C.C. § 3-404 official comment 3.

63. See generally RESTATEMENT § 7 at 28-29, § 26 at 100.

64. *Id.*

65. *Id.* § 26 at 100.

66. *Id.* §§ 320, 324.

authority to perform acts that are incidental to the purpose of the agency.⁶⁷ Communications between principal and agent determine applicability of both express and implied authority.⁶⁸ An agent should be loath to rely on implied authority in the absence of such factors as business emergencies⁶⁹ or a principal's statements to third parties by which the principal recognizes the agent's authority to act.⁷⁰ The Restatement clarifies the scope of implied authority. Unless otherwise agreed, authority to manage a business includes authority to make incidental or reasonably necessary contracts, to buy necessary equipment and supplies, to make necessary repairs, to employ or discharge employees as reasonably necessary, to sell products in accordance with business purposes, to receive payment on the principal's behalf, and to pay business debts.⁷¹

c. Apparent Authority

A principal's statement to a third party that his agent has authority to act will confer apparent authority on the agent and will empower the agent to bind the principal, even if the principal privately ordered the agent not to act.⁷² Courts limit the scope of apparent authority by requiring the third party's reliance to be reasonable.⁷³ In *Taillie v.*

67. "Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it." *Id.* § 35.

68. *Ebasco Services, Inc. v. Pa. Power & L. Co.*, 402 F. Supp. 421, 445 (E.D. Pa. 1975).

69. RESTATEMENT § 47 recognizes the agent's authority to do whatever he reasonably believes necessary to prevent a substantial loss to his principal in an unforeseen situation. The unforeseen situation and reasonable belief as to what is necessary may be difficult to establish. Courts, therefore, have considered relatively few cases in which agents relied on implied or emergency authority.

70. See "apparent authority," *infra* notes 72-80 and accompanying text.

71. RESTATEMENT § 73.

72. *Id.* § 8 and comment a; § 160.

73. In *Stephens v. Yamaha Motor Co., Ltd.*, 627 P.2d 439 (Okla. 1981), the Supreme Court of Oklahoma held that plaintiff was not entitled to rely on the appearance of an agency relation. *Id.* at 442. The *Stephens* plaintiff had the defendant repair a motorcycle tire because plaintiff believed defendant was affiliated with Conoco. The only reason for believing there was a connection between defendant's service station and Conoco was the small Conoco sign defendant displayed. When his tire deflated, plaintiff sued defendant's service station and Conoco, Inc., arguing that defendant had apparent authority to bind Conoco to express and implied warranties. *Id.* at 440. The Oklahoma Supreme Court affirmed summary judgment for Conoco as it noted, "Ap-

*Chedester*⁷⁴ the Tennessee Court of Appeals based a finding of apparent authority on a course of dealing. The unanimous opinion found that plaintiffs were entitled to rely on apparent authority of Chedester's fiancée' because of her supervision of construction and the course of changes she ordered.⁷⁵

Similarly, the Texas Court of Civil Appeals found apparent authority in a course of dealing in *Southline Equipment Co. v. National Marine Service, Inc.*,⁷⁶ but noted that estoppel is the basis for apparent

parent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. *Id.* at 441 (quoting RESTATEMENT § 8 comment c. The court quoted Rosser-Moon Furniture Co. v. Oklahoma State Bank, 192 Okla. 169, 135 P.2d 336 (1943)):

"Apparent authority" of an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing. And the elements that must be present before a third person can hold the principal for the acts of the agent on the theory of apparent authority are (a) conduct of the principal, (b) reliance thereon by the third person, and (c) change of position by the third person to his detriment.

Stephens, 627 P.2d at 441.

74. 600 S.W.2d 732 (Tenn. App. 1980). Chedester entered an agreement with a general contractor to build his home. Chedester's fiancée watched the work and proposed changes in plans. The contractor considered her Chedester's agent, and made all changes she proposed. When she asked to change cabinets, the contractor introduced her to plaintiffs, who were cabinet makers. She agreed to proposed plans and cost. When Chedester did not pay for the change, plaintiffs sued Chedester and the general contractor. The court rejected Chedester's argument that he had never authorized his fiancée to act on his behalf. *Id.* at 733-35.

75. *Id.* at 735. The court quoted 3 AM. JUR. 2d *Agency* § 73 (1962):

[S]o far as concerns a third person dealing with an agent, the agency's "scope of authority" includes not only the actual authorization conferred upon the agent by the principal, but also that which has apparently been delegated to him. Apparent authority, or ostensible authority, as it is also called, is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. In effect, therefore, an agent's apparent authority is, as to third persons dealing in good faith with the subject of his agency and entitled to rely upon such appearance, his real authority, and it may apply to a single transaction, or to a series of transactions.

600 S.W.2d at 734-35.

76. 598 S.W.2d 340 (Tex. Civ. App. 1980). National sued Southline for amounts due for repair of Southline's forklift. Southline claimed its employees, Whitey and Planta, did not have authority to enter in a contract for Southline. Planta previously placed orders; Planta and Whitey were present while plaintiff worked on the forklift, with their employer's implicit approval. *Id.* at 341-42.

authority. Apparent authority⁷⁷ exists if the principal causes a reasonably prudent person to believe the agent has authority to act.⁷⁸ The court agreed with defendant that only manifestations by the principal are relevant; an agent may not create apparent authority by his own words or conduct.⁷⁹ In this case, however, the court found sufficient evidence of manifestations by the principal to invoke apparent authority.⁸⁰

d. Inherent Agency Power

Drafters of the Restatement attempted to find a theoretical justification for judicial decisions imposing liability on the principal for acts of the agent when the principal had conferred neither actual nor apparent authority.⁸¹ Section 8A of the Restatement adopts the term inherent agency power which refers to "the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent."⁸²

Neither the U.C.C. nor the official comments mentions inherent power as a basis for freeing an unauthorized agent from liability under section 3-404. It also appears that no appellate tribunal has directly addressed the issue. The Code indicates, however, that courts should follow a traditional analysis of the law of principal and agent as they evaluate the scope of an agent's authority.⁸³ In *Musulín v. Woodtek, Inc.*,⁸⁴ the Oregon Supreme Court suggested that inherent power, de-

77. *Id.* at 343.

78. *Id.* at 343, citing *Chastain v. Cooper & Reed*, 152 Tex. 322, 257 S.W.3d 433 (1953).

79. *Id.* at 343 (citing *Bugh v. Word*, 424 S.W.2d 274 (Tex. Civ. App. 1968)).

80. *Id.* at 343.

81. *See, e.g., Butler v. Maples*, 76 U.S. 766 (1869).

82. RESTATEMENT § 8A.

83. U.C.C. § 3-403(1) recognizes that the agent's authority may be established as in other cases of representation.

84. 491 P.2d 1173 (Or. 1971). Charles Benert, Woodtek's general manager and vice president, signed an \$80,000 promissory note on behalf of Woodtek. *Id.* at 1174. Woodtek defended subsequent suit on the grounds of lack of consideration and lack of actual or apparent authority for Benert to obligate the corporation. The court cited a pre-U.C.C. case, *DuBois Matlack Lumber Co. v. Davis Lumber Co.*, 149 Or. 571, 573, 42 P.2d 152, 154 (1935), for the proposition that neither the president nor the vice president has inherent power to obligate a corporation on a negotiable instrument. *See also Capital Bank v. American Eyewear, Inc.*, 597 S.W.2d 17 (Tex. Civ. App. 1980),

fined in the case as “power flowing from the nature of the office,”⁸⁵ may be relevant only if no other source of authority is available. A mere vice president or president may not have inherent power to bind a corporation. If the corporate officer signs an instrument without actual or apparent authority he will bind himself and the court will require a high threshold of proof to establish inherent power.

Courts are most likely to invoke inherent power to obligate the principal of a general agent.⁸⁶ A general agent may have power to bind his principal in transactions that usually accompany, or that are incidental to, work he is authorized to perform if the third party reasonably believes the agent is authorized to act.⁸⁷

e. Ratification

The U.C.C. provides that a principal may ratify the unauthorized signature of his agent if the agent purported to sign in his behalf.⁸⁸ The Official Comment recognizes that ratification is retroactive, and that it may relieve an unauthorized agent from personal liability on the instrument.⁸⁹ An unauthorized signer, however, may be liable to the principal even after ratification.⁹⁰ A court may find ratification in express statements by the principal or in the principal’s retention of benefits after he learns of the unauthorized signature.⁹¹ The Restatement would place a heavy burden on a principal. Section 43 finds ratification in a principal’s acquiescence in an unauthorized act.⁹² Section 94 suggests that failure to take active measures to repudiate an unauthorized act may

in which the court held that a bank president did not have actual or apparent authority or inherent power to sign a lease on the bank’s behalf. The *Musulin* court did not address the issue of agent’s liability as it affirmed judgment for plaintiff.

85. *Musulin*, 491 P.2d at 1177.

86. A general agent is “an agent authorized to conduct a series of transactions involving a continuity of service.” RESTATEMENT § 3(1); *Ebasco Services, Inc. v. Penn. Power & Light Co.*, 402 F. Supp. 421, 445 (E.D. Pa. 1975).

87. RESTATEMENT § 161; *Ebasco Services, Inc. v. Penn. Power & Light Co.*, 402 F. Supp. 421, 446 (E.D. Pa. 1975).

88. U.C.C. § 3-404(2).

89. U.C.C. § 3-404(2) official comment 3: “[T]he word ‘ratified’ is used in order to make it clear that the adoption is retroactive. . . [t]he ratification relieves the actual signer from liability on the signature.”

90. U.C.C. § 3-404(2) and official comment 3.

91. U.C.C. § 3-404 official comment 3.

92. RESTATEMENT § 43.

imply affirmance.⁹³ The extent of this burden remains unclear.

f. Termination of Authority

An agent acting within the apparent scope of authority may find himself personally obligated under U.C.C. section 3-404(1) if the agency relation terminates before he signs an instrument on behalf of his principal. This result protects innocent principals and third parties and it places a substantial burden on the agent to verify his status before each representative act. The Restatement enumerates established grounds for termination of the agency relation.⁹⁴ Actual authority ends at the time specified in the agent's contract with the principal.⁹⁵ If the original agreement does not provide for duration of authority, the relation will cease when the agent accomplishes the authorized act⁹⁶ or when specified events occur.⁹⁷ In most cases a principal may unilaterally terminate an agent's employment or an agent may expressly or implicitly renounce the relation.⁹⁸ However, a party who wrongfully terminates the relation may be liable in damages for breach of contract or for other grounds. Actual authority will also end if either principal or agent loses capacity to contract.⁹⁹ This most often occurs upon death of the principal or of the agent or upon the winding up of a corporate principal or agent.

The Supreme Court of Arizona followed the majority rule in *Mubi v. Broomfield*¹⁰⁰ as it held that death of the principal instantaneously

93. RESTATEMENT § 94 official comment a (limiting the broad ramifications of this rule). The drafters would leave broad discretion to the factfinder by basing the test for ratification on whether the principal failed to object when "according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent." *Id.*

94. See RESTATEMENT §§ 105-39.

95. See *supra* text accompanying notes 63-66.

96. RESTATEMENT § 106.

97. *Id.* § 107.

98. *Id.* § 118.

99. *Id.* § 122.

100. 108 Ariz. 39, 492 P.2d 700 (1972). Petitioner's decedent sued Walter and Jane Doe Tribble for injuries he suffered in a car accident. On August 5, 1970, defendants filed an offer of judgment. Rule 68 of the Arizona Rules of Civil Procedure required any offer to be accepted in writing within ten days or it would be deemed withdrawn. Before he died on August 11, 1970, petitioner's decedent told his wife to accept the offer. She immediately instructed their attorney to accept the proposal but he did not file the required acceptance until after decedent's death. *Id.* at 40-41, 492

ends agency authority by operation of law.¹⁰¹ The court considered whether the attorney had authority after his client's death to carry out instructions made before death. In holding that the acceptance was not valid, the unanimous opinion noted, "[w]here there is only a naked authority, not coupled with an interest, the death of the principal without notice ends the agent's authority to act in his principal's behalf."¹⁰² This decision is noteworthy for two reasons. First, it does not require any notice to the agent before his authority is terminated. Second, it does not apply to a power coupled with an interest.¹⁰³ The court observed, however, that courts sometimes make an exception to protect innocent third parties who deal with an agent in good faith and without knowledge of the principal's death.¹⁰⁴

The Supreme Court of Washington considered requirements for termination of apparent authority in *Lazov v. Black*.¹⁰⁵ The court noted the general rule protecting third parties from revocation of an agent's authority without notice, by stating that "generally, termination by a principal of an agency relationship is not effective as to the agent and third parties who have previously dealt with the agent in that capacity until notice of the termination of the relationship is conveyed to them."¹⁰⁶ The court found the general rule inapplicable in this case because statutes required filing of a revocation of power of attorney and provided that filing was constructive notice to third parties.¹⁰⁷

Mubi and *Lazov* indicate that an agent's authority may terminate immediately upon the death or incapacity of the principal—even without notice to the agent or third party. An agent or third party, however, may continue to rely on an agent's appearance of authority after

P.2d at 701-702.

101. *Id.* at 41, 492 P.2d at 702.

102. *Id.*

103. *See infra* text accompanying notes 110-114.

104. *Mubi*, 108 Ariz. at 42 n. 1, 492 P.2d at 703 n. 1.

105. 88 Wash. 2d 883, 567 P.2d 233 (1977). Spridon Lazov executed and recorded a general power of attorney naming his wife attorney in fact. He left the state and his wife purchased a home in their names from appellants. Mrs. Lazov then conveyed her husband's interest to Mr. and Mrs. Boyce. Mr. Lazov returned to the state, filed suit for divorce, and told his wife he intended to revoke the power of attorney. He accepted a quitclaim deed from Mr. and Mrs. Boyce and filed a revocation of the power of attorney. The wife then conveyed their interest in the property to appellants. The husband sued and the trial court declared the deed void. *Id.* at 884-85, 567 P.2d at 234.

106. *Id.* at 886, 567 P.2d at 234.

107. *Id.* at 885-6, 567 P.2d at 234-5.

they have dealt together and until they receive notice that the principal has revoked the agent's authority. The *Mubi* court reconciled this apparent inconsistency; the agent's authority is derivative—if the principal does not have capacity to contract the agent can have no power to contract on his behalf.¹⁰⁸ However, an agent claiming that his apparent authority remains does not assert a greater capacity than his principal enjoys; he merely asserts that he retains a power he once possessed. The *Mubi* opinion suggests, furthermore, that an agent whose power is coupled with an interest in the transaction may retain authority even after the principal's death or attempted revocation.¹⁰⁹

The Arizona Supreme Court clarified the doctrine of power coupled with an interest in *Phoenix Title and Trust Co. v. Grimes*.¹¹⁰ The trial court entered summary judgment for defendants and the Supreme Court reversed, holding that agency power to sell the land passed to the agent's estate because the agent had a power coupled with an economic interest in the underlying transactions.¹¹¹ The court limited this rule by noting that personal service contracts may not be assignable if they can only be performed by the initial person employed.¹¹² The unanimous opinion found that the agent's power in this case:

was a power coupled with an interest, and is irrevocable. It is of course the general rule that the death of either principal or agent terminates the relationship. However, the exception to the rule is that if the agency or power of the agent is coupled with an interest in the subject matter of the agency, the power so coupled will survive to the personal representative of the agent upon the death of the agent.¹¹³

The court found that the decedent's rights survived his death¹¹⁴ be-

108. *Mubi*, 108 Ariz. at 41-42, 492 P.2d at 702-3.

109. See *supra* text accompanying note 102.

110. 101 Ariz. 182, 416 P.2d at 979 (1966). Plaintiff's decedent was a coven-turer in a land development plan. He owned an undivided 7/24 interest in the property, and the other investors signed a contract giving him the exclusive right to subdivide, advertise, develop, and sell the land for a commission; the agreement explicitly provided that this right would pass to decedent's heirs or assigns. Defendants refused to permit the executor to continue performing the contract. *Id.*

111. *Id.* at 184-85, 416 P.2d at 981-82.

112. *Id.* at 185, 416 P.2d at 982.

113. *Id.* at 184-85, 416 P.2d at 981-82 (citing *Commercial Nursery Co. v. Ivey*, 164 Tenn. 502, 51 S.W.2d 238 (1932)).

114. See also *Matter of Estate of Gray*, 541 P.2d 336 (Colo. App. 1975), in

cause the decedent was a conventurer with an economic interest in addition to his interest in the exercise of the power to manage the property.

C. Summation

An attorney advising an agent should recommend that the agent have a written statement establishing the scope of authority because the agent's subsequent attempt to prove implied authority or inherent power may be especially difficult. If an agent acts pursuant to written authorization, particularly a power of attorney, he should follow its terms strictly. The agent should show on the instrument both his representative capacity and the identity of his principal. An attorney determining who is liable on a negotiable instrument must consider several questions. Did the agent name the principal? Did the agent properly acknowledge his representative capacity? Did the agent have authority to bind the principal? If the agent did not have authority to bind the principal, then did the principal ratify his agent's conduct?

These questions are essential to determination of liability not only on negotiable instruments in the United States, but also on countries that adopted the English Bills of Exchange Act¹¹⁵ and the Geneva Conventions on negotiable instruments.¹¹⁶

III. England

A. Negotiable Instruments

The English law of negotiable instruments is based on the Bills of Exchange Act and the Cheques Act.¹¹⁷ The Bills of Exchange Act was the basis for the United States Uniform Negotiable Instruments Law

which the Colorado Court of Appeals found decedent had a sufficient interest in oil wells for his power as agent to pass to his estate.

115. See *supra* note 3 and accompanying text.

116. See *supra* note 4 and accompanying text.

117. Section 1 of the Cheques Act protects bankers who pay cheques in good faith, without negligence, and in the ordinary course of business; Sections 2 and 4 protect bankers who participate in the cheque collection process. Section 5 of the Cheques Act adopts Bills of Exchange provisions for crossed cheques. Further discussion of the Cheques Act is beyond the scope of this note.

and influenced the evolution of the Uniform Commercial Code.¹¹⁸ Negotiable instruments may be transferred as readily under the Bills of Exchange Act as under the Uniform Commercial Code. If a holder takes a negotiable bill of exchange in good faith, for value, and without notice of any defect in title, he becomes a holder in due course¹¹⁹ and will hold the bill free from any personal defenses or defect of title.¹²⁰ The United States practitioner should feel reasonably comfortable when planning commercial transactions in any of the countries that adopted the English Bills of Exchange Act. The Bills of Exchange Act generally has the same effect as the Uniform Commercial Code. The following discussion addresses provisions under the Bills of Exchange Act that differ from commercial law in the United States.

The statute defines a negotiable bill of exchange:

A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.¹²¹

A drawer may write a bill of exchange on anything that is not metal.¹²² A bill of exchange must be payable to order or to bearer.¹²³ The Act construes a bill payable to a particular person as payable to that person's order unless the face of the instrument prohibits transfer.¹²⁴ No one is liable on a bill of exchange unless his signature appears;¹²⁵ but a

118. M. MEGRAH & F. RYDER, *BYLES ON BILLS OF EXCHANGE* 3 (23d ed. 1972) [hereinafter cited as *BYLES ON BILLS OF EXCHANGE*].

119. *Bills of Exchange Act* § 29.

120. *Id.* § 38(2).

121. *Id.* § 3(1).

122. *BYLES ON BILLS OF EXCHANGE*, *supra* note 118, at 8. The Coinage Act, 1870, 33 & 34 Vict., ch. 10, reprinted in 6 *HALSBURY'S STATUTES OF ENGLAND* 836 (3d ed. 1968) [hereinafter cited as *Coinage Act*], forbids issuance of any metal as "a token for money, or as purporting that the holder thereof is entitled to demand any value denoted thereon." *Coinage Act*, § 5.

123. *Id.* § 8(2).

124. *Id.* § 8(4). Compare United States practice requiring use of words "order" or "bearer." U.C.C. § 3-104(1)(d) and official comment 5 require the use of prescribed language or a clear equivalent, and provide that in doubtful cases courts should hold against negotiability. A statement "pay John Doe" would, therefore, be negotiable in England but not in the United States.

125. *Bills of Exchange Act* § 23. Compare United States under U.C.C. § 3-401(2), providing that a person may sign a trade or assumed name.

person may be personally liable if he signs a trade or assumed name.¹²⁶ The signature of a partnership's name acts as the personal signature of every partner.¹²⁷ The drawer of indorser may add a statement such as "without recourse to me" or "*sans recours*" to eliminate or limit his liability on the instrument.¹²⁸

A check is a bill of exchange drawn on a bank.¹²⁹ The Bills of Exchange Act permits the drawer to "cross" the check and thereby eliminate negotiability.¹³⁰ Section 83(1) defines "promissory note" as "an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer." The maker of a note contracts to pay it according to its tenor¹³¹ and is subject to the same liability as in United States practice.¹³²

The Court of Appeals clarified requirements for checks and bills of exchange and illustrated a difference from United States law¹³³ in *Orbit Mining & Trading Co., Ltd. v. Westminster Bank, Ltd.*¹³⁴ In hold-

126. Bills of Exchange Act § 23(1).

127. *Id.* § 23(2).

128. *Id.* § 16(1). Compare United States practice permitting a drawer or indorser to sign "without recourse" to eliminate personal liability. U.C.C. §§ 3-413, 3-414. Under the U.C.C. a transfer without recourse does not eliminate all warranty liability; the transferor then only warrants he has no knowledge of a valid defense against him. U.C.C. § 3-417(3).

129. Bills of Exchange Act § 73. Lord Chorley defines "cheque" as follows:

A cheque is an unconditional order in writing drawn by one person upon another, who must be a banker, signed by the drawer, requiring the banker to pay on demand, or at sight, or on presentation or expressing no time for payment, a sum certain in money to or to the order of a specified person or to bearer.

R. CHORLEY, LAW OF BANKING 44 (6th ed. 1974).

130. A check bearing two parallel transverse lines across its face is "crossed," and is not negotiable. Bills of Exchange Act §§ 76-81.

131. *Id.* § 88.

132. U.C.C. §§ 3-413(1), 3-413(3).

133. U.C.C. § 3-111 provides that an instrument will be deemed payable to bearer if it indicates it is payable to "(a) bearer or the order of bearer; or (b) a specified persons or bearer; or (c) 'cash', or any other indication which does not purport to designate a specific payee." *Id.* The Bills of Exchange Act does not have a comparable provision. The present court considered whether checks payable to cash could be negotiable.

134. [1962] 3 All E.R. 565 (C.A.). Epstein was a secretary and a director of Orbit Mining Company and was authorized to cosign checks with the other director,

ing for the bank, the court found that the instruments were not checks¹³⁵ and that section 4(1)(a) of the Cheques Act protected the bank from liability since the bank was not negligent in paying.¹³⁶ The court noted that the Cheques Act is to be interpreted in conjunction with the Bills of Exchange Act.¹³⁷ The Bills of Exchange Act defines a check as "a bill of exchange drawn on a banker payable on demand."¹³⁸ A bill of exchange must be payable to a particular person, to order, or to bearer.¹³⁹ Because the instruments were payable to cash rather than to order, bearer, or a particular person, they were not bills of exchange and could not be cheques.¹⁴⁰ The court noted that section 7(3) of the Bills of Exchange Act provides that "[w]here the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."¹⁴¹ The opinion construed this provision strictly, finding that "cash" was not a person so the Bills of Exchange Act was inapplicable.¹⁴² Although the instrument was not a check under section 4(2)(a), it was a document under section 4(2)(b).¹⁴³ The court found that the bank was not negligent in paying because there was nothing on the face of the instrument to place the bank on notice of a defect.¹⁴⁴

B. Signature by Agent

Over one hundred and fifty years ago Chancellor Erskine wrote, "[n]o rule of law is better ascertained, or stands upon a stronger foundation, than this; that, where an agent names his principal, the princi-

Wolff. Before Wolff left town he signed blank checks so Epstein could continue business in his absence. Epstein signed his name, made the instrument payable to cash, and deposited it in his own account. Orbit Mining sued the drawee bank when it discovered the fraud. *Id.*

135. *Id.* at 570.

136. *Id.* at 574.

137. Cheques Act § 6.

138. Bills of Exchange Act § 73.

139. *Id.* § 3(1).

140. *Cf.* U.C.C. § 3-111, providing that an instrument payable to cash will be deemed payable to bearer.

141. [1962] 3 All E.R. at 570.

142. *Id.*

143. Cheques Act § 4(2)(b) provides: "This section applies to the following instruments . . . (b) any document issued by a customer of a bank which, though not a bill of exchange, is intended to enable a person to obtain payment from that banker of the sum mentioned in the document."

144. [1962] 3 All E.R. at 570.

pal is responsible: not the agent: but, for the application of that rule, the agent must name his principal as the person to be responsible."¹⁴⁵ Contemporary practice still follows this principle.

1. Form of Signature

The Bills of Exchange Act states how an agent must sign a negotiable instrument to escape personal liability:

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

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.¹⁴⁶

Parliament redrafted this section in committee, and may have liberalized the strict common law presumption that the agent always was personally liable.¹⁴⁷ Courts even today find such terms as "agent" or "manager" following a signature as mere *designatio personae*.¹⁴⁸

The form of signature is especially important in England.¹⁴⁹ A person who indicates on the instrument that he signs on behalf of another and who identifies the claimed principal with reasonable certainty generally will not be liable on the instrument, even if he signs without

145. Ex parte Hartop, 33 Eng. Rep. 132, 133 (1806).

146. Bills of Exchange Act § 26.

147. J. BATT, CHALMERS ON BILLS OF EXCHANGE 80 (1947) [hereinafter cited as CHALMERS ON BILLS OF EXCHANGE]. Lord Ellenborough followed the strict approach in *Leadbitter v. Farrow*, 105 Eng. Rep. 1077, 1079 (K.B. 1816):

It is not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration for another, which are words of exclusion? Unless he says plainly "I am the scribe" he is liable.

Id.

148. CHALMERS ON BILLS OF EXCHANGE, *supra* note 147, at 80.

149. Compare U.C.C. § 3-404(1), which provides that a person who signs in the proper form but without authority is personally liable for the instrument.

authority.¹⁵⁰ In deciding whether a signature binds the signer or his principal, a court will adopt the interpretation most favorable to the instrument's validity.¹⁵¹ The Court of Appeals in *Ernest Scragg & Sons, Ltd. v. Preserverance Banking & Trust Co., Ltd.*¹⁵² demonstrated the results of failing to disclose the principal on the face of the instrument. The Defendant claimed the plaintiff had actual knowledge that the plaintiff was acting on behalf of Isranyl, but the court refused to look beyond the face of the instrument as it found defendant liable for conversion. The court noted, "English law will attribute to a document its face value if the document is, or is in the nature of, a negotiable instrument. . . or if it is what is sometimes called a quasi-negotiable instrument (as, for example, a bill of lading). . . ." ¹⁵³

*Maxform S.P.A. v. Mariani & Goodville Ltd.*¹⁵⁴ demonstrated the interrelationship between the Bills of Exchange Act and the Companies Act of 1948¹⁵⁵ and their effect on personal liability of an agent who fails to disclose his principal. Mariani appealed from the decision of the trial court, arguing that he could not be liable as an acceptor under section 17(2) of the Bills of Exchange Act because he was not the drawee, that the only possible source of liability was section 108(4)(b) of the Companies Act, which imposes personal liability on agents of corporations who sign negotiable instruments on behalf of undisclosed principals,¹⁵⁶ and that because the bill of exchange never mentioned

150. Bills of Exchange Act § 26(1).

151. *Id.* § 26(2).

152. [1973] 2 Lloyd's L.R. 101 (C.A.). Defendant ordered texturing machines from plaintiffs. The order said it was from Preserverance Banking & Trust Co., Ltd., and was signed "for and on behalf of the Preserverance Banking & Trust Co." Pursuant to agreement, plaintiff shipped the goods to Isranyl Ltd. in Israel. Plaintiff sent a sight draft with invoice and bill of lading to defendant in London. Defendant did not pay or accept the draft, but immediately forwarded the documents to Isranyl Ltd. Plaintiff sued for breach of contract and for conversion of documents. *Id.* at 102.

153. *Id.* at 103 (citing Building & Civil Engineering Holidays Scheme Management Ltd. v. Post Office, [1964] 2 Q.B. 430, 445).

154. [1981] 2 Lloyd's L.R. 54 (C.A.). Italian plaintiff manufactured and sold furniture to Goodville, Ltd., d/b/a/ Italdesign. Plaintiff drew four bills of exchange for the purchase price of 4,969,080 lire; three bills totaling 4,073,680 lire were outstanding at the time of suit. Of all three bills of exchange the drawee was "Italdesign," the registered trading name for Goodwin, Ltd. The drawer had typed "*per accettazione*" below the drawee's name. Mariani signed at the bottom of the bill without any description of his status. *Id.* at 56.

155. Companies Act, 1948, 11 & 12 Geo. 6 ch. 38, reprinted in 5 HALSBURY'S STATUTES OF ENGLAND 110 (3d ed. 1968) [hereinafter cited as Companies Act].

156. *See id.*

Goodville Ltd. or Italdesign, Mariani could not have purported to sign on their behalf. The Court of Appeals affirmed judgment for plaintiff as it found that the face of the instrument revealed Mariani signed on behalf of the drawee without disclosing his representative status.¹⁵⁷ The court agreed that Mariani could not be liable as acceptor, but rejected his argument that section 26(1) of the Bills of Exchange Act required the court to look only to the form of signature.¹⁵⁸ The court applied section 26(2), which required the court to give the instrument the construction most favorable to its validity, and which allowed the court to look at the instrument as a whole.¹⁵⁹

In addition to disclosing the principal, the agent should avoid ambiguities on the instrument. In *Rolfe Lubbell v. Keith*,¹⁶⁰ the Court accepted plaintiff's argument that the Bills of Exchange Act section 26(2) requires construction most favorable to the validity of the instrument,¹⁶¹ that because the principal, Grafton, was already required to pay, defendants' signatures purportedly binding the company would be meaningless "mercantile nonsense,"¹⁶² and that the court should allow parol evidence to determine the parties' intent because of the ambiguity on the instrument.¹⁶³ The court held that the patent ambiguity permitted admission of parol evidence of a course of dealing, and previous requirement by the plaintiff of personal indorsements indicated a mutual intent that the defendant be personally bound.¹⁶⁴ The court noted that the defendants did not argue that the plaintiff waived his right to hold them personally liable by his failure to object to the stamp re-

157. *Id.* at 57.

158. *Id.*

159. *Id.*

160. [1979] 2 Lloyd's L.R. 75 (Q.B.). Plaintiff supplied cloth to the manufacturing firm Grafton Manquest Ltd. Grafton was delinquent in paying bills of over £9000. Plaintiff drew three bills of exchange payable by Grafton to Rolfe Lubbell, and presented them to Grafton for acceptance. After Grafton accepted the bills, Grafton's managing director, Keith, and company secretary, Greenwood, indorsed the bill in appropriate boxes labeled "managing director" and "company secretary," and immediately after their signatures stamped "for and on behalf of Grafton Manquest, Limited." *Id.* at 76-77.

161. *Id.* at 77.

162. *Id.*

163. *Id.*

164. *Id.* at 78. *Cf.* *Western Casualty & Surety Co. v. Bauman Ins. Agency, Inc.*, 401 N.E.2d 614 (Ill. App. 1980) (admitting parol evidence to show defendant intended to bind himself on a contract that he signed in an ambiguous capacity).

vealing the representative capacity of the signature.¹⁶⁵

Ernest Scragg, Maxform, and Rolfe Lubbell demonstrate the importance of an unambiguous signature revealing a representative capacity and identifying the principal. A court may refuse to look beyond the face of an instrument to determine whether the parties intended the signer to be personally liable. An agent signing on behalf of a principal should not permit his signature to appear in more than one place on the instrument because a court may construe the second signature as a personal indorsement.

2. Authority for Signature

The Bills of Exchange Act provides that an unauthorized signature generally will be completely inoperative and will not confer any rights on the instrument.¹⁶⁶ An agent who signs in the proper form, therefore, will not be personally obligated on the instrument even if he signs without authority. English courts achieve results similar to personal liability on the instrument by invoking a theory of breach of warranty of authority.¹⁶⁷

English law provides an exception by which agents who sign negotiable instruments on behalf of principals may be liable even if they indicate their representative capacity and identify their principal. A promoter of a corporation who signs on the corporation's behalf before the corporation is formed may be personally liable on the instrument under the European Communities Act of 1972.¹⁶⁸

165. *Rolfe Lubbell*, 2 Lloyds L.R. at 78.

166. Bills of Exchange Act § 24. *Cf.* U.C.C. § 3-404(1), providing that an agent who signs without authority of the person he purports to obligate will bind himself.

167. *See generally* F. REYNOLDS & B. DAVENPORT, *BOWSTEAD ON AGENCY* 378-86 (14th ed. 1976) and cases cited therein. Analysis of warranty liability arising off the instrument is beyond the scope of this article.

168. European Communities Act, 1973 ch. 68, *reprinted in* 42 *HALSBURY'S STATUTES OF ENGLAND* 59 (3d ed. 1972) [hereinafter cited as *E.E.C. Act of 1972*]. Section 9(2) provides:

Where a contract purports to be made by a company, or by a person as agent for a company, at a time when the company has not been formed, then subject to any agreement to the contrary the company shall have the effect as a contract entered into by the person purporting to act for the company or as agent for it, and he shall be personally liable on the contract accordingly.

Id.

In *Phonogram Ltd. v. Lane*,¹⁶⁹ the Court of Appeals applied this statute for the first time¹⁷⁰ to hold a corporate promoter personally liable to repay a loan made to his corporation before its formation.¹⁷¹ Defendant's corporation was never formed. The plaintiff sued, claiming that the defendant assumed liability by signing the letter acknowledging receipt of the loan, or that the defendant was liable under the EEC Act.¹⁷² In affirming the judgment of the trial court, Lord Denning noted that the word "you" in the letter appeared to refer to the defendant personally, but he deferred to the determination of the trial court.¹⁷³ The defendant argued that section 9(2) of the EEC Act of 1972 did not apply.¹⁷⁴ European Economic Community Council Directive 68/151 of March 9, 1968,¹⁷⁵ was the basis for the EEC Act of 1972.¹⁷⁶ Defendant argued that article 7 of the EEC Directive, as written in the original French text, would only impose personal liability on a promoter of a corporation who acted while the corporation was in the process of formation.¹⁷⁷ Defendant could not be liable since he acted on

169. [1981] 3 All E.R. 182 (C.A.).

170. *Id.* at 186.

171. Musicians employed defendant, Brian Lane, as business agent to obtain financing for their band and Fragile Management, Ltd., the corporation they proposed to form to manage their business. Defendant obtained a commitment from plaintiff, Phonogram, Ltd., for £12,000, payable to Jelly Music Ltd. on behalf of Fragile Management Ltd. (Defendant was a promoter of Fragile Management Ltd. and a director of Jelly Music Ltd. Plaintiff executed the checks in this way for administrative convenience. Plaintiff sent a letter to defendant with the check, in which it explained, "[i]n the unlikely event that we fail to complete within, say, one month you will undertake to repay us the £ 6000." Plaintiff asked defendant to sign the letter on a line immediately above the statement, "for and on behalf of Fragile Management Ltd." Defendant signed and returned the letter. *Id.* at 184-85.

172. *See supra* note 168.

173. *Lane*, 3 All E.R. at 185.

174. *Id.* at 186.

175. Hereinafter cited as EEC Directive.

176. *Lane*, 3 All E.R. at 186.

177. *Id.* English was not an official language of the European Economic Community in 1968. [1981] All E.R. at 186. The EEC Directive provided:

If acts are accomplished on behalf of a corporation while being formed but before being incorporated and if the corporation does not take back the obligations resulting from these acts, the people who have performed them will be jointly and indefinitely liable in the absence of a contrary provision.

Id.

The French text refers to a corporation "*en formation*," which implies "while being incorporated." Defendant's argument may fail because the original drafters did not use the stronger terms "*en train d'être formée*," or "*en train de se former*," which would

behalf of the corporation before taking any steps to incorporate. The defendant next argued he could not come within section 9(2) of the EEC Act of 1972 because he did not "purport" to act for the company.¹⁷⁸ The defendant disclosed that the company did not yet exist.¹⁷⁹ The Court of Appeals rejected this argument without discussion, noting that "[a] contract can purport to be made on behalf of a company, or by a company, even though that company is known by both parties not to be formed and that it is only about to be formed."¹⁸⁰

C. Summation

The English Bills of Exchange Act influenced development of the Uniform Commercial Code, and negotiable instruments in England have substantially the same effect as in the United States. An agent sued on an instrument may present the same defenses his principal could assert. A holder in due course takes the instrument free from personal defenses; a person signing a bill of exchange or promissory note may wish to avoid negotiability and the possibility that a holder in due course will sue for payment.

An agent signing a negotiable instrument on behalf of his principal may avoid negotiability by making a bill of exchange payable to cash, crossing a check, or failing to comply with requirements in the Bills of Exchange Act. An agent generally will not be liable on the instrument if he indicates his representative capacity and identifies his principal, even if he exceeds his authority. The promoter of a corporation may, however, be personally liable on an instrument he issues on behalf of his corporation before it is formed.

refer more closely to the period during which promoters were working to incorporate.

178. *Lane*, 3 All E.R. at 186.

179. *Id.*

180. *Id.* G. CHESHIRE & C.H.S. FIFOOT, *LAW OF CONTRACT* 462 (9th ed. 1976), discusses Section 9(2) of the EEC Act of 1972:

[T]his provision makes no change in the position of the company, which still cannot ratify the contract. It is clearly intended however to increase the number of cases where the agent is personally liable. How far it in fact does so will depend on the meaning given to the words "subject to any agreement to the contrary" since it could be argued that words showing that A signs as agent express an agreement that he is not to be personally liable.

Id.

IV. Civil Law Practice and the Geneva Convention

A. Overview

The Geneva Conventions¹⁸¹ are the basis for negotiable instruments law in much of continental Europe.¹⁸² Commercial need led to early attempts to unify commercial law. The Association for the Progress of Social Sciences first addressed the matter in a congress in Ghent in 1863.¹⁸³ In 1908 the Dutch government called an international conference at the Hague. In 1912, this conference produced the first draft of a uniform law.¹⁸⁴ The League of Nations addressed the concern in 1928, after the first World War interrupted efforts to codify a uniform law.¹⁸⁵ Drafters of the Geneva Conventions learned from the Hague conferences that they could only achieve some degree of unification of laws if they attempted merely to reduce the number of commercial law systems to two—the Anglo-American system and the continental system.¹⁸⁶ Drafters modeled the form of bills of exchange after German practice and eliminated bills payable to bearer to please the French.¹⁸⁷ Thirty-one states participated in the Geneva Conference

181. Convention Providing a Uniform Law on Bills of Exchange and Promissory Notes, June 7, 1930, 143 L.N.T.S. 259 [hereinafter cited as Bills of Exchange]; Convention Providing a Uniform Law for Cheques, March 19, 1921, 143 L.N.T.S. 355 [hereinafter cited as Cheques Convention].

182. The following nations ratified or acceded to all or part of both Conventions. For reservations and dates of ratification or accession, see UNITED NATIONS, MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS 581-86 (1978), U.N.Doc. ST/LEG/SER.D/11 (1978). Greece, Denmark, Norway, Sweden, Netherlands, Switzerland, Austria, Belgium, Finland, Italy, Japan, Germany, Portugal, Monaco, France, Poland, Brazil, Hungary and Luxembourg. On February 21, 1974, the Secretary-General of the United Nations received notification that the German Democratic Republic declared reapplication of the Convention beginning June 6, 1958. On January 13, 1976, the Federal Republic of Germany notified the Secretary-General that it would not recognize retroactive application of the Convention in the German Democratic Republic beyond June 21, 1973. *Id.*

183. Hamel, *The Geneva Conventions on Negotiable Instruments and Methods of Unifying Private Law*, in UNIFICATION OF LAW 270, 275 (1948).

184. *Id.*

185. *Id.*

186. Hudson & Feller, *The Internat'l Unification of Laws Concerning Bills of Exchange*, 44 HARV. L. REV. 333, 347 (1931).

187. Hamel, *supra* note 183, at 276-77.

May 13, 1930, through June 7, 1930.¹⁸⁸ Participants adopted conventions dealing with uniform law on bills of exchange and promissory notes,¹⁸⁹ conflicts of laws in connection with bills of exchange and promissory notes,¹⁹⁰ and stamp laws in connection with bills of exchange and promissory notes.¹⁹¹ On March 19, 1931, participants at a second conference adopted three conventions unanimously, proposing a uniform law on checks, conflicts of laws in connection with checks, and stamp laws in connection with checks.¹⁹² The following section will analyze the law of France to illustrate negotiable instruments practice in a civil law jurisdiction that has adopted the Geneva Conventions.

B. Practice in France

1. *Negotiable Instruments*

The Code de Commerce governs negotiable instruments in France and gives effect to the Geneva Conventions.¹⁹³ Assignment of debts generally requires formal notice to the debtor or the debtor's notarized acceptance.¹⁹⁴ Debts represented by negotiable instruments are more readily transferable and are better suited to commercial needs.¹⁹⁵ Negotiability under French law is much like its Anglo-American equivalent. Unlike United States and English provisions restricting applicability of personal defenses, the French Code de Commerce and the Geneva Conventions do not distinguish between holders and holders in due course.¹⁹⁶ Under the French law any holder in good faith receives a

188. Hudson & Feller, *supra* note 186, at 333. For proceedings of the Conference, see League of Nations Doc. C. 360. M. 151 II (1930).

189. See League of Nations Doc. C. 346(1). M. 142(1) II (1930).

190. See League of Nations Doc. C. 347(1). M. 143(1) II (1930).

191. See League of Nations Doc. C. 348(1). M. 144(1) II (1930).

192. *Conventions Concerning Negotiable Instruments*, UNIFICATION OF LAW 363 (1948).

193. CODE DE COMMERCE art. 110-182 (Daloz 1981-1982) control bills of exchange; art. 183-189 govern promissory notes, and the Decree of October 30, 1935, modified by Law 72-10, January 3, 1972, and Law 75-4, January 3, 1975, 1935 Daloz *Periodique et Critique* IV 467 [hereinafter cited as Check Laws], controls checks.

194. CODE CIVIL art. 1690 (Daloz 1981-1982).

195. F. LAWSON, A. ANTON, & L. BROWN, AMOS & WALTON'S INTRODUCTION TO FRENCH LAW 365 (1967) [hereinafter cited as AMOS & WALTON].

196. O. GILES, UNIFORM COMMERCIAL LAW 166 (1970). Compare U.C.C. § 3-305 with Bills of Exchange Act § 29.

negotiable instrument free from defects in title of earlier parties.¹⁹⁷ French law confers negotiability on a wide variety of instruments, including bonds, bills of lading, bills of exchange, promissory notes, and checks.¹⁹⁸ The Code de Commerce refers to bills of exchange, promissory notes, and checks as *effects de commerce*, and commercial courts have jurisdiction over all parties to these instruments.¹⁹⁹ The following sections discuss essential characteristics of *effects de commerce* under the French Commercial Code and the Geneva Conventions.

a. Bills of Exchange

A French bill of exchange has an effect similar to its counterpart in England and to a draft in the United States.²⁰⁰ It is a signed and dated instrument in writing in which the drawer orders the drawee to pay a sum certain in money to a named payee or his order at a fixed or determinable time.²⁰¹ Unlike its United States or English equivalents it may not be payable to bearer²⁰² and a drawer may prevent its transfer by indorsement by making it payable "*non à ordre*."²⁰³ The drawer has the responsibility, enforced by fines and imprisonment,²⁰⁴ of supplying a "provision" or fund from which the drawee will pay.²⁰⁵ The holder may not enforce the bill of exchange until the instrument is stamped and the stamp tax paid.²⁰⁶

A bill of exchange must contain: the term "bill of exchange" written in the text in the language used in drawing the instrument,²⁰⁷ an

197. *Id.* AMOS & WALTON, *supra* note 195, at 365.

198. *Id.*

199. *Id.*

200. *See generally id.* at 365-37.

201. C. COM. art. 110; Bills of Exchange Convention art. 2; AMOS & WALTON, *supra* note 195, at 365.

202. C. COM. art. 110.

203. *Id.*

204. *See, e.g.*, CODE PÉNAL art. 405 (Daloz 1981-1982) which treats failure to provide funds as a type of fraud.

205. C. COM. art. 116.

206. C. COM. art. 147.

207. The drafters of the Bills of Exchange Convention required the label "bill of exchange" to provide a definite and quick way to distinguish between a bill of exchange and a check or a promissory note, and to insure that the signer realizes he is entering a serious legal obligation. Balogh, *Critical Remarks on the Law of Bills of Exchange of the Geneva Convention*, 9 TUL. L. REV. 165, 184 (1935).

unconditional order to pay a sum certain, the name of the payor (drawee), a statement of the time of payment, identification of the place of payment, the name of the person to whom or to whose order payment is to be made,²⁰⁸ a statement of the date and place where the bill was issued, and the signature of the person issuing the bill (drawer).²⁰⁹ The signature may be by hand or by any other method.²¹⁰ A bill of exchange in which the time of payment is not specified is deemed payable at sight. In the absence of any statement to the contrary, the place designated beside the drawee's name is deemed the place of payment, and also the domicile of the drawee.²¹¹ A bill of exchange that does not identify the place where it was issued will be deemed to have been drawn in the place mentioned beside the name of the drawer.²¹² If the sum payable on a bill of exchange is expressed both in words and in numbers, the sum expressed in words will govern if there is a difference. If the sum payable on a bill of exchange is expressed more than once in words or more than once in numbers, the smaller amount will control if there is a difference.²¹³

All drawers, acceptors, indorsers, or guarantors by *aval*²¹⁴ of a bill of exchange are jointly and severally liable to the holder.²¹⁵ The holder has the right to proceed against all these people, individually or collectively, without being required to follow the order in which they became bound.²¹⁶ Anyone who signs a bill of exchange and pays the holder enjoys the same right the holder possessed.²¹⁷ Filing suit, by the holder, against one of the parties, on the instrument does not constitute an

208. Compare Anglo-American practice requiring merely that the payee be identified with reasonable certainty. U.C.C. § 3-110; Bills of Exchange Act § 7.

209. C. COM. art. 110. Compare Bills of Exchange Convention art. 1, which does not include the second clause of requirement (8).

210. *Id.*

211. Domicile is relevant in choice of law questions. *See infra* notes 417-423 and accompanying text.

212. C. COM. art. 110; Bills of Exchange Convention art. 2. Place of issue is relevant in choice of questions. *See infra* notes 417-423 and accompanying text.

213. C. COM. art. 113; Bills of Exchange Convention art. 6.

214. An *aval* is a guarantee of payment written on the bills or on an *allonge*. *See* Bills of Exchange Convention art. 31; C. COM. art. 130. A guarantor may create an *aval* with the signed statement "good as *aval*" or "*bon pour aval*," or any similar provision. *Id.*

215. C. COM. art. 151; Bills of Exchange Convention art. 47.

216. C. COM. art. 151; Bills of Exchange Convention art. 47.

217. *Id.* Compare the doctrine of subrogation in United States practice codified in U.C.C. § 3-415(5).

election of remedies and does not preclude later suit against the others, even if they became obligated on the instrument after the person plaintiff sued first.²¹⁸

b. Checks

France adopted the Cheques Convention into its Code de Commerce by the Decree of October 30, 1935.²¹⁹ Provisions related to checks in both the French Code and the Cheques Convention are similar to those dealing with bills of exchange.²²⁰ The following discussion addresses significant characteristics of checks and differences between checks and bills of exchange.²²¹

A check is a written instrument by which a drawer orders a bank or a similar financial institution to pay a sum certain on demand to a specified person, his order, or to bearer.²²² If a check specifies the payee it may be negotiated by indorsement.²²³ The drawer may be subject to criminal penalties if he does not provide the drawee adequate funds to cover the check.²²⁴

The Cheques Convention and the French Check laws provide stricter formal requirements than the English Bills of Exchange Act or the United States Uniform Commercial Code. A check must contain the term "cheque" in the body of the instrument in the language used in the rest of the instrument, an unconditional order to pay a sum certain in money, the name of the drawee, identification of place of payment, statement of date and place that the check is drawn, and the drawer's signature.²²⁵ The drawee will not be liable on the instrument

218. C. COM. art. 151; Bills of Exchange Convention art. 47.

219. 1935 PERIODIQUE ET CRITIQUE IV 467.

220. See generally AMOS & WALTON, *supra* note 195, 365-68.

221. The following discussion will not address French use of postal checks. In 1918 the French government attacked a wartime shortage of cash by establishing a check service under direction of the postal administration. AMOS & WALTON, *supra* note 195, at 369. Depositors may open accounts at post offices and then draw checks against funds deposited in their names. The Cheque Convention does not address postal checks and postal checks are governed by laws different from those controlling checks drawn on banks. *Id.* See Decree 62-273, 1962 BULLETIN LÉGISLATIF DALLOZ 170 (Mar. 12, 1962).

222. Check Laws art. 1, § 3 *Cf.* Cheque Convention art. 3, which provides that a check may only be drawn on a banker.

223. Check Laws art. 1, §§ 13, 17; Cheque Convention arts. 14, 17.

224. See, e.g., C. PÉN. art. 405.

225. Check Laws art. 1, § 5; Cheque Convention art. 1.

if the drawer fails to deposit adequate funds to pay the check,²²⁶ and the drawee may not accept a check.²²⁷ The Check laws add that a purported acceptance is void (deemed "*non écrite*"), but the drawee may initial the check to show that the drawer has provided adequate funds to cover the check.²²⁸

c. Promissory Note

A promissory note contains the clause "to order" or the term "promissory note" written in the text of the instrument in the same language as the rest of the instrument,²²⁹ and the following: an unconditional promise to pay a sum certain, a statement of the time of payment, a statement of the place where payment is to be made, the name of the person to whom or to whose order payment is to be made,²³⁰ a statement of the date and place where the note was issued and the signature of the person who issued the instrument (maker).²³¹ A promissory note that does not specify the time of payment is payable at sight.²³² In the absence of an explicit indication to the contrary, the place where the instrument is issued is deemed to be the place of payment and the maker's domicile.²³³ A promissory note that does not state the place where it was issued is deemed to have been made at the place mentioned beside the name of the maker.²³⁴ The maker of a promissory note is liable in the same way as an acceptor of a bill of exchange.²³⁵

2. *Liability on the Instrument*

Both the French Commercial Code and the Geneva Conventions permit limited disclaimers of liability. In the absence of a provision to

226. Check Laws art. 1, § 3.

227. Check Laws art. 1, § 4; Cheque Convention art. 4.

228. Check Laws art. 1, § 4.

229. *Cf.* Bills of Exchange Convention art. 75, which requires "promissory note" to be written in all cases.

230. Compare Anglo-American practice requiring merely that the payee be identified with reasonable certainty. *See, e.g.*, U.C.C. § 3-110, Bills of Exchange Act § 7.

231. C. COM. art. 183; Bills of Exchange Convention.

232. C. COM. art. 184; Bills of Exchange Convention.

233. *Id.* The maker's domicile and the placer of issue are relevant in choice of law determinations. *See infra* notes 417-23 and accompanying text.

234. *Id.*

235. C. COM. art. 188; Bills of Exchange Convention art. 78.

the contrary the indorser of a bill of exchange guarantees both acceptance and payment.²³⁶ He may prohibit any later indorsement, in which case he does not make any guarantee to the person to whom the bill of exchange is ultimately indorsed.²³⁷ The drawer also guarantees both acceptance and payment.²³⁸ He may release himself from guaranteeing acceptance, but unlike an indorser, he may not release himself from the guarantee of payment.²³⁹ The drawer of a check guarantees payment and any statement purporting to release him from this guarantee will be void.²⁴⁰ The indorser of a check guarantees payment in the absence of a contrary stipulation.²⁴¹

The French Commercial Code's restriction on use of personal defenses is similar to treatment of rights of holders in due course under U.C.C. section 3-305. A person sued on a bill of exchange or a check may not raise a defense based on his relations with the drawer or with previous holders unless the holder knowingly acted to the debtor's detriment in acquiring the bill.²⁴² These provisions are a compromise between the pre-Geneva Convention French and German rules that a plaintiff could not maintain a cause of action if he knew of the debtor's defenses when he acquired the instrument and the stricter view that a plaintiff should prevail unless a plaintiff and the previous holder conspired to injure the debtor.²⁴³ The 1928 draft convention held that a plaintiff's bad faith was a defense to suit on the instrument. The Geneva Convention rejected this rule as too great an impediment to negotiability.²⁴⁴ The Geneva Convention and the French Commercial Code in effect define bad faith.²⁴⁵ A majority of the delegates believed that

236. C. COM. art. 119; Bills of Exchange Convention art. 15. Compare U.C.C. § 3-414(1) which provides that "[u]nless the indorsement otherwise specifies. . . every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor. . . ." *Id.*

237. C. COM. art. 119; Bills of Exchange Convention art. 15.

238. C. COM. art. 115; Bills of Exchange Convention.

239. C. COM. 115; Bills of Exchange Convention art. 9. Any provision purporting to release him from the guarantee of payment will be deemed not written, "*non écrite.*"

240. Cheque Convention art. 12; Check Laws art. 1 § 12.

241. Cheque Convention art. 18; Check Laws art. 1 § 18.

242. For treatment of liability on bills of exchange, see Bills of Exchange Convention art. 17; C. COM. art. 121. For treatment of liability on checks, see Cheque Convention art. 22; Check Laws art. 1 § 22.

243. O. GILES, *supra* note 196, at 167.

244. *Id.*

245. See *supra* note 242 and accompanying text.

mere knowledge of defenses should not prevent a holder from asserting a claim, but knowledge and intent to injure the debtor at the time the holder acquired the instrument should be a defense.²⁴⁶ The French, German, Austrian, and the Italian courts of last resort have all addressed the issue: when does a holder act knowingly to the debtor's detriment by acquiring a negotiable instrument and thereby permit the debtor to assert a personal defense?²⁴⁷

Several illustrative holdings indicate the scope of personal defenses. If a holder has actual knowledge of a defense at the time he acquires the instrument and he knows that he will deprive defendant of that defense if he acquires it, his suit on the instrument will fail.²⁴⁸ If the plaintiff knew of the business transaction between the drawer and the previous holder but did not know details of the dispute, the defendant may not assert the personal defense in an action on the instrument.²⁴⁹ If facts surrounding the negotiation placed the plaintiff on notice that the defendant could have pleaded fraud in defending a suit by an earlier holder and that the earlier holder negotiated the instrument to avoid that defense, the plaintiff's suit will fail even if he does not know the exact basis for the claim of fraud.²⁵⁰ If a holder has reason to know of defenses, and knows that he will injure the defendant by acquiring the instrument, the defendant may maintain a successful defense.²⁵¹ If the defendant shows that a holder was grossly negligent in failing to take precautions that a reasonably prudent businessman should take, and if the holder had taken those precautions he would have known of a defense, a court will exercise a rebuttable presumption that the holder had actual knowledge of the defense.²⁵²

A court generally will consider a holder's state of mind at the time he acquires a negotiable instrument. If the holder had no knowledge of a defense when he obtained the instrument but later did something closely related to the acquisition which damaged defendant, a court will find that the later action related back to the time of acquisition.²⁵³

246. O. GILES, *supra* note 196, at 167.

247. *Id.*

248. *Id.* at 168. For example, if the drawer of a bill of exchange sells goods to the acceptor but fails to deliver the goods, and then discounts the bill to a bank that is aware of the fraud, the acceptor may maintain a defense.

249. *Id.*

250. *Id.*

251. *Id.* at 168-69.

252. *Id.*

253. *Id.*

3. Rationale for Personal Liability

The French Civil Code imposes almost strict liability for injuries caused by "[a]ny act by anyone which causes any injury to another, obliges the wrongdoer to repair the injury."²⁵⁴ The phrase "any act" implies strict liability, but mention of the word "fault" suggests a more lenient standard. This provision is ambiguous and courts sometimes hold a principal liable for unauthorized acts of agents under this provision.²⁵⁵ Courts recently have turned toward application of apparent authority to avoid broad interpretation of this act.²⁵⁶ Other authorities explain that a business agent is responsible for damage to third parties caused by his fault in the execution of his contract.²⁵⁷ Reference to fault again implies less than strict liability.

In addition to personal liability for injuries he causes, an agent is liable on the instrument if he exceeds his authority in issuing a negotiable instrument. The French Commercial Code adopted article 8 of the Bills of Exchange Convention. Anyone who signs a bill of exchange as an agent for a person for whom he did not have authority to act is personally bound on the instrument, and if he pays, he will have the same rights that the claimed principal would have.²⁵⁸ This rule treats an agent who exceeds his authority in the same way as an agent who acts without authority.²⁵⁹ The Report of the Drafting Committee interprets this article to provide that an agent who executes a bill of exchange for an amount greater than he is authorized will be liable for the full amount, not just for the amount by which the bill exceeds his authorized limit.²⁶⁰ If one person without authority or capacity signs an instrument, however, other signatures on the instrument remain valid.²⁶¹ Other authorities note that a third party may not take advantage of his own negligence in failing to discover the scope of an agent's authority when the agent signs without authority to bind his

254. "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer." C. CIV. art. 1382.

255. See *infra* text accompanying notes 313-318.

256. See, e.g., *Banque Canadienne Nationale v. Directeur Général des Impôts*, 1963 Dalloz, *Jurisprudence* 277 (Cass. Ass. Plen. 1962).

257. 1 ENCYCLOPÉDIE DALLOZ, *Agent d'Affaires* § 87 (1956).

258. C. COM. art. 114. Cf. U.C.C. § 3-404(1).

259. *Id.*

260. Hudson & Feller, *supra* note 186, at 351.

261. C. COM. art. 114; Bills of Exchange Convention art. 7.

principal.²⁶²

In addition to liability on the instrument, if the agent exceeds his authority, he may be liable for breach of warranty of authority. If an agent's lack of authority injures a third party who in good faith relies on the agent's manifestation of authority to bind the principal, the third party may hold the purported agent liable,²⁶³ but generally will have no cause of action against the principal.²⁶⁴ An agent may, however, disclaim this implied warranty. An agent who exceeds his authority after giving a third party adequate notice of its proper scope will not be liable unless he is personally bound on the contract.²⁶⁵ The law is unclear as to what constitutes adequate disclosure but the agent should show the third party the *mandat*, or agreement, authorizing him to act along with all other relevant documents.

4. Signature by Agent

An agent may sign a negotiable instrument on the principal's behalf.²⁶⁶ If the agent is authorized to sign the instrument only the principal is bound, provided that the instrument clearly acknowledges representative capacity of the signature. If the agent's representative capacity does not appear on the instrument, even if the agent signed for the principal, the agent assumes personal liability on the negotiable instrument.²⁶⁷ If the third party has actual knowledge of the agency relationship; however, the principal may be liable.²⁶⁸ If a person claiming to represent another signs as if he were an agent, but he either has no authority or exceeds his authority, he will be personally obligated.²⁶⁹

An agent under the French Code may obtain authority by operation of law under a statute or court order, or by contract with the per-

262. See 1 ENCYCLOPÉDIE DALLOZ, *Agent d'Affaires* § 88 (1956).

263. Cf. C. CIV. art. 1997. See *infra* text accompanying note 265.

264. M. PLANIOL & G. RIPERT, 6 TRAITE PRACTIQUE DE DROIT CIVIL FRANÇAIS 70 (1952).

265. C. CIV. art. 1997.

266. R. RODIÈRE, DROIT COMMERCIAL 21 (7th ed. 1975) [hereinafter cited as R. RODIÈRE] For implicit recognition of an agent's authority to sign a bill of exchange on his principal's behalf, see Bill of Exchange Convention art. 8, C. COM. art. 114. For similar treatment of agents who sign checks, see Cheque Convention art. 11, Check Laws art. 1, § 11.

267. C. COM. art. 114, Check Laws art. 1, § 11.

268. C. COM. art. 114, Check Laws art. 1, § 11.

269. C. COM. art. 114, Check Laws art. 1, § 11.

son he represents.²⁷⁰ When there is a voluntary or consensual agency relation, the principal confers authority by an act termed the *procuratio* or *mandat*.²⁷¹ The procuratio must follow the form prescribed by law only if the underlying transaction is one that the law was designed to govern and if the statute requires the prescribed form in the interests of the parties.²⁷² The procuratio does not need to be written,²⁷³ but the prudent legal advisor will require a written contract for evidentiary purposes. The contract creating an agency relation may be a public act or document, a simple contract, or even a letter.²⁷⁴ It may be given orally, but if there is a dispute the agency contract may only be proven according to strict limitations prescribed in the Civil Code title "Contracts or Conventional Obligations in General."²⁷⁵ Acceptance of the agency contract may be implied, and will then empower the agent to bind the principal in matters within the scope of the authority granted.²⁷⁶

The French Civil Code prevents unjust enrichment by recognizing a principle related to the Anglo-American equitable doctrine of quasi contract. The agent may bind the principal despite absence of pre-existing authority or ratification of the agent's act benefited the principal.²⁷⁷ The principal must satisfy all obligations contracted on his behalf by his agent, and should reimburse the agent for all useful or necessary expenses the agent incurred in a properly managed business transaction.²⁷⁸ Planiol and Ripert note that by conferring representative authority on anyone who, in certain situations, acts for the benefit of another, this article supports the policy of avoiding unjust enrichment.²⁷⁹

French businesses employ four general kinds of agents: *representants salaries, voyageurs—representants—placiers* (V.R.P.s. or *representants statutaires*), *agents commerciaux*, and *representants mandataires*.²⁸⁰ The French Labor Code governs transactions with the

270. M. PLANIOL & G. RIPERT, *supra* note 264, at 67.

271. C. CIV. art. 1984.

272. M. PLANIOL & G. RIPERT at 67.

273. C. CIV. art. 1985.

274. *Id.* art. 1985.

275. *Id.*

276. *Id.*

277. M. PLANIOL & G. RIPERT at 71-72, citing C. CIV. art. 1375.

278. C. CIV. art. 1375.

279. M. PLANIOL & G. RIPERT, *supra* note 264, at 72.

280. Hay & Müller-Freienfels, *Agency in the Conflict of Laws and the 1978*

representant salarie and the V.R.P.²⁸¹ The V.R.P. enjoys special rights but he may not engage in business on his own behalf or he will lose his special status.²⁸² *Agents commerciaux* are subject to Decree 58-1345 of December 23, 1958. The French Civil Code governs *agents mandataires*²⁸³ and defines the term as:

[A] representative who ordinarily carries on independently and professionally (and otherwise than as an employee) the activity of the negotiation or conclusion of contracts for the sale, purchase, or letting on lease or hire of goods or other property, or the provision of services, for and on behalf of manufacturers, producers or merchants.²⁸⁴

A commercial agency contract must be written,²⁸⁵ and a commercial agent may practice only after he registers in the commercial court.²⁸⁶ The National Federation of Commercial Agents prepares standard form contracts providing a statement identifying principal and agent, a statement specifying the scope of the agent's authority, conditions for exercising authority, commission, duration of relation, amendment procedures, and dispute resolution.²⁸⁷ Professor Guyenot²⁸⁸ discussed the role of the commercial agent:

The negotiation or conclusion of a contract by a commercial agent does not involve him in liability to third parties who deal with him, provided he acts within the limits of his authority, and they can not have recourse to him if the principal does not fulfill his obligations under the contract.²⁸⁹

Hague Convention, 27 AM. J. COMP. L. 1, 13 (1979).

281. CODE DE TRAVAIL art. L. 751-1 (Daloz 1981-1982).

282. Hay & Müller-Freienfels, *supra* note 280, at 13.

283. C. CIV. art. 1984.

284. Decree of December 23, 1958, *reprinted in and translated by* G. GUYENOT, THE FRENCH LAW OF AGENCY AND DISTRIBUTORSHIP AGREEMENTS 23 (1976).

285. G. GUYENOT, *supra* note 284, at 46, citing Decree of December 23, 1958, art. 1(2).

286. G. GUYENOT, *supra* note 284, at 73, 75, citing Decree of December 23, 1958, art. 4, *as amended by* Decree of August 22, 1968, *supplemented by* Order of August 22, 1968.

287. G. GUYENOT, *supra* note 284, at 48.

288. M. Guyenot is Chief Assistant in the Faculty of Law and Economic and Social Sciences at the University of Paris.

289. G. GUYENOT, *supra* note 284, at 51.

The remainder of the discussion of French agency law will focus on the *mandataire libre*, or contractual agent. Because this type of agency is purely consensual, characteristics of the agency relation vary substantially. Authority may terminate by agreement between the parties, by death of principal or agent, or by the bankruptcy of the principal.²⁹⁰ The Civil Code permits the agent to continue acting on behalf of the principal until he learns that his power has terminated.²⁹¹ The agent must continue to act even after he learns of his principal's death if his failure to act could cause damage to the principal's estate.²⁹²

5. Scope of Authority

The French Civil Code appears initially to construe agents' authority strictly. The need to protect innocent third parties and to further the negotiability of commercial instruments has led to a more liberal interpretation of the Code. Whereas the English language distinguishes between an agent's "authority" to act on behalf of a principal and an agent's "power" to bind a principal,²⁹³ French texts use the single word "*pouvoir*," which is a vaguer term denoting "power," or "ability to act." This linguistic difference causes interpretation of the codes, treatises, and judicial opinions to be more difficult and causes discussion of agent's liability to be less clear.

The Civil Code defines actual authority strictly. The agent may not exceed the authority he received in the agency agreement; authority to negotiate does not include authority to compromise the principal's rights.²⁹⁴ The agency agreement written in general terms only empowers the agent to perform administrative acts.²⁹⁵ If the agent intends to alienate or pledge the principal's property the agency agreement must provide expressly that the agent has such authority.²⁹⁶

Although the scope of an agent's actual authority may be construed strictly, the Code treats its duration broadly. An agent's representative capacity does not begin or end until the agent has actual no-

290. *Id.* at 148.

291. *Id.* at 63.

292. C. civ. art. 1991(2); G. GUYENOT, *supra* note 284, at 63.

293. "Authority" connotes rightful conduct; "power" denotes conduct that may exceed the authority that the agent received from the principal.

294. C. civ. art. 1989.

295. C. civ. art. 1988.

296. *Id.*

tice of the fact beginning or terminating his authority,²⁹⁷ or until he receives a notification required by law.²⁹⁸ If a principal restricts or revokes an agent's authority, even if he properly notifies the agent, he may not assert this change in status as a defense to claims by third parties who acted in good faith²⁹⁹ without knowledge of the change.³⁰⁰ In order to end all powers of the agent, the principal must notify third parties according to statutory requirements for publicizing the change or in the manner most likely to give the third parties actual notice of the revocation of the agent's authority.³⁰¹ The principal may require the agent to return any document declaring the agent's representative authority.³⁰² This may not, however, be adequate notice to third parties to free the principal from liability for later contracts the agent enters on the principal's behalf.³⁰³ What constitutes adequate notice remains unclear. A principal revoking or reducing an agent's authority should give actual notice to all people with whom the agent has dealt and should take reasonable measures to notify those with whom the agent is likely to deal.

French courts recognize the need for predictability in business relations and, therefore, sometimes find that an agent binds his principal even when the agent exceeds his authority or acts without any authority.³⁰⁴ The resulting judicial interpretations of the Civil Code resemble apparent authority in Anglo-American law and inherent power in United States practice. French courts are willing to protect a third party who relies reasonably and in good faith on the appearance of authority, if the purported principal is responsible for the appearance of authority or if the third party relied on the existence of authority normally granted to a permanent employee in the agent's position.³⁰⁵

In some cases, statutes create an irrebuttable presumption of authority. Statutes creating limited liability corporations render any contractual limitation on an agent's authority invalid as related to third parties.³⁰⁶ Although the agent may have power to bind the principal he

297. C. CIV. art. 2008.

298. M. PLANIOL & G. RIPERT, *supra* note 264, at 69.

299. C. CIV. art. 2009; M. PLANIOL & G. RIPERT, *supra* note 264, at 69.

300. C. CIV. art. 2005; M. PLANIOL & G. RIPERT, *supra* note 264, at 69.

301. M. PLANIOL & G. RIPERT, *supra* note 264, at 69.

302. C. CIV. art. 2004.

303. M. PLANIOL & G. RIPERT, *supra* note 264, at 69.

304. *Id.* at 70.

305. *Id.*

306. *Id.*

may be liable to the principal for exceeding his authority under the contract. The French Cours de Cassation Civil met in plenary assembly and extended the doctrine of apparent authority in *Banque Canadienne Nationale v. Directeur General des Impots*.³⁰⁷ The defendant relied on Civil Code provisions and earlier judicial opinions to argue that it could only be obligated on the instrument if it had acted in bad faith or given actual authority to the director to sign the instrument on its behalf. Since neither was applicable, the bank argued it should not be held liable. The Cours de Cassation, however, found the defendant liable under a new rule: an agent may bind his principal by exercise of apparent authority, even if the principal is without fault, if the third party's belief as to the extent of the agent's powers is reasonable and the circumstances justify the third party's failure to verify the precise scope of the agent's authority. It is significant that the court did not refer to any provisions of the French codes, rather it based its decision on a finding that the agent acted within the normal scope of authority for a person holding his office.

The commentator, Professor Jean Calais-Auloy, found the court in *Banque Canadienne Nationale* had abandoned earlier established law and recognized a new legal principle. The plaintiff did not assert that the defendant held out the agent as having authority, or that it relied on the defendant's representations implying that the agent had authority. Calais-Auloy noted that the decision appeared inconsistent with the Civil Code.³⁰⁸ Public policy, however, supported the decision.³⁰⁹ Businessmen must be certain of the validity of their acts without complicated and time-consuming research. It is especially important for people dealing with a company's agent to be able to rely on the agent's apparent authority without painstaking study of corporate bylaws.³¹⁰

Professor Calais-Auloy questioned the efficacy of the holding. He noted that modern business' need for quick decisions is not new; law

307. 1963 D. Jur. 277 (Cass. Ass. Plen. 1962). The president-director general of the Canadian National Bank signed for the bank as surety on an instrument for fr. 700,000. The president did not have authority to bind the bank; the corporation's bylaws required two signatures. When the drawee failed to pay the instrument, plaintiff sued the bank. *Id.*

308. *Id.* The Civil Code provides that a principal is bound by contracts entered by his agent while the agent is acting within the scope of his authority; the principal is only bound by his agent's ultra vires acts if the principal ratifies the acts expressly or implicitly. C. civ. art. 1998.

309. 1963 D. Jur. at 277.

310. *Id.*

has evolved to satisfy this need since the beginning of the century.³¹¹ Calais-Auloy noted that legislators might in the future fix the authority of all agents as they had the authority of agents of limited liability corporations.³¹²

Before the *Banque Canadienne Nationale* opinion, courts based liability of a principal for unauthorized acts of agents on a theory of fault.³¹³ Courts invoked two provisions: article 1382 of the Civil Code, which created liability for the defendant's own wrongful act and article 1384(5), which created liability for acts of defendant's managing officers and directors.³¹⁴ Courts based corporate liability on article 1382 by finding that the principal acted wrongfully by concealing from third parties the limitation on the agent's authority, and by holding that this concealment injured innocent third parties who relied on the incorrect belief that they were creditors of the principal.³¹⁵ Courts found that the most adequate compensation to third parties was to hold the principal a debtor to the contracting third party as if the agent had acted within the scope of his authority.³¹⁶ Unlike article 1382, article 1384(5) does not impose liability on a principal for his personal fault, but for the fault of an agent acting in a supervisory role. This provision has the practical and theoretical advantage of imposing liability for the clear fault of the agent rather than on the uncertain fault of the principal.³¹⁷ As in suits under article 1382, the injured third party may have the court require the principal to pay as if the agent acted within the scope of his authority.³¹⁸

6. Ratification

An agent who is personally liable on a negotiable instrument because he exceeded the scope of his authority³¹⁹ may escape liability to a third party by his principal's explicit or implicit ratification of his

311. *Id.*

312. *Id.*

313. *Id.* "The judges. . . preferred to rely on the solid ground of Civil Code arts. 1382 et seq. rather than on the quicksand of apparent authority." [translation by author].

314. *Id.* See C. civ. § 1382.

315. 1963 D. Jur. 277.

316. *Id.*

317. *Id.* at 278.

318. *Id.*

319. See C. COM. art. 114, Check Laws § 11.

act.³²⁰ Not only will ratification cause a principal to become bound on an instrument his agent executed without authority;³²¹ ratification will also confer actual authority to commit the act the agent already performed.³²² Courts often find ratification, which relates back to the time of the act, when an agent exceeds his authority or when the court finds an apparent agency.³²³ Ratification is a unilateral manifestation of consent expressed by the principal or by a person authorized to act on his behalf and it may occur at any time.³²⁴ Although ratification may free an agent from liability to a third party on a negotiable instrument, his obligation to the principal is governed by a separate contract. The agent, therefore, may be liable off the instrument for breach of his employment contract.

C. Summation

The Genva Conventions on negotiable instruments influenced commercial law in continental Europe and Japan. The French experience is typical; France adopted the rigid rules of the Convention into its Code de Commerce. The French Commercial Code and the Geneva Conventions on negotiable instruments prescribe rules similar to those governing negotiable instruments in the United States and England. An agent who signs a negotiable instrument will be personally liable unless the face of the instrument makes his representative capacity clearly apparent and he signs with authority of the person he represents. The existence and the scope of representative authority are essential issues in determination of who is liable on the instrument. The French Civil Code construes an agent's authority strictly. The Cours de Cassation, however, appears willing to expand the statutory provisions to include representative capacity analogous to apparent authority or inherent power in United States practice.

V. Choice of Law

The essential similarity between commercial law among western nations reduces somewhat the importance of choice of law principles.

320. C. CIV. art. 1998.

321. *Id.*

322. M. PLANIOL & G. RIPERT, *supra* note 264, at 71.

323. *Id.*

324. *Id.*

However, differences in local law remain and a substantial body of legal theory has evolved to aid courts in determination of which local law to apply. Each legal system balances concerns of party autonomy and power to contract for application of a chosen law with a need for judicial predictability and fear of overreaching. The following analysis discusses the efficacy of choice of law clauses and principles for selecting local law in the absence of express provisions in the instruments.

A. United States

The Uniform Commercial Code and developing precedent³²⁵ further party autonomy by permitting choice of applicable law, providing that the parties select law of a state bearing a reasonable reaction to the transaction.³²⁶ This limitation protects parties in a weak bargaining position from overreaching by a more powerful potential adversary. It also protects an overburdened judicial system from having to research and apply the law of distant states and nations when application of the law of the foreign jurisdiction is not foreseeable—and perhaps not desired by at least one party to the transaction. Section 1-105(1) states the Code's basic choice of law principles:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.³²⁷

The drafting of the first sentence is unfortunate. The drafters intended to permit parties to an instrument to select the law of any state with a reasonable connection to the transaction.³²⁸ As written, however, if a

325. The following discussion of United States choice of law rules is included as a basis for comparison with English and Continental approaches. For a more thorough discussion, see Nordstrom & Ramerman, *The Uniform Commercial Code and The Choice of Law*, 1969 DUKE L.J. 623; Tuchler, *Boundaries to Party Autonomy in the Uniform Commercial Code; a Radical View*, 11 ST. LOUIS U.L.J. 180 (1967); Nordstrom, *Choice of Law and the Uniform Commercial Code*, 24 OHIO ST. L.J. 364 (1963); RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 213-218 (1971).

326. See Annot., 63 A.L.R. 3d 341 (1975).

327. Section 1-105(2) states exceptions to the general rule that are not relevant to discussion of negotiable instruments under article 3.

328. See U.C.C. § 1-105 official comment 1.

party brings suit in a state that does not have a reasonable relation to the instrument courts of that state may not be bound by the parties' otherwise appropriate choice of law.³²⁹

The term "agree" in Section 1-105(1) may include an implied understanding that the law of a certain state or nation should govern the transaction.³³⁰ The Code does not define "agree," but provides that "agreement" means "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."³³¹ If a transaction has the closest connection with a jurisdiction other than the forum, the parties did not specify the applicable law, and the parties are most familiar with the law of the foreign jurisdiction, then courts should apply that jurisdiction's law.³³²

The United States Supreme Court defined the appropriate standard³³³ for a "reasonable relation" in *Seeman v. Philadelphia Warehouse*.³³⁴ The unanimous opinion authored by Justice Stone found the place where the parties contracted irrelevant.³³⁵ The Court recognized the general rule that contracts are governed by the law of the jurisdic-

329. See Nordstrom & Ramerman, *supra* note 325, at 623, 629.

330. See U.C.C. § 1-201(3).

331. *Id.* (emphasis added).

332. Nordstrom & Ramerman, *supra* note 325, at 632.

333. U.C.C. § 1-105 official comment 1.

334. 274 U.S. 403 (1927). In *Seeman*, defendant pledged canned salmon to plaintiff as collateral for a loan. Plaintiff executed a promissory note that named itself debtor and that was payable to its own order. Plaintiff indorsed the note, discounted it to its note banker, and forwarded the proceeds to the borrower—after subtracting a commission of 3% per year for its services, the brokerage fee and discount. Defendant agreed to repay the face amount of the loans at the end of one year or to pay additional charges to refinance for another year. The effective interest rate varied between 8 ½ % and 10 ½ % but the maximum legal rate for interest on loans was 6% under the laws of New York and Pennsylvania. Plaintiff sued for conversion when defendant fraudulently regained possession and sold the pledged salmon. Defendant argued that the transaction involved a usurious loan, New York law applied and New York law made the entire transaction void. Plaintiff argued that it made a loan of credit rather than of money so the usury limits did not apply; even if the transaction were a usurious loan, Pennsylvania law should apply to enforce repayment of principal and the maximum legal rate of interest. Plaintiff was a Pennsylvania corporation, had its only place of business in Pennsylvania, and required repayment of the loan in Pennsylvania. Defendant argued that New York law applied since the parties conducted negotiations in New York and plaintiff forwarded the funds to the borrower in New York. *Id.* at 404-07.

335. *Id.* at 407.

tion where they are to be performed.³³⁶ The law permitted plaintiff to lend money to borrowers outside the state and to require repayment within and according to the laws of plaintiff's state.³³⁷ Justice Stone noted an exception to the rule allowing parties the power to select the law governing the contract: the parties must act in good faith.³³⁸ The Court limited the scope of the rule:

The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject. . . . Assuming their real, *bona fide* intention was to fix the situs of the contract at a certain place which has a natural and vital connection with the transaction, the fact that they were actuated in so doing by an intention to obtain a higher rate of interest than is allowable by the situs of some of the other elements of the transaction does not prevent the application of the law allowing the higher rate.³³⁹

The Court concluded by noting that the plaintiff contracted for payment in the forum where it was incorporated and where it conducted its business. The selection of Pennsylvania law was not frivolous, and was binding on the parties because Pennsylvania had a reasonable relation to the transaction.³⁴⁰

In *Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*,³⁴¹ the Florida Supreme Court held that the Louisiana usury

336. *Id.*

337. *Id.*

338. *Id.* at 408.

339. *Id.*

340. *Id.* at 409.

341. 404 So. 2d 1059 (Fla. 1981). Defendants argued that the Florida criminal usury statute applied and that it made the entire obligation unenforceable. *See* FLA. STAT. § 687.071(2) (1972). The trial court held that Louisiana law applied and that under Louisiana law there was no limit to interest chargeable to a corporation. 404 So. 2d at 1061. Defendants appealed and the Fifth Circuit certified the following question to the Florida Supreme Court:

Are notes executed and payable in a state other than Florida, secured by a mortgage on Florida real estate, providing for interest legal where made, but usurious under Florida law, unenforceable in Florida courts due to Florida's usury statute, public policy or otherwise, where (a) the interest charged or paid exceeds 25 percent and (b) where the interest charged does not exceed 25 percent, but exceeds the maximum interest rate al-

statute should govern promissory notes executed in Louisiana but secured by a mortgage on property in Florida.³⁴² The Florida Supreme Court noted that the law of the state where the parties entered into and performed the contract traditionally governed the contract's validity and interpretation.³⁴³ In an earlier case decided the same year, however, the Florida Supreme Court found that this traditional rule for choice of law "is today of little practical value since these contacts are so easily manipulated in our mobile society."³⁴⁴ The *Morgan Walton Properties* court held that Florida would apply Louisiana law to uphold the parties' express or implied intent since Louisiana had a normal and reasonable relation to the notes,³⁴⁵ the parties implicitly or explicitly had agreed to be bound by Louisiana law,³⁴⁶ and Florida did not have a sufficiently strong public policy to justify adoption of Florida law.³⁴⁷

The *Morgan Walton Properties* opinion relied heavily on *Continental Mortgage Investors v. Sailboat Key, Inc.*,³⁴⁸ in which the Florida Supreme Court reversed a lower court's holding that Florida's usury law was applicable to a financing agreement between a Florida corporation and a Massachusetts business trust. The district court of appeal³⁴⁹ found that Massachusetts had no substantial connection to the transaction and that the parties selected Massachusetts law solely to avoid strong public policy expressed in the Florida usury law. On appeal the Florida Supreme Court reversed and found that Massachusetts did have a reasonable relation to the transaction.³⁵⁰ The Florida

lowed by law?

International Civil Bank and Trust Co. v. Morgan Walton Properties, Inc., 612 F.2d 227, 229 (5th Cir. 1980).

342. *Morgan Walton Properties, Inc.*, 404 So. 2d at 1063.

343. *Id.* at 1061, citing *Brown v. Case*, 80 Fla. 703, 86 So. 684 (1920); *Thompson v. Pyle*, 39 Fla. 582, 23 So. 12 (1897); *Perry v. Lewis*, 6 Fla. 555 (1856).

344. *Morgan Walton Properties, Inc.*, 404 So. 2d at 1062, quoting *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507, 510 (Fla. 1981).

345. *Id.* at 1062-63. The court cited *Seeman* as it held courts should honor the parties' choice of law if the choice bore a reasonable relation to the transaction, "even if the parties' purpose in making it was to avoid the restrictive effects of Florida's usury law." *Id.* at 1063.

346. *Id.* at 1063.

347. *Id.*

348. 395 So. 2d 507 (Fla. 1981) [hereinafter cited as *CMI*].

349. *Sailboat Key, Inc. v. Continental Mortgage Investors*, 354 So. 2d 67 (Fla. Dist. Ct. App. 1977).

350. *CMI*, 395 So. 2d at 513. One of the parties was a Massachusetts business trust with offices in Massachusetts, and the parties executed the agreement in Massa-

public policy against usury was not strong enough to invalidate the parties' choice of law even if they were motivated primarily by a desire to avoid Florida's usury statute.³⁵¹

Drafters of the Code wanted to achieve as high a degree of uniformity in the law as possible. Only Pennsylvania had enacted the Code by the time the drafters finished the first revision of section 1-105,³⁵² and the Pennsylvania legislature may not have foreseen the nearly unanimous enactment of the Code. Because the drafters preferred to have cases decided according to the U.C.C., they provided in the second sentence of section 1-105(1), so that the forum's version of the code should govern if the parties did not select another jurisdiction's law and if the forum bore an appropriate relation to the transaction.³⁵³ What constitutes an appropriate relation remains unclear. The Supreme Judicial Court of Massachusetts discussed this provision in *Industrial National Bank of Rhode Island v. Leo's Used Car Exchange, Inc.*³⁵⁴ as it held that Massachusetts law applied to a transaction in which a Massachusetts corporation drew a check on a Massachusetts bank payable to an automobile dealer in Connecticut and cashed by a bank in Rhode Island.³⁵⁵ The court noted that Rhode Island, Connecticut, and Massachusetts each bore a reasonable relation to the transaction and the parties could have stipulated that the law of any of these states should apply.³⁵⁶ Because the parties did not explicitly choose the applicable law and because Massachusetts bore an appropriate relation to the transaction, the Massachusetts Uniform Commercial Code governed.³⁵⁷

The Code gives preference to the forum's version of the U.C.C. if the parties fail to agree upon applicable law,³⁵⁸ however, the Code does not encourage application of the forum's non-U.C.C. substantive law.³⁵⁹ Courts must apply traditional choice of law rules to determine

chusetts. *Id.* at 508.

351. *Id.* at 509.

352. See Note, *Conflicts of Laws and the "Appropriate Relation" Test of Section 1-105 of the Uniform Commercial Code*, 40 GEO. WASH. L. REV. 797, 801 (1971-1972).

353. See U.C.C. § 1-105 official comment 2.

354. 362 Mass. 797, 291 N.E.2d 603 (1973).

355. *Id.* at 800, 291 N.E.2d at 605.

356. *Id.* at 800 n.3, 291 N.E.2d at 605 n.3.

357. *Id.* at 800, 291 N.E.2d at 605.

358. See U.C.C. § 1-105 official comment 2.

359. *Id.*

applicable law if the forum does not bear an appropriate relation to the transaction, or to select appropriate non-code law in the absence of agreement between the parties. The Restatement³⁶⁰ discusses choice of law principles for negotiable instruments,³⁶¹ which are applicable if neither the Code nor the parties' agreement designates appropriate law. If the instrument designates a place of payment the local law of that jurisdiction governs obligations of the maker of a note or the acceptor of a draft.³⁶² If the instrument does not designate a place of payment the local law where the maker or acceptor delivered the instrument will control his obligations.³⁶³

The drafters of the Restatement noted the importance of predictability in negotiable instruments and, therefore, proposed that a single set of contacts govern choice of law for obligations of makers and acceptors.³⁶⁴ They recognized that fairness required keeping the obligations of makers and acceptors constant throughout the life of the instrument, and suggested that initial delivery or designation of place of payment fix the parties' obligations.³⁶⁵ Therefore, the local law of the place where a drawer or indorser delivers the instrument controls the obligations of an indorser of a draft or a note and of the drawer of a draft.³⁶⁶ The drafters noted the different responsibilities of drawers, indorsers, makers, and acceptors, and concluded that a different set of laws may govern the obligations of each party to the instrument.³⁶⁷ Therefore, the local law of the jurisdiction where presentment, payment, protest, or notice of dishonor occur governs details of each of those transactions.³⁶⁸ Local law of the state where a negotiable instrument is when a holder transfers his interest determines effect of the transfer.³⁶⁹

In *Exchange Bank and Trust Co. v. Tamerius*,³⁷⁰ the Supreme

360. In this discussion "Restatement" refers to RESTATEMENT (SECOND) CONFLICT OF LAWS (1971). Compare references to RESTATEMENT (SECOND) OF AGENCY (1958) earlier in this article.

361. RESTATEMENT §§ 214-217.

362. *Id.* § 214(1).

363. *Id.* § 214(2).

364. *Id.* comment b at 702.

365. *Id.*

366. *Id.* § 215(1).

367. *Id.* comment b at 707.

368. *Id.* § 217.

369. *Id.* § 216.

370. 200 Neb. 807, 265 N.W.2d 847 (1978). Plaintiff sued on a delinquent

Court of Nebraska reached the result suggested by the Restatement's analysis.³⁷¹ The unanimous court affirmed the lower court's decision that Texas law was applicable because the promissory note provided explicitly that the Texas Consumer Credit Code governed the transaction.³⁷² The court then noted alternatively that Texas law would govern even if the parties did not choose Texas law.³⁷³ The opinion cited pre-U.C.C. cases for the proposition that the law of the place of payment governs a promissory note unless the parties clearly prefer application of law of the place where the note was made.³⁷⁴

The Georgia Court of Appeals considered relationships among federal, Georgia, and Virginia law in *Fitzgerald v. United Virginia Bank of Roanoke*.³⁷⁵ The appellants signed the notes in Georgia and mailed them to the appellee.³⁷⁶ The notes were payable in Virginia.³⁷⁷ The United States Code permits national banks to charge the highest interest rate that state banks may charge on similar loans.³⁷⁸ The court found that Virginia law governed the interest rate because the notes were to be paid in Virginia.³⁷⁹ The court held that the place of performance prevails over the place where the instrument is executed.³⁸⁰

promissory note bearing an interest rate of 12.83%. Defendants argued that the loan was usurious and void under the laws of Nebraska. Plaintiffs contended that Texas law governed the note and that the interest charged was valid under the applicable statute. *Id.*

371. See RESTATEMENT § 214.

372. *Tamerius*, 200 Neb. at 810, 265 N.W.2d at 849.

373. *Id.* at 810, 265 N.W.2d at 850.

374. *Id.* at 810, 265 N.W.2d at 850, citing *United Bank & Trust Co. v. McCullough*, 115 Neb. 327, 212 N.W. 762 (1927); *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, 202 N.W. 877 (1925).

375. 139 Ga. App. 664, 229 S.E.2d (1976). Appellee, a national bank doing business in Virginia, sued appellant on two delinquent promissory notes. Appellants argued that the notes prescribed a usurious rate of interest under Georgia law so they should only be liable for outstanding principal. *Id.* at 664-65, 229 S.E.2d at 139.

376. *Id.* at 665, 229 S.E.2d at 139.

377. *Id.*

378. 12 U.S.C. § 85 (Supp. 1981).

379. *Fitzgerald*, 139 Ga. App. at 666, 229 S.E.2d at 140.

380. *Id.* (citing *Vinson v. Platt & McKenzie*, 21 Ga. 135 (1856)); *Liberty Loan Corp. v. Crowder*, 116 Ga. App. 280, 157 S.E.2d 52 (1967). *Cf. Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976) (in which the court cited the RESTATEMENT § 214(2) to support the proposition that the local law of the place where promissory notes are executed governs their validity rather than the law of the state where they are payable. This section is only applicable if the parties did not designate the place of payment on the instrument).

The United States Constitution requires each state to give full faith and credit "to the public Acts, Records, and Judicial Proceedings of every other state."³⁸¹ In 1948 Congress enacted legislation implementing the following provision:

Such Acts, records and judicial proceedings or copies thereof . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of each State, Territory or Possession from which they are taken.³⁸²

These provisions balance policies favoring *res judicata* and uniformity of decisions with policies supporting federalism. The practitioner should consider the ramifications of the Full Faith and Credit Clause before selecting a forum for litigation. The Missouri Court of Appeals summarized the effects of the full faith and credit clause in *Jennings v. Klemme*.³⁸³ The court noted that the only defenses that may prevent entry of judgment under the full faith and credit clause are that the original court did not have subject matter jurisdiction, that the defendant did not have reasonable notice or opportunity to be heard in the original suit, or that the judgment resulted from fraud.³⁸⁴ The opinion then noted that the Full Faith and Credit Clause precludes

381. U.S. CONST. art. IV, § 2. The Full Faith and Credit Clause only applies to "Acts, Records, and Judicial Proceedings" of sister states; it does not apply to international situations. See generally RESTATEMENT § 2, comment b.

382. 28 U.S.C. § 1738 (Supp. 1981).

383. 620 S.W.2d 403 (Mo. App. 1981). In 1967 defendants executed a promissory note to plaintiffs. The note contained a warrant of attorney to confess judgment if defendant became delinquent in payments. The note did not mention a corporation, but defendants signed the note, "Lem Klemme, Pres.," and "Yvonne Klemme, Sec.-Treas." The Illinois circuit court entered judgment by confession when defendants did not pay the note. Illinois law only permits garnishment of salary if defendant has been served with notice and given opportunity to appear. Plaintiff, therefore, served each defendant with a summons stating that if he failed to appear, "A judgment by confession for \$39,893.68 entered against you on December 7, 1970, may be confirmed." Defendants ignored the summonses and the Illinois court confirmed judgment. Plaintiffs then filed a petition in Missouri court for registration of the Illinois judgment pursuant to the Uniform Enforcement of Foreign Judgments Law. Defendants then sought to raise the defense in U.C.C. § 3-403(2) by parol evidence that they signed on behalf of a partly disclosed principal. The Missouri Court of Appeals affirmed the trial court's holding for plaintiffs. *Id.* at 404-07.

384. *Id.* at 406 (citing *W.B.M. v. G.G.M.*, 579 S.W.2d 659, 661 (Mo. Ct. App. 1979)).

consideration of the underlying cause of action, of the analysis of the foreign judgment or of the law supporting the foreign court's decision.³⁸⁵

B. England

English rules for choice of law are different from provisions of the Restatement. The Bills of Exchange Act treats each contract on the instrument separately, and applies the law of the jurisdiction where that contract was entered to determine its validity and interpretation.³⁸⁶ Section 72 states choice of law rules applicable to bills of exchange; section 89 applies these rules to promissory notes.

The Bills of Exchange Act distinguishes between inland or foreign bills of exchange.³⁸⁷ Courts treat a bill of exchange as an inland bill unless the face of the instrument shows it is foreign.³⁸⁸ The law of the jurisdiction where a person draws, indorses, or accepts an instrument or accepts a bill over protest generally governs interpretation of his rights and obligations.³⁸⁹ If a person indorses an inland bill in a foreign country, however, the courts will apply United Kingdom law to interpret the indorsement's effect on rights and obligations of the payor.³⁹⁰

For choice of law purposes a party enters a contract on a bill of exchange or a promissory note where he delivers the instrument rather than where he attaches his signature.³⁹¹ If the defendant argues that an instrument is invalid according to the law of the jurisdiction where it is issued, he must prove the foreign law as a question of fact.³⁹² The Court of Appeals has found that law governing transfer of personal property also controls negotiation of bills of exchange and checks in a foreign country.³⁹³

385. *Id.* at 406 (citing *Matter of Estate of Fields* 588 S.W. 2d 50, 52 (Mo. Ct. App. 1979)).

386. *See* Bills of Exchange Act §§ 72(1), 72(2).

387. Bills of Exchange Act § 4(1) defines inland and foreign bills: "An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill." *Id.*

388. *Id.* § 4(2).

389. *Id.* § 72(2).

390. *Id.*

391. CHALMERS ON BILLS OF EXCHANGE, *supra* note 147, at 235.

392. *Id.*

393. *Embircos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, 683 (C.A.).

The law of the place where an instrument was issued determines formal validity.³⁹⁴ The law of the place where a person accepts, protests, or indorses a negotiable instrument determines formal validity of his contract.³⁹⁵ The statute states two provisos. First, a negotiable instrument issued outside the United Kingdom will not be invalid merely because it was not stamped according to the law of the jurisdiction where it was issued. Second, if a negotiable instrument satisfies requirements for formal validity in the United Kingdom but is issued abroad, courts may treat it as valid between all people who negotiate, hold, or become parties to it in the United Kingdom.³⁹⁶

The following illustrations reflect choice of law principles for formal validity:³⁹⁷ (1) Law of country A requires a bill of exchange to state the value received but law of B does not. A bill of exchange that does not express the value received is valid if it was drawn in B but payable in A;³⁹⁸ (2) A bill of exchange drawn and payable in A is invalid according to A's law because it fails to state the value received. If the bill is indorsed in B, where the bill is valid, a holder could sue the indorser in B's court but would have no recourse against the drawer;³⁹⁹ (3) B's law will determine whether a bill of exchange drawn in B against a drawee in A is unconditional.⁴⁰⁰

The following situations illustrate the effect of section 72(2), which provides rules for interpretation of instruments that are valid under section 72(1): (1) If a negotiable instrument payable to bearer is issued in England and negotiated by delivery in a country that does not recognize bearer instruments, English courts will uphold validity of the transfer;⁴⁰¹ (2) If a holder sues in England on an instrument issued in Belgium and indorsed in blank in France, French law will determine the effect of the indorsement;⁴⁰² (3) French law governs an acceptance occurring in France;⁴⁰³ (4) A check drawn abroad on an English bank

394. Bills of Exchange Act § 72(1).

395. *Id.*

396. *Id.*

397. *See id.*

398. CHALMERS ON BILLS OF EXCHANGE, *supra* note 147, at 235. *Cf.* RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 214-217 (providing that place of performance generally governs).

399. CHALMERS ON BILLS OF EXCHANGE, *supra* note 147, at 235.

400. *Id.*

401. *Id.* at 236; Bills of Exchange Act § 72(2) paragraph 2.

402. CHALMERS ON BILLS OF EXCHANGE, *supra* note 147, at 236.

403. *Id.*

is stolen and the first indorsement is forged. An Austrian bank cashes the check and acquires good title under Austrian law. The Austrian bank sends the check to the drawee through the normal collection process and receives the face value from the drawee. The drawee is not guilty of conversion for improper payment.⁴⁰⁴

The Cheques Act codified the result in illustration (4) by providing that a banker is not liable for paying an irregularly indorsed check if he pays in good faith and in the ordinary course of business.⁴⁰⁵ The *Embiricos* decision on which this hypothetical situation is based⁴⁰⁶ found choice of law rules determinative, and created broader protection for bankers than that codified in the Cheques Act.

C. Civil Law Practice and the Geneva Conventions

1. Overview

Delegates to the Geneva Conference which was held from May 13, 1930, to June 7, 1930, signed a convention to regulate choice of law problems for bills of exchange crossing national boundaries.⁴⁰⁷ On March 19, 1931, delegates to a second conference signed a convention regulating conflicts of law problems for checks.⁴⁰⁸ The Conventions were registered with the secretariat and were entered into force on January 1, 1934.⁴⁰⁹ The Conventions provide that the law of the state of a person's nationality governs his capacity to bind himself on a negotiable

404. *Id.* (citing *Embiricos*, 1 K.B. 677).

405. Cheques Act § 1, *supra* note 97.

406. *See supra* note 404.

407. Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, June 7, 1930, 143 L.N.T.S. 319 [hereinafter cited as Bills of Exchange Conflicts Convention].

408. Convention for the Settlement of Certain Conflicts of Laws in Connection with Cheques, March 19, 1931, 143 L.N.T.S. 409 [hereinafter cited as Cheques Conflicts Convention]. The following states ratified or acceded to the Convention: Austria, Belgium, Brazil, Denmark, Finland, France, Germany, German Democratic Republic, declaring reapplication of the Convention as of June 6, 1958, Hungary, Indonesia, Italy, Japan, Luxembourg, Monaco, Netherlands, Nicaragua, Norway, Poland, Portugal, Sweden and Switzerland. UNITED NATIONS, MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS 580 (1978), U.N.Doc. ST/LEG/SER.D/11 (1978).

409. Cheques Conflicts Convention, 143 L.N.T.S. at 319.

instrument.⁴¹⁰ If choice of law rules in his country provide for application of another's law, that nation's local law will determine capacity.⁴¹¹ The law of the jurisdiction where a person enters a contract arising from a negotiable instrument controls that contract's form.⁴¹² The law of the jurisdiction where a bill of exchange or promissory note is payable controls the obligations of the acceptor of the bill or maker of the note.⁴¹³ The law of the country in which any other person signs the instrument governs the effect of his signature.⁴¹⁴

The Convention's emphasis on place of signature, domicile, and jurisdiction where the instrument is payable has the advantage of basing a person's liability on the law with which he is generally is most familiar and which he generally expects to apply. Emphasis on a single criterion such as place of signature or payment increases predictability of effects of commercial instruments by facilitating determination of appropriate law. The Geneva Conventions on Conflicts of Laws do not include any provisions permitting contractual selection of law or forum; the drafters emphasized uniformity of selection of law at the expense of party autonomy.

2. France

France did not adopt the Geneva Conventions on Conflicts into its legal codes. Commentators deplore the lack of codification and the resulting need to follow archaic law.⁴¹⁵ Conflicts of law principles applicable to negotiable instruments remains unclear. Unlike the Geneva Conventions on Conflicts of Law, France permits parties to exercise substantial discretion in choice of law. The Cours de Cassation has recognized that the law applicable for formation, conditions, or effects of

410. Bills of Exchange Conflicts Convention art. 2, 143 L.N.T.S. at 325; Cheques Conflicts Convention art. 2, 143 L.N.T.S. at 415.

411. Bills of Exchange Conflicts Convention art. 2, 143 L.N.T.S. at 325; Cheques Conflicts Convention art. 2, 143 L.N.T.S. at 415.

412. Bills of Exchange Conflicts Convention art. 2, 143 L.N.T.S. at 325; Cheques Conflicts Convention art. 2, 143 L.N.T.S. at 415. Cf. U.C.C. § 1-105 (providing that the forum's version of the Code will govern the form); Bills of Exchange Act § 72 (providing that the place of delivery after execution determines applicable law).

413. Bills of Exchange Conflicts Convention art. 2, 143 L.N.T.S. at 325.

414. *Id.*; Cheques Conflicts Convention art. 2, 143 L.N.T.S. at 415.

415. See, e.g., ENCYCLOPÉDIE DALLOZ, *Droit international- Conflicts de lois* § 82 (1968).

contracts is the law that the parties expressly adopt.⁴¹⁶ In the absence of a stipulation by the parties, the court considers circumstances of each case to determine which law should govern the contract.⁴¹⁷ The court also presumes that the parties intend the law of the place of performance to control their obligations.⁴¹⁸ A French principal and a *mandataire* or contractual agent are generally free to choose any nation's law to control their contract.⁴¹⁹ Claims to compensation by a V.R.P.⁴²⁰ are subject to French law when the agent lives and performs the contract in France, and parties may not avoid mandatory provisions of the labor code by a choice of law provision in the contract.⁴²¹

The Cours de Cassation developed special choice of law principles applicable to negotiable instruments. If a party contests his obligations under a bill of exchange drawn outside France and payable within France, a French court generally will apply the law of the jurisdiction where the drawees are domiciled.⁴²² If the instrument is domiciled the court will apply law of the jurisdiction where it is payable, or where plaintiff signed a protest.⁴²³

D. Summation

The practitioner should advise an agent executing negotiable instruments that he expects to cross national or state boundaries to include an explicit choice of law clause. United States courts generally will uphold the provision if the parties select the laws of a jurisdiction with a reasonable relation to the transaction. What constitutes a reasonable relation remains unclear, but the domicile of one of the parties or the place of performance of some part of the transaction should have sufficient connection to satisfy U.C.C. section 1-105(1). Unlike the Uniform Commercial Code, the English Bills of Exchange Act emphasizes uniformity at the expense of party autonomy. A practitioner whose client does business with the United Kingdom should review

416. *Ste. des Fourrures Renel v. Allouche*, reprinted in 48 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 708 (1959), citing C. CIV. art. 1134.

417. *Id.*

418. 3 JURISPRUDENCE FRANÇAISE, *Conflit de lois* § 419 (1967).

419. E. Hay & Müller-Freienfels, *supra* note 280, at 14.

420. *See supra* text accompanying note 280.

421. Hay & Müller-Freienfels, *supra* note 280, at 14.

422. 3 JURISPRUDENCE FRANÇAISE, *Conflit de lois* § 476 (1967), citing REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 116 (1939).

423. *Id.*

choice of law rules in section 72 of the Bills of Exchange Act. The Geneva Conventions on Conflicts of Law differ substantially from the United States approach as they base choice of law largely on the place where a party signs the instrument or where the instrument is payable. Although France acceded to the Convention, it did not adopt it into its Commercial or Civil Codes. French law remains poorly defined and allows parties to a negotiable instrument substantial direction in selecting applicable law.

VI. Proposals for Reform

A. Hague Convention on Agency

When the General Meeting of the Thirteenth Hague Session was unable to complete work on a convention on agency, a special commission of the Thirteenth Session of The Hague Conference on Private International Law convened on June 6, 1977, to draft a final agreement.⁴²⁴ France was the only country to sign the Convention when it was opened for signature in March, 1978,⁴²⁵ and France has not adopted its provisions. The Hague Convention adopts a flexible approach to choice of law in international agency relations and it may form the basis for future developments in the area.

The Hague Convention deals solely with choice of law questions; it contains no provisions prescribing standards for local law. Article 5 allows complete party autonomy by permitting principal and agent to select applicable law.⁴²⁶ Article 6⁴²⁷ indicates applicable law when the parties do not record any preference in their contract. In the absence of agreement by the parties, the courts of law of the nation where the agent has his place of business should apply the local law where the agent has his habitual residence.⁴²⁸ The local law of the place of performance applies if it is also the principal's place of business or the

424. Hague Conference on Private International Law, 3 *Actes et Documents de la Treizieme Session* 42 (1978), 26 AM. J. COMP. L. 438 (1978) [hereinafter cited as Hague Convention]. See Comment, *The Hague Convention on the Law Applicable to Agency*, 26 AM. J. COMP. L. 434 (1978).

425. Hay & Müller-Freienfels, *supra* note 280, at 36 n. 184.

426. Cf. U.C.C. § 1-105(1) (permitting express or implied selection of the law of any jurisdiction with a reasonable relation to the transaction).

427. Hague Convention art. 6.

428. *Id.*

principal's habitual residence, if he does not have a place of business.⁴²⁹ The law found applicable under the Convention determines the existence and scope of an agent's authority.⁴³⁰ Additionally, the applicable law also governs relations between an agent and a third party when the agent exceeds or misuses his authority.⁴³¹ The Convention combines elements from several legal systems as it balances policies favoring party autonomy with a need for uniform and predictable decisions.⁴³² The drafters placed special importance on the parties' choice of applicable law. Unlike the Uniform Commercial Code, the Hague Convention does not limit the right to choose law.⁴³³ Although they may be expected to select law with which they are most familiar, complete party autonomy allows the principal or agent to make frivolous or unfair selections that may burden courts with a need to research and apply rules from a distant jurisdiction.

The Hague Convention furthers policies for uniformity and predictability by stating objective criteria for choice of law in the absence of a stipulation by the parties. In the absence of agreement between parties as to choice of law, the Convention applies law of the state in which the agent does business:⁴³⁴

because it is the law indicated by the connecting factor most closely connected with the party who performs the obligation characteristic of the agreement; secondly, because the agent's principal place of business is more likely to coincide with the place where he acts than is the principal's principal place of business; and thirdly, because this solution seems to do justice to the pivotal role of the agent, at the center of the complex of relationships arising in an agency situation. As a connecting factor, the agent's principal place of business has the advantage of being clear and readily ascertainable.⁴³⁵

The Convention is particularly significant because it reflects a con-

429. *Id.*

430. *Id.* art. 8(a).

431. *Id.* art. 15.

432. *See generally* Hay & Müller-Freienfels, *supra* note 280.

433. *Cf.* § 1-105(1) (requiring selection of the law of a jurisdiction that bears a reasonable relation to the transaction).

434. Hague Convention art. 6.

435. Karsten, Report on the Preliminary Draft Convention, Prel. Doc. No. 5 at 14, Hague Conference on Private International Law, 1 *Actes et Documents de la Treizieme Session* (1976), reprinted in 27 *AM. J. COMP. L.* at 41.

cerned effort to unify choice of law rules and because the drafters were able to further competing policy concerns by borrowing from several legal systems.

B. UNCITRAL Proposal

The United National Commission on International Trade Law at its second session in Geneva in March, 1969, discussed methods for unifying law governing negotiable instruments in international commerce.⁴³⁶ The Commission noted that three competing legal regimes controlled bills of exchange and promissory notes transactions among western nations. The delegates concluded that the most effective way to achieve uniformity would be by creation of a new instrument to be used in international commerce and subject to a new uniform law.⁴³⁷ The final draft of UNCITRAL's Uniform Law on International Bills of Exchange and Promissory Notes (ULIB)⁴³⁸ allows private parties to choose whether the UNCITRAL proposal or traditional law should govern each instrument.⁴³⁹ Although eighteen nations participated in the UNCITRAL draft,⁴⁴⁰ the Convention has not been adopted into law.

Parties to a negotiable instrument may choose to have the ULIB govern only if the instrument satisfies requirements of article 1. The instrument must be written and must state in the text "pay against this international bill of exchange, governed by [the Convention of ____]."⁴⁴¹

436. Blomquist, *The Proposed Uniform Law on International Bills of Exchange and Promissory Notes: A Discussion of Some Special and General Problems Reflected in the Form and Content, Choice of Law, and Judicial Interpretation Articles*, 9 CAL. W. INT'L. L. J. 30 (1979).

437. *Id.* at 32.

438. International Bills of Exchange and International Promissory Notes, Draft Report of the Working Group on International Negotiable Instruments on the Work of its Fifth Session (July 18-29, 1977), U.N. Doc. A/CN.9/WG.IV/CRP.11 (1977) [hereinafter cited as ULIB].

439. *Id.* at 35.

440. Members of the working group include France, India, Mexico, Union of Soviet Socialist Republics, United Kingdom, and United States of America. Observers included Argentina, Austria, Brazil, Burundi, Chad, Chile, Federal Republic of Germany, Liberia, Malaysia, Philippines, Thailand, and Turkey. Organizations represented on the Commission included International Monetary Fund, European Banking Federation, European Economic Community, and the Hague Conference on Private International Law. U.N. Doc. A/CN.9/WG. IV/INF. 2, July 27, 1977.

441. ULIB art. 1(2). *Cf.* Bills of Exchange Convention art. 1, C. COM. art. 110

It must include an unconditional order to pay a definite sum of money to a specified person or to his order, be payable on demand or at a definite time, and be signed by the drawer and dated.⁴⁴² An international bill of exchange subject to the ULIB must show that at least two of the following places are in different countries: the place of payment, the place indicated next to the name of the drawee, and the place written beside the name of the payee.⁴⁴³ The ULIB has similar requirements for a promissory note, but the text must include the provision "against this international promissory note, governed by [the Convention of ___]", and must show that at least two of the following are in different countries; the place where the instrument was made, the place identified next to the signature of the maker or the name of the payee, or the place of payment.⁴⁴⁴

The ULIB paraphrases Uniform Commercial Code provisions discussing an agent's liability on negotiable instruments but rejects admission of parol evidence if it is unclear whether the agent signed in a representative capacity.⁴⁴⁵ A person can only be liable on an instrument

(requiring statement "bills of exchange" written on the instrument).

442. ULIB art. 1.

443. *Id.*

444. *Id.* art. 1, § 3.

445.

- (1) An instrument may be signed by an agent.
- (2) The signature on an instrument by an agent with authority to sign and showing on the instrument that he is signing in a representative capacity for a named person imposes liability thereon on that person and not on the agent.
- (3) The signature on an instrument by an agent without authority to sign, or by an agent with authority to sign but not showing on the instrument that he is signing in a representative capacity for a named person, or showing on the instrument that he is signing in a representative capacity but not naming the person whom he represents, imposes liability thereon on such agent and not on the person whom the agent purports to represent.
- (4) The question whether a signature was placed on the instrument in a representative capacity may be determined only with reference to what appears on the face of the instrument.
- (5) An agent who is liable pursuant to paragraph 3 and who pays the instrument has the same rights as the person for whom he purported to act would have had if that person had paid the instrument.

ULIB art. 30. *Cf.* U.C.C. §§ 3-403 and 3-404(1), which provide rules for agents' personal liability. *Compare* art. 30(5) with § 3-415(5), concerning the doctrine of subrogation.

under the ULIB if he signs it or if an agent signs it on his behalf.⁴⁴⁶ A signature may be by facsimile, symbols, or by any mechanical means.⁴⁴⁷ Furthermore, a person signing another's name without authority is deemed to have signed his own.⁴⁴⁸ An agent who signs on his principal's behalf, but without authority, is treated as a forger and is liable for any damages his signature causes.⁴⁴⁹

The ULIB follows United States practice by recognizing separate classes of holder and protected holder.⁴⁵⁰ A protected holder takes the instrument free from any claims by any person,⁴⁵¹ free from all defenses but incapacity⁴⁵² or the signer's excusable ignorance that his signature made him a party to a negotiable instrument,⁴⁵³ and free from any claim that the instrument was not presented for acceptance or payment, or that dishonor was not protested.⁴⁵⁴ A drawer, maker, or indorser may protect himself from a protected holder by writing a statement on the instrument such as "not negotiable," "not transferable," "not to order," or "pay X only."⁴⁵⁵ The transferee of an instrument bearing these words will become a holder only for the limited purposes of collection.⁴⁵⁶

If the ULIB is adopted, it will provide practitioners greater flexibility in advising their clients. The third draft is patterned closely after the Uniform Commercial Code, and a practitioner should provide similar advice to an agent as to form of signature and necessary authority

446. ULIB art. 22.

447. *Id.* Cf. U.C.C. § 1-201(39), which defines "signature" as "any symbol executed or adopted by a party with present intention to authenticate a writing." *Id.*

448. ULIB art. 22. Cf. U.C.C. § 3-404(1) (providing that an unauthorized signature obligates the signer on the instrument).

449. ULIB art. 22.

450. ULIB art. 5, §§ 6-7. A protected holder has rights similar to those of a holder in due course under U.C.C. § 3-305. *See* ULIB art. 25(1). Compare practice under the Geneva Convention in which there is only one class of holder.

451. Cf. U.C.C. § 3-305(1) (granting the same right to a holder in due course).

452. Cf. U.C.C. § 3-305(2)(a) (providing the defense of infancy to the extent that local law provides defendant did not have capacity to obligate himself, and § 3-305(2)(b), granting a defense of incapacity to the extent that defendant's act was void rather than voidable).

453. Cf. U.C.C. § 3-305(2)(c) (providing a defense for "fraud in the factum" or "real fraud" for misrepresentation that prevented the signer from learning the nature or essential terms of the instrument he signed).

454. These rights of a protected holder are governed by ULIB art. 25.

455. *See* ULIB art. 16.

456. *Id.*

in order to prevent his client's unintended personal liability on the instrument. Drafters of the ULIB intend its provisions to be optional. Lawyers should evaluate their clients' right if the ULIB is applied and also if the client acts under the law of another jurisdiction. The ULIB furthers both party autonomy and uniformity of law because application of the ULIB would be subject to the parties' agreement, and its application would supply substantive law rather than rules for choice of law.

VII. Conclusion

Negotiable instruments receive similar treatment under the Uniform Commercial Code, the English Bills of Exchange Act, and the Geneva Conventions. Differences remain, however, and choice of law principles become increasingly important as the size and frequency of international transactions increase. An agent signing a negotiable instrument in his representative capacity may always escape personal liability on the instrument if he has authority to sign and he signs in the proper form.

In the United States, a person who signs an instrument in another's behalf is personally liable on the instrument, if he did not have authority to obligate the person he claimed to represent. A signer may escape personal liability if he establishes that he had actual or apparent authority, or any other source of power to obligate the principal. The authorized agent should indicate on the instrument that he signs in a representative capacity, and should identify the person in whose behalf he signs.

The English Bills of Exchange Act influenced development of the U.C.C., and negotiable instruments in England have substantially the same effect as in the United States. An agent generally will not be liable on the instrument if he indicates his representative capacity and identifies his principal, even if he exceeds his authority.

The Geneva Conventions are the basis for negotiable instruments law in several nations in western Europe. France adopted these Conventions and French treatment of negotiable instruments follows their provisions. The Code de Commerce provides more stringent formal requirements for negotiability than the Bills of Exchange Act or the U.C.C. France requires the maker or drawer to indicate in the text of the instrument the kind of instrument he is executing and to state the name of the payor. An agent may obligate his principal and escape personal liability on the instrument only if he has authority to bind the

principal and he clearly acknowledges the representative capacity of his signature. The Code Civil suggests that representative authority is strictly construed in France. The Cours de Cassation, however, recognizes a source of authority similar to apparent authority or inherent agency power in United States practice.

The U.C.C. allows parties to an instrument to select the law governing the instrument provided that they choose the law of a state which has a reasonable relation to the transaction. If they do not choose applicable law the forum will apply its own version of the U.C.C., provided that the forum has an appropriate relation to the transaction. If the parties do not choose applicable law and the forum must look beyond its version of the U.C.C. to resolve the dispute, the court will apply general choice of law rules from outside the U.C.C.

The English Bills of Exchange Act treats each contract on the instrument separately, and applies the law of the jurisdiction where that contract was entered into, in order to determine its validity and interpretation. The Bills of Exchange Act furthers predictability at the expense of party autonomy. Courts will choose applicable law on the basis of objective and uniform criteria rather than on the parties' choice of law.

The Geneva Conventions on negotiable instruments include conventions on conflicts of law. These conventions emphasize objective criteria in choice of law, such as place of signature, domicile, and jurisdiction where the instrument is payable. The Geneva Conventions do not contain any provisions permitting contractual selection of law or forum. The drafters of the Conventions emphasized uniformity of selection of law at the expense of party autonomy.

Although France acceded to the Geneva Conventions it did not adopt their provisions on conflicts of laws. France permits parties to exercise substantial discretion in choosing applicable law. If the parties have not selected governing law, courts generally will apply the law with which the parties are most familiar.

Perhaps the most intriguing proposal for reform is UNCITRAL's final draft of a Uniform Law on International Bills of Exchange and Promissory Notes. If this draft is adopted, parties to an international transaction may select a comprehensive body of rules that borrows from each of the major systems of negotiable instruments. Adoption of this proposal would further potentially conflicting policies favoring party autonomy and uniform application of law. Parties to an international transaction could choose to be subject to the ULIB, and the ULIB then would provide the rules governing their rights and obliga-

tions. The transnational practitioner should consult each regime of law as he determines when an agent will be personally liable on a negotiable instrument which the agent signed on his principal's behalf.