

THE FUNCTIONS OF THE BANK IN THE COLLECTION OF FOREIGN BILLS AND OF THE NOTARY PUBLIC IN THE EVENT OF DISHONOUR

Before delving too deeply into the subject matter of this paper it is considered appropriate to identify a group of words and expressions of particular significance and revisit the definitions and special meanings given to those words and expressions by statute law and in particular by the Bills of Exchange Act 1882. In this context, the words and expressions below are singled out for attention. For the purposes of this paper such words and expressions shall have the meanings set opposite them below:

‘acceptance’, the form, completed by delivery or notification, by which the drawee named in the bill signifies his assent to the order of the drawer contained in the bill. A bill that has been accepted may also be referred to as between bankers as an ‘acceptance’

‘acceptor’, a drawee named in a bill who has duly completed and delivered his acceptance of the bill or has otherwise signified his acceptance of it to the drawer.

‘bill of exchange’, 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.

‘Bills of Exchange Act’, the Bills of Exchange Act 1882 as amended and extended by the statute law of Ireland and herein referred to as the ‘Code’.

‘drawee’, the person who is ordered to pay money in a bill. A bill is said to be ‘drawn on’ the drawee.

‘drawer’, the person who gives the order to pay in a bill. A bill is said to be ‘drawn by’ the drawer.

‘holder’, the payee or indorsee of a bill or note who is in possession of it. In a general sense the description ‘holder’ signifies the mercantile owner who may or may not be the legal owner. A holder may be ‘a holder in due course’ or ‘a holder for value’ (each having its own definition and meaning), or he may be a mere holder with the right to possession of the bill against all but the true owner.

Foreign Collections

A bank in Ireland undertaking collections on behalf of foreign or overseas remitting banks must act strictly in compliance with the terms of the letter of instruction (collection order) received by it from the foreign bank or its agent and in accordance with the Code. ‘Collection’, in this context, means the handling by a bank of financial and commercial documents on the instructions of a foreign remitting bank for the purposes of obtaining payment for goods or services or the discharge of a legal obligation. Collections may be categorised as ‘clean’ or ‘documentary’. A clean collection refers to a financial instrument e.g. bill of exchange or promissory note, that is not accompanied by any commercial or trade documents. A documentary collection will be accompanied by commercial or trade documents e.g. airway bill, bill of lading, certificate of origin, freight and insurance documents, invoices, which will usually relate to the title or right to possession of goods being forwarded.

The letter of instruction received by the Irish bank will state the service or services requested of the bank in connection with the collection e.g. presentation of the bill for acceptance or payment, as the case may be, and will indicate the nature of the action to be taken by the bank in the event of non-acceptance or non-payment. A typical instruction would be “Present bill for acceptance/payment and in event of non-acceptance/non-payment have bill noted/protected by Notary”. This is the point at which the Notary Public will enter into the picture. For the purposes of the collection the bill will have been indorsed by the drawer (or other holder e.g. an indorsee holding under an indorsement from the drawer) so that the collecting bank in Ireland will be a holder (albeit a mere holder) of the instrument and, as such, authorised and empowered to hold and to take appropriate action on the bill.

Meaning of Dishonour

A bill may be dishonoured by (a) non-acceptance or (b) non-payment.

As to (a): Acceptance, as previously defined, is the means by which the drawer of a bill secures confirmation of the drawee’s assent to it.. [Different considerations arise in the case of a foreign promissory note as it is made, signed and issued by the maker.]

A bill is dishonoured by non-acceptance when (a) it is duly presented for acceptance and acceptance is refused or cannot be obtained or (b) presentment for acceptance is excused under the Code and the bill is not accepted (Code s.43(1)).

Presentment for acceptance must be made by or on behalf of the holder to the drawee *or some person authorised to accept or refuse acceptance on his behalf*. The drawee’s bank may have express authority to accept or refuse acceptance of bills on the drawee’s behalf. Such authority cannot be implied. The authority may be given in the mandate governing the opening and operation of the customer’s bank account, e.g. ‘we authorise you to accept, refuse, pay and honour bills of exchange drawn on us’ or, it may be in a letter addressed by the drawee to the drawer, i.e. ‘our bank, Alpha Bank p.l.c. has our authority to deal on our behalf with bills, notes and acceptances drawing on us’.

Where should a bill be accepted? The Code does not make any express provision as regards the place at which presentment for acceptance is to be made. It simply requires the drawer (or other person seeking to have a bill accepted) to use ‘reasonable diligence’ to find the drawee whose acceptance is required. Invariably, there will have been correspondence between the drawer and the drawee which will provide the drawer with an address, business or residential, at which the drawee will be found; and this, more than likely, will be the address inserted in the bill.

Dishonour by non-payment

As to (b) above: A bill is dishonoured by non-payment when (a) it is *duly presented for payment* and payment is refused or cannot be obtained or (b) presentment is excused and the bill is overdue and unpaid (Code s.47 (1)).

Presentment for payment : purpose of: must be made at the proper place.

Presenting a bill for payment is the first step in the process by which the holder seeks to be paid and which, in the event of non-payment, operates so as to render all other parties to the bill liable to the holder. (Code s.45).

In order to be *duly presented* for payment, a bill must be presented for payment at *the proper place* (Code s.45 (2)). The proper place for presentment for payment is determined in accordance with the following rules:-

1. Where a place of payment is expressly stated in the text of the bill (or note), that is the proper place to present it for payment. The place of payment may be specified by (a) the drawer (as in Illustration A) or (b) the acceptor (as in Illustration B). Such a place may be the address of a branch of a clearing bank in the city or town where the drawee or the acceptor (or maker in the case of a promissory note) resides or carries on business. It may also be the business or residential address of the drawee, acceptor or maker; or, indeed, it may be the address of the agent of the foreign drawer in Ireland (Code s.87(1) applies to foreign promissory notes). When an address for payment is stated in the bill that is the place at which the bill must be presented for payment and, if dishonoured, the place at which the Notary must present it in the course of making his protest.
2. Where no place of payment is expressly stated in the bill, but the address of the drawee or acceptor is stated (as in Illustration C) the bill must be presented at that address. [In the case of a promissory note, except as provided in rule I (above), presentment for payment is not necessary in order to render the maker liable (Code s.87(1)), but it is necessary to render an indorser liable (Code s.87(2)).]
3. Where no place of payment is stated in the bill or no address for the drawee or acceptor is given, the bill must be presented at the drawee's or acceptor's place of business, if known, or, if not known, at his ordinary residence, if known.
4. In any case not covered by the above rules, presentment may be made to the drawee or acceptor wherever he can be found or at his last known place of business or residence.

Where a bill is presented at the proper place but after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required. (Code s. 45 (5)).

While presentment for payment is the function of the collecting banker, the notary should be aware of the rules which govern the process so that he does not unwittingly protest a bill that has not been duly presented in the first instance.

[Subject to the qualifications laid down in s.89 of the Code, the provisions of the Code that apply to bills of exchange apply also to promissory notes.]

What is a Notarial Protest: where should protest be made: use of a Protest Note.

A Notarial Protest is a formal written statement made and signed by a Notary Public in which the notary, having identified the bill, declares that it was duly presented for acceptance or payment, as the case may be, at the request of the collecting bank or holder and that acceptance or payment, as the case may be, was refused or could not be obtained. The Notary Public is the author of a protest and is its sole signatory. A notarial protest must not be confused with a householders' protest in which a notary has no function. A protest must contain a copy of the bill which is being protested. This requirement is usually met by attaching a photocopy of the bill to the protest.

IA Protest should also contain the following information :

- (a) the name of the person at whose request the bill is protested;
- (b) the date on which the protest is made;
- (c) the place at which the protest is made;
- (d) the reason for the protest;
- (e) the demand made i.e. whether for 'acceptance' or 'payment';
- (f) the answer given; and, where such is the case,
- (g) A statement that the drawee or acceptor could not be found.

A typical form of protest is contained in Illustration D.

If all the formalities for protest cannot be dealt with on the day, the notary may 'note' the bill for non-acceptance or non-payment, as the case may be, by attaching a notarial ticket (or a short note) to it. The notary may at any subsequent time (prior to proceedings) complete a formal protest and may do so as of the date on which the bill was noted. This is described as *extending the note of protest*. A notary should not write on the original bill. And should not, under no circumstances, subscribe his name to it.

Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance, the Code provides that it must be *duly protested* for non-acceptance. And where a foreign bill (not previously dishonoured by non-acceptance) is dishonoured by non-payment, it must be *duly protested* for non-payment. (Code s.51 (2)). The consequence of failing to properly protest a bill for non-payment is that the drawer and indorsers are discharged. A bill that has been previously dishonoured by non-acceptance may also be protested for non-payment at the request of the holder if it is not paid on being presented for payment on the due date. (Code s.51 (3)).

The words *duly protested* have a particular meaning namely, protested in accordance with the requirements of the Code. One such requirement is that the bill must be protested *at the place where it is dishonoured* (Code s.51(6)). It is, therefore, important for the notary protesting a dishonoured bill to ascertain where the bill was dishonoured so that the notary can protest it at that place. The following guidelines may be helpful:

- (a) Where the dishonour has occurred at the branch of the bank which has engaged the notary's services, i.e. where the acceptance on the bill specified that branch as place of payment, the protest must be made at that branch.
- (b) Where the dishonour has occurred at a bank or a branch of a bank other than the branch requiring the notary to protest the bill, the protest must be made at the bank or branch where it was dishonoured and not at the branch which engages the notary's services.

Example

A foreign bill is accepted 'payable at Main Street Branch of Alpha Bank Ltd. Tralee.' When the maturity date (for payment) is approaching, the bill is sent by the holder to the High Street Branch of Beta Bank Ltd. in Tralee for collection and with instructions to protest the bill in the event of non-payment. The bill is dishonoured on being presented for payment. On being requested by the Beta Bank to protest the bill for non-payment the Notary Public must do so at the Main Street Branch of Alpha Bank Ltd. in Tralee.

- (c) Where a place of payment has been designated by the drawer in the text of the bill (as in Illustration B), that is the proper place at which the bill is to be presented for payment and, in default of payment, is the proper place at which the bill must be protested for non-payment.

(d) Where a bill bears no indication either in its text or in the acceptance of the place where it is to be paid but bears the address of the drawee or acceptor, the bill must be presented for payment at that address and, in default of payment, that is the proper place at which protest must be made.

(e) Where no place of payment is stated in the bill or acceptance and no address for the drawee or acceptor is given in the bill, the bill must be presented for payment at the drawee's or acceptor's place of business and, in default of payment, must be protested there. If the drawee's or acceptor's place of business is not known, the bill may be presented at the drawee's or acceptor's place of ordinary residence (if known) and, in default of payment, that place becomes the proper place of protest under the Code.

Exceptions to Rule

Exceptions to the above rules and guidelines arise in two instances:-

1. Where a bill is presented for payment through the post office and returned by post dishonoured, the bill may be protested at the place to which it is returned unpaid (Code s.51(6)(a)).

2. Where a bill drawn payable at the place of business or residence of some person other than the drawee is dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary (Code s.51(6)(b)).

Delay in Protest to be avoided

Protest of a dishonoured bill must be made without delay. It should be made on the day of its dishonour or, if that is not possible, the next succeeding business day in which banks generally are open for business in the state. Delay in protesting a bill may be excused when it is due to circumstances beyond the control of the collecting bank or holder and is not caused by his default, misconduct or negligence (Code s.51(9)). As soon as the cause of delay ceases, the bill must be noted or protested with reasonable diligence (Code s.51(9)). A dishonoured bill may be noted for non-acceptance or non-payment within the same time frame and the formal instrument of protest prepared and signed at a later date as of the date of noting. This is referred to as an extended protest.

Banking and Notarial Practice must conform to the Code

In noting and protesting bills of exchange, the first principle is that the practice of both the collecting bank and Notary Public must be strictly in accord with the Code and the Uniform Rules for Collections. The Code is drafted in very technical language and extreme care must be exercised in considering any of its provisions. Words and phrases are given special rather than ordinary meanings as for example in reference to bills being *duly presented* or being *duly protested* or being protested at *the proper place*. It is not, therefore, open to either the bank or the notary to suggest or follow practices which may be designed for the convenience of either or both but which do not comply with the requirements of the Code and the Uniform Rules for Collections. Failure to observe this direction could result in action against the bank and the Notary Public if loss was to be suffered by the owner of the bill as a direct result of such failure.

[The Code renders it unnecessary to protest a foreign promissory note for non-payment (Code s.88(4)).]

Acceptance of Bill
(with Place of
payment indicated)

Illustration B
(Place of payment indicated in Acceptance)

Place where
drawn
(indicating a
foreign Bill)

Acceptor

Accepted payable at Alpha Bank Ltd., Main Street, <i>Tralee</i> , For and on behalf of: Tralee Engineering Ltd., <i>Jack Frost,</i> Managing Director.	No: 016	Milan, Italy, 10 January, 2003
	E500,000,000	
At sight of this Sole of Exchange pay to the order of Messrs. Nico & Nico the sum of 500 Million <u>euro</u> value received.		
To: Tralee Engineering Ltd., Tralee, Co. Kerry.	For and on behalf of Nico & Nico, <i>P. Nordone,</i> Managing Director.	

Payee

Drawee

Drawer

Illustration C

(No place of payment indicated in bill or acceptance)

Accepted For and on behalf of: Tralee Engineering Ltd., <i>Jack Frost,</i> Managing Director.	No: 017	Milan, Italy, 10 January, 2003
	€500,000,000	At sight of this Sole of Exchange pay to the order of Messrs. Nico & Nico the sum of 500 Million <u>euro</u> value received.
	To: Tralee Engineering Ltd., Tralee, Co. Kerry.	For and on behalf of Nico & Nico, <i>P. Nordone,</i> Managing Director.

Place for presentment

ILLUSTRATION D

**DISHONOUR OF
BILL OF EXCHANGE FOR [NON ACCEPTANCE] † [NON PAYMENT] †**

NOTARIAL PROTEST

On the day of 2009 at the request of ¹
the holder of the bill of exchange dated the day of 2009 (herein referred to as ‘the
bill’), a true copy of which is annexed hereto, I, [A.B.] Notary Public, duly constituted and
appointed for ²
did exhibit and present the bill to the drawee therein named at ³
and demanded [acceptance] † [payment] † of the bill forthwith on behalf of the holder; to
which said demand the aforementioned drawee answered as follows: ⁴

WHEREFORE I, the said [A.B.] Notary Public, at the request aforesaid, did protest and do
by this instrument SOLEMNLY PROTEST against the drawee, acceptor(s), indorsers of the
said bill and all other persons whom it may concern for all costs of exchange, re-exchange
and all costs, damages, charges and interest incurred and to be incurred by reason of the
[non-acceptance] † [non-payment] † of the bill.

DONE AND EXECUTED by me, the said A.B. Notary Public,
at ⁵
on the day of 2009

WHICH I ATTEST

L.S.

Notary Public
(address)
Commissioned for Life

Notes

- † delete as appropriate
- ¹ name of collecting bank
- ² area of jurisdiction
- ³ place at which bill presented
- ⁴ answer received
- ⁵ place where protest completed.

E.Rory O’Connor
Notary Public
Fellow of the Institute of Bankers in Ireland
July, 2009

For further information on Notarial Protest see O’Connor *The Irish Notary* (1987) and Hall & O’Connor *The Supplement* (2007) both
available from the Faculty of Notaries Public Distribution Office, 13 Fownes Street, Dublin 2