

## Louisiana Law Review

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Volume 15 | Number 2

*The Work of the Louisiana Supreme Court for the*

*1953-1954 Term*

*February 1955*

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# The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana - Formal Requisites of Negotiability

Sidney B. Galloway

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### Repository Citation

Sidney B. Galloway, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana - Formal Requisites of Negotiability*, 15 La. L. Rev. (1955)

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# LOUISIANA LAW REVIEW

LOUISIANA STATE UNIVERSITY LAW SCHOOL

BATON ROUGE 3, LOUISIANA

Subscription per year \$5.00 (Foreign \$5.50)

Single copy \$1.25

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VOLUME XV

FEBRUARY, 1955

NUMBER 2

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## Comments

### The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana—Formal Requisites of Negotiability

The Uniform Commercial Code is the result of seven years of joint effort by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.<sup>1</sup> The Code is intended to cover the entire field of commercial transactions

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1. For a detailed discussion of the preparation of the Code, see the Comment, UNIFORM COMMERCIAL CODE, OFFICIAL DRAFT, TEXT AND COMMENTS EDITION 1 (1952). See also Richter, *The Uniform Commercial Code—A Preview*, 24 CALIF. S.B.J. 414 (1949); Schnader, *The New Commercial Code: Modernizing Our Uniform Commercial Acts*, 36 A.B.A.J. 179 (1950).

and to replace the present laws in this field.<sup>2</sup> It has been adopted in Pennsylvania<sup>3</sup> and is now under study by the New York legislature.<sup>4</sup> The extensive discussion of the Code in legal periodicals<sup>5</sup> is indicative of the widespread interest which it has created. It is not improbable that it will be proposed for adoption in Louisiana should it be enacted in the larger commercial states. The effect of the adoption of the Code in Louisiana should therefore be given serious consideration.

Article 3 of the Code, entitled Commercial Paper, is a "complete revision and modernization of the Uniform Negotiable Instruments Law"<sup>6</sup> which has been the law of Louisiana for half a century. It is the purpose of this comment to point out the changes which the adoption of Article 3 will bring about in one

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2. Article 2, Sales, replaces the Uniform Sales Act; Article 3, Commercial Paper, replaces the Uniform Negotiable Instruments Law, LA. R.S. 7:1 *et seq.* (1950); Article 4 deals with Bank Deposits and Collections; Article 5 deals with Documentary Letters of Credit; Article 6 deals with Bulk Transfers; Article 7, Warehouse Receipts, Bills of Lading and Other Documents of Title, replaces the Uniform Warehouse Receipts Act, LA. R.S. 54:1 *et seq.* (1950) and the Uniform Bills of Lading Act, LA. R.S. 45:901 *et seq.* (1950); Article 8, Investment Securities, replaces the Uniform Stock Transfer Act, LA. R.S. 12:521 *et seq.* (1950); Article 9, Secured Transactions, Sales of Accounts, Contract Rights and Chattel Paper, replaces the Uniform Trust Receipts Act and the Uniform Conditional Sales Act.

3. Pa. Laws 1953, No. 1, p. 3.

4. In 1954 NEW YORK STATE LEGISLATIVE ANNUAL 461 (1954) the report of the New York Law Revision Commission on its study of the new Code is set forth.

5. For discussions of Article 3, Commercial Paper, see Beutel, *Comparison of the Proposed Commercial Code, Article 3, and the Negotiable Instruments Law*, 30 NEB. L. REV. 531 (1951); Britton, *Formal Requisites of Negotiability—The Negotiable Instruments Law Compared with the Proposed Commercial Code*, 26 ROCKY MT. L. REV. 1 (1953); Britton, *Transfers and Negotiations under the Negotiable Instruments Law and Article 3 of the Uniform Commercial Code*, 32 TEXAS L. REV. 153 (1953); Cosway, *Innovations in Articles Three and Four of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 284 (1951); Emblidge, *Commercial Paper under Proposed Uniform Code*, 23 N.Y.S.B.A. BULL. 371 (1951); Hill, *How the Adoption of the Uniform Commercial Code Would Affect the Law of Negotiable Instruments in Oregon*, 32 ORE. L. REV. 97 (1953); Invernizzi, *The Law of Negotiable Instruments under the Proposed Commercial Code*, 54 MD. S.B.A. 224 (1949); Palmer, *Negotiable Instruments under the Uniform Commercial Code*, 48 MICH. L. REV. 255 (1950); Sherman & Feeney, *An Examination of the Negotiability Concept of the Uniform Commercial Code*, [1953] WASH. U.L.Q. 297; Tisdale, *Uniform Commercial Code—Commercial Paper*, 26 N.D. BAR BRIEFS 252 (1950); Tyler, *How the Adoption of the Uniform Commercial Code would Affect the Law of Negotiable Instruments in Oregon*, 33 ORE. L. REV. 41 (1953); Note, *Acceleration Clauses in Time Paper, under the NIL and the Uniform Commercial Code*, 101 U. OF PA. L. REV. 835 (1953); *A Symposium of the Proposed Uniform Commercial Code*, 17 ALB. L. REV. 1 (1953); Symposium, *The Uniform Commercial Code in Ohio—Should Article 3 of the Uniform Commercial Code Be Adopted in Ohio?*, 14 OHIO ST. L.J. 1, 32 (1953); Symposium, *The Uniform Commercial Code—The Effect of Its Adoption in Tennessee*, 22 TENN. L. REV. 776 (1953).

6. UCC § 3-101, comment.

limited area of the Louisiana Negotiable Instruments Law—the formal requisites of negotiability. No attempt is made here to itemize every change of phraseology made by the Code; this comment will discuss only those changes of substance which appear to be most significant.<sup>7</sup> Louisiana cases will be discussed wherever the Code is not in accord with the jurisprudence of this state; otherwise the Code will merely be compared with the NIL provisions.

### *Scope of Applicability*

At the outset it will be helpful to compare the scope of applicability of Article 3 with that of the NIL. The NIL provisions are intended to be the sole means of determining the negotiability of any executory instrument which creates rights in personam. This approach is expressed in NIL 1: "An instrument to be negotiable must conform to the following requirements: . . ."<sup>8</sup> Because of its broad applicability the NIL limits the development and utility of instruments which might be adapted to changing commercial usages by denying them any of the attributes of negotiability.

Article 3 of the Code by the terms of Section 3-103<sup>9</sup> does not apply to money, documents of title or investment securities. It is restricted to drafts (bills of exchange), checks, notes and certificates of deposit.<sup>10</sup> In addition to this specific restriction of Section 3-103, Section 3-104, which lists the formal requisites of negotiability, provides that "Any writing to be a negotiable instrument *within this Article* must . . ." (Italics supplied.) The comment following Section 3-104 interprets the words "within this Article" as leaving open "the possibility that some writings may be made negotiable by other statutes or by judicial

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7. For brevity the present Louisiana Negotiable Instruments Law will be referred to as NIL. The Uniform Commercial Code will be referred to merely as the Code in the text and as UCC in the footnotes. All references to sections or subsections, unless prefaced by NIL, will be to those of the Code.

8. Under this language of the NIL there is the constant danger that investment securities and documents of title not covered by specific statutes may be held non-negotiable for failure to conform to the formal requirements of the NIL. *E.g.*, *Manhattan Co. v. Morgan*, 242 N.Y. 38, 150 N.E. 594 (1926), an instrument calling for the delivery of bonds held non-negotiable because not payable in money.

9. "Section 3-103. Limitations on Scope of Article. (1) This Article does not apply to money, documents of title or investment securities. . . ."

10. UCC § 3-103, comment 1.

decision."<sup>11</sup> Professor Britton feels that the words indicate on the part of the drafters a loss of faith in the legislative process and will eliminate uniformity by encouraging the courts to experiment.<sup>12</sup> However, other writers have expressed the opinion, which seems more sound, that the approach of the drafters will provide a much needed flexibility so that new forms of negotiable paper can be developed in the future and treated as such by the courts independently of statutory enactments.<sup>13</sup>

*Requirement That an Instrument Must Contain a Promise or an Order*

Section 3-104(1): "Any writing to be a negotiable instrument within this article must . . . (b) contain an unconditional promise or order. . . ."

Section 3-102(1) (b): "An 'order' is a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession."

Section 3-102(1) (c): "A 'promise' is an undertaking to pay and must be more than an acknowledgment of an obligation."

The Code retains the provision of NIL 1<sup>14</sup> that an instrument, to be negotiable, must contain an order or a promise. To clarify this requirement the Code defines "order" and "promise." The definitions are, with slight exceptions, merely codifications of the majority judicial interpretations of the NIL.<sup>15</sup> One exception, which will effect a change in present law, is the provision in the definition of an order that it may be addressed to persons *in the alternative*. This provision is incorporated into the definition of a draft (bill of exchange) by Section 3-104(2) and will therefore reverse the rule of NIL 128<sup>16</sup> which does not permit a

11. UCC § 3-104, comment 1. The Louisiana legislature has on at least one occasion adopted the approach of declaring particular instruments negotiable by statute. La. Acts 1951(E.S.), No. 17, p. 22, authorizing the issuance of bonds payable out of a certain fund. The act provided that the bonds "shall constitute negotiable instruments within the meaning of [the NIL]."

12. Britton, *Formal Requisites of Negotiability—The Negotiable Instruments Law Compared with the Proposed Commercial Code*, 26 ROCKY MT. L. REV. 1 (1953).

13. Sherman & Feeney, *An Examination of the Negotiability Concept of the Uniform Commercial Code*, [1953] Wash. U.L.Q. 297.

14. LA. R.S. 7:1 (1950).

15. For a discussion of what constitutes an order or a promise under the NIL, see BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES 41 (1943).

16. LA. R.S. 7:128 (1950).

draft to be addressed to alternative drawees. The change is included in recognition of "the practice of corporations issuing dividend checks and of other drawers who for commercial convenience name a number of drawees, usually in different parts of the country."<sup>17</sup>

*Requirement that the Promise or Order Must Be Unconditional*

Section 3-104: "(1) Any writing to be a negotiable instrument within this Article must . . . (b) contain an unconditional promise or order. . . ."

Section 3-105: "(1) A promise of order otherwise unconditional is not made conditional by the fact that the instrument

"(a) is subject to implied or constructive conditions; or

"(b) states its consideration, whether performed or promised, or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or 'as per' such transaction; or

"(c) refers to or states that it arises out of a separate agreement; or

"(d) states that it is drawn under a letter of credit; or

"(e) states that it is secured, whether by mortgage, reservation of title or otherwise; or

"(f) indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or

"(g) is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or

"(h) is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

"(2) A promise or order is not unconditional if the instrument

"(a) states that it is subject to or governed by any other agreement; or

"(b) states that it is to be paid only out of a particular fund or source except as provided in this section."

In Subsection (1) of 3-105 the drafters of the Code have attempted to resolve conflicts and give clarity by spelling out in

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17. UCC § 3-102, comment 3.

detail the generally accepted or majority interpretations of NIL 3.<sup>18</sup> Most of the provisions are in accord with Louisiana decisions, but in a few instances the law will be changed or clarified.

Several Louisiana cases have dealt with a promise to pay followed by the words "as per" some particular agreement or transaction. In *Continental Bank & Trust Co. v. Times Publishing Co.*,<sup>19</sup> the conclusion was reached that the words "as per contract dated. . ." <sup>20</sup> subjected the promise to the conditions of the contract and rendered the note non-negotiable. A later case, *Tyler v. Whitney-Central Trust & Savings Bank*,<sup>21</sup> dealt with a very similar note.<sup>22</sup> There, however, the court, on finding that the "as per contract" phrase was in a separate sentence from the promise, concluded that the phrase bore no relation whatever to the promise, but was merely a statement of the transaction giving rise to the note. The only real difference in the notes involved in these cases was the position of the "as per contract" stipulations in relation to the promises. This difference was in all probability the result of pure accident.<sup>23</sup>

Subsection 3-105(1) (b) will make it unnecessary to draw fine distinctions as to the meaning of an "as per contract" stipulation. Anyone handling a note containing these words can be sure that, wherever located, they will not make an otherwise unconditional promise conditional.

The provision of NIL 3 that an order or promise to pay out of a particular fund is not unconditional is retained in Subsection 3-105(2) (b). It is, however, modified by Subsections (1) (g)

18. LA. R.S. 7:3 (1950). The general problems covered by this NIL section have been the subject of considerable litigation. Britton collects many cases and discusses the problems. BRITTON, *BILLS AND NOTES* 47-86 (1943). Cases involving instruments which refer to separate agreements or to the transactions giving rise to them, or which state their consideration are collected in a long series of annotations, the latest of which is Note, 104 A.L.R. 1378 (1936). For cases involving notes secured by mortgages, see Note, 75 A.L.R. 1210 (1931); for cases involving notes with references to collateral security other than mortgages, see 102 A.L.R. 1095 (1936).

19. 142 La. 209, 76 So. 612 (1917).

20. The note read: "I promise to pay to the order of myself one hundred fifty dollars . . . , rent for . . . brick building . . . in Shreveport, La., as per contract dated March 24, 1913." *Id.* at 210, 76 So. at 613.

21. 157 La. 249, 102 So. 325 (1924).

22. The note read: ". . . we promise to pay to the order of ourselves eighty-five and no/100 dollars. . . . Value to be received in rent for store . . . as per lease this date." *Id.* at 252, 102 So. at 326.

23. Beutel, *Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions*, 9 TULANE L. REV. 64 (1934). See also *City Savings Bank & Trust Co. v. Wilkinson*, 165 La. 385, 115 So. 629 (1928), 4 TULANE L. REV. 126 (1929).

and (1) (h). Subsection (1) (g), by treating as unconditional the promise or order of a government agency or unit even if limited to payment out of a particular fund, will reverse the rule of such cases as *Boxwell v. Department of Highways*.<sup>24</sup> Because of the scarcity of litigation of instruments of the type covered by Subsection (1) (h), the rule adopted by that subsection can be looked upon as a new rule of law, at least in Louisiana.<sup>25</sup> There seems to be no sound argument against the policy of holding the instruments of partnerships, unincorporated associations, trusts and estates negotiable, particularly since Subsection (1) (h) is not intended to change the law as to the liability of any party on such an instrument.<sup>26</sup>

According to the comment following Section 3-105,<sup>27</sup> Subsection (2) (a) retains the generally accepted rule that an instrument containing language such as "subject to the terms of contract dated . . ." is not negotiable. The Louisiana court followed this rule in *Gaines v. Fitzgibbons*,<sup>28</sup> but rejected it in *Newman v. Schwarz*.<sup>29</sup> In the latter case, in the court's opinion, the words "Rent Note Subject to Terms of Lease Dated May 2, 1927" written across the face of the instrument did not refer to the promise to pay. Therefore the note was held to be negotiable in spite of the quoted language.

The adoption of the Code will eliminate the uncertainty resulting from the decision in *Newman v. Schwarz*. Subsection (2) expressly states that "if the instrument states that it is subject to or governed by any other agreement," then the prom-

24. 203 La. 760, 14 So.2d 627 (1943) (warrants of Highway Commission held non-negotiable because payable out of a particular fund).

25. No Louisiana cases could be found which dealt directly with the negotiability of notes of the type covered by Subsection (1)(h). In *Hibbs v. Brown*, 190 N.Y. 167, 82 N.E. 1108 (1907), a note, on which liability was expressly restricted to the assets of an unincorporated association, was held to be negotiable. See Note, 8 COL. L. REV. 215 (1908). In *Charles Nelson Co. v. Morton*, 106 Cal. App. 144, 288 Pac. 845 (1930), 5 TULANE L. REV. 135, a note made by the trustee of a business trust, on which liability was restricted to the assets of the trust, was held negotiable. Contra: *Lorimer v. McGreevy*, 229 Mo. App. 970, 84 S.W.2d 667 (1935). For general discussion, see BRITTON, BILLS AND NOTES 58 (1943).

26. UCC § 3-105, comment 7.

27. *Id.* at comment 8.

28. 168 La. 260, 121 So. 763 (1929) (notes stating that they were "subject to the conditions set forth in the act of sale," held non-negotiable). See also *Shushan v. Trepagnier*, 187 La. 1012, 175 So. 651 (1937).

29. 180 La. 153, 156 So. 206 (1934), reversing *Newman v. Schwarz*, 153 So. 362 (La. App. 1934). For discussion, see Beutel, *Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions*, 9 TULANE L. REV. 64 (1934).

ise is conditional. (Italics supplied.) This provision should add needed clarity to the law.<sup>30</sup>

*Requirement that There Be No Promises or Orders Other Than For the Payment of Money*

Section 3-104: "(1) Any writing to be a negotiable instrument within this Article must . . . (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; . . ."

Section 3-112: "(1) The negotiability of an instrument is not affected by

"(a) the omission of a statement of any consideration or of the place where the instrument is drawn or payable; or

"(b) a statement that collateral has been given for the instrument or in case of default on the instrument the collateral may be sold; or

"(c) a promise to give additional collateral on demand; or

"(d) a term authorizing a confession of judgment on the instrument if it is not paid when due; or

"(e) a term purporting to waive the benefit of any law intended for the advantage or protection of any obligor; or

"(f) a term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer.

"(2) Nothing in this section shall validate any term which is otherwise illegal."

The last part of Section 3-104(1) (b) retains the basic NIL rule that an instrument must not contain an order or promise to do any act other than the payment of money. The rule is expanded to prohibit not only an order or promise but also any obligation or power given by the maker or drawer. This blanket provision is greatly modified by Section 3-112, which is little more than a rewording of NIL 5 and 6.<sup>31</sup> A change of slight importance is the omission of any provision similar to that of NIL

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30. Lack of clarity under the NIL is illustrated in *Baldwin Realty Co. v. Interstate Trust & Banking Co.*, 172 La. 749, 135 So. 228 (1931), where the decision commented upon the differing views of the court members as to the effect of a statement in an instrument that it was "subject to the terms" of a contract.

31. LA. R.S. 7:5-6 (1950).

5(4).<sup>32</sup> As a result, an instrument which allows the holder to require that something be done in lieu of the payment of money will no longer be negotiable.

In *Hibernia Bank & Trust Co. v. Dresser*<sup>33</sup> a promise to give additional collateral on demand was considered a promise to do something in addition to the payment of money and held to render a note non-negotiable. Later Louisiana cases have held notes containing similar provisions to be negotiable.<sup>34</sup> Subsection 3-112(1) (c), which has no NIL counterpart, will make it clear that a promise of this kind will not destroy negotiability.

*Requirement that the Promise Must Be for a Sum Certain*

Section 3-104: "(1) Any writing to be a negotiable instrument within this Article must . . . (b) contain an unconditional promise or order to pay a sum certain. . . ."

Section 3-106: "(1) The sum payable is a sum certain even though it is to be paid

"(a) with stated interest or by stated installments; or

"(b) with stated different rates of interest before and after default or a specified date; or

"(c) with a stated discount or addition if paid before or after the date fixed for payment; or

"(d) with exchange or less exchange, whether at a fixed rate or at the current rate; or

"(e) with costs of collection or an attorney's fee or both upon default.

"(2) Nothing in this section shall validate any term which is otherwise illegal."

Section 3-107: ". . . (2) A promise or order to pay a stated sum in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying

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32. LA. R.S. 7:5 (1950): "But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: . . . (4) Gives the holder an election to require something to be done in lieu of payment of money."

33. 132 La. 532, 61 So. 561 (1913).

34. *Merchants & Marine Bank of Pascagoula, Miss. v. Hibernia Bank & Trust Co.*, 16 F. Supp. 433 (E.D. La. 1936); *Mechanics & Metals Nat. Bank v. Warner*, 145 La. 1022, 83 So. 228 (1919); *Bonart v. Rabito*, 141 La. 970, 76 So. 166 (1917). See also *In re Liquidation of Canal Bank & Trust Co.*, 182 La. 421, 162 So. 31 (1935).

sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the day of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency."

Section 3-106 is the counterpart of NIL 2.<sup>35</sup> Most of the slight changes and additions to phraseology are not intended as substantive changes.<sup>36</sup> However, Subsections (1) (b) and (1) (c) are new in the sense that there are no express provisions in the NIL which correspond to them. They will settle the considerable conflict of authority concerning varying rates of interest and discounts.<sup>37</sup> The solutions reached by the drafters in favor of negotiability seem to be entirely sound. A holder of an instrument containing the stipulations covered by Subsection (1) (b) or (1) (c) can at any time determine from the face of the instrument the exact amount then due.

The provision of NIL 2 (3)<sup>38</sup> on acceleration clauses has been omitted from Section 3-106. However, Section 3-109,<sup>39</sup> which deals with certainty as to time, validates all acceleration clauses, and the comment following Section 3-106 states that the "disappearance of the language referred to in [NIL 2 (3)] means merely that it was regarded as surplusage."<sup>40</sup>

Under Section 3-107 an instrument is for a sum certain even though the sum is stated in terms of foreign currency and payment may be made in dollars. The fact that the exchange rate may fluctuate from time to time does not affect negotiability.

#### *Requirement that the Instrument Must Be Payable in Money*

Section 3-104: "(1) Any writing to be a negotiable instrument within this Article must . . . (b) contain an unconditional promise or order to pay a sum certain in money. . . ."

35. LA. R.S. 7:2 (1950).

36. UCC § 3-106, comment: "Purposes of Changes: The new language is intended to clarify doubts arising under the [NIL]. . . ."

37. BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 233 (7th ed., Beutel, 1948); BRITTON, *BILLS AND NOTES* 147 (1943). For discussion, see Bugea, *Sum Certainty in Negotiable Paper as Affected by Interest and Discount Provisions*, 2 *LOYOLA L. REV.* 1 (1943). No Louisiana cases could be found on this subject.

38. LA. R.S. 7:2 (1950): "The sum payable is a sum certain within the meaning of this Chapter, although it is to be paid: . . . (3) By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due. . . ."

39. Section 3-109(1): "An instrument is payable at a definite time if by its terms it is payable . . . (c) at a definite time subject to any acceleration. . . ."

40. UCC § 3-106, comment 4.

Section 3-107: "(1) An instrument is payable in money if the medium of exchange in which it is payable is money at the time the instrument is made. An instrument payable in 'currency' or 'current funds' is payable in money.

"(2) A promise or order to pay a stated sum in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the day of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency."

Section 1-201: ". . . 'Money' means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency."

The NIL contains no definition of "money," and there are various views as to what constitutes "money" in order for an instrument to be negotiable.<sup>41</sup> The definition in Section 1-201 rejects both the view that money is limited to legal tender and the view that it includes any medium of exchange commonly used as money in a given community. Under the Code's definition "money" is any medium of exchange which is a part of the official currency of a government.

The conflict concerning the negotiability of instruments payable in "currency" or "current funds" is settled by Section 3-107(1) in accord with the majority of the decisions.<sup>42</sup> Such instruments are "payable in money" and therefore negotiable.

Although, under the NIL, there is substantial authority which follows the opposite rule,<sup>43</sup> Section 3-107(2) will make an instrument negotiable even if it requires payment in foreign currency and designates the place of payment in the United States.

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41. BRITTON, *BILLS AND NOTES* 119 (1943).

42. *Id.* at 123-24; BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 300 (7th ed., Beutel, 1948).

43. Chafee, *Progress of the Law—Bills and Notes*, 33 *HARV. L. REV.* 255 (1920); Perkins, *May a Promissory Note Be Payable in Foreign Money*, 5 *IOWA L. BULL.* 227 (1920). But see Oliphant, *The Theory of Money in the Law of Commercial Instruments*, 29 *YALE L.J.* 606 (1920). These articles are noted under discussion in BRITTON, *BILLS AND NOTES* 128 (1943).

*Requirement as to Time of Payment*

Section 3-104: "(1) Any writing to be a negotiable instrument within this Article must . . . (c) be payable on demand or at a definite time; . . . ."

*(a) Demand Instruments*

Section 3-108: "Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated."

As far as it goes Section 3-108 merely restates NIL 7.<sup>44</sup> The only change is the omission of the last sentence of NIL 7, which reads: "Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or endorsing it, payable on demand." This language gives the impression that the requirements as to presentment, notice of dishonor and protest, which are applicable in connection with regular demand paper, are enforceable in favor of one who endorses an instrument after its maturity. Section 3-501 provides that one endorsing after maturity of the instrument is not entitled to presentment, notice of dishonor or protest. Since the impression created by the language of the last sentence of NIL 7 is definitely false under the new Code, the language is omitted.

*(b) Instruments Payable at a Definite Time*

Section 3-109: "(1) An instrument is payable at a definite time if by its terms it is payable

"(a) on or before a stated date or at or a fixed period after a stated date; or

"(b) at a fixed period after sight; or

"(c) at a definite time subject to any acceleration; or

"(d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or automatically upon or after a specified act or event.

"(2) An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred."

The phrase "definite time" is substituted in the Code for the NIL words "fixed or determinable future time." The comment

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44. LA. R.S. 7:7 (1950).

following Section 3-109 states that "[t]he time of payment is definite if it can be determined from the face of the instrument."<sup>45</sup> In this regard, Subsection 3-109(2) will reverse the rule of NIL 4(3)<sup>46</sup> which treats as negotiable an instrument payable "[o]n or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain." Clearly such an instrument is not payable at a definite time and is not negotiable under the Code.<sup>47</sup>

Subsection 3-109(1)(c), dealing with acceleration clauses, will clarify the present Louisiana law. In *Hibernia Bank & Trust Co. v. Dresser*,<sup>48</sup> on rehearing, the Louisiana Supreme Court held that a provision in a note, giving the holder the right to demand from the maker additional security satisfactory to the holder and maturing the note on the maker's failure to comply with the demand, rendered the note uncertain as to time of payment, and therefore non-negotiable. Although the court held in *Mechanics & Metals Nat. Bank of New York v. Warner*<sup>49</sup> that an almost identical provision did not render a note non-negotiable because of uncertainty of time of payment, the *Hibernia Bank* case was not overruled expressly. Any authority which the *Hibernia Bank* case now has as a precedent will be eliminated by the new Code, which clearly follows the rule of the *Mechanics & Metals Nat. Bank* case. The provision for immediate maturity of an instrument on the maker's failure to supply additional collateral is a form of acceleration clause. Section 3-109(1)(c) provides that the certainty as to time of payment is not affected by *any* acceleration.<sup>50</sup> Also, Section 3-112(1)(c) provides that negotiability is not affected by a promise to give additional collateral on demand. In discussing this provision, the comment following

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45. UCC § 1-109, comment 2.

46. LA. R.S. 7:4(3) (1950).

47. No recent Louisiana cases could be found dealing with this type of instrument. The Code provision will reverse the rule of *Mortee v. Edwards*, 20 La. Ann. 236 (1868), which held that a note payable "thirty days after peace between the Confederate States and the United States" was a negotiable instrument.

48. 132 La. 532, 61 So. 561 (1913).

49. 145 La. 1022, 83 So. 228 (1919).

50. UCC § 3-109, comment 4: "Objections to the acceleration clause must be based rather on the possibility of abuse by the holder, which has nothing to do with negotiability. . . ." In this connection reference should be made to Section 1-208, which provides: "A term providing that one party may accelerate payment or performance or require collateral or additional collateral not on stated contingencies but 'at will' or 'when he deems himself insecure' or in words of similar import means that he has power to do so only in the good faith belief that the prospect of payment or performance is impaired but the burden of establishing lack of good faith is on the party against whom the power has been exercised."

Section 3-112 states that such a promise is often accompanied by a provision for acceleration in default of additional collateral, "which is now permitted by [Section 3-109]."<sup>51</sup>

The provisions of Subsection 3-109(1)(d) are apparently based on the majority judicial interpretation of the NIL.<sup>52</sup> It should be noted that a provision allowing extension of the time of payment by the maker must state a definite time limit. Although this section apparently gives to the holder complete freedom to extend the date of payment indefinitely, the power of the holder is greatly limited by Section 3-118(f) which requires the consent of the maker to any extension. That section also provides that such consent, unless otherwise specified, authorizes only a single extension for not longer than the original period of the instrument.

*Requirements that an Instrument Must Be Payable to Order or Bearer*

Section 3-104: "(1) Any writing to be a negotiable instrument within this Article must . . . (d) be payable to order or to bearer."

(a) *Instruments payable to order.*

"Section 3-110

"(1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as 'exchange' or the like and names a payee. It may be payable to the order of

"(a) the maker or drawer; or

"(b) the drawee; or

"(c) a payee who is not maker, drawer or drawee; or

"(d) two or more payees together or in the alternative;

or

"(e) an estate, trust or fund, in which case it is payable to the order of the representative of such estate, trust or fund or his successors; or

"(f) an office or officer as such, in which case it is payable to the order of the incumbent of the office or his successors; or

51. UCC § 3-112, comment 1.

52. BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 274 (7th ed., Beutel, 1948); BRITTON, *BILLS AND NOTES* 113 *et seq.* (1943).

“(g) a partnership or unincorporated association, in which case it is payable to the partnership or association and may be indorsed or transferred by any person thereto authorized.

“(2) An instrument not payable to order is not made so payable by such words as ‘payable upon return of this instrument properly indorsed.’

“(3) An instrument made payable both to order and to bearer is payable to order unless the bearer words are handwritten or typewritten.”

Section 3-110 contains the same substance as NIL 8.<sup>53</sup> With few exceptions the expansion or added detail is merely intended to settle a specific conflict or to give needed clarity to the law. In the first sentence the words “or assigns” are made words of negotiability equivalent to “or order.” Similarly, words such as “‘exchange’ or the like” are made words of negotiability. The latter provision seems to allow the use of a wide range of words to make an instrument negotiable. It should be noted, however, that the Code contains no provision similar to NIL 10,<sup>54</sup> which allows the use of any terms “which clearly indicate an intention to conform to the requirements” of the NIL. In the comment following Section 3-104, it is stated that the omission of a provision similar to NIL 10 means “that either the language of the section or a clear equivalent must be found, and that in doubtful cases the decision should be against negotiability.”<sup>55</sup>

The words “payable upon return of this instrument properly indorsed” are frequently contained in certificates of deposit. Subsection (2) settles the conflict which exists under the NIL<sup>56</sup> by providing that these words, standing alone, do not make the instrument order paper. The omission of the word “order” or its clear equivalent is to be considered as indicating an intention that the instrument be non-negotiable.

Subsection (3) is directed towards those instruments which are prepared by filling in the blanks in a printed form. The comment states that language such as “Pay to the order of John Doe or bearer” usually results from a maker’s overlooking the printed words “or bearer” when filling in the payee blank.<sup>57</sup> For this

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53. LA. R.S. 7:8 (1950).

54. LA. R.S. 7:10 (1950).

55. UCC § 3-104, comment 5.

56. BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 230 (7th ed., Beutel, 1948); BRITTON, *BILLS AND NOTES* 37 (1943).

57. UCC § 3-110, comment 6.

reason, the words "or bearer" are controlling only when hand-written or typewritten.

(b) *Instruments payable to bearer.*

Section 3-111. "An instrument is payable to bearer when by its terms it is payable to

"(a) bearer or the order of bearer; or

"(b) a specified person or bearer; or

"(c) 'cash' or the order of 'cash,' or any other indication which does not purport to designate a specific payee."

Along with Subsection 3-110(3), Subsection 3-111(a) is directed toward instruments prepared by filling in the blanks on a printed form. When the drawer or maker writes the word "bearer" in the payee blank of a form containing the words "Pay to the order of \_\_\_\_\_," it is logical to give effect to the word consciously included by the maker or drawer. This is the result intended by Subsection (a), which makes such an instrument bearer paper.

Subsections (3) and (5) of NIL 9,<sup>58</sup> the article corresponding to Section 3-111, have been omitted from this section, but are covered elsewhere in Article 3.<sup>59</sup>

Subsection (c) rewords NIL 9(4). The purpose of the rewording can be determined only by reading the comment following the section, which states that the rewording is to "remove any possible implication that 'Pay to the order of \_\_\_\_\_' makes the instrument payable to bearer. It is an incomplete order instrument. . . ."<sup>60</sup> A further rewording of Subsection (c) seems to be needed if its stated purpose is to be accomplished.

### *Conclusion*

In general, Part I of Article 3 of the new Code should be an improvement over that part of the NIL dealing with the formal requisites of negotiability.

The Code's approach to the concept of negotiability will provide needed flexibility so that new types of instruments can be developed in conformity with changing commercial practices.

Basically, the formal requisites of negotiability as set forth in the Code are identical with those of the NIL. The improve-

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58. LA. R.S. 7:9 (1950).

59. UCC §§ 3-405, 3-204.

60. UCC § 3-111, comment 2.

ment will come in the clarification of uncertainties which have been evidenced by conflicting jurisprudence over the past half century. In nearly all areas of uncertainty the drafters of the Code have adopted the rules followed by the majority of the courts. As Louisiana has in most cases settled questions arising under the NIL in accord with the weight of judicial authority, the Code will affect few substantive changes in the law of this state.

The adoption of the Code will result in greater uniformity as to the formal requisites of negotiability than is now present under the NIL. It is submitted that there is nothing contained in Part I of Article 3 which should preclude its adoption in Louisiana, and the clarification which it will provide in many questions will be a definite improvement over the present law.

*Sidney B. Galloway*

## The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana—Rights of a Holder

### *The Holder in Due Course*

A fundamental concept in the law of negotiable instruments is the legal protection which accompanies the status of holder in due course. This protection allows the holder in due course, generally termed a good faith purchaser, to enforce the obligation represented by the instrument regardless of the fact that the drawer or maker may have a valid defense against the party with whom he dealt.<sup>1</sup> By thus cutting off defenses available between the immediate parties to the instrument the law provides a vital element of certainty in commercial paper transactions. Under the provisions of the proposed Uniform Commercial Code the holder in due course will still be afforded this legal protection; however, certain innovations and modifications have been made in the requirements for the holder in due course status.

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1. NEGOTIABLE INSTRUMENTS LAW §§ 57, 58.