ARTICLES

THE EXPORT TRADE NOTE: A NEW INSTRUMENT FOR INTERNATIONAL TRADE*

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INTRODUCTION

The persistently weak United States exports during the past several years[1] have contributed greatly to the recent staggering trade

[1] From 1981 to 1984, United States exports decreased 8% in constant (1972) dollars, from $89.8 billion in 1981 to $81.4 billion in 1982, $76.7 billion in 1983 and $82.1 billion in 1984. As the chart below shows, the decline in exports to Central and South American countries has been especially severe. For example, between 1981 and 1984, United States exports to Chile were down 46% in constant (1972) dollars. Over the same period, exports were down 45% to Bolivia, 41% to Nicaragua, 39% to Venezuela, 34% to Mexico, 34% to Guatemala, 25% to Ecuador, 20% to Colombia, and 18% to the Dominican Republic. United States Department of Commerce, Bureau of the Census, *Highlights of U.S. Export and Import Trade*, FT 990 (monthly) [hereinafter cited as *Trade Highlights*]; U.S. Department of Commerce, Bureau of the Census, *Survey of Current Business*, FT 990 (monthly); Government Printing Office, *Economic Report of the President*, 43-48, 72 (February 1984) [hereinafter cited as *Economic Report of the President*].

deficits.[2] One cause of this weakness[3] is the limited financing available for United States export sales.[4]

This Article proposes a new international financing technique — the export trade note (the "ETN") — to help provide the requisite financing for export sales of United States products, particularly sales by small exporters. The ETN is modeled after the *forfait* transaction, which has successfully driven an increasing amount of export trade in Western Europe for two decades. The ETN has been designed to avoid problems that have arisen in *forfait* transactions and also to make the financing technique more appropriate for United States export transactions. The basic concept of the ETN as an improved version of the *forfait* transaction suitable for use by United States exporters and financial entities was first developed by Mr. Austin Belton, a Manager of Brown Brothers Harriman & Co., a private New York banking organization that specializes in innovative trade financing.[5]

	United States Exports (millions of 1972 dollars) 1981	1984	% Change
Guatemala	216.55	141.57	- 34
Honduras	135.31	120.93	- 10
Nicaragua	71.35	41.91	- 41
Mexico	6,894.84	4,508.30	- 34
Colombia	686.84	545.11	- 20
Venezuela	2,110.42	1,269.62	- 39
Ecuador	330.81	246.12	- 25
Peru	575.89	282.40	- 50
Bolivia	73.37	39.69	- 45
Chile	567.90	302.74	- 46
Panama	327.13	284.69	- 12
Dom. Rep.	299.26	242.70	- 18

[2] From 1977-1981, the trade deficit hovered between $29 billion and $27 billion per annum. The trade deficit, however, has steadily increased since 1981, to $31.8 billion in 1982, $57.5 billion in 1983, and $107.9 billion in 1984. Through the first six months of 1985, the deficit was $62.5 billion. *Trade Highlights*, *supra* note 1.

[3] Two other much-discussed causes of the diminishing amount of United States exports are the relative strength of the dollar over other currencies, and the weakness of the economies of many importing countries. *See General Trade Policy: Hearings on H.R. 2203 Before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 98-55 (Apr. 15, 1983) (testimony of George C. Lodge, Professor, Harvard Business School at p. 269); *Strong Dollar: Causes, Consequences and Policy Implications: Hearings on J842 Before the Joint Economic Comm.*, 99th Cong., 2d Sess. 99-100 (1985).

[4] "Many U.S. firms that normally export to the debtor countries, especially Mexico and Brazil, are currently unable to do so as trade credit from private sources has disappeared." *Economic Report of the President*, *supra* note 1, at 82.

[5] *See* Belton, *U.S. Capital Markets are Out There — But Where?*, Euromoney

As Part I of this Article details, the foreign importer in a *forfait* transaction issues to a foreign exporter a negotiable promissory note in an amount equal to the price of the goods plus the cost of the *forfait* financing, in exchange for the exporter's goods. The note is secured by the *aval* (a form of guaranty common in civil-law jurisdictions) of a financial institution (the so-called *avalor*) of the importer's home country. The exporter typically sells the note without recourse and at a discount to a bank or other financial institution in the exporter's own country, which may, in turn, either sell the note in the secondary market or hold it until maturity.

The weakest link in the *forfait* chain is the high risk that a note-holder confronts when attempting to enforce the *forfait* note against a non-performing importer or *avalor*. The courts of the importer's and *avalor's* country are frequently reluctant to enforce the note against a local party, and the courts of the note-holder's country often lack the jurisdiction over these foreign entities necessary to render a judgment against them. Since the legal effect of the *aval* may differ from country to country, the *avalor* may escape liability even if the note-holder sues it in a court able to assert jurisdiction over the dispute and the parties.

The remainder of this Article examines how the ETN adopts the basic structure of the *forfait* transaction while eliminating many of its weaknesses. Part II of this Article describes some of the characteristics of the ETN which distinguish it from the *forfait* transaction. Part III discusses the virtues of expressly choosing one body of law (in particular New York state law) to govern all ETN transactions, including that of assuring that the ETN will be interpreted under a body of United States commercial law which is both comprehensive and well-known to the United States financial community. Similarly, Part IV examines why it is useful for the ETN to specify that all ETN disputes be submitted to a single jurisdiction for resolution. Part IV also concludes that the courts of New York State would be the best forum for ETN disputes and explains how the various provisions of the ETN will give these courts jurisdiction over the importer that issues the ETN (the "Importer") and its guarantor (the "Foreign Guarantor").

Part V describes the procedure by which the United States exporter that first receives the ETN (the "Exporter") may sell it at a discount

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Trade Finance Report (Feb. 1986); Belton, *A New Weapon in the Battle for Trade*, Euromoney (Feb. 1984).

to a United States bank or other financing entity (the "Discounting Bank") by endorsing it "without recourse." This essentially transforms the Exporter's credit sale into a cash sale and allows the Exporter effectively to disclaim liability to subsequent holders of the ETN. Part VI discusses the extent to which the Foreign Guarantor's guaranty of the ETN will, under the Uniform Commercial Code (the "U.C.C.") as adopted by New York, provide the Discounting Bank with adequate assurance of payment.

Finally, Part VII discusses the "pooling" of ETNs and the distribution of interests in such "pools" to a broader range of investors than might otherwise invest in an export transaction. The ETN would thus serve as a vehicle for generating substantial new funds from the private sector for financing export sales of the United States goods. In addition, Part VII examines how ETN pools could be made even more attractive to investors if one of the government financing agencies charged with promoting United States exports, such as the Export-Import Bank of the United States ("Eximbank") or the Overseas Private Investment Corporation ("OPIC"), agreed to place its guaranty on the ETN.

I. FORFAIT FINANCING

Forfait financing arose in Western Europe about twenty years ago when many manufacturers, burdened with their own debt, were unable to grant foreign purchasers medium-term credit,[6] and private and public bankers were frequently unable or unwilling to finance export-sales on behalf of the exporter or the importer.[7] Although *forfait* financing helped to resolve this dilemma, and although the amount of *forfait* financing has steadily increased over the years, it still encompasses a relatively small portion of western European trade.[8] Nevertheless, the speed with which a *forfait* transaction can be consummated and its simple and spare documentation have made it an increasingly popular credit vehicle.[9]

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[6] "Medium term" credits are usually considered to be those due from three to five (or, in some cases, seven) years after credit has been extended. Gmur, *Forfaiting*, in TRADE FINANCING 117 (C. Gmur ed. 1981) [hereinafter cited as "Gmur"].

[7] *See* Tavernier, *Legal Aspects of Forfaiting*, 11 INT'L BUS. LAW. 25 (Oct. 1983) [hereinafter cited as "Tavernier"]; Gmur, *supra* note 6, at 117; CREDIT SUISSE, FORFAITING (2d ed. 1983).

[8] One authority has estimated that only about $10 billion in forfait paper existed as of 1985. I. GUILD & R. HARRIS, FORFAITING 11 (1985) [hereinafter cited as FORFAITING].

[9] Tavernier, *supra* note 7, at 31.

A *forfait* transaction commonly originates upon consummation of a sales contract under which the exporter promises to export durables or other capital goods within a certain period. The importer typically agrees, through issuance of a negotiable promissory note to the order of the exporter, to pay for these goods within three to five years. The note's face amount typically includes the price of the exporter's goods and the "discount" that will be demanded (usually on a prearranged basis) by the financing institution to which the exporter will sell the note.

The importer's promissory note must be secured by the *aval* — a type of irrevocable and transferable guaranty common in many civil law countries[10] — of a reputable financial institution, such as the importer's local bank (the "*avalor*"). Since the importer that issues the note may be unknown and effectively non-assessable[11] by the financing institution that will ultimately purchase the note from the exporter, that institution will virtually always rely on the *aval* as its sole source of repayment if the importer fails to pay the note.[12] The legal interpretation of the *aval*, however, is not the same in all civil law countries. For example, the unconditional nature of the *aval* depends in some countries on the intention of the *avalor* and the note-maker. In those countries, an *avalor* might refuse to honor the *aval* if one of the "conditions" it refused to guaranty materializes.[13]

The exporter typically receives the avalised note upon delivery of the goods to the importer or its agent. The exporter then sells the note to a bank or other financial institution in its country, endorsing it to the purchaser "without recourse." The exporter thus promptly receives cash for his export sale — the face amount of the *forfait* note minus the note purchaser's "discount" — and from the exporter's perspective converts a credit-based sale into a cash sale.[14] The note-purchaser may resell the note in the secondary market, or

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[10] The term *aval* is a customary term used in Latin America and other civil law countries to denote an unconditional and irrevocable guaranty under which the *avalor* is obliged to pay the debt obligation as if it were the primary debtor, without the need of prior demand on the notemaker. *See* Banco Nacional de Costa Rica v. Bremar Holdings Corp., 492 F. Supp. 364, 366 n.1 (S.D.N.Y. 1980); Tavernier, *supra* note 7, at 26 n.1; Gmur, *supra* note 6, at 117.

[11] The importer is generally considered to be less assessable than the *avalor* because in most cases, the importer, unlike the *avalor*, will not have a substantial amount of assets in the exporter's home country. Tavernier, *supra* note 7, at 26.

[12] Gmur, *supra* note 6, at 117.

[13] *Id.* at 123.

[14] *Id.* at 117.

hold the note for presentation to the note-maker or *avalor* at its maturity.

As the term "*forfait*" — French for "forfeit" — implies, the "without recourse" element is the keystone of the *forfait* transaction. By accepting the note without recourse from the exporter, the note-purchaser "forfeits" its right to recover from the exporter as a note-endorser if the importer or the *avalor* fails to pay the note-purchaser on presentation. The "without recourse" qualification, however, may not free the exporter from all liability with regard to the note, something that participants in a *forfait* transaction generally do not appreciate. For example, it is unclear under European civil law whether the exporter, despite its endorsement of the note "without recourse," implicitly covenants to the note-purchaser that the note it is selling is a valid note, validly executed by the importer and validly avalised by the importer's bank. Thus, the exporter in a *forfait* transaction may ultimately be liable to the note-purchaser if the note proves to be invalid in form or substance.[15]

Assuming, however, that the note and its *aval* are valid in all respects, the note-purchaser may not recover from the exporter in the event the importer or its *avalor* fails to pay at maturity. Consequently, the "without recourse" clause normally should result in the note-purchaser, or *forfaiter*, assuming from the exporter the political, transfer, and commercial risks that both the importer and the *avalor* will be unable to satisfy their note obligations when the note matures.[16]

The dangers that a *forfait* transaction poses to the note-purchaser become evident when one of these risks materializes. As noted above, an *avalor* in a country which does not recognize the unconditional nature of an *aval* may refuse to honor its *aval* if, in its opinion, circumstances arise whose non-occurrence the *avalor* assumed at the time it issued its *aval*.[17] In addition, the importer and its *avalor* may be unable to pay the note due to their own commercial difficulties or the imposition of foreign-currency restrictions. In such cases the note-purchaser must sue the importer and its *avalor*, often in their country, since the standard *forfait* note generally does not include choice-of-law, submission-to-jurisdiction, and other clauses included in more traditional and thoroughly documented transactions that

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[15] Tavernier, *supra* note 7, at 28-29.
[16] *Id.* at 29.
[17] *See supra* note 13 and accompanying text.

protect the finance creditor.[18] Further, the importer and its *avalor* will frequently not have the contacts with the exporter and note-purchaser's country necessary for that country's courts to assert jurisdiction over them.[19]

Despite the enforcement limitations highlighted above, *forfait* transactions may be consummated with speed and simplicity and usually are quite profitable for the financing bank. European financiers thus view *forfait* transactions as "high yield-high risk" transactions.[20] The high risk has become increasingly acceptable in Europe, where the countries typically involved in *forfait* transactions have established commercial relationships and harmonized commercial laws. The fact that the United States export-trade partners frequently have legal systems and cultures that differ widely from its own makes the risks of *forfait* transactions unacceptable for most United States exporters and United States entities that finance United States trade. As a result, *forfait* financing has failed to gain a toehold in the United States despite its thriving existence in Western Europe. Even if the *forfait* transaction were to gain acceptance in the United States, it would probably not become a major source of financing for United States export-trade without substantial modification.

II. OVERVIEW OF THE ETN TRANSACTION

As Part I discusses, the *forfait* transaction as practiced in Europe has certain inherent enforcement risks which probably render it an unacceptable finance tool for general use in export transactions involving United States exporters and their banks. This part of the Article, in providing an overview of the ETN transaction, highlights how the ETN modifies the *forfait* transaction to fit the needs of the United States export market.

The ETN will be a negotiable promissory note in a standard form similar to the note appearing in the Appendix to this Article. A foreign importer (the "Importer") will issue the ETN to a United States exporter (the "Exporter") in exchange for goods or perhaps documents that transfer title to goods. The ETN will typically mature and be payable three to five years from its issuance for an amount

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[18] Tavernier, *supra* note 7, at 31.

[19] *See, e.g.,* the *Allgemeine-Deutsche Credit-Anstalt* case that was submitted to the High Court of England in the early 1980s, discussed in Tavernier, *supra* note 7, at 26-31.

[20] Tavernier, *supra* note 7, at 25.

equal to the price of the Exporter's goods (including its profit) plus the "discount" at which a United States bank or other financing entity (the "Discounting Bank") will purchase the ETN from the Exporter.

To ensure that the ETN will be interpreted according to a developed body of United States commercial law, and that United States holders of ETNs will be able to obtain judicial enforcement of their rights under these notes, the substantive law of New York State will govern disputes pertaining to the ETN.[21] In addition, the note will expressly state that the parties voluntarily submit to the jurisdiction of New York courts for resolution of ETN disputes.[22] The ETN will require payment in New York City so as to provide the substantial relationship with New York necessary to allow New York law to govern and New York courts to have subject matter jurisdiction over ETN disputes.[23]

Prior to the Importer's delivery of the ETN to an Exporter, a bank or other financial entity in the Importer's country (the "Foreign Guarantor") will affix its payment guaranty to the ETN in the form provided in the Appendix to this Article. This payment guaranty allows the Discounting Bank to demand payment from the Foreign Guarantor if the ETN remains unpaid at maturity without first demanding payment from or otherwise pursuing the Importer.[24] The Discounting Bank's status as a "holder in due course" under the U.C.C., as adopted in New York, will effectively deprive the Foreign Guarantor of most of the defenses it could otherwise raise to escape liability under the ETN.[25]

After receiving the ETN from the Importer, the Exporter will sell it at a discount to the Discounting Bank. In so doing, the Exporter will endorse the ETN "without recourse," which under the U.C.C. will excuse the Exporter from virtually all liability to the Discounting Bank or any subsequent holder of the ETN should the Importer or the Foreign Guarantor default on payment. This arrangement will allow the Exporter to receive cash shortly after completing shipment of its goods and to thereafter effectively disappear from the ETN transaction.[26]

The Discounting Bank may hold the ETN until maturity or resell

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[21] *See infra* Part III.
[22] *See infra* Part IV.
[23] *See infra* Part III(C).
[24] *See infra* Part VI.
[25] *See infra* Part VI(A) and VI(B).
[26] *See infra* Part V.

it in the secondary market. We anticipate that the Discounting Bank or any other holder of ETNs will create pools of ETNs and sell shares of such pools to investors in the form of ETN-backed securities.[27] We also expect that some or all of the risk of default on the ETNs in a pool will be covered by some form of letter of credit, insurance, or payment guaranty provided by a United States insurer, bank, or government-related entity such as OPIC or Eximbank. Indeed, this type of transaction would appear to be an ideal opportunity for Eximbank and OPIC to commit their guaranty and/or insurance capabilities, since their public mission is, in essence, to insure or guaranty commercial and political risks — similar to those associated with the ETN — in a manner that will increase the flow of exports from the United States. Furthermore, there is a particular need for this type of commitment at a time when adequate private substitutes are unavailable. In this regard, the ETN will likely prove especially attractive to smaller exporters — a constituency that Congress has urged Eximbank and OPIC to serve[28]—because the ETN provides a largely standardized and simplified way of financing export trade.

III. GOVERNING LAW

A. *Benefits of a Uniform Governing Law*

The ETN should specify the jurisdiction whose law will apply to resolve disputes that may arise under it. Such specification will enable the four entities directly involved in each ETN — the Importer, its Foreign Guarantor, the Exporter, and the Discounting Bank — to appreciate better in advance the likely outcome of such disputes by referring to the body of law that the ETN designates.

Furthermore, one jurisdiction's law should govern all ETNs, since the ETN is intended to be a standardized instrument. The uniform designation of governing law will help to ensure that the same law will apply to resolve disputes under all ETNs, thereby eliminating differences that might otherwise distinguish virtually identical ETNs subject to interpretation under the laws of different jurisdictions. In addition, this uniformity will facilitate the pooling of ETNs for the purpose of selling ETN-backed securities to investors. It will also facilitate the use of ETNs by smaller exporters.

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[27] *See infra* Part VII.

[28] *See, e.g.*, 12 U.S.C. § 635(b)(1)(B) (Eximbank) (1982).

B. *Choice of New York Law*

For various reasons, the law of a state of the United States, as opposed to the law of a foreign jurisdiction, should govern the ETN. The United States Discounting Banks that purchase ETNs from Exporters and the investors who purchase ETN-backed securities will generally finance ETN transactions. These investors, at least initially, are likely to be United States citizens or institutions, and are much more likely to find the ETN an attractive investment if it is governed by a law with which they and their counsel are familiar.

The law of the State of New York is the best choice for governing ETN transactions for several reasons. First, New York, as the financial capital of the United States, has developed a mature and comprehensive body of commercial law. Second, the ultimate underwriters of ETNs will often be New York-based financial institutions, which are familiar and comfortable with New York law. Indeed, investors will be more likely to finance ETN transactions knowing that New York law will apply to resolve disputes related to these instruments.

C. *"Substantial Relationship" with New York State*

The fact that parties to the ETN have expressed their preference for New York law, however, will not alone ensure that every court or tribunal resolving an ETN dispute will apply New York law. Most state courts in the United States have traditionally applied the law that the parties to a transaction chose only if that law has a "significant" or "reasonable" relationship or contact to the parties or the transaction.[29] The U.C.C. as adopted in New York provides that the parties may choose the jurisdiction whose law is to be applied if the transaction "bears a reasonable relationship" to the law of that jurisdiction.[30] In fact, New York courts have long refused to

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[29] Most courts adjudicating contract disputes follow the choice of law rules of the state in which they sit to determine which state's substantive law will be applied. *See* RESTATEMENT (SECOND) CONFLICTS OF LAW § 186 comment b (1969). The choice of law rules of most states provide that the law of the jurisdiction that the parties have selected in the contract should be followed unless: (i) the chosen jurisdiction has no substantial relationship to the parties or the transaction; or (ii) the applicable law of the chosen jurisdiction is contrary to the public policy of the forum state or the states whose law would otherwise apply. *Id.* at § 187(2).

[30] U.C.C. § 1-105 (1981). Not even New York is likely to have significant contacts with the ETN transaction in all cases, particularly with respect to the primary transaction between the Importer and the Exporter (as distinguished from resales of the ETN in the secondary market). The Exporters, which will be the named payees of the ETNs, are likely to be domiciled all over the United States. Similarly, the

accomodate parties' choice of law unless the law of the chosen jurisdiction bears a substantial relationship to the parties or the transaction.[31]

The New York legislature recently enacted a statute, however, which would prevent New York courts from refusing to apply New York law where the parties selected this law in the contract and the related transaction in the aggregate "covers" not less than $250,000, whether or not the transaction "bears a reasonable relation to" New York.[32] This statute goes a long way toward solving the choice-of-law problem for the ETN; however, two problems remain. First, the statute would not cover ETNs with a value of less than $250,000. Second, courts outside New York would not be bound to apply this statute regardless of the amount of the ETN, since such courts are not required to follow New York's choice-of-law rules.[33]

Perhaps the best way to increase the likelihood that the courts of *any* state deciding an ETN dispute will apply New York law is to structure into the instrument a "substantial relationship" between the

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ultimate holders of the ETNs are likely to be situated in various parts of the United States or abroad. The Importers and their Foreign Guarantors will, of course, reside outside the United States. And while the United States bank guarantors and underwriters of the ETNs are likely to be predominantly domiciled in New York, they will not in all cases be domiciled there. Courts following these accepted choice-of-law principles will probably refuse to apply New York law if no substantial relationship exists between New York and the ETN or its parties. *See, e.g.*, Teamsters Security Fund v. Sperry Rand Corp., 6 CLSR 951, 965 (N.D. Calif. 1977), in which the court refused to apply New York law despite the reference to it in the underlying contract because, in the court's view, New York had no "reasonable relation" to the transactions in question.

[31] *See, e.g.*, Southern Int'l Sales Co. v. Potter & Brumfield Div., 410 F. Supp. 1339, 1342-43 (S.D.N.Y. 1976) (contractually referenced choice of Indiana law not respected and Puerto Rican law applied instead, where all significant contractual activities occurred in Puerto Rico and application of Indiana law would frustrate fundamental policy of applicable Puerto Rican law).

[32] N.Y. Gen. Oblig. § 5-1401 (McKinney 1985) [hereinafter cited as "Section 5-1401"]. Section 5-1401 by its terms does not apply to any contract, agreement or undertaking: (i) for labor or personal services; (ii) relating to any transaction for personal, family or household services; and (iii) to the extent provided to the contrary in subsection 2 of § 1-105 of New York's version of the U.C.C. Transactions treated under U.C.C. § 1-105 include, for example, the rights of creditors against sold goods, bulk transfers under the U.C.C., and the validity and registration of investment securities.

The possibility exists that New York's new choice-of-law provision will be held unconstitutional under the United States Constitution's full faith and credit clause. *See* Note, *New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 CORNELL L. REV. 227 (1985).

[33] *See supra* note 29.

transaction and New York. This could be done, for example, by providing that the Importer or the Foreign Guarantor must pay the ETN in New York City. Since this requirement will clarify that the ETN is to be partially performed in New York, it will create a "reasonable relationship" under the choice-of-law rules that New York and most other jurisdictions will follow, ensuring that New York law, as chosen by the parties, will govern the transaction.[34] Accordingly, the model ETN that appears in the Appendix provides that the note is to be paid in New York City.

IV. CHOICE OF FORUM

A. *Need for a Designated Forum*

In addition to establishing New York law as governing, the ETN should state that the parties to the note, particularly the Importer and the Foreign Guarantor, consent to the jurisdiction of a specific forum for the resolution of all disputes under the ETN. This arrangement is desirable for several reasons. First, allowing a single forum to hear ETN disputes will, like applying a single jurisdiction's laws to resolve ETN disputes, result in more harmonious and predictable decisions. The single forum will develop an expertise and a body of governing case law for the adjudication of ETN disputes. This practice in turn will help establish the ETN as a generic instrument, thereby facilitating the pooling of ETNs and the issuance of ETN-backed securities.

Moreover, the Importer and Foreign Guarantor's consent in the ETN to the jurisdiction of a specific forum will usually eliminate the ability of those entities, if sued under an ETN in the designated forum, to argue effectively that the lawsuit should be dismissed or transferred on the ground of *forum non conveniens*.[35] United States courts have consistently held that a party's prior contractual consent to the jurisdiction of a particular forum bars that party from objecting to that court's jurisdiction over it on the ground of *forum non conveniens*.[36]

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[34] *See, e.g.*, J. Zeevi & Sons v. Grindlays Bank (Uganda) Ltd., 37 N.Y.2d 220, 226-28, 333 N.E.2d 168, 172-74, 371 N.Y.S.2d 892, 898-900, *cert. denied*, 423 U.S. 866 (1975); *In re* Rosenbergers' Estate, 131 N.Y.S.2d 59, 66 (Surr. Ct. N.Y. County 1954).

[35] *See, e.g.*, 28 U.S.C. § 1404 (1982) (Change of venue).

[36] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974); D'Antuono v. CCH Computax Systems, 570 F. Supp. 708, 710-11, 713

B. Selection of the Forum

For the reasons examined below, either the courts of New York[37] or an arbitral tribunal acting under the auspices of the International Chamber of Commerce[38] should serve as the forum of choice for settling ETN-related disputes. We favor selecting New York courts, and have done so in the draft ETN documentation in the Appendix.

The selection of either forum, however, presents certain problems. With respect to the choice of New York courts, an Importer or Foreign Guarantor against whom an ETN-holder secures a New York judgment may prevent that judgment from being enforced outside New York, and particularly in its home country, by challenging the validity of the New York court's exercise of jurisdiction during enforcement proceedings.[39] This problem will not arise, however, when the losing Importer or Foreign Guarantor maintains assets in New York, making the enforcement of a New York judgment outside that jurisdiction unnecessary.[40]

Moreover, the United States financing entities that will finance ETN transactions by the purchase of ETNs from Exporters strongly disfavor arbitration, the alternative forum to New York courts. These institutions generally believe that arbitral panels, operating in an atmosphere of compromise and reconciliation, tend to "split the baby" in one form or another in rendering awards.[41] A bank that has lent a large sum is usually unwilling to submit disputes over

(D.R.I. 1983); Full-Sight Contact Lense Corp. v. Soft Lenses, Inc., 466 F. Supp. 71, 72-73 (S.D.N.Y. 1978). *See also* Nat'l Equipment Rental, Ltd. v. Graphic Art Designers, Inc., 36 Misc. 2d 442, 234 N.Y.S.2d 61, 63 (N.Y. Sup. Ct. 1962), holding that since the defendant had consented in the contract to: (1) New York law as the governing law of the contract, (2) personal service on its New York agent, and (3) the statement that the contract will be deemed to have been made in New York, a lawsuit under the contract brought in a New York court could not be dismissed on the ground that litigation in New York would be "inconvenient" to the defendant. *See also* P. WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE 3-52 (1984) [hereinafter cited as WOOD].

As discussed in the text below, however, the inclusion of a choice-of-forum clause in the ETN will not necessarily result in all ETN-related suits being heard by the chosen forum, particularly if an Importer or Foreign Guarantor wishing to avoid the chosen jurisdiction initiates the suit outside the chosen jurisdiction (in its home country, for example). *See infra* notes 45-47 and accompanying text.

[37] *See infra* notes 41-73 and accompanying text.

[38] *See infra* notes 71-92 and accompanying text.

[39] *See infra* notes 70-72 and accompanying text.

[40] *See infra* text at note 73.

[41] *See infra* text at notes 88-89; *see also* Stein, *Jurisprudence and Jurists' Prudence*, 78 A.J.I.L. 1 (1984).

payment defaults to an arbitral tribunal that will ultimately award some fraction of that amount. There is also reason to doubt that the awards that arbitral panels grant against Importers and Foreign Guarantors will consistently be enforced by the courts of countries (particularly those of their home countries) where their assets are located, despite the existence of an international legal regime which theoretically ensures the enforcement of such awards.[42]

Nevertheless, either forum would probably prove satisfactory provided that the chosen forum is used exclusively in all ETN transactions and is selected pursuant to a proper consent to jurisdiction, such as appears in the Appendix. Finally, it is worth emphasizing that there is nothing inherent in an ETN transaction that renders forum selection or enforcement of judgments more troublesome than would be the case in a traditional international loan transaction. On the contrary, the simplicity of ETN transactions and the fact that they are trade-related should make ETN-related judgments easier to enforce.

1. New York State

a. Factors favoring a New York forum

Several factors favor the choice of New York as the forum for the resolution of ETN disputes. First, New York courts are likely to be more skilled at applying New York law — the chosen law of the ETN — than are the courts of any other jurisdiction. Second, the financers of ETNs will likely consider ETNs selecting New York courts more attractive than ETNs specifying another forum since many of the banks and financial institutions that will finance ETNs will be located in New York. As a result, these organizations and their counsel will no doubt enjoy considerable familiarity with New York courts.

Third, only New York courts are bound to apply the newly enacted New York statute discussed in Part III(C) above, which requires that New York law govern contract disputes in which parties to the contract have selected New York law when the transaction "covered" by the contract involves not less than $250,000.[43] As noted above, a court outside New York could refuse to apply New York law to an ETN dispute even if the ETN equaled or exceeded $250,000 if, for example, the law that would otherwise govern or the public policy of the forum conflicted with applicable New York law.[44]

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[42] *See infra* notes 76-78 and accompanying text.
[43] *See supra* note 32 and accompanying text.
[44] *See supra* note 29.

b. New York Courts' Subject Matter Jurisdiction Over ETN Disputes

One prerequisite for the validity of a court judgment is that the court issuing the judgment have jurisdiction both over the parties to the dispute ("personal" jurisdiction) and the subject of their dispute ("subject-matter" jurisdiction). Courts typically may exercise personal jurisdiction over any person or entity that has consented to the exercise of their jurisdiction.[45] Accordingly, the Importer and the Foreign Guarantor's consent in the ETN to the jurisdiction of the New York courts would grant these courts personal jurisdiction over those entities.

The New York courts' exercise of subject matter jurisdiction with respect to ETN disputes is more problematic. Section 1314(b) of the New York Business Corporation Law severely limits the ability of "foreign" corporations (i.e., corporations not incorporated under the laws of New York) and "nonresidents" (i.e., persons whose principal residence is not New York) to sue foreign corporations in New York courts.[46] This provision specifies only five sets of circumstances under which a non-New York entity or person may sue a "foreign" corporation.[47] Since ETN-holders, Importers, and Foreign Guarantors will often be "foreign corporations" and "nonresidents" within the meaning of section 1314(b), this provision would frequently preclude ETN-holders from access to New York courts when none of the five sets of circumstances allowing access in that provision apply.

Fortunately, two of these five sets of circumstances[48] will apparently be routinely applicable to ETN-related lawsuits. The first set permits

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[45] RESTATEMENT (SECOND) CONFLICTS OF LAW § 32 (1969).

[46] N.Y. Bus. Corp. Law § 1314(b) (McKinney 1984). The limitations of Section 1314(b) reflect the policy of the New York legislature against lending that state's courts to the resolution of disputes between nonresident parties, and was designed solely to block New York courts' subject matter jurisdiction in appropriate cases where courts otherwise have personal jurisdiction over the defendant foreign corporation. *See* Simonson v. Int'l Bank, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964).

[47] Subsection (a) of Section 1314 provides that New York courts have subject matter jurisdiction over any cause of action brought by a New York resident or "domestic" corporation (i.e., a corporation incorporated under New York law) against any "foreign" corporation. Thus, where the ETN-holder is a New York resident or a corporation incorporated under New York law, New York courts would have subject matter jurisdiction over lawsuits brought by such an entity under an ETN against the Import or Foreign Guarantor corporation.

[48] Section 1314(b) provides:

> Except as otherwise provided in this article, an action or special proceeding against a foreign corporation may be maintained by another foreign cor-

lawsuits "brought to recover damages for the breach of a contract made *or to be performed* within" New York.[49] The second set allows lawsuits "where the cause of action arose within" New York.[50] If ETNs uniformly provide that they are to be "paid" (i.e., "performed") in New York, suits that a non-New York holder brings against the Importer or Guarantor when the ETN is not "paid" according to its terms would appear to satisfy the requirements of section 1314(b), for such failure may (i) constitute a failure to "perform" the ETN, and (ii) give rise to a cause of action in New York.[51] Consequently, New York courts should have both personal and subject

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poration of any type or kind or by a nonresident in the following cases only:

(1) Where the action is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.

(2) Where the subject-matter of the litigation is situated within this state.

(3) Where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state.

(4) Where the action or special proceeding is based on a liability for acts done within this state by a foreign corporation.

(5) Where the defendant is a foreign corporation doing business in this state.

N.Y. Bus. Corp. § 1314(b) (McKinney 1984).

[49] *Id.* at § 1314(b)(1) (emphasis added).

[50] *Id.* at § 1314(b)(3).

[51] *See, e.g.*, J. Zeevi & Sons v. Grindlays Bank (Uganda) Ltd., 37 N.Y.2d 220, 226-28, 333 N.E.2d 168, 169, 371 N.Y.S.2d 892, 893, *cert. denied*, 423 U.S. 866 (1975). *See generally* Nat'l Equipment Rental, Ltd. v. Graphic Art Designers Inc., 36 Misc.2d 442, 234 N.Y.S.2d 61 (N.Y. Sup. Ct. 1962) (holding that New York court subject-matter jurisdiction exists under § 1314(b)(1) where the foreign parties: (1) agreed in the contract that the contract would be "deemed" to have been made in New York, and (2) the last signature necessary to create the contract was executed in New York).

Beyond relying on these two exceptions to the general jurisdictional prohibition of § 1314(b), an ETN-holder seeking legal redress may establish the subject matter jurisdiction of New York courts under a relatively new New York statute enacted in tandem with § 5-1401 (*see supra* note 31 and accompanying text) if the ETN "covers" a transaction of at least $1 million. Section 5-1402 of New York's General Obligations Law allows both New York and non-New York entities to maintain actions or proceedings against "foreign" corporations, non-residents, and foreign states relating to any contract that: (1) references New York, (2) relates to any obligation arising out of a transaction "covering" not less than $1 million, and (3) contains a provision by which the defendant submits to the jurisdiction of New York courts — even if New York does not have a substantial relationship with the underlying contracts. N.Y. Gen. Oblig. § 5-1402 (McKinney 1984). Since ETNs will not typically involve an amount as great as $1 million, § 5-1402 may not be relevant in most cases concerning the establishment of the subject-matter jurisdiction of New York courts over an ETN lawsuit between non-New York entities.

matter jurisdiction over all ETN-related disputes regardless of the relationship of a particular ETN's parties to that state.

It should be noted, however, that New York courts have construed section 1314(b) to permit, but not to require, them to hear cases between non-New York entities which fall within one or more of the five sets of circumstances stated in that provision.[52] Notwithstanding the courts' discretion to accept or decline jurisdiction in such cases, New York courts have generally held that "[w]here the controversy is of a commercial or contractual nature, jurisdiction will ordinarily be retained where public policy will not be violated."[53]

c. *New York as the Exclusive ETN Forum*

As discussed above, New York courts will be able to assert jurisdiction over ETN-related disputes if the ETN specifies that its parties agree that the instrument will be paid in New York City and that disputes under the ETN will be submitted to New York courts. This result does not mean, however, that an Importer or Foreign Guarantor will never succeed in having a court beyond New York hear an ETN dispute. A party may attempt to avoid a New York court by three principal maneuvers. As discussed below, only the third of these maneuvers poses any real threat to the exclusive jurisdiction of New York courts over ETN disputes.

(i) Removal to Federal Court

First, an Importer or Foreign Guarantor sued in a New York state court by an ETN-holder may "remove"[54] the suit to a federal district

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[52] Notwithstanding compliance with Section 1314(b), New York courts retain the discretion to decline jurisdiction over suits between non-New York entities under "the principle long imbedded in our jurisprudence that courts are not bound to try actions between non-residents but may, in the exercise of sound discretion, refuse to take cognizance of the controversy. . . . [Section 1314(b)], which permits maintenance of such actions is permissive and not mandatory." Yesuvida v. Pennsylvania R.R., 111 N.Y.S.2d 417, 420 (N.Y. Sup. Ct. 1951).

[53] Rederiet Ocean Aktieselskab v. W.A. Kirk & Co., 51 N.Y.S.2d 565, 566 (N.Y. Sup. Ct. 1944).

[54] Removal to federal court in this context would not by itself prevent the application of New York law to the ETN dispute. First, under the "outcome-determinative" test of *Erie* v. *Tompkins*, a federal court is required to apply *state* law to substantive issues in dispute. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Second, a federal court in a diversity case must apply the substantive law of the state in which it is sitting to the substantive issues before it. Freeman v. Continental Gin Co., 381 F.2d 459, 463 (5th Cir. 1967), *reh'g denied*, 384 F.2d 365 (1967). *See also* C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE & PROCEDURE §

court in New York based on the "diversity of citizenship" of the parties.[55] After removal of the ETN dispute to federal court, the removing party may then invoke two separate theories in attempting to effect the transfer of the dispute beyond New York. First, the removing party may request that the suit be transferred to a forum outside New York on the ground of *forum non conveniens*.[56] However, the Supreme Court has held that a party may not avoid application of a forum selection clause to which it voluntarily agreed solely on the ground that it would be "inconvenient" for that party to litigate in the chosen forum.[57] Indeed, recent federal case law suggests that to the extent a party has consented to a valid forum selection clause,

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1204 (1969) [hereinafter cited as WRIGHT & MILLER]. Finally, a federal court in a diversity action must, with respect to substantive law matters, follow the choice-of-law rules of the state in which it is sitting to determine which state's law to apply. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941). *See also* WRIGHT & MILLER, *supra*, § 4506 (1976). Accordingly, a New York federal court to which an ETN-related dispute has been removed from a New York state court would, following the New York choice-of-law rules discussed above, apply New York law to the dispute. *See supra* notes 29-34 and accompanying text.

[55] Federal district courts have "original jurisdiction" over all civil actions where the matter in controversy is in excess of $10,000 and is between "citizens of a State and citizens or a subject of a foreign state." 28 U.S.C. § 1332(a) (1982). For purposes of that section, a corporation is deemed to be a citizen of the state where it is incorporated or where it has its principal place of business. *Id.* § 1332(c). Since the parties to an ETN dispute will almost always meet the requirements of § 1332(a), federal district courts will usually have original jurisdiction over ETN lawsuits. Section 1441(a) of Title 28 provides that:

> except as otherwise expressly provided by an Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (1982). Thus, the Importer or Foreign Guarantor as a defendant in an ETN lawsuit brought in New York state court will usually be able to have that suit initially "removed" to the corresponding federal district court in that state.

As discussed in the text above, however, a state court would not grant such a defendant's motion for a change of venue to a non-New York court on *forum non conveniens* grounds, since the defendant would be deemed to have waived any right to have its convenience considered by consenting in the accompanying text. *See supra* notes 35-36 and accompanying text. Furthermore, such a federal court would probably remand the suit to the forum that the parties selected unless the defendant could carry the heavy burden of showing that the ETN's forum selection clause is "unreasonable." *See infra* notes 59-64 and accompanying text.

[56] Subsection (a) of 28 U.S.C. § 1404(a) ("Change of Venue") provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[57] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

that party has waived the right to have its convenience considered in the determination of the propriety of the chosen forum's jurisdiction.[58] As a result, such a request by the removing party for a change of venue beyond New York on *forum non conveniens* grounds would probably be denied.

The removing party may alternatively attempt to have the suit dismissed or transferred out of New York on the basis that the forum selection clause of the underlying ETN is invalid. Federal law provides that the federal court of a district in which a suit has been "wrong[ly]" filed may dismiss the case or transfer it to another federal district or division in which it could have been brought.[59] Parties resisting the jurisdiction of the courts of a certain federal district have invoked this provision in attempts to invalidate forum selection clauses to which they have consented.[60] Consequently, an Importer or Foreign Guarantor that removes an ETN-related suit from state to federal court in New York may attempt to demonstrate that the lawsuit has been "wrongly" filed in New York by showing that the ETN's forum selection clause is invalid.

Recent federal case law on the validity of forum selection clauses, however, indicates that an Importer or Foreign Guarantor would have little success in pleading the invalidity of the ETN's forum selection clause. For example, the United States Supreme Court held in *The Bremen v. Zapata Off-Shore Co.* that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[61] The Court noted that the resisting party bears a heavy burden of proof in its attempt to demonstrate the unreasonableness of a forum selection clause.[62]

Lower federal courts that have interpreted and applied the *Bremen* standard have made it difficult for a resisting party to establish the invalidity of a forum selection clause. Such courts have ruled that a forum selection clause is "unreasonable" only if the resisting party

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[58] Full-Sight Contact Lens Corp. v. Soft Lenses, Inc., 466 F. Supp. 71, 74 (S.D.N.Y. 1978).

[59] 28 U.S.C. § 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[60] *See, e.g.*, D'Antuono v. CCH Computax Systems, 570 F. Supp. 708 (D.R.I. 1983).

[61] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 10.

[62] *Id.* at 17.

presents evidence of fraud, undue influence, "overweening" bargaining power, or a serious inconvenience in litigating.[63] With respect to this last factor, one federal court has ruled that a resisting party cannot have a forum selection clause invalidated by demonstrating the "serious inconvenience" of litigating in a jurisdiction to which it consented in the contract, since that party "has in effect subordinated his convenience to the bargain" by consenting to the inclusion of the clause.[64]

As a result, it is unlikely that a New York federal court would dismiss or transfer an ETN dispute beyond New York on the ground that the ETN's forum selection clause was invalid. The more probable result is that a New York federal district court to which an ETN dispute has been removed from a New York state court will uphold the validity of the ETN's forum selection clause and remand the suit to the state court for further adjudication. In sum, an ETN holder can be reasonably sure that a lawsuit brought against an Importer or Foreign Guarantor in a New York state court will ultimately be resolved by that court.

(ii) Initiation of Suit in the United States Outside New York

An Importer or Foreign Guarantor that wishes to avoid having a New York court adjudicate an ETN dispute may attempt to initiate suit in a state or federal jurisdiction outside New York, such as the Exporter or Discounting Bank's home state, before the ETN-holder brings the action in a New York court. In this case, the ETN-holder could avail itself of the federal procedural concepts discussed in the previous subsection. The parties would probably have the complete diversity of citizenship necessary to give a federal district court subject-matter jurisdiction over the dispute. Such jurisdiction would allow the ETN-holder to "remove" a state court suit to federal court;[65] under the principles discussed above, the federal court could then enforce the forum selection clause and transfer the case to a New York state court — except in the unlikely event that the resisting

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[63] Fireman's Fund American Ins. Companies v. Puerto Rican Fowarding Co., 492 F.2d 1294, 1297 (1st Cir. 1974). *See also* Crown Beverage Co. v. Cerveceria Moctezuma, S.A., 663 F.2d 886, 888 (9th Cir. 1981) (per curiam); Republic Int'l Corp. v. Amco Engineers, Inc., 516 F.2d 161, 168 (9th Cir. 1975); D'Antuono v. CCH Computax Systems, 570 F. Supp. at 711.

[64] *D'Antuono v. CCH Computax Systems,* 570 F. Supp. at 713.

[65] *See supra* note 55 and accompanying text.

Importer or Foreign Guarantor could demonstrate that application of this clause would be unreasonable under the circumstances.[66]

(iii) Initiation of Suit Beyond the United States

The third method an Importer or Foreign Guarantor might invoke in an attempt to avoid litigating an ETN dispute in a New York state court would be to sue the ETN-holder outside the United States (for example, in its home country) before the ETN-holder sues in New York. However, the courts of several western countries, including England, France, Belgium, and Germany, have recently joined their United States counterparts in rejecting the ancient legal maxim that parties to a contract may not solely by their agreement oust a court of its jurisdiction;[67] they have upheld derogations from their jurisdictions in favor of foreign forums that parties have freely chosen.[68]

Nevertheless, the courts of some countries still refuse to give effect to parties' agreements that deny jurisdiction of such courts over disputes. For example, under article 2 of Italy's Code of Civil Procedure, the validity of a contract clause ousting Italian courts is limited to obligations between aliens or between an alien and an Italian citizen who neither resides in, nor is a domiciliary of, Italy.[69]

Thus, it is theoretically possible that an Importer or Foreign Guarantor may avoid New York state courts by being the first to sue and doing so in a country that does not allow its courts to be ousted of jurisdiction by the contractual agreement of the parties. It is, of course, far more likely that ETN-holders will immediately file suit in New York when the cause arises. Accordingly, there seems to be little practical risk to an ETN-holder that an Importer or Foreign Guarantor will avoid the jurisdiction of New York state courts when sued by ETN-holders for payment defaults.

d. Foreign Enforcement of New York ETN-Judgments

A judgment that an ETN-holder secures from a New York state court will be of value only if it can be enforced against the losing Importer or Foreign Guarantor or that party's assets. The judgment-holder should be prepared for the Importer or Foreign Guarantor to

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[66] *See supra* notes 59-64 and accompanying text.

[67] *See, e.g.*, Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 452 (1874) (dictum) (noting that forum selection clauses were then thought to be of dubious public value in that they restrained resort to the courts).

[68] *See* WOOD, *supra* note 36, at 323.

[69] *Id.*

resist vigorously satisfying such a judgment and to oppose proceedings that the ETN-holder may initiate beyond New York to enforce the judgment.

In many countries, and not merely the less-developed ones, it will be difficult for an ETN judgment-holder to convince local courts to enforce the judgment of a United States court against a losing Importer or Foreign Guarantor, particularly if the losing party is a resident of that foreign country.[70] The Scandinavian countries, for example, are especially hostile to foreign judgments. They require that the case underlying a foreign judgment essentially be retried before they will recognize or enforce the judgment.[71] Even countries that recognize and enforce foreign judgments require that: (1) the exercise of jurisdiction over the defendant by the court which issued the judgment be consistent with the standards of jurisdiction of the enforcing country; (2) the trial and other procedures to which the defendant was subjected have been "fair" under the standards of the enforcing country; (3) the judgment be for money damages only, and not for equitable relief; (4) the judgment be final and conclusive, and not subject to appeal; (5) the judgment not be contrary to the public policy of the enforcing country; and (6) that the country in which the judgment was issued would recognize and enforce a similar judgment issued by other courts of the enforcing country.[72]

This does not mean that ETN transactions are somehow less safe than other international commercial or financial transactions; the contrary is true. First, ETNs probably will not be enforced against Importers, but against Foreign Guarantors. As noted above, Foreign Guarantors typically will have substantial assets both in, and more importantly from an enforcement perspective, outside their home countries. Given the importance of New York and London as financial centers, Foreign Guarantors in many cases will have substantial assets in these jurisdictions — places where New York ETN judgments are likely to be enforced.

Moreover, a New York judgment will be honored in any state of the United States where a Foreign Guarantor has assets, since the full faith and credit clause of the United States Constitution requires that the courts of every state fully recognize and enforce judgments

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[70] *See generally* COUNCIL OF EUROPE, THE PRACTICAL GUIDE TO RECOGNITION AND ENFORCEMENT OF FOREIGN JUDICIAL DECISIONS IN CIVIL AND COMMERCIAL LAW (1975).

[71] *See* WOOD, *supra* note 36, at 3-34 to 3-44.

[72] *Id.*

from the courts of another state.[73] In these cases, the reluctance of foreign countries to enforce United States judgments will be irrelevant.

2. Arbitration

a. Factors Favoring Arbitration

As an alternative to the courts of New York, the ETN could specify that all disputes arising thereunder be resolved through arbitration. A number of factors make arbitration an attractive means of settling ETN-related disputes. For example, arbitrators, both as a common practice[74] and under the rules of international arbitration,[75] generally apply the law that the parties have chosen. Further, arbitrators' respect for the parties' choice of law usually does not require that a "substantial relationship" exist between the jurisdiction whose law has been chosen and the transaction or parties to the transaction.[76] Consequently, the parties to an ETN could be certain that the arbitrators would apply New York law to their dispute, even if the ETN did not state that it was to be paid in New York or have some other substantial relationship with that state.

In addition, parties to an ETN which refer all disputes to arbitration could be reasonably sure that the courts of at least sixty-eight countries would dismiss the initiation of any ETN-related proceeding in favor of arbitration. United States courts are bound by federal law[77] to enforce arbitration clauses in commercial contracts such as the ETN.[78]

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[73] U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given by each State to the public Acts, Records, and judicial Proceedings of every other State"). *See generally* Stoll v. Gottlieb, 305 U.S. 165, *reh'g denied*, 305 U.S. 675 (1938).

[74] Lando, *Lovvalgsregler for voldgiftsmaend*, 49 NORDISK TIDSKRIFT FOR INTERNATIONAL RET 181, 183 (1980) [hereinafter cited as "Lando"].

[75] *See, e.g.*, UNCITRAL Arbitration Rules Art. 33, G.A. Res. 98, U.N. GAOR Supp. (A/31/17), P. Sanders, *Commentary on the UNCITRAL Arbitration Rules*, in YEARBOOK COMMERCIAL ARBITRATION 172 (1977) [hereinafter cited as Sanders].

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> No occasion is known on which an arbitrator has set aside the parties' choice of law because of a missing connection to the chosen system of law. Various decisions recognize the choice of the law of a country that has no connection to the contract. This practice is well founded. The parties may have wanted to submit themselves to a neutral or well-developed system of law.

Lando, *supra* note 74, at 184 (translation, footnotes omitted).

[77] 9 U.S.C. §§ 1-14 (1982).

[78] The United States Supreme Court has held that arbitration clauses constitute a specialized variety of forum-selection clauses which, in circumstances such as would be involved in an ETN transaction, must be specifically enforced. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974).

In addition, the United States and sixty-seven other countries, including many third-world nations,[79] are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention").[80] This Convention requires the courts of the contracting countries to refer to arbitration all disputes which arise from contracts containing valid arbitration clauses.[81]

Furthermore, the parties to the ETN could choose the kind of arbitration they desire.[82] For example, the New York Convention implicitly recognizes parties' right to choose the arbitral authority, the place of arbitration, and the arbitral procedure.[83] United States

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[79] The parties to the New York Convention are: Australia, Austria, Belgium, Benin, Botswana, Bulgaria, Byelorussian Soviet Socialist Republic, Central African Republic, Chile, Colombia, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Ecuador, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kampuchea, Korea, Kuwait, Luxembourg, Madagascar, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Philippines, Poland, Romania, San Marino, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Thailand, Trinidad & Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Yugoslavia. *See* Multilateral Treaties Deposited with the Secretary-General at 685, U.N. Doc. St/LEG/SER. E/ 3 (1985) [hereinafter cited as "Multilateral Treaties"].

[80] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature, June 10, 1958, 21 U.S.T. 2519, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (1959) [hereinafter cited as the "New York Convention"]. United States legislation implementing the New York Convention is codified at 9 U.S.C. §§ 201-08 (1982).

[81] New York Convention, *supra* note 80, at art. II(3).

[82] The three best known sets of arbitral procedure are those developed by the American Arbitration Association (the "AAA"), the International Chamber of Commerce (the "ICC"), and the United Nations Commission on International Trade Law ("UNCITRAL"). *See* Mead, *Arbitration Overview: The AAA's World and Domestic and International Arbitration*, 1 J. INT'L ARB. 263 (1984); ICC, GUIDE TO ICC ARBITRATION (1972); Sanders, *supra* note 75, at 172.

[83] *See* New York Convention, *supra* note 80, at art. V(d). Article V(d) provides that recognition and enforcement of an arbitral award may be refused if the "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." The commentators agree that this provision accords complete party autonomy regarding the choice of arbitral procedure, irrespective of the number of contacts with the arbitral forum. *See* K.H. SCHWAB, SCHIEDSGERICHTS BARKEIT 380-81 and note 3 (3d ed. 1979). The European Convention on International Commercial Arbitration, opened for signature April 21, 1961 [hereinafter cited as the "European Convention"], art. IV(1), 484 U.N.T.S. 349, explicitly provides that the parties are free to appoint arbitrators, determine the place of arbitration and establish the arbitral procedure. *See also* SCHWAB *supra*, at 383-84.

statutes also mandate respect for contract provisions naming or appointing arbitrators,[84] and permit United States courts to "direct that arbitration be held in accordance with the agreement at any place therein provided for."[85]

As with a judgment from a more traditional forum such as the state courts of New York, an arbitral award from an ETN dispute would be valuable only to the extent courts with jurisdiction over the losing party's assets recognize and enforce the award. As noted above, arbitral awards related to international commercial disputes are, by federal law, fully enforceable in the United States.[86] Moreover, the sixty-eight countries that are parties to the New York Convention are each bound, when the conditions of that Convention are met, to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."[87] Thus, to the extent the Importer or the Foreign Guarantor maintains assets in the United States, those assets could be attached through the enforcement of an arbitral award in the state where the assets are located. Given the New York Convention's provisions regarding the obligations of its signatories to recognize and enforce arbitral awards, the courts of foreign countries that are parties to the Convention may be more likely to recognize and enforce an arbitral award from an ETN dispute than a judgment from a state or federal court in the United States.

b. *The Limitations of Arbitration*

Despite the advantages that arbitration offers, there are several reasons why United States holders of ETNs would probably prefer

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[84] 9 U.S.C. § 5 (1982).

[85] *Id.* at § 206.

[86] *Id.* at §§ 1-9.

[87] New York Convention, *supra* note 80, at art. III. Many of these countries have declared that they will apply the New York Convention only to: (1) the recognition and enforcement of arbitral awards made in the territory of another country that is a member of the New York Convention, and (2) legal relationships considered commercial under the declaring country's law. *See* the New York Convention, *supra* note 80, at art. 1 (3); Multilateral Treaties, *supra* note 79, at 686-93 (Supp. at art. XXII.1.-1). In the case of an arbitral award under an ETN, both of these conditions would be met if the arbitration were to take place in New York. First, the United States is a party to the New York Convention. Second, as an agreement relating to payment for the international sale of goods between merchants, the ETN transaction would likely be interpreted as a commercial agreement under the law of virtually every country.

that New York courts adjudicate ETN disputes. First, as noted above, arbitrators often tend to force compromise on the parties and to apply general principles of equity instead of strict principles of municipal laws. In certain international contracts, such as disputes stemming from construction contracts where compromise is necessary to allow work to continue, decisions *ex aequo et bono*[88] may be acceptable and even preferable. In disputes involving international loans, however, there are no questions of timeliness or sufficiency of performance. In such disputes, the borrower typically has not repaid considerable and easily-computed sums of money. Lending institutions that finance ETNs will be reluctant to consent to arbitral proceedings in which they can realistically expect to recover only half of their losses.[89]

Furthermore, the three advantages that arbitration offers over traditional court resolution of disputes — finality, expert adjudication, and privacy — are not necessarily "advantages" in the international loan context. First, arbitral awards are "final" in that they cannot be appealed to "higher" tribunals. Finality is preferable in disputes where questions of fact predominate and securing a quick and final result is in both sides' interest so that work may proceed. The outcome of international loan disputes, however, typically turns on questions of law, not fact, thus increasing the importance of party access to a higher tribunal to review erroneous legal rulings.[90]

Second, arbitration is often favored in complex and technical international contracts, such as construction and procurement contracts, because the parties can select experts in the relevant field as arbitrators. Since international loan disputes usually do not require the resolution of complex issues of specification and performance, adjudicators of such disputes need only be, like traditional judges, experts in the law.[91]

Finally, arbitral proceedings and results are usually conducted privately and held in strict confidence. Confidentiality may render arbitration contrary to the interests of ETN financers, since such confidentiality might deprive them of the sanction of adverse publicity

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[88] In justice and fairness. BLACK'S LAW DICTIONARY 500 (5th ed. 1979).

[89] *See* WOOD, *supra* note 36, at 3-28. Indeed, Eximbank, who the authors hope will be the guarantor of a portion of the ETNs, is unlikely to participate in an ETN transaction where arbitration is selected.

[90] *Id.* at 3-26.

[91] *Id.*

that a defaulting Importer or Foreign Guarantor might want to avoid.[92]

As the above discussion suggests, the adjudication of ETN disputes through arbitration does not, on balance, offer as many benefits for the financers of ETN transactions as would adjudication in the New York courts. For this reason, the ETN should specify that New York law will govern the parties' rights and obligations under the ETN and that the parties will submit to the jurisdiction of New York courts for resolution of their ETN-related disputes.

V. LIMITATION OF THE EXPORTER'S LIABILITY

The ETN will attract United States exporters if it favorably alleviates two general concerns, the second of which is addressed inadequately by the *forfait* transaction. First, the Exporter will want to be paid immediately for his export sale. Like the *forfait* transaction, the ETN addresses this concern by allowing the Exporter to receive cash by selling the ETN to the Discounting Bank.[93] Moreover, the ETN transaction, as is the case with the *forfait* transaction, will usually result in the Exporter receiving cash shortly after receiving an ETN in payment for his export goods. The Exporter will receive cash quickly since the sale of the ETN to the Discounting Bank typically will occur simultaneous with or just after the Exporter's delivery of his goods to the Importer.

Beyond receiving immediate payment for his export transaction, the Exporter will want to be relieved of all possible liability on the ETN should the Importer or Foreign Guarantor fail for any reason to pay the Discounting Bank upon the ETN's maturity. As noted above in Part I, applicable civil law may prevent the Exporter in a *forfait* transaction from doing this. Under the U.C.C., however, the Exporter may avoid entirely such liability by endorsing the ETN to the note-purchaser "without recourse" and by specifically disclaiming certain warranties.[94]

Under the U.C.C., an Exporter who transfers the ETN to a Discounting Bank by endorsing it incurs three types of liability *unless* he generally or specifically disclaims these liabilities. First, he incurs secondary liability on the instrument as an endorser, which generally

[92] *Id.*

[93] As noted in Part II above, the Discounting Bank will typically purchase the ETN at a discount from the present value of the ETN's face amount to reflect the fact that the ETN is to be paid in the future.

[94] *See infra* notes 106-08 and accompanying text.

requires him to pay the ETN if the party expected to pay (in this case the Importer or the Foreign Guarantor) fails to do so.[95]

Second, as the person who obtains payment on the ETN from the Discounting Bank, the Exporter incurs the three presentor's warranties.[96] The presentor first warrants that he has good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has good title.[97] The presentor next warrants that "he has no knowledge that the signature of the maker or drawer is unauthorized."[98] The presentor finally warrants that "the instrument has not been materially altered."[99]

In addition to the warranties of endorsement and presentment, an

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[95] Subsection (1) of U.C.C. § 3-414 (1984) ("Contract of Indorser; Order of Liability") provides:

> Unless the indorsement otherwise specifies (as by such words as 'without recourse') every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

[96] Subsection (1) of U.C.C. § 3-417 (1984) ("Warranties on Presentment and Transfer") provides:

> (1) Any person who obtains payment or acceptance . . . warrants to a person who in good faith pays or accepts that
> (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and
> (b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith
> (i) to a maker with respect to the maker's own signature; or
> (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
> (iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and
> (c) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith
> (i) to the maker of a note; or
> (ii) to the drawer of a draft whether or not the drawer is also the drawee; or
> (iii) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or
> (iv) to the acceptor of a draft with respect to an alteration made after the acceptance.

[97] U.C.C. § 3-417(1)(a) (1984).

[98] *Id.* at § 3-417(1)(b).

[99] *Id.* at § 3-417(1)(c).

Exporter who sells an ETN to a Discounting Bank, as a transferor for consideration, would be deemed to have given five separate implied warranties.[100] The warranties are: (1) that the transferor has good title to the instrument;[101] (2) that all signatures on the instrument are genuine and authorized;[102] (3) that the instrument has not been materially altered;[103] (4) that no defense of any party to the instrument is good against the transferor;[104] and (5) that the transferor has no knowledge of any insolvency proceeding affecting the instrument's maker.[105]

The U.C.C. nevertheless allows the Exporter to disclaim each of these three types of liability when transferring the ETN to the Discounting Bank. First, the Exporter may disclaim its liability as an endorser by including the term "without recourse" in its endorsement.[106] Second, the Exporter may disclaim the warranties of presentment and transfer by specifically disclaiming each warranty in its endorsement. The official comments to the U.C.C. provide that since the obligations of presentor and transferor imposed by the Code "are stated in terms of warranty," they can, "[l]ike other warranties . . . be disclaimed by agreement between the immediate parties."[107] Thus, the U.C.C. effectively allows the Exporter to escape virtually all liability that would otherwise result from the Exporter's sale of the

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[100] Subsection (2) of U.C.C. § 3-417 (1984) provides:

> Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that
>
> (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
>
> (b) all signatures are genuine or authorized; and
>
> (c) the instrument has not been materially altered; and
>
> (d) no defense of any party is good against him; and
>
> (e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

[101] U.C.C. § 3-417(2)(a) (1984).

[102] *Id.* at § 3-417(2)(b).

[103] *Id.* at § 3-417(2)(c).

[104] *Id.* at § 3-417(2)(d).

[105] *Id.* at § 3-417(2)(e).

[106] U.C.C. § 3-414(1) (1984) provides that the endorser will incur the obligations specified in that provision "[u]nless the indorsement otherwise specifies (as by such words as without recourse)."

[107] U.C.C. § 3-417 comment 1 (1984). This comment further provides that the parties' agreement regarding disclaimer of warranties must be evidenced by the appearance of the disclaimer in the endorsement, and that "no parol proof of 'agreement otherwise'" would be "admissible" as evidence.

ETN to the Discounting Bank, so long as the Exporter endorses it "without recourse" and includes in its endorsement the warranty disclaimers discussed above.[108] The ETN that appears in the Appendix to this Article includes such a disclaimer.

VI. THE ETN'S FOREIGN GUARANTY

To be attractive to United States investors, the ETN must be backed by an entity other than the Importer that is reasonably reliable and generally known, that has attachable assets outside its country against which a judgment can be enforced, and from whom payment can be extracted relatively quickly. To meet these criteria, we have drafted the ETN to provide for an unconditional and irrevocable guaranty[109] given by the Importer's bank (the Foreign Guarantor) on the ETN. Moreover, we have provided that the U.C.C. as adopted by New York State will govern this guaranty. For the reasons discussed below, such a payment guaranty will be superior to an *aval* and will provide satisfactory legal security for the ETN holder.

The U.C.C. provides that a party, such as the Foreign Guarantor, may sign an instrument in order to lend its name to another party

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[108] The following endorsement should allow the Exporter to disclaim liability on an ETN in connection with the Exporter's transfer of such an instrument to a Discounting Bank:

> _____ (the "Endorser") hereby endorses this Promissory Note (the "Note") without recourse to _____, and in connection with such endorsement expressly disclaims the following warranties:
>
> 1. That the Endorser has good title to this Note or is authorized to obtain payment or acceptance on behalf of one who has such title;
> 2. That the Endorser has no knowledge that the signature(s) of the maker(s) or drawer(s) is (are) not genuine or unauthorized;
> 3. That the Note has not been materially altered;
> 4. That no defense of any party to the Note is good against the Endorser;
> 5. That the Endorser has no knowledge of any insolvency proceeding affecting any party to the Note.

[109] A stand-by letter of credit ("SLC") is another type of unconditional backing that could be used in an ETN transaction. The importer would procure an SLC from his bank obligating the bank to pay the holder of the ETN in the event the holder certifies in writing to the bank that there has been a default in payment on the ETN. This type of arrangement, however, would require at least two other documents beside the ETN — the SLC itself and the holder's certification of default — thereby diminishing through added complexity the prospects of "securitizing" ETNs by pooling similar ones. Furthermore, letters of credit are not transferable unless transferability is expressly allowed on the face of the credit and, even if transferable, may only be transferred once. *See* Uniform Customs and Practices for Documentary Credits, art. 46(d) (1974 ed.). ETNs backed by SLCs would thus not be as negotiable as ETNs backed by a U.C.C. guaranty.

to that instrument, such as the Importer. In U.C.C. parlance a party that lends its name to another is known as an "accomodation party."[110] When the instrument is taken for value before it is due, "the accomodation party is liable in the capacity in which he has signed."[111] When an accomodation party adds words such as "payment guaranteed" to his signature, he pledges under the U.C.C. that "if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party."[112] The guarantor is liable even in the absence of presentment, notice of dishonor, and protest.[113]

Under the U.C.C., therefore, the payment guarantor's liability is primary; a holder need not first pursue another party liable on the paper. Even a guarantor, however, may assert certain defenses. These defenses depend on whether the party seeking to enforce the guarantor's obligations is, under the U.C.C., a "holder in due course" (HDC) and whether the guarantor has validly waived the defenses.

The remainder of this part of the Article examines the extent of the Foreign Guarantor's obligations under the U.C.C. as the guarantor of the ETN, and considers the following: (1) the status of the Discounting Bank as an HDC; (2) the defenses available to the Foreign Guarantor; (3) the ability of the Foreign Guarantor to waive those defenses; and (4) the circumstances in which the Foreign Guarantor's liability may be discharged.

A. The Discounting Bank as an HDC

Five conditions must be met before a person holding an instrument qualifies under the U.C.C. as an HDC. He must be a *holder* who takes a *negotiable instrument* for *value*, in *good faith*, and *without notice* that it is overdue or has been dishonored or that any defense against, or claim to, the instrument by any party has been asserted.[114]

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[110] U.C.C. § 3-415(1) (1984) provides: "An accomodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it."

[111] *Id.* at § 3-415(2).

[112] *Id.* at § 3-416(1). Section 3-416(3) provides that "[w]ords of guaranty which do not otherwise specify guarantee payment."

[113] U.C.C. § 3-416(5) (1984) states: "When words of guaranty are used[,] presentment, notice of dishonor and protest are not necessary to charge the user." Note, however, that since a payment guarantor waives presentment, notice of dishonor, protest and demand on the maker, a cause of action accrues against such a guarantor, and the statute of limitations begins to run on the date the note is to be paid regardless of whether demand for payment has been made on the maker. *See* Bank of New York v. Bersani, 90 A.D.2d 302, 457 N.Y.S.2d 142 (1982).

[114] *See* U.C.C. § 3-302(1) (1984).

To be a "holder," a person must first possess an instrument issued or endorsed to him or his order, or to bearer or in blank.[115] Assuming that in each case the Discounting Bank will take the ETN from the Exporter upon paying the Exporter, and that it will obtain the Exporter's valid endorsement on the ETN in the form provided in Appendix A of this Article, the Discounting Bank will qualify as a "holder."

Second, there can be no HDC of an instrument that is not a "negotiable instrument" under the definition of the Code. A promissory note such as the ETN is a negotiable instrument if it is a writing that has been signed by the maker and contains an unconditional promise to pay a sum certain in money on demand or at a definite time to order or bearer.[116] The model ETN that appears in the Appendix to this Article satisfies this requirement.

Third, an HDC must take for "value." An executory promise generally does not constitute value; rather, the consideration must have been performed.[117] Although a note payee such as the Exporter may be an HDC,[118] the Exporter will not be an HDC in cases where the ETN has been issued to him but he has yet to ship the underlying goods or to transfer title documents covering the underlying goods. The Exporter in such cases would become an HDC (assuming the other conditions are met) only when he fulfills his promise to deliver.

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[115] "Holder" is defined in U.C.C. § 1-201(20) (1981) as follows: "'Holder' means 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."

[116] Section 3-104(1) of the U.C.C. provides:

> (1) Any writing to be a negotiable instrument within this Article must
> (a) be signed by the maker or drawer; and
> (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; and
> (c) be payable on demand or at a definite time; and
> (d) be payable to order or to bearer.

[117] U.C.C. § 3-303 (1984) provides:

> A holder takes the instrument for value
> (a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or
> (b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or
> (c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person.

[118] *See* U.C.C. § 3-302(2) (1984).

The Discounting Bank's status as an HDC, however, does *not* depend on the Exporter having a pre-existing status as an HDC, for the Discounting Bank will have given sufficient consideration in exchange for the ETN by immediately paying the Exporter a percent of the ETN's face amount. As far as the Discounting Bank's status as an HDC is concerned, whether the entire face amount is paid is irrelevant so long as the Discounting Bank pays all that it has agreed to pay. When it does, the Discounting Bank will generally be considered to have taken the ETN for "value."

It may also be assumed that the Discounting Bank will routinely take the ETN in good faith and without notice: (1) that the ETN is overdue; (2) that it has been dishonored; or (3) that "any person" has a defense against the ETN or a claim to it. Thus, under circumstances described above, the five conditions necessary to create HDC status would be met, and the Discounting Bank would qualify as an HDC.

B. The Foreign Guarantor's Defenses

The concept of the HDC, unique to the Anglo-American law of commercial paper, was designed to create a class of privileged parties whose recourse on an instrument is subject to minimal defenses. The rationale is that according HDC status to instrument-holders that meet the requirements discussed in the previous section will facilitate commerce by increasing confidence in commercial paper. Consequently, when an entity places its guaranty on a negotiable instrument that subsequently is negotiated to an HDC, the U.C.C. eliminates many of the common law defenses otherwise available to the guarantor against a demand for payment by the HDC.[119]

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[119] Outside the context of the U.C.C., a "surety" (a term which generally encompasses the concept of a "guarantor") may assert a number of broad defenses against demands for performance on his surety agreement. For example, a surety is not liable, and therefore may assert a defense, in those cases where the consent of the principal (in this case, the Importer that issues the ETN) is vitiated or altogether lacking, or in other circumstances where the principal is excused from performance. The clearest case of the absence of the principal's consent is where the principal's signature on the underlying agreement has been forged or is otherwise unauthorized. *See* L. SIMPSON, *Handbook on the Law of Suretyship*, No. 54 at 271 (1950). The courts reason that it is the creditor's duty, since he deals directly with the principal, to ascertain the genuineness of the signature. The surety is similarly not bound in the absence of the signature of a person who was meant, as shown from the face of the document, to be a co-surety. *Id.* No. 53 at 270.

Nevertheless, the U.C.C. does make certain defenses available to a guarantor against an HDC such as the Discounting Bank.[120] Section 3-305 provides that an HDC takes free from all defenses (except those enumerated in that provision) asserted by any party to the instrument "with whom the holder has not dealt."[121] The Foreign Guarantor, by attaching his guaranty of payment subject to U.C.C. section 3-416, becomes a party to the instrument.[122] Accordingly, if the Discounting Bank has "dealt with" the Foreign Guarantor, it will be subject to all of the common law suretyship defenses the Foreign Guarantor could raise outside the context of the U.C.C.[123]

While the U.C.C. does not define the "dealt with" requirement, the case law interpreting this phrase suggests that only a party that *directly* dealt with another party with regard to the *specific instrument*

The U.C.C. implicitly recognizes the survival of common law suretyship defenses in the law of commercial paper. One of the Code's parol evidence provisions prevents an accomodation party from using oral proof against an HDC to establish his accomodation status and thereby claim "[t]he benefit of discharges dependent on his character as such." U.C.C. § 3-415(3) (1984). The comment to this section explains that it "recognizes the defenses of a surety in accordance with the provisions subjecting one not a holder in due course to all simple contract defenses, as well as his rights against his principal after payment." *Id.* comment 1. The comment refers to the Code provision which subjects a person taking an instrument without the status of an HDC to "all defenses of any party which would be available in an action on a simple contract." *Id.* at § 3-306(b). It thus seems to be the case that common law suretyship defenses are available against a mere "holder" who is not an HDC.

[120] U.C.C. § 3-305 (1984) provides:

> To the extent that a holder is a holder in due course he takes the instrument free from . . .
>
> (2) all defenses of any party to the instrument with whom the holder has not dealt except
>
> (a) infancy, to the extent that it is a defense to a simple contract; and
>
> (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
>
> (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
>
> (d) discharge in insolvency proceedings; and
>
> (e) any other discharge of which the holder has notice when he takes the instrument.

[121] *Id.*

[122] U.C.C. § 1-201(29) (1981) states; " 'Party,' as distinct from 'third party,' means a person who has engaged in a transaction or made an agreement within" the U.C.C.

[123] *See supra* note 119.

or *transaction* in question has "dealt with" the other party for purposes of section 3-305(c).[124] Thus, the Discounting Bank should be able to investigate the credit of the Foreign Guarantor without losing its status as an HDC.[125] For the Discounting Bank to maintain its status as an HDC, however, it will have to be careful, prior to discounting an ETN, not to deal directly with the Importer or the Foreign Guarantor with respect to that ETN (for example, by negotiating the terms of the ETN in advance with these parties).

Assuming that the Discounting Bank will typically be an HDC which has not "dealt with" the Foreign Guarantor, U.C.C. section 3-305(2) would allow the Foreign Guarantor to raise only five defenses against such an HDC's demand for payment. Those defenses are extremely limited. The first defense, infancy,[126] would of course not apply to the Foreign Guarantor.

The second defense[127] involves any other incapacity, duress, or illegality that would render the obligations not merely voidable, but entirely null and void.[128] These defenses, particularly incapacity and illegality, can and do void commercial transactions and could void an ETN transaction. Examples of void contracts include those in which one of the parties did not have the power to enter into the

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[124] *See, e.g.*, Anderson, Clayton & Co. v. Farmers Nat'l Bank of Cordell, 624 F.2d 105 (10th Cir. 1980) (Okla. law) (plaintiff had "dealt with" bank which issued cashier's check on the basis of plaintiff's fraudulent misrepresentation); Bucci v. Paulick, 277 Pa. Super. 492, 419 A.2d 1255 (1980) (plaintiff paving company that was recipient of defendant's promissory note had dealt with the defendant as a party to the transaction underlying the note); Chicago Title & Trust Co. v. Walsh, 34 Ill. App. 3d 458, 340 N.E.2d 105 (1975) (plaintiff creditor of debtor who funded escrow account with a forged certified check had not dealt with defendant bank which issued checks to plaintiff); Maynard v. England, 13 Wash. App. 961, 538 P.2d 551 (1975) (note holder who made a credit check of the note maker and insisted on additional collateral prior to taking note from the original payee did not directly participate in the original transaction between the maker and the payee and thus had not "dealt with" the maker).

[125] *See Maynard*, at 972, 538 P.2d at 558.

[126] U.C.C. § 3-305(2)(a) (1984).

[127] *Id.* at § 3-305(2)(b) (1984).

[128] A "void" contract is a promise the breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor. RESTATEMENT (SECOND) OF CONTRACTS § 7 comment 1 (1979). A voidable contract, on the other hand, "is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." *Id.* at § 7. Examples of voidable contracts include those signed by a mental incompetent (*see, e.g.*, Estate of Lucas v. Whiteley, 550 S.W.2d 767 (Tex. Civ. App. 1977)); those induced by bribery (*see, e.g.*, Bankers Trust Co. v. Litton Systems, 599 F.2d 488 (2d Cir. 1979)), or by fraud, such as when a person misrepresents his product to convince another to purchase it (*see,*

contract because its articles of incorporation[129] or its license to do business in the relevant state[130] were revoked at the time the contract was made. Accordingly, a Foreign Guarantor's contention that it lacked the power to guaranty the ETN is a defense it could raise against the Discounting Bank's demand for payment. The Discounting Bank should thus be certain before discounting the ETN that the Foreign Guarantor had the legal right and power to guaranty the ETN under the laws of its jurisdiction of incorporation and the jurisdiction in which it acts.[131]

The third defense the Foreign Guarantor may raise under section 3-305(2) of the U.C.C. is "fraud in the factum" or "fraud in the essence," as opposed to "fraud in the inducement."[132] Fraud in the factum is a defense against an HDC only to the extent the Foreign Guarantor is unaware of the character and essential terms of the instrument and has had no reasonable opportunity to obtain such knowledge. The test is excusable ignorance, and education and business experience are taken into account in determining the validity of the excuse.[133] It would be virtually impossible for the Foreign Guarantor to meet this test.

The fourth defense permitted against an HDC under section 3-305(2) is the party's own discharge in bankruptcy.[134] For example, if the Foreign Guarantor to an ETN were to be generally discharged under the law of its country from satisfying its obligations, it could raise that discharge as a defense against a demand to pay the ETN.

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e.g., Citizen's Nat'l Bank of Quitman v. Brazil, 141 Ga. App. 388, 233 S.E.2d 482 (1977)); those entered contrary to a court order, (*see, e.g.*, New Jersey Mortgage & Inv. Corp. v. Berenyli, 140 N.J. Super. 406, 356 A.2d 421 (1976); and usurious contracts (*see, e.g.*, Fed. Deposit Ins. Corp. v. Wood, 758 F.2d 156 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 308 (1985)). *But see* Bank of North Carolina v. Rock Island Bank, 630 F.2d 1243 (7th Cir. 1980) (noting that usury may be a "real" defense which would prevent an HDC from recovering under the note).

[129] *See, e.g.*, Pacific Nat'l Bank v. Hernreich, 240 Ark. 114, 398 S.W.2d 221 (1966).

[130] *See, e.g.*, Universal Acceptance Corp. v. Burks, 7 U.C.C. Rep. 39 (D.C. Ct. Gen. Sess. 1969).

[131] Questions of corporate right and power to act are usually decided under the law of the jurisdiction in which the corporation was created or acted, as opposed to the jurisdiction whose law was selected by the parties to govern the contract. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 296 (1969).

[132] U.C.C. § 3-305(2)(c) and comment 7 (1984).

[133] *Id.* at § 3-305 comment 7 (1984). The typical example is the case of a party tricked into signing an instrument under the belief that it is a receipt or some other document. *Id.*

[134] *Id.* at § 3-305(2)(d) (1984).

This is a major risk for Discounting Banks and other investors in ETNs that underscores the importance for the party that will ultimately rely on the Foreign Guarantor or Importer's ability to pay the ETN of carefully evaluating that entity's financial strength before entering the arrangement.

Fifth, a party may assert against an HDC any other defense of which the HDC had notice when he accepted the negotiable instrument.[135] If a holder has notice that all parties to the instrument have been discharged, he cannot become an HDC.[136] Where the holder knows only that a specific party has been discharged, that discharge is valid against him. While no Discounting Bank would knowingly purchase an ETN from which the Foreign Guarantor had been discharged, there is some risk, given the size of most financial entities that would purchase ETNs as Discounting Banks, that such an entity might purchase such a "discharged" instrument.

A final valid defense against an HDC is forgery or execution by an unauthorized signature. U.C.C. section 3-305 does not expressly provide for this because that section discusses only the defenses of a "party" to the instrument, i.e., one who has signed the instrument.[137] If an HDC sues a person on an instrument, that person may always demonstrate that he is not a party by showing that his signature was forged or is otherwise unauthorized, so long as his negligence did not contribute to the making of the unauthorized signature.[138] Thus, forgery or other unauthorized use of the Foreign Guarantor's signature is another major risk for the Discounting Bank and the United States investor in ETNs.

C. *The Foreign Guarantor's Possible Waiver of Defenses*

As noted, the U.C.C.'s HDC and guaranty provisions protect the Discounting Bank as an HDC of the ETN from the vast majority of suretyship defenses that otherwise would be available to the Foreign Guarantor. Nonetheless, three significant defenses remain: the Foreign Guarantor's lack of power to guaranty the ETN; its discharge in

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[135] *Id.* at § 3-305(2)(e) (1984).

[136] *Id.* at § 3-302(1)(c) (1984).

[137] *Id.* at § 1-201(29) (1981).

[138] *Id.* at § 3-406 (1984). This problem generally does not arise as a defense to an action by an HDC because, if the unauthorized signature is in the chain of title, the holder is generally not a HDC. Unless the paper is later acquired by the person whose signature was unauthorized, there can be no later holder of the paper. The Foreign Guarantor, as an accomodation party, would not be in the chain of title of the ETN.

bankruptcy; and forgery or other unauthorized execution of the instrument. As discussed below, the Foreign Guarantor may not waive these defenses in its guaranty of the ETN.

A waiver is the intentional relinquishment of a known right.[139] If the Foreign Guarantor's signature were forged on the ETN's guaranty, he could not be construed as having intentionally given any waiver of defenses contained in that instrument. Thus, a waiver for forgery in the ETN would be ineffective.

As a general rule, parties may waive all rights which they may dispose of by contract.[140] The only limitation to waiver by agreement is public policy;[141] the parties may not waive rights imposed for their protection or rights not subject to their control. Consequently, when a party is prevented by law from engaging in certain activities, it may not "waive" that incapacity in order to give legal effect to its actions. Accordingly, parties cannot waive infancy, absence of valid incorporation or authority, duress, illegality, and other defenses which render contracts void (as opposed to voidable). Parties also cannot waive in advance discharge in bankruptcy proceedings, since the state and not the individual discharges debts in bankruptcy. Thus, the Foreign Guarantor's inclusion of a waiver in the ETN guaranty of available defenses is unwarranted.

D. Circumstances of the Foreign Guarantor's Discharge

Parties to a negotiable instrument are protected from liability not only by the defenses they may raise under the U.C.C. in an action by a holder, but also by circumstances of "discharge," which will release a party of its obligation to pay. The U.C.C. specifies certain situations in which the liability of a party to an instrument will be discharged,[142] only two of which cause potential problems for the ETN transaction. First, a fraudulent and material alteration of the instrument sometimes discharges a party's liability.[143] Second, a party is generally discharged to the extent the holder impairs the party's right of recourse against another person or the collateral.[144] The remainder of this subsection examines these two issues.

1. Alteration

An alteration of a negotiable instrument discharges the parties to

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[139] RESTATEMENT (SECOND) OF CONTRACTS § 84 comment b (1981).
[140] *See id.*
[141] CORBIN, CORBIN ON CONTRACTS § 1515 (1962).
[142] U.C.C. § 3-601 (1984).
[143] *Id.* at §§ 3-601(1)(f), 3-407 (1984).
[144] *Id.* at §§ 3-601(1)(d), 3-606 (1984).

the paper when it is both "material" and "fraudulent."[145] An alteration is "material" to the extent it makes any change, however slight, in a party's contract.[146] If the holder alters the instrument, this discharges any party whose contract is changed, unless that party assents to the alteration or is precluded, as by estoppel, from asserting this defense.[147] A subsequent HDC, however, may in any case enforce the instrument according to its original terms.[148]

Discharge due to alteration of the instrument would have only limited application to the ETN transaction. Neither the Importer nor the Foreign Guarantor would be holders of the ETN, so no alteration that they made would discharge themselves.[149] If the Discounting Bank, as holder of the ETN, materially and fraudulently altered the ETN, then both the Importer and the Foreign Guarantor would be discharged. Such an alteration by the Discounting Bank would deprive any United States investor who purchases an ETN-backed security secured by an ETN pool containing the altered ETN of its recourse against the foreign parties. To assure the protection of the United States investor, participation certificates in ETN pools should include a warranty by the Discounting Bank that it has not and will not make material fraudulent alterations of ETNs in the underlying pool.

Alteration by the Exporter would not discharge the foreign parties once the ETN is negotiated to an HDC, since, as noted above, an HDC, even when it takes from a holder who has materially and fraudulently altered the instrument, may always enforce the instrument according to its original terms.[150] In such a case, however, the Discounting Bank, like an HDC, could enforce the ETN against the foreign parties only according to the original tenor of the note.[151] Thus, if the Discounting Bank paid the Exporter according to the altered terms, it would not be able to recover the difference from the Importer or the Foreign Guarantor. Moreover, as discussed in Part V above, since the Exporter will have endorsed the ETN to the Discounting Bank with the express disclaimer of the presentor's warranty under the U.C.C. that the instrument has not been materially altered,[152] the Discounting Bank probably would be unable to recover the difference from the Exporter.

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[145] *Id.* at § 3-407(2)(a) (1984).
[146] *Id.* at § 3-407 comment 1 (1984).
[147] *Id.* at § 3-407(2)(a) (1984).
[148] *Id.* at § 3-407(3) (1984).
[149] *Id.* at § 1-201(20) (1981); *id.* at § 3-407(2)(b) (1984).
[150] *Id.* at § 3-407(3) (1984).
[151] *See supra* note 148.
[152] U.C.C. § 3-417(1)(c) (1984).

The Discounting Bank, however, would not become an HDC if it took the ETN either with notice of any such alteration or under circumstances where it should have noticed the alteration.[153] Consequently, a Discounting Bank having notice or suspicion of a material alteration to the ETN should follow standard banking practice and refuse to purchase the instrument from an Exporter.

Some possibility exists that material alteration of an ETN may be waived as a ground of discharge. Section 3-407(2)(a) of the U.C.C. provides that the holder's fraudulent, material alteration of an instrument discharges a party thereto "unless that party assents or is precluded from asserting the defense."[154] The official comment to this subsection notes that assent to an alteration, when given either before or after the alteration is made, prevents a party from asserting the discharge.[155] A party may also be barred by estoppel.[156]

In general, courts permit parties to waive grounds of discharge.[157] A waiver of rights with respect to fraudulent conduct, however, may be contrary to public policy. The U.C.C. specifically prohibits the disclaimer by agreement of the "obligations of good faith, diligence, reasonableness and care prescribed by this Act."[158] A holder that alters the amount of an ETN upward and then attempts to collect the higher amount would clearly violate this provision. On the other hand, it would not be a fraudulent holder who would be asserting a waiver of alteration against an "innocent" Foreign Guarantor, but the equally innocent Discount Bank as an HDC. The courts may well permit two innocent parties to distribute by agreement the risk of an unrelated third party's fraud. Therefore, the model ETN that appears in the Appendix to this Article contains a clause whereby the Foreign Guarantor waives alteration of the instrument as a ground of discharge, except when the party asserting the waiver was involved in the fraud.

2. Impairment of Recourse

The second ground for discharge relevant to the ETN transaction is the impairment of recourse.[159] A party is discharged when the holder of a negotiable instrument performs certain acts which impair

[153] *Id.* at § 3-407 comment 4; *id.* at § 3-302(1)(c); *id.* at § 3-304(1)(a) (1984).
[154] *Id.* at § 3-407(2)(a) (1984).
[155] *Id.* at § 3-407 comment 3(c) (1984).
[156] *Id.*
[157] *See* Crompton-Richmond Co. v. Briggs, 560 F.2d 1195, 1200-01 (5th Cir. 1977).
[158] U.C.C. § 1-102(3) (1981).
[159] *Id.* at § 3-606 (1984). A party is also discharged when the holder unjustifiably impairs collateral for the instrument given by the party or on his behalf or by any

the party's recourse against another person. Those acts include granting a release, agreeing not to sue, agreeing to suspend the right to enforce the instrument, or otherwise discharging the other person.[160] Such acts operate as a discharge only if the party that would be discharged does not consent to the acts and if the holder does not expressly reserve its rights.

Discharge for impairment of recourse is important in the ETN context because, as discussed above in Part V, the Exporter will endorse the ETN "without recourse" to the Discounting Bank. This "release" of the Exporter, however, would discharge neither the Foreign Guarantor nor the Importer since neither would have recourse against the Exporter on the ETN. For the same reason, the Discounting Bank's sale of the ETN without recourse in the secondary market also would not discharge the foreign parties.

Impairment of recourse or collateral does not constitute grounds for discharge of the Foreign Guarantor's obligations on the ETN for yet another reason: the model ETN that appears in the Appendix contains an express waiver of impairment of recourse or collateral as grounds for discharge. The U.C.C. specifically provides that such waivers are valid under the U.C.C.,[161] and courts typically uphold them[162] if they are unequivocal and precise.[163]

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person against whom the party has a right to recourse. Since the ETN transaction is unsecured, the Discounting Bank generally need not be concerned about impairing collateral. *Id.*

[160] *Id.* at § 3-606(1)(a) (1984); *see also* Note, *Discharge of Sureties — Impairment of the Right of Recourse*, 9 BOSTON COLL. INDUST. & COMM. L. REV. 970 (1968). An agreement to extend the maturity of a note constitutes a suspension of recourse sufficient to discharge parties to the paper. *See* B. SUMMERS & J. WHITE, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 522-25 (2d ed. 1980); *see* Lee Fed. Credit Union v. Gussie, 542 F.2d 887 (4th Cir. 1976).

[161] *See id.* at § 3-606 comment 2 (1984).

[162] *See* Walter E. Heller & Co. v. Ocean Air Tradeways, 343 F. Supp. 519, 522-26 (S.D.N.Y. 1972); American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975); Rhode Island Hospital Trust Nat'l Bank v. Nat'l Health Foundation, 199 R.I. 823, 384 A.2d 301 (1978); Republic Nat'l Bank of New York v. Sabet, 512 F. Supp. 416, 426 (S.D.N.Y. 1981), *cert. denied*, 456 U.S. 976 (1982); Etelson v. Suburban Trust Co., 263 Md. 375, 283 A.2d 408 (1971); Holmes v. Rushville Prod. Credit Ass'n, 170 Ind. App. 509, 353 N.E.2d 509, *vacated on other grounds*, 170 Ind. App. 517, 355 N.E.2d 417 (1976); Executive Bank of Fort Lauderdale v. Tighe, 54 N.Y.2d 330, 429 N.E.2d 1054 (1981); Schauss v. Garner, 590 P.2d 1316 (Wyo. 1979); Farmington Nat'l Bank v. Basin Plastics, Inc., 94 N.M. 668, 615 P.2d 985 (1980).

[163] *See* National Acceptance Co. v. Demes, 446 F. Supp. 388 (N.D. Ill. 1977); Executive Bank v. Tighe, 66 A.D.2d 70, 411 F.Y.S.2d 939 (N.D. Ill. 1978); D.W. Jaquays & Co. v. First Security Bank, 101 Ariz. 301, 419 P.2d 85 (1966).

E. Summary

The U.C.C. gives the Discounting Bank and the United States investor reasons to have considerable confidence in the ETN's Foreign Guaranty. The Foreign Guarantor may assert none of the traditional suretyship defenses that could be raised if the Discounting Bank were not an HDC. Instead, the Foreign Guarantor may assert only the small number of defenses allowed in section 3-305(2) of the U.C.C. The most important defenses with respect to the ETN transaction are the Foreign Guarantor's lack of legal right or power to guaranty the ETN, its discharge in bankruptcy, and the forgery of, or other lack of authority for, its signature. None can be validly waived. These are the chief commercial risks in the ETN transaction, just as they are serious risks in virtually every financial transaction.

VII. ETN-BACKED SECURITIES

This Article has focused on aspects of the ETN which make it a superior instrument for financing individual export sales. Beyond its use in individual transactions, however, the ETN may be used synergistically to create the "ETN-backed security," an investment vehicle for drawing substantial, untapped investment funds into the export sales market. The first step in creating ETN-backed securities would be the collection, or "pooling," of ETNs of similar amounts, maturities, and perhaps countries-of-origin. Such a pool could be created by a Discounting Bank that has purchased a number of ETNs or by some other professional manager experienced in collecting assets such as ETNs for pooling and securitization. After creation of an ETN pool, the pool's manager would sell undivided fractional interests in the pool in the form of ETN-backed securities to private investors. The pool manager would use funds from the investors to pay the selling Discounting Banks for the pool's ETNs and to compensate

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The principal danger under the impairment provisions, as discussed above, is the discharge of the Foreign Guarantor which, without waiver, would result from extending the term of the Importer's obligation on the ETN. An appropriate waiver has been included in the ETN to eliminate the difficulty. The drafting of the waiver is complicated by the Code provision that "specified consent to extension authorizes a single extension for not longer than the original period." U.C.C. § 3-118(f) (1984). The comment states that, unless otherwise indicated, "consent is to be construed as authorizing only one extension for not longer than the original period of the note." *Id.* at comment 7. To prevent multiple extensions from constituting grounds for discharge, the language must be explicit to that effect. *See* Union Constr. Co. v. Beneficial Standard Mortgage Investors, 125 Ariz. 433, 610 P.2d 67 (1980).

itself for managing the pool. ETN security-holders would be paid according to the terms of their securities as ETNs in the underlying pool are paid.

A. *Reasons for ETN Securitization*

There are three reasons why the "securitization" of ETNs would increase the availability of funds for United States export sales beyond those generated by the use of single ETNs in such transactions. First, the pooling of ETNs will lower the risk of investing in ETNs below the risk reduction achieved through the terms of individual ETNs. Although the ETN is designed to limit substantially the risk of default and nonrecovery for United States financers, the terms of the ETN do not eliminate the risk inherent in investing all one's assets in a single source. The pooling of ETNs, and the subsequent issuance of ETN securities reflecting an interest in all the ETNs in a particular "pool," will substantially dilute the risk of default on an individual ETN by distributing a fraction of that risk to each purchaser of a pool's securities. Thus, unlike the holder of an ETN that is not pooled, no individual investor in an ETN pool will bear the full risk of default on any particular ETN in the pool.

Second, the securitization of ETNs will provide smaller investors access to the export finance market. Ordinarily, only relatively large institutions, such as commercial banks, invest in export transactions. This result is due to the relatively substantial minimum investment required in an export transaction and the even larger investment that is typically necessary to purchase enough export paper to spread the risks. The securitization of ETNs will allow small investors, as well as large investors willing to invest only moderate amounts in export trade, to participate in export finance with relatively small investments and simultaneously achieve significant risk diversification.

Finally, the pooling of ETNs is likely to attract more United States banks into the export finance market. Such banks will welcome the opportunity to accomodate valued customers by discounting their export trade paper and, by selling that paper to a pool, raising cash to acquire other assets and avoid having the ETNs counted against their single borrower lending limits.[164] Furthermore, the creation of ETN pools will increase opportunities for banks and other financial entities to generate fee income by acting as pool administrators.

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[164] *See* 12 U.S.C. § 84 (1982).

B. *Domestic Guaranty of ETN Pools*

ETN-backed securities would be even more attractive to investors who have heretofore avoided the export financing market if a financially sound United States entity were to guaranty the payment of the ETNs in an underlying pool.[165] Private institutions such as United States insurance companies and commercial banks could provide a domestic guaranty of ETN pools.[166] The premiums that these institutions would likely charge for their guaranties would be quite high, however, thus lowering the overall rate of return on the securities insured by the pool.

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[165] Outside the context of securitized ETNs, an individual ETN also would be more attractive to banks and other United States financial institutions if it were guarantied in some manner by a domestic United States entity as well as the Foreign Guarantor.

[166] Most state and federally-chartered banks within the jurisdiction of the federal bank regulators are technically prohibited from serving as guarantors or sureties. For example, national banks, which are chartered by the federal government, have long been prohibited from serving as sureties or guarantors under a line of federal cases interpreting the statute (12 U.S.C. § 24 (1982)) that lists the powers of such banks. *See* Bowen v. Needles Nat'l Bank, 94 F. 925 (9th Cir. 1899); Lord, *The No-Guaranty Rule and Standby Letter of Credit Controversy*, 96 BANKING L.J. 46, 47 (1979). The Federal Deposit Insurance Corporation has flatly prohibited the state and federal banks whose deposits it insures from becoming guarantors or sureties. *See* 12 C.F.R. § 332.1(d) (1986).

Nevertheless, such banks would be able, in effect, to guaranty ETNs either by endorsing and selling them *with* recourse to the administrators of ETN pools or by merely issuing standby letters of credit. Unless the endorsement otherwise specifies (by such words as "without recourse"), an endorser on a negotiable instrument:

> engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who does take it up was not obligated to do so.

U.C.C. § 3-414(1) (1984). The Comptroller of the Currency, which regulates national banks, has indicated in interpretive letters that such guaranty by endorsement is permitted: "A line of court decisions has established generally that it is beyond the power of a commercial bank to guaranty the obligation of another party, *other than by way of endorsement and sale of a note previously owned by the bank.*" Fed. Banking L. Rep. (CCH) 85,132, letter from Charles F. Byrd, Assistant Director, Legal Advisory Services Division, Comptroller of the Currency (Oct. 5, 1978) (emphasis added).

However, a Discounting Bank's endorsement and sale of an ETN to an ETN pool administrator *with* recourse would likely prevent that bank from removing that instrument from its books as an asset. And in any case, the sale of a note with recourse or insuring a stand-by letter of credit to back the instrument is likely to give rise to certain prudential limitations currently being contemplated by the federal bank regulators.

As an alternative to a private-source domestic guaranty, a public sector financial entity such as Eximbank could effectively secure ETN pools. Eximbank is an independent agency of the United States Government established to finance and facilitate the export of United States goods and services.[167] As part of its export support services, Eximbank is specifically authorized to issue guaranties.[168] Indeed, because of the Reagan administration's budget proposal to eliminate Eximbank's direct loan programs, Eximbank's export-trade assistance may soon be limited to guarantying export transactions.[169]

Eximbank already has implemented several guaranty programs in accordance with its statutory and regulatory authority. Under its medium-term bank guaranty program, Eximbank guaranties notes that United States banks purchase without recourse from United States exporters.[170] Eximbank also guaranties repayment of certain loans that United States banks make to foreign importers of United States exports.[171] These guaranties are typically issued with an Eximbank direct loan to the borrowing foreign importer.

Eximbank should find it particularly easy to justify using its guaranty authority in connection with ETNs. ETNs are not only ideal instruments for financing export trade generally, but as noted above, they also are especially attractive instruments to use in financing small business-related exports due to their simplicity.

Neither Eximbank guaranty issued in connection with the two programs described above appears on promissory notes or other documentation between the parties to the guarantied transaction. Instead, the guaranty is memorialized in a separate agreement between Eximbank and the bank that is the beneficiary of the guaranty. Nevertheless, Eximbank does occasionally place its guaranty directly on guarantied promissory notes.

Eximbank does this, for example, in connection with its support of the Private Export Funding Corporation (PEFCO). PEFCO is a private corporation owned by a group of fifty-five banks and seven industrial corporations that serves as a supplemental source of long-term financing for foreign buyers of high-cost United States exports

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[167] *See* 12 U.S.C. § 635(a)(1) and (a)(c) (1982); 12 C.F.R. § 401.1(a) (1986).

[168] *See* 12 U.S.C. § 635(a)(1), (6)(1)(A), and (c)(2) (1982); *id.* at § 6359(3)(A)(B); 12 C.F.R. § 401.1(c)(10) (1980).

[169] *See* 3 INT'L TRADE REP. 212 (Feb. 12, 1986).

[170] *See* FINANCING AND INSURING EXPORTS: A USER'S GUIDE TO EXIMBANK AND FCIA PROGRAMS III-I (Eximbank 1985).

[171] *Id.* at VII-1.

such as aircraft, industrial plants, and conventional or nuclear power plants. PEFCO makes long-term, fixed-rate loans to foreign buyers of these goods with payment terms that typically are unacceptable to commercial banks.[172] It obtains most of the funds for its lending operations by selling its own debt obligations through major securities underwriters in the public market or through private placements. A pledge of Eximbank-guarantied loans to a bank trustee for the benefits of the noteholders secures the principal on these intermediate-term notes.[173] Eximbank's guaranty of loan repayment is memorialized in a guaranty placed directly on the borrower's note pledged to the bank trustee. Similarly, if Eximbank's proposed "I Match" program is authorized by Congress, Eximbank will guaranty promissory notes which could be sold to a trust, whose trustee would be able to issue trust interests indirectly guarantied by Eximbank.[174]

Despite these and other instances of Eximbank's direct placement of its guaranty on promissory notes, Eximbank usually does not place guaranties on negotiable instruments. There appear to be two reasons for this. First, as a general rule, Eximbank does not allow debt it guaranties to be freely transferred.[175] This rule reflects Eximbank's desire to ensure that holders of Eximbank-guarantied debt will be responsible entities that will inform Eximbank in case of default, supervise eventual claims, and generally aid in the preservation of Eximbank's rights. As the description of Eximbank's guaranty of PEFCO financing demonstrates, Eximbank occasionally allows its guaranty to be transferred by placing its guaranty on a commercial instrument when Eximbank is reasonably sure that the ultimate holder of this instrument, and thus the ultimate beneficiary of the guaranty, will be sufficiently responsible. This would be the case, for example, when that holder is a reputable bank trustee, as with PEFCO's Eximbank-guarantied financings. Of course, an arrangement under which Eximbank would guaranty ETN-backed securities could be structured so as to assure Eximbank that ETN pool managers, who will be the ultimate holders of ETNs, will be reputable entities capable of protecting Eximbank's interests as the domestic ETN guarantor.

The second reason for Eximbank's general inability to guaranty trade-related negotiable instruments in connection with the issuance

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[172] *Id.* at VIII-1.

[173] *Id.*

[174] *See generally* 3 INT'L TRADE REP. 212-13 (Feb. 12, 1986).

[175] *See* Eximbank Report 1 (Int'l Publication Jan. 13, 1986).

trade-backed securities is that the United States Department of the Treasury, which is charged with raising funds for the Federal Government, has generally opposed the establishment of a secondary market in Eximbank-financed obligations. The Treasury Department believes that Eximbank-backed securities would compete with Treasury-issued instruments for investors, thereby in its view increasing Treasury's cost of raising funds.

The Treasury Department's objection to Eximbank's guaranty of negotiable instruments is misplaced, for the quantity of Eximbank-guarantied negotiable paper would almost certainly be negligible compared to Treasury borrowings. Thus, it is highly unlikely that such Eximbank-backed paper will affect the quantity and rate of Treasury's borrowings. Moreover, if the market in Eximbank-backed securities were to grow to the point where it actually competed with Treasury borrowings, the benefits that such a large market would yield for United States exporters in terms of increased and less expensive financing would justify marginal increases in Treasury's cost of raising funds.

VIII. CONCLUSION

The United States lackluster export trade has resulted in part from the lack of financing for United States manufacturers who wish to sell their goods abroad. The ETN seeks to fill this void, particularly with respect to small and medium-size exporters, by attracting investment to the export trade market. The ETN is based on the *forfait* promissory note, which has driven an increasing amount of international trade in Europe during the past two decades but has not been accepted in the United States for a variety of reasons, including the risks associated with enforcing the *forfait* note after default. The ETN reduces these risks by including generally enforceable choice-of-law and choice-of-forum clauses that should greatly help ETN-holders secure enforceable judgments against delinquent Importers that have issued ETNs and their Foreign Guarantors.

The ETN also has the potential to serve as an asset against which securities could be issued to a wider and more diverse group of investors than would otherwise participate in export financing. In this regard, the ETN presents the federal government, through Eximbank, with the opportunity to stimulate United States export trade by guarantying the ETNs underlying such securities. The principal obstacle to this arrangement appears to be the Treasury Department's concern that Eximbank's guaranty of transferable trade debt might inhibit Treasury's ability to raise funds. Assuming that this intramural concern can be accomodated, ETN-backed securities guarantied by Eximbank should cause an infusion of substantial new investment funds into the United States export market.

APPENDIX

Export Trade Note

PROMISSORY NOTE

______, 19___ [date of issue]
New York City, U.S.A.

U.S. $______

FOR VALUE RECEIVED, ______________________________
____
____
[name and address of Importer] ("Maker") by this promissory note (the "Note") hereby unconditionally promises to pay on ____________
____, 19____, to the order of______________________________
____
[name of Exporter] at ______________________________
____
[name and address of U.S. commercial bank in New York State] the sum of ____
______________________________ U.S. Dollars ($______).

1. *Taxes Not Deductible*: This Note is payable in lawful money of the United States of America without any set-off or abatement whatsoever, including but not limited to any deduction for or on account of any present or future taxes, duties or other charges levied or imposed on this Note or the proceeds or the holder of this Note by the government of the country of Maker or any political subdivision or taxing authority thereof.

2. *Waiver of Presentment, Protest, and Notice of Dishonor*: Maker and any endorser of this Note hereby waive diligence, presentment, demand, protest or notice of nonpayment or dishonor with respect to this Note as well as any right to other notices or demands that might otherwise be required by law.

3. *Effect of Holder's Delay or Partial Exercise of a Right*: No delay or omission on the part of the holder of this Note in exercising any power or right under this Note shall operate as a waiver of the power or right, nor shall any single or partial exercise of any power or right preclude further exercise of that power or right.

4. *Assignability and Binding Effect*: Neither this Note nor any obligation hereunder may be assigned by the Maker. Any holder of this Note may at any time and from time to time assign or otherwise transfer this Note and/or any of said holder's rights hereunder. This Note and the provisions thereof are to be binding on the heirs, executors, adminis-

trators, and successors of Maker. The provisions of this Note shall continue in force notwithstanding any change in any partnership that is a party to this Note, whether such change occurs through death, retirement, or otherwise.

5. *Certification of Completeness*: Maker certifies that all blank spaces in this Note were completed and filled in before Maker signed this Note.

6. *Jurisdiction*: Maker hereby irrevocably:

(a) Submits to the jurisdiction of the courts of the State of New York in respect of any legal proceeding in connection with this Note;

(b) Consents to the service of process out of any such court in such legal proceedings by the mailing of a copy or notice thereof by prepaid mail to the address of the Maker and confirms that failure by Maker to receive such copy of notice shall not prejudice due service;

(c) Waives:

(i) Any objection it has or may hereafter have to the laying of venue of any such legal proceeding in any of the said courts;

(ii) Any claim that it has or may hereafter have that any such legal proceedings have been brought in an inconvenient forum;

(d) Agrees that nothing herein shall affect the right to service of process in any other manner permitted by law or preclude the right to bring proceedings in any other court or courts of competent jurisdiction as the holder of this Note may elect and that legal proceedings in any one or more jurisdictions shall not preclude legal proceedings in any other jurisdiction.

7. *Sovereign Immunity*: Maker hereby irrevocably agrees not to claim and irrevocably waives any claim or right (whether or not claimed) which it has or may hereafter acquire under any constitutional provision, law, decree, regulation, treaty or international agreement to immunity for itself or for any of its revenues, assets or properties (including any property held for the account of Maker): (i) from the jurisdiction of any court (including but not limited to any court of the United States of America or the State of New York); (ii) from attachment prior to judgment; (iii) from attachment in aid of execution of a judgment; (iv) from execution of judgment; (v) from set-off; or (vi) from any other legal process in any jurisdiction with respect to any of Maker's obligations under this Note. Maker hereby represents and warrants that its actions in connection with this Note, including the financing for which this Note is evidence, constitute private and commercial acts as distinct from public acts.

8. *Governing Law*: This Note, including all rights and obligations of any party hereto, shall be governed by, and construed in accordance with, the law of the State of New York in the United States of America. Unless the context requires otherwise, all terms used in this Note that are defined in the Uniform Commercial Code of the State of New York shall have the meanings stated therein.

[Name of Importer]

By: ______________________

(signature)

Name: ____________________

Title: ____________________

[Exporter Endorsement to Discounting Bank]

______________________________ (the "Endorser") hereby endorses this Promissory Note (the "Note") without recourse to ______________________, and in connection with such endorsement expressly disclaims the following warranties:

1. That the Endorser has good title to this Note or is authorized to obtain payment or acceptance on behalf of one who has such title;
2. That the Endorser has no knowledge that the signature(s) of the maker(s) or drawer(s) is (are) not genuine or unauthorized;
3. That the Note has not been materially altered;
4. That no defense of any party to the Note is good against the Endorser;
5. That the Endorser has no knowledge of any insolvency proceeding affecting any party to the Note.

[Foreign Guarantor's Note Guaranty; to be placed on the Note]

GUARANTY OF PAYMENT

FOR VALUE RECEIVED, the undersigned hereby unconditionally and irrevocably guaranties, as primary obligor and not merely as surety, the payment in full when due of the foregoing promissory note (the "Note"). The undersigned unconditionally agrees that if the Note is not paid when due, the undersigned will promptly pay the Note without notice or demand of any kind, and the holder of the Note will not be required at any time to proceed against the Maker, any endorser or other guarantor of, or any collateral held as security for, the Note. The undersigned agrees to pay all costs and expenses, including legal fees, incurred in the collection of the

Note and in the enforcement of this guaranty. The undersigned hereby waives the benefits of "division" and "discussion," diligence, presentment, demand for payment, protest, notice of dishonor and all other notices and demands whatsoever. The obligations of the undersigned hereunder are continuing, absolute and unconditional, irrespective of the genuineness, validity, regularity, enforceability or value of the Note or of any other circumstance which might otherwise constitute a legal or equitable discharge or defense of a surety or guarantor, all of which are hereby expressly waived. The undersigned explicitly waives as a ground of discharge any alteration of the Note, even where the alteration was fraudulently made, except against a holder who himself was complicit in the fraud, and agrees to pay the Note according to its terms as the holder received it. Neither any renewal or extension of the Note, regardless of the number of extensions which may be made from time to time, nor any release of any person primarily or secondary liable on the Note, shall affect the liability of the undersigned. The undersigned expressly agrees that the holder shall be deemed to have exercised reasonable care in the custody and preservation of any collateral given for the Note if the holder takes such action for that purpose as the undersigned shall request in writing, but failure of the holder to comply with any such request shall not of itself be deemed a failure to exercise reasonable care, and no failure of the holder to preserve or protect any rights with respect to the collateral against prior parties, or to do any act with respect to the preservation of the collateral not so required by the undersigned, shall be deemed a failure to exercise reasonable care in the custody or preservation of the collateral. The undersigned hereby (i) consents to be bound by all the terms and provisions of the Note, and (ii) repeats and makes each and every waiver, consent, and submission made by the Maker of the Note. Without limiting the generality of the foregoing, the undersigned explicitly agrees that the following paragraphs of the Note are hereby incorporated in this Guaranty by reference as if stated in full herein, provided that the term "Guaranty" is substituted for the term "Note" and the term "undersigned" is substituted for the term "Maker": paragraphs 1, 3, 4, 6, 7, and 8.

[Name of Guarantor]

By: ______________________
(signature)

Name: ______________________
Title: ______________________

Date: ________________, 19____.