

NEGOTIABLE INSTRUMENTS

■ A negotiable instrument

- (1) is **written**;
- (2) is **signed** by its *maker* or *drawer*; and
- (3) sets forth the signer's **unconditional** promise or order to pay
- (4) a **fixed amount** of money (with or without interest in a specified amount or at a specified rate)
- (5) **on demand** or at an **exact future time**
- (6) to a **specific person**, or to **order**, or to the instrument's **bearer**.

TYPES OF NEGOTIABLE INSTRUMENTS

- **Draft:** An unconditional **order** (including a *check*) by which the party creating the draft (the *drawer*) orders another party (the *drawee*), typically a bank, to pay money to a third party (the *payee*).
 - **Time Draft:** A draft payable at a time certain.
 - **Sight Draft:** A draft payable on presentment.
 - **Acceptance:** A drawee's written promise to pay the draft when due or on presentment. A drawee that has so bound itself is an *acceptor*.
 - **Trade Acceptance:** A draft drawn by a seller of goods ordering the buyer to pay a specified sum of money to the seller, usually at a specified future time. The buyer accepts the draft by signing and returning it to the seller.
- **Promissory Note:** A *maker's* written **promise** to pay a fixed sum of money to another person (the *payee*) on demand or at a specified future time.
- **Certificate of Deposit:** A note by which a bank or similar financial institution acknowledges receiving money from a party and promises to repay the money, plus interest, to the party or the party's designee, on a certain date.

NEGOTIABILITY: WRITING & SIGNATURE

- **Written Form:** A negotiable instrument must be written on material that
 - (1) lends itself to **permanence** and
 - (2) is **portable**.

- **Signature:** Any symbol
 - (1) made manually or by means of a device or machine,
 - (2) using any **name**, including a trade or assumed name, **word, mark, or symbol**
 - (3) the signer executes or adopts with a present **intention to authenticate** a writing.

- Who must sign?
 - (a) The **maker**, or her authorized agent, must sign the instrument if it is a **note** or a **certificate of deposit**.
 - (b) The **drawer**, or his authorized agent, must sign the instrument if it is a **draft** or a **check**.

NEGOTIABILITY: UNCONDITIONALITY

- **Promise or Order:** A negotiable instrument must contain an express order or promise to pay.
 - Except in the case of a *certificate of deposit*, merely acknowledging a debt is not sufficient without evidence that the maker or drawer affirmatively undertakes to repay the debt.

- **Unconditionality of Promise or Order:** A promise or order is conditional (and, therefore, not negotiable) if it states
 - (1) an **express condition** to payment,
 - (2) that the promise or order is **subject to or governed by** another writing, or
 - (3) that the rights or obligations with respect to the promise or order are **stated in** another writing.

- Merely mentioning another writing does not make a promise or order conditional.

NEGOTIABILITY: FIXED AMOUNT

- **Fixed Amount:** An amount (including interest, if any) ascertainable from the face of the instrument – with or without reference to some outside source of information identified on the face of the instrument.
- **Payable in Money:** The amount due must be payable in “a medium of exchange authorized or adopted by a domestic or foreign government as part of its currency.”

NEGOTIABILITY: TIME FOR PAYMENT

- **Payment on Demand:** An instrument is payable on demand, “at sight,” or “upon presentment” if it is subject to payment immediately upon being presented to the payor or drawee.
 - **Presentment** occurs when a person entitled to enforce an instrument demands that the payor or drawee pay or accept the instrument.
 - If no time for payment is specified, a negotiable instrument is **presumed** to be payable on demand.
- **Payment at a Definite Time:** An instrument must be payable (1) on a **specified date**, (2) within a **definite period** of time, or (3) on a date or at a time **readily ascertainable** at the time the promise or order is made.
 - **Acceleration Clause:** A clause permitting a payee or other *holder* of a time instrument to **demand payment of the entire amount or balance due**, with interest, if a certain event occurs, such as failure to pay an installment when due.
 - **Extension Clause:** A clause in a time instrument that permits the **date of maturity** to be extended.

NEGOTIABILITY: PAYMENT TO WHOM

- **Order Instrument:** A negotiable instrument that is payable “to the order of” an identified payee (*e.g.*, “Pay to the Order of Joan Ebert”) or “to” an identified person “or order” (*e.g.*, “Pay to Joan Ebert or Order”).

- **Bearer Instrument:** A negotiable instrument payable “to bearer” or to “cash,” rather than to an identified payee.
 - **Bearer:** The person possessing a bearer instrument.

 - Any instrument payable to the following is a bearer instrument:
 - (1) “Payable to the order of bearer”;
 - (2) “Payable to Jane Smith or bearer”;
 - (3) “Payable to bearer”;
 - (4) “Pay cash”; or
 - (5) “Pay to the order of cash.”

FACTORS NOT AFFECTING NEGOTIABILITY

- The fact that an instrument is **undated** does not affect its negotiability, unless the date of the instrument is necessary to understand the payment term.
- **Antedating** or **postdating** an instrument does not affect its negotiability.
- **Interlineation**, other written or typewritten **alterations**, and even **conflicting terms** need not affect negotiability.
 - **Handwritten** terms take precedence over **typewritten** terms, and typewritten terms take precedence over **printed** terms.
 - **Words** take precedence over **figures**, unless the words are ambiguous in and of themselves.
- If the instrument **fails to specify the applicable interest rate**, the judgment rate of interest (defined by statute) becomes the interest rate on the instrument.
- Notations that an instrument is “nonnegotiable” or “not governed by Article 3” do not affect the negotiability of a check but may make other instruments nonnegotiable.