A/CN.9/328, annex I	*A/CN.9/318, annex*	*Source of modifications (paragraph numbers refer to this report. WP.41 refers to A/CN.9/WG.IV/WP.41)*
8(2)	3(1)	
8(3)	3(2)	
8(4) Variant A		Drafting Group
8(4) Variant B	5(4)	
9(1)	7(1)	Reworded by Drafting Group
9(2)	7(3)	
9(3)	7(5)	
9(4)		Para. 82
10(1)-(7)		Paras. 112-113
10(8)	8(6)	Paras. 102-103
Chapter III (Title)		Drafting Group
11 *chapeau*	5(3)	
11*(a)*	5(3)*(c)*	Drafting Group inserted "less than" in place of "different from"
11*(b)*	5(3)*(b)*	
12(1)	9(1)	Para. 131
12(2)-(5)*(b)*	9(2)-(5)*(b)*	"Value date" deleted in (4)*(b)*
12(5)*(c)*	9(5)*(c)*	Para. 139
12(5)*(d)*	9(5)*(d)*	Para. 143
12(6)	5(1 *bis*)	Reworded by Drafting Group
12(7)-(8)	9(6)-(7)	
13	10	
14	11	
15	12	

B. International credit transfers: comments on the draft Model Law on International Credit Transfers: report of the Secretary-General[a]

(A/CN.9/WG.IV/WP.41) [Original: English]

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INTRODUCTION

1. The Commission, in conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers (A/CN.9/SER.B/1) as a product of the work of the Secretariat, decided to begin the preparation of model rules on electronic funds transfers and to entrust the task to the Working Group on International Payments (A/41/17, para. 230).

2. The Working Group undertook the task at its sixteenth session held at Vienna from 2 to 13 November 1987. At that session the Working Group reviewed a number of legal issues set forth in a report prepared by the Secretariat (A/CN.9/WG.IV/WP.35). At the conclusion of the session the Working Group requested the Secretariat to prepare draft provisions based on the discussions during that session for its consideration at its next meeting (A/CN.9/297, para. 98).

3. At its seventeenth session held in New York from 5 to 15 July 1988 the Working Group considered a text of draft provisions for Model Rules on Electronic Funds Transfers that had been prepared by the Secretariat (A/CN.9/WG.IV/WP.37). At the close of the session the Working Group requested the Secretariat to prepare a revised draft of the provisions for the Model Rules (A/CN.9/317, para. 10).

4. The revised draft requested by the Working Group was published in A/CN.9/WG.IV/WP.39, accompanied by a commentary. Portions of articles 1 to 6 were considered by the Working Group at its eighteenth session held at Vienna from 5 to 16 December 1988. The text of the articles revised by the Working Group at that session, as well as those that it did not consider, was published in the annex to the report of the session (A/CN.9/318).

5. This report contains a commentary on the draft articles, indicating their history and their relation to other provisions.

6. A companion report, A/CN.9/WG.IV/WP.42, contains a discussion of the main issues to be decided in preparing the final text of the draft articles.

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Comments

1. The Working Group decided at its eighteenth session that the words "Model Law" should be used in the title to reflect the fact that the text was for use by national legislators and that the text should not for the time being be in the form of a convention (A/CN.9/318, paras. 12 and 13).

2. The use of the words "Credit Transfers" reflected the decision that only credit transfers and not debit transfers should be included (A/CN.9/318, para. 14). This decision is set forth as a rule in article 1(1). Credit transfers are defined in article 2*(a)*.

3. The word "electronic" is not used in the title as a result of the decision that the Model Law would be applicable to paper-based credit transfers as well as those made by electronic means (A/CN.9/318, paras. 15 to 17).

4. The Working Group decided that the Model Law should be restricted to international credit transfers and that that decision should be reflected in the title (A/CN.9/318, para. 18). The criteria for determining whether a credit transfer is international are to be found in article 1.

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

(1) This law applies to credit transfers where the originator's bank and the beneficiary's bank are in different countries.

(2) For the purpose of determining the sphere of application of this Law, branches of banks in different countries are considered to be separate banks.

*This law is subject to any national legislation dealing with the rights and obligations of consumers.

Comments

Internationality of a transfer

1. As indicated by the title, the Model Law will apply only to credit transfers that are international. The test of internationality in paragraph (1) is that the originator's bank and the beneficiary's bank are in different countries.

2. Since the application of the Law depends on the existence of two banks in different countries, normally the Law would not apply where the originator and the beneficiary had their accounts in the same bank. However, according to paragraph (2), for the purposes of the sphere of application of this Law, branches of banks in different countries are considered to be separate banks. Therefore, a transfer may be within the application of this Law even though only one bank is involved if the accounts are in branches of that bank in different countries.

3. The rule that the Model Law does not apply where the originator and the beneficiary have their accounts in the same bank applies as well to a bank that effects a transfer for its own account. Such a bank is an originator and not an originator's bank. Similarly a bank that receives credit for its account is a beneficiary and not a beneficiary's bank. Therefore, a credit transfer by Bank A for its own account to Bank B for its account made by instructing their mutual correspondent Bank C to debit and credit the appropriate accounts held with it, is not an international credit transfer and the Model Law would not apply even if the three banks were in different States. However, if the transfer was to Bank B for the credit of its customer, Bank B would be the beneficiary's bank. The transfer would be international if Bank B and Bank C were in different States. If it is considered desirable for the Model Law to apply whenever two banks are involved in different States, consideration could be given to introducing a definition of originator's bank as "(1) the receiving bank to which the payment order of the originator is issued if the originator is not a bank or (2) the originator if the originator is a bank" with a similar definition of "beneficiary's bank". If this suggestion is adopted, drafting changes involving the use of the term "originator's bank" would have to be made in articles 2*(a)*, 5(3)*(c)*, 7(1)*(a)* and 7(1)*(d)*. Similar drafting changes would have to be considered in respect of "beneficiary's bank".

4. In some cases involving a transfer from a customer's account in a financial institution in State A to an account in a financial institution in State B, application of this Law will depend on whether both financial institutions are considered to be banks under the definition of a bank in article 2*(e)*. If either financial institution was determined not to be a bank because it did not as an ordinary part of its business engage in credit transfers for other persons, the other financial institution would be both the originator's bank and the beneficiary's bank and the Model Law would not apply. Such a situation might arise where one of the financial institutions was a broker which would, on instructions of a customer, transfer a credit balance in a customer's brokerage account but which did not engage in credit transfers for its customers as an ordinary part of its business. See comments 10 and 11 to article 2.

5. A determination as to whether a credit transfer was international would also depend on how the transfer was structured. An example was given in the eighteenth session of the Working Group where the originator's bank in State A reimbursed the beneficiary's bank in State B by several different means. It was stated that these different means of reimbursing the beneficiary's bank for the transfer would determine whether some or all of the activities comprising the transfer would be considered to be international and fall within the sphere of application of the Model Law or would be considered to be domestic and fall outside of it (A/CN.9/318, paras. 25-26). This did not seem to be appropriate since the transfer would otherwise be identical from an economic point of view. Although the definition of a credit transfer in article 2*(a)* as comprising "a complete movement of funds from the originator to the beneficiary" might lead to the result that the Model Law would apply to all elements of a credit transfer that was international under article 1, the provision on the territorial application of the Law might lead to a different result. See comment 8, below.

6. International credit transfers may be denominated in the currency of the country where the originator's bank is located, in the currency of the country where the beneficiary's bank is located, or in some other currency or unit of account. If the originator's bank and the beneficiary's bank were in the same country, the Model Law would not apply to the transfer even if it was denominated in the currency of a third country. This result was adopted because, while the settlement between the originator's bank and the beneficiary's bank might have to pass through banks in the country of the currency in which the transfer was denominated, it may also be possible for settlement to be effected within the country where the two banks are located (A/CN.9/318, para. 21).

7. Restricting application of the Model Law to international credit transfers means that a State that adopts the Model Law will potentially have two different bodies of law governing credit transfers, one applicable to domestic credit transfers and the Model Law applicable to international credit transfers. In some countries there are no domestic credit transfers or the domestic elements of international transfers are segregated from purely domestic transfers. In other countries domestic credit transfers and the domestic elements of international transfers are processed through the same banking channels. In those countries it would be desirable for the two sets of legal rules to be reconciled to the greatest extent possible.

8. Since the Model Law is being prepared for international credit transfers, questions of conflict of laws naturally arise. Draft provisions on the territorial application of the Law are contained in article 12. Further consideration is given to the question in the companion report, A/CN.9/WG.IV/WP.42.

Consumer transfers

9. The Working Group decided at its eighteenth session that the Model Law should apply to all international credit transfers, including transfers made for consumer purposes.

Not only would this preserve the basic unity of the law, it would avoid the difficult task of determining what would be a credit transfer for consumer purposes. That was also thought to be of importance since special consumer protection legislation affecting credit transfers currently exists, and could be envisaged in the future, in only some of the countries that might consider adopting the Model Law.

10. At the same time, it was recognized that the special consumer protection legislation that exists in some countries, and that may be adopted in others, could be expected to affect some international credit transfers as well as domestic credit transfers. To accommodate this possibility, the footnote to article 1 was adopted to indicate that the Model Law would be subject to any national legislation dealing with the rights and obligations of consumers, whether the provisions of that legislation supplemented or contradicted the provisions of the Model Law (A/CN.9/318, paras. 30 to 33).

Effect of contractual agreement

11. At its eighteenth session the Working Group decided that the extent to which the Model Law would be subject to the contrary agreement of the interested parties would be considered in connection with the individual provisions (A/CN.9/318, para. 34). In the current draft mention of the effect of contractual rules is made in articles 3(1), 4(2)*(b)*, 5(1), 5(4)*(a)*, 6(2)*(a)*, 7(1)*(a)*, 9(6), 11(1), 11(3), 12(1) and 12(2).

Article 2. *Definitions*

(a) "Credit transfer" means a complete movement of funds from the originator to the beneficiary pursuant to a payment order received by the originator's bank [directly] from the originator. A credit transfer may involve one or more payment orders.

(b) "Originator" means the issuer of the first payment order in a credit transfer.

(c) "Beneficiary" means the ultimate person intended to receive the funds as a result of a credit transfer.

(d) "Sender" means the person who sends a payment order including the originator and any sending bank.

(e) "Bank" means a financial institution which, as an ordinary part of its business, engages in credit transfers for other persons.

(f) A "receiving bank" is a bank that receives a payment order.

(g) "Intermediary bank" means any bank executing a payment order other than the originator's bank and the beneficiary's bank.

(h) "Funds" or "money" includes credit in an account kept by a bank. The credit may be denominated in any national currency or in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this Law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(i) "Payment order" means a message, whether written or oral, that contains either explicitly or implicitly at least the following data:

(i) an order to the receiving bank to pay, or to cause another bank to pay, to a designated person a fixed or determinable amount of money;

(ii) identification of the sender;

(iii) identification of the receiving bank;

(iv) the amount of the transfer, including the currency or the unit of account;

(v) identification of the beneficiary;

(vi) identification of the beneficiary's bank.

(j) "Authentication" means a procedure to determine whether all or part of a payment order is authorized, and which is the product of an agreement.

(k) "Cover" means the provision of funds to a bank to reimburse it for a payment order sent to it. The provision of cover might precede or follow execution of the order by the receiving bank.

(l) "Execution date" means the date when the receiving bank is to execute the payment order, as specified by the sender. When no execution date is stated on a payment order, the execution date of that order shall be deemed to be the date the order is received, unless the nature of the order indicates that a different execution date is appropriate.

(m) "Pay date" means the date when funds are to be at the disposal of the beneficiary, as specified by the originator.

(n) "Value date" means the date when funds are to be at the disposal of the receiving bank.

Comments

1. The Working Group at its sixteenth session expressed the view that, in order to harmonize to the greatest extent possible the terms as used by bankers and as used in legal rules governing credit transfers, an effort should be made to use the terminology adopted by the Committee on Banking and Related Financial Services of the International Organization for Standardization in ISO 7982-1 (A/CN.9/297, paras. 25 to 28). However, in view of the fact that the ISO terminology had not been adopted with legal considerations in mind, some deviation from both the terminology and the definitions had to be envisaged.

2. The comments below indicate the extent to which the terms used and the definitions differ from those in ISO 7982-1.

"Credit transfer"

3. The definition is based upon the definition of "funds transfer" in ISO 7982-1. The words "pursuant to a payment order received by the originator's bank [directly] from the originator" was added by the Working Group at its eighteenth session as a means of clarifying the difference between a credit transfer and a debit transfer (A/CN.9/318, para. 36). The word "directly" was placed in square brackets because of a concern that it might exclude some types of transfers that should be considered to be credit transfers.

4. At the eighteenth session of the Working Group concern was expressed about the use of the words "complete movement of funds" (A/CN.9/318, para. 37). These words form part of the ISO definition and no special examination was given to them by the Working Group. They would seem to indicate that the term "credit transfer" includes the entire set of actions from the issue of the payment order by the originator through credit to the account of the beneficiary, or other action leading to completion of the transfer. These words also indicate that reimbursement of the beneficiary's bank and any intermediary banks is part of the transfer. Potentially, therefore, these words have an important effect on the sphere of application of the Model Law. See comment 5 to article 1.

5. The second sentence refers to "one or more payment orders" rather than to one or more "funds transfer transactions" as in ISO 7982-1 or to one or more "segments", as in the draft before the Working Group at its eighteenth session. While the change in wording gives a narrower focus to the sentence, it would not seem to narrow the practical effect of the sentence.

"Originator"

6. The definition differs from the wording of the definition in ISO 7982-1, but not from its meaning. It was approved by the Working Group at its seventeenth and eighteenth sessions (A/CN.9/317, para. 32; A/CN.9/318, para. 41). Under the definition a bank that issues a payment order for its own account is an originator. See comment 3 to article 1 for the consequences on the sphere of application of the Model Law and for a suggestion as to a definition of "originator's bank" and of "beneficiary's bank".

"Beneficiary"

7. The definition differs from the wording of ISO 7982-1 in that a person whose account is credited in error is not a beneficiary (A/CN.9/318, para. 42). Although it is not stated in the definition, it would seem that the person intended to receive the funds is the person named as beneficiary in the originator's payment order. For the situation where the identity of the beneficiary is expressed both by words and by account number and there is a discrepancy between them, see article 3(2). Similar to the rule in regard to an originator, a bank may be the beneficiary of a transfer.

"Sender"

8. The Working Group decided at its seventeenth and eighteenth sessions that the term should include the originator as well as any sending bank (A/CN.9/317, para. 46; A/CN.9/318, para. 44). ISO 7982-1 defines "sending bank" as the "bank that inputs a message to a service" but it has no term that includes the originator as a sender. Such a term is not necessary in the context of ISO 7982-1.

"Bank"

9. The Working Group at its eighteenth session agreed to use the word "bank" since it was short, well-known and covered the core concept of what was intended (A/CN.9/318, para. 46). The definition in the Model Law will necessarily differ from that used in national legislation since there are different definitions in various countries and in some countries there are two or more definitions for different purposes.

10. The definition in ISO 7982-1 is that a bank is "a depository financial institution". The Working Group was of the view that the test as to whether a financial institution should have the rights and obligations of a bank under the Model Law should depend on whether "as an ordinary part of its business it engaged in credit transfers for others", rather than whether it engaged in the totally unrelated activity of taking deposits. As a result, some individual financial institutions that would not normally be considered to be banks, such as dealers in securities that engage in credit transfers for their customers as an ordinary part of their business, would be considered to be banks for the purposes of the Model Law.

11. The extension of the definition to such financial institutions has the potential to extend the sphere of application of the Model Law. If a given brokerage firm met the definition of a bank, it would be either an originator's bank or a beneficiary's bank (since it can be assumed that such institutions would not function as intermediary banks), and the payment orders given to it by its customer would be governed by this Law rather than by some other body of law. If another brokerage firm was not considered to be a bank under the definition, its payment order to a bank to make a transfer would be as an originator, even if in the given case the order was given for the account of one of its customers. The order from the customer to the brokerage firm would be outside the sphere of application of the Model Law. Compare comment 4 to article 1.

"Receiving bank"

12. Although the Working Group at its eighteenth session modified the wording of the definition from that found in ISO 7982-1, the meaning remained the same (A/CN.9/318, paras. 55 to 57). A bank that receives a payment order is a receiving bank even if the payment order was not addressed to it. (The problem of mis-directed payment orders is addressed in article 5(1 *bis*).) A bank to which a payment order is addressed but which does not receive it is not a receiving bank.

13. The receiving bank becomes responsible for a payment order only when that payment order has been delivered to it. The observation was made in the Working Group that if the word "delivered" was used, the definition might not cover the situation where the payment order was sent but not delivered (A/CN.9/317, para. 45). However, until the payment order has been delivered, the sender has not effectuated the communication.

"Intermediary bank"

14. The definition was proposed by the Working Group at its seventeenth session (A/CN.9/317, para. 41). It differs from the defintion in ISO 7982-1 in three substantial

respects: first, it includes all banks other than the originator's bank and the beneficiary's bank, whereas ISO 7982-1 includes only those banks between the given receiving bank and the beneficiary's bank; secondly, ISO 7982-1 includes only those banks between the receiving bank and the beneficiary's bank "through which the transfer must pass if specified by the sending bank"; and thirdly, reimbursing banks are included in this definition, even though the transfer may be considered not to pass through them and they are not in the chain of payment orders from the originator to the beneficiary's bank. The definition was not considered by the Working Group at its eighteenth session.

"Funds" or "money"

15. The definition is modelled on the definition of "money" or "currency" contained in article 5(l) of the United Nations Convention on International Bills of Exchange and International Promissory Notes. However, it specifies that the term includes credit in an account, as is proper in the context of this Model Law.

16. In order to bring the definition closer to that in the Convention, the beginning portion might be drafted as follows:

"'Funds' or 'money' includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account which is established . . .".

"Payment order"

17. In accordance with a suggestion made in the seventeenth session of the Working Group, the minimum data elements necessary to constitute a payment order have been included in the definition of the term (A/CN.9/317, para. 54). Inclusion of these data elements in the Model Law will have an educational function. Other data elements may be required by a particular funds transfer system (see comment 22, below). The sender's failure to include one of the necessary data elements will be a factor in allocating loss in case the transfer is not carried out, is carried out late or is carried out incorrectly.

18. Since a message may be considered not to be a payment order if any one of the listed data elements is omitted, consideration may be given to modifying the text as follows:

"'Payment order' means a message, whether written or oral, that contains an order to the receiving bank to pay, or to cause another bank to pay, to a designated person a fixed or determinable amount of money. A payment order is required to contain either explicitly or implicitly at least the following data:

(i) identification of the sender;

. . . ."

19. Authentication has been deleted as a required data element in a payment order. It is, however, defined in subparagraph *(j)*. In accordance with the suggestion at the seventeenth session of the Working Group, the consequences of a failure to authenticate a payment order or other message are considered in article 4 on the obligations of a sender (A/CN.9/317, para. 55).

20. Although there was some hesitancy in the Working Group as to whether it was necessary to specify that the payment order could be either written or oral (A/CN.9/317, para. 53), the words have been retained since they seem to add clarity to the definition.

21. The fact that the required data elements could be contained in the payment order "either explicitly or implicitly" would also seem to make it clear that communicating parties can agree on specific formats, as was suggested in the Working Group (A/CN.9/317, para. 53). The designation of the currency or unit of account may be implicit where the funds transfer system used is restricted to a particular currency or unit of account.

22. A preliminary version of ISO Draft Proposal 7982-2, "Universal Set of Data Segments and Elements for Electronic Funds Transfer Messages" contained in document ISO/TC68/SC5/N230, dated 8 August 1988, proposes a set of mandatory data elements. Under the proposal, those mandatory data elements that would always be required to appear in the message are labelled "Mandatory Explicit". The data elements that would be required either to appear in the message or be derivable from another mandatory data segment and/or data element in the message or from the processing conventions of the system used are referred to in the proposal as "Mandatory Implicit". The document lists several data elements as being either mandatory explicit or mandatory implicit that are not set forth in the current definition of payment order, e.g. the date and time the message was delivered by a communications service.

"Authentication"

23. The purpose of an authentication procedure is to permit the receiving bank to determine whether the payment order was authorized. Even if the payment order was not authorized in fact, the purported sender will be bound if the requirements of article 4(2) are met, including the requirement that "the authentication provided is a commercially reasonable method of security against unauthorized payment orders".

24. The definition makes it clear that an authentication of a payment order does not refer to formal authentication by notarial seal or the equivalent, as it might be understood in some legal systems. The definition also differs from the definition of "message authentication" in ISO 7982-1 in that authentication as here defined does not include the aspect of validating "part or all of the text" of a payment order. This is appropriate, even though most electronic authentication techniques do both, since this Model Law also applies to paper-based payment orders. However, a definition of authentication that included validation of part or all of the text might be desirable if it was thought desirable to extend the result of article 4(2) to the content of the payment order. See comments 11 and 12 to article 4.

25. The definition as adopted by the Working Group at its eighteenth session includes the provision that the authentication procedure is the product of an agreement between the sender and the receiving bank. However, under article 4(2) the authentication procedure must be

"commercially reasonable" in order for a purported sender to be bound by an unauthorized payment order even if the authentication used was agreed to by the sender.

"Cover"

26. The first sentence has the same meaning, though not the same wording, as the definition of "cover payment" in ISO 7982-1. The second sentence was added at the suggestion of the Working Group at its seventeenth session (A/CN.9/317, para. 33).

27. Concern over use of the word "cover" has been expressed in the Working Group on several occasions. In the current draft the word is used in articles 4(2)*(b)* (different meaning), 6(2)*(a)* and 6(2)*(c)* variant A.

"Execution date"

28. There is no equivalent term in ISO 7982-1. The execution date is the date on which a given payment order is to be executed as specified by the sender. Since a credit transfer may require several payment orders, each of those payment orders may have an execution date, and each of the execution dates may be different.

29. At the eighteenth session of the Working Group the second sentence, which was previously part of article 7(1)*(b)*, was added to the definition (A/CN.9/318, paras. 104, 106). Article 7(1)*(b)* continues to provide a rule for determining the execution date if no value or pay date is specified on the payment order.

30. The rule that, absent other indication, the execution date of a payment order is the date the order is received would seem to be an appropriate rule for international credit transfers.

31. The most obvious indication of an execution date other than the date the order was received is the provision of an explicit execution date or value date or, in the case of the beneficiary's bank, of a pay date. In addition, the execution date is not the date received if "the nature of the payment order indicates that a different execution date is appropriate". This phrase, which was first added to the rule before the sphere of application of the Model Law was restricted to international credit transfers, can be easily applied to bulk credit transfers of low value sent through a system that operates on a set time schedule, such as execution on the third day after receipt of the payment orders on magnetic tape. It may be less often applicable to international credit transfers.

"Pay date"

32. The term "pay date" is also used by ISO 7982-1 to indicate the date when the funds are to be available to the beneficiary. ISO 7982-1 uses the term "payment date" to indicate the date on which a payment was executed.

33. The definition of "pay date" differs from that in ISO 7982-1 in that in the latter the pay date is the "date on which the funds are to be available to the beneficiary for withdrawal in cash". In the Model Law definition the pay date is the date "when the funds are to be at the disposal of the beneficiary". The definition leaves open the question when and under what circumstances the funds are at the disposal of the beneficiary, but they may be at the disposal of the beneficiary even though they are not available for withdrawal in cash. The most obvious example is when the transfer is in a unit of account that may be at the disposal of the beneficiary for further transfer but not available in cash either as a unit of account or, perhaps, in the local currency.

"Value date"

34. The definition is identical to that in ISO 7982-1. As in respect of "pay date", the question is left open as to when and under what circumstances the funds are at the disposal of the receiving bank.

Article 3. *Discrepancies within a payment order*

(1) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank is required to notify the sender of the discrepancy unless the sender and the receiving bank had agreed that the receiving bank would rely upon either the words or the figures, as the case may be.

(2) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank must notify, within the time prescribed in article 7, paragraph (4), its sender, and also the originator's bank if it is identified on the payment order.

Comments

1. Article 3 deals only with the responsibility of a receiving bank when it receives a payment order that expresses either the amount to be transferred or the identification of the beneficiary in both words and figures and there is a discrepancy between the two. Allocation of loss arising out of the actions of a fraudulent third party that do not result in such a discrepancy are to be covered in the provisions on liability (A/CN.9/318, para. 63). Compare comment 24 to article 2 and comments 11 and 12 to article 4.

2. The current text was adopted by the Working Group at its eighteenth session (A/CN.9/318, paras. 60 to 69).

Paragraph (1)

3. If the amount is expressed in both words and figures and there is a discrepancy, the receiving bank is required to notify the sender. If the receiving bank does not do so and it acts upon the incorrect amount, it is responsible for the consequences, even if it had no subjective awareness of the discrepancy.

4. The rule is expressed in general terms to apply to payment orders between any sender and receiving bank. However, it was the expectation in the Working Group that paragraph (1) would apply in fact only between the originator and the originator's bank, since interbank payment orders in electronic form transmit the amount of the transfer in figures only (A/CN.9/318, paras. 61 and 63).

5. Paragraph (1) makes the general rule subject to the agreement of the sender and the receiving bank that the receiving bank will act upon either the words or the figures, as the case may be. Such an agreement could be anticipated between a bank and its customers. If such an agreement exists, it could be anticipated to provide that the bank would act upon the amount in figures.

Paragraph (2)

6. Paragraph (2) applies only to a payment order received by the beneficiary's bank containing a discrepancy between the identification of the beneficiary in words and its identification in figures. No bank prior to the beneficiary's bank can be expected to have the information to be able to determine that such a discrepancy exists.

7. Any solution to the case envisaged presents substantial difficulties. While a discrepancy in the identification of the beneficiary may be the result of error, it may also be an indication of fraud. Rather than take the chance that the incorrect account would be credited, the Working Group decided that the transfer should be suspended and the beneficiary's bank should notify its sender and also the originator's bank, if that bank is identified on the payment order, of the discrepancy (A/CN.9/318, para. 64).

8. In order to reduce to a minimum the time during which the transfer is suspended, the notification to both the sender and the originator's bank must be done within the time specified in article 7(4), i.e. on the day the decision is made, but not later than the day the receiving bank was required to execute the order. It is anticipated that within a reasonable time the beneficiary's bank would receive further instructions as to the proper identification of the beneficiary, or an indication that the transfer was fraudulent.

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

(1) *Variant A*

A purported sender is bound by a payment order, if he authorized it or if it was issued by a person who, pursuant to the applicable law [of agency], otherwise had the power to bind the purported sender by issuing the payment order.

Variant B

A purported sender is bound by a payment order if it was issued by the purported sender or by another person who had the authority to bind the purported sender.

(2) Notwithstanding anything to the contrary in paragraph (1), when a payment order is subject to authentication, a purported sender of such an order is bound if:

(a) the authentication provided is a commercially reasonable method of security against unauthorized payment orders,

(b) the amount of the order is covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank or there is an agreement between the sender and the receiving bank that such payment orders are to be executed despite the absence of such balances or overdrafts, and

(c) the receiving bank complied with the authentication.

(3) *Variant A*

A purported sender [that is not a bank] is, however, not bound by a payment order under paragraph (2) if

(a) the actual sender was a person other than a present or former employee of the purported sender, and

(b) the actual sender had gained access to the authentication procedure without fault on the part of the purported sender.

Variant B

No sender may become bound under paragraph (2) if the sender proves that the payment order was executed by

(a) a present or former employee or agent of the receiving bank, or

(b) a person acting in concert with a person described in *(a)*, or

(c) any other person who, without the sender's authorization, obtained confidential information about the authentication from a source controlled by the receiving bank, regardless of fault.

(4) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the execution date, unless otherwise agreed.

Comments

1. Paragraphs (1) to (3) set forth the situations in which a purported sender of a payment order is bound by the order. Paragraph (4) sets forth the only obligation of the sender in regard to a payment order on which it is bound, i.e. to pay the receiving bank for it.

Paragraph (1)

2. Paragraph (1) states the basic rule that a purported sender is bound by a properly authorized payment order. Concern was expressed at the eighteenth session of the Working Group to find a means to express the rule without referring to the law of agency so as not to be faced with the differences in legal systems on this issue. Variant B was proposed as a formulation to avoid that problem (A/CN.9/318, paras. 72, 73 and 83).

Paragraph (2)

3. Paragraph (2) has been drafted as an exception to paragraph (1), but from the viewpoint of banking operations it provides the basic rule. In almost all cases a

payment order must be authenticated. Proper authentication indicates proper authorization and the receiving bank will act on the payment order. Even if the payment order was not properly authorized under paragraph (1), the purported sender is bound by the order if the three requirements of paragraph (2) are met.

4. The first requirement is that the authentication provided is commercially reasonable. The discussion in the Working Group proceeded on the basis that it was the receiving bank that determined the type of authentication it was prepared to receive from the sender. Therefore, it was the receiving bank's responsibility to assure that the authentication procedure was at least commercially reasonable. The sender and the receiving bank could not provide for a lower standard by agreement (A/CN.9/318, para. 75).

5. No attempt has been made to set a standard as to what constitutes a commercially reasonable authentication procedure. The standard would depend on factors related to the individual payment order, including such factors as whether the payment order was paper-based, oral, telex or data transfer, its amount and the identity of the purported sender. The standard as to what was commercially reasonable could be expected to change over time with the evolution of technology.

6. The second requirement, that the amount of the payment order is covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank, affords a protection for originators in some countries. By limiting the amount that can be debited to an account, a customer can limit the amount of potential loss. Such a limitation also furnishes to a limited degree an indication that an excessively large payment order may be in error or fraudulent.

7. The last clause was added to be sure that the provision would not cause problems in a net settlement system where a sending bank would have no account relationship with the receiving bank (A/CN.9/318, paras. 85-86). The clause would also seem to apply to the situation where a receiving bank was to receive reimbursement by credit in its account at a third bank. Furthermore, it was thought to apply to the situation in some countries where the agreements between banks and their customers provide that the bank is permitted, but not required, to create an overdraft when it receives a payment order from its customer (A/CN.9/318, paras. 84 and 86). However, the imperative nature of the words "are to be executed" may leave the latter case outside the clause as currently drafted.

8. The third requirement is that the receiving bank complied with the authentication. If the bank did not comply with the authentication but the payment order was authorized, the purported sender would be bound nevertheless under paragraph (1).

Paragraph (3)

9. The paragraph was prepared in two versions at the eighteenth session of the Working Group. In general, those who were in favour of placing on the receiving bank the major risk that an authentication had been falsified by a known or unknown third person favoured variant A. This was said to be appropriate because it was the receiving bank that usually designed the authentication procedure (see comment 4). In general, those who were in favour of placing the major risk on the sender favoured variant B. This was said to be appropriate because it was the sender who chose the means of transmission of the particular payment order. Moreover, variant B would act as an incentive to senders to protect the authentication or encryption key in their possession (A/CN.9/318, paras. 88 to 90).

10. At the eighteenth session it was suggested that in order to compare better the advantages or disadvantages of the two variants, variant A should be re-written to state, as does variant B, what would have to be proven and by whom. Since even the supporters of variant A seemed to assume that it would be the sender who had the burden of proving the exonerating conditions (see A/CN.9/318, para. 91), the introductory words to variant A might read as follows:

> "A purported sender [that is not a bank] is not bound under paragraph (2) if the purported sender proves that *(a)* . . .".

Altered payment orders

11. It may be thought desirable to extend the principle of paragraphs (2) and (3) to situations in which the payment order as received by the receiving bank differs from the payment order as sent. The current rule is that the receiving bank is obligated only by the payment order it has accepted (article 5(3)*(a)*). Therefore, the sender bears the risk of any fraud or data corruption that may have occurred prior to reception of the payment order by the bank.

12. However, some of the procedures used to authenticate the source of a payment order can be used to verify some or all of the content of the order. When the use of such a procedure has been agreed between the sender and the receiving bank but the receiving bank does not comply with the procedure, it should bear any loss that may result from the failure to find that the content of the order is not correct.

Paragraph (4)

13. The distinction between the obligation of the sender to pay the receiving bank being created when the receiving bank accepts the payment order and the obligation to pay maturing on the execution date is relevant when the execution date is in the future. At the eighteenth session the use of the execution date as the date when the sender should be obligated to make the funds available to the receiving bank was questioned on the grounds that the execution date was defined in article 2(l) as the date the receiving bank was obligated to act and not the date the receiving bank had performed its obligation (A/CN.9/318, para. 104).

14. It can be doubted whether receiving banks will often accept payment orders for future execution prior to the

execution date, unless the sender has already paid for the order. However, if the receiving bank executes the payment order prior to the execution date, it accepts the order at the time of its execution. While the sender can no longer revoke the order (article 8(1) and (2)), and is obligated to pay for it, the receiving bank may not debit the sender's account or otherwise require payment for the order until the execution date. See, however, article 11(4).

Article 5. *Obligations of receiving bank*

(1) In the absence of an agreement otherwise,

(a) a receiving bank is not required to comply with the sender's payment order;

(b) a receiving bank that decides not to comply with a sender's payment order is required to notify the sender of its decision, within the time required by article 7, unless one of the reasons for non-compliance is insufficient funds.

If a receiving bank does not notify the sender within the required time that it will not comply, it may no longer give such notice and is bound to execute the order.

(1 *bis*) When a payment order is received that contains information which indicates that it has been misdirected, the receiving bank shall notify the sender of the misdirection. [If the receiving bank fails to notify, and the credit transfer is delayed, the receiving bank shall be liable:

(a) if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank; or

(b) if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days.]

(2) Deleted

(3) A receiving bank other than the beneficiary's bank that accepts a payment order is obligated under that payment order:

(a) to issue a payment order, within the time required by article 7, to either the beneficiary's bank or an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner;

(b) where a payment order consistent with the contents of the payment order issued by the originator and containing instructions necessary to implement the credit transfer in an appropriate manner is not issued to or accepted by the beneficiary's bank—to refund to its sender any funds received from its sender, and the receiving bank is entitled to the return of any funds it has paid to its receiving bank; and

(c) where a payment order is issued to a beneficiary's bank in an amount different from the amount in the payment order issued by the originator to the originator's bank—to assist the originator and each subsequent sending bank, and to seek the assistance of its receiving bank, to obtain the issuance of a payment order to the beneficiary's bank for the difference between the amount paid to the beneficiary's bank and the amount stated in the payment order issued by the originator to the originator's bank.

(4) A beneficiary's bank that accepts a payment order fulfils its obligations under that payment order

(a) if the beneficiary maintains an account at the beneficiary's bank into which funds are normally credited, by, in the manner and within the time prescribed by law, including article 7, or by agreement between the beneficiary and the bank

(i) crediting the account,

(ii) placing the funds at the disposal of the beneficiary, and

(iii) notifying the beneficiary; or

(b) if the beneficiary does not maintain an account at the beneficiary's bank, by

(i) making payment by the means specified in the order or by any commercially reasonable means, or

(ii) giving notice to the beneficiary that the bank is holding the funds for the benefit of the beneficiary.

(5) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive delay in completion of the funds transfer. The receiving bank acts within the time required by article 7 if it, in good faith and in the time required by that article, enquires of the sender as to the further actions it should take in light of circumstances.

Comments

Paragraph (1)

1. As a general principle the receiving bank is neither required to comply with a payment order it receives nor is it required to justify its non-compliance. However, this rule is subject to contrary agreement of the sender and receiving bank.

2. Nevertheless, since the expectation is that a receiving bank will comply with a payment order it has received, it must notify the sender of its decision not to comply.

3. The only exception to the requirement that the sender be notified is that the receiving bank need not do so if one of its reasons for non-compliance is insufficient funds. This exception applies to several different fact situations that, perhaps, should be treated differently. Its clearest application is where the originator does not have a sufficient balance or line of credit to support a debit to its account in the originator's bank. It can be assumed that the originator is aware of its account balance and need not be informed that it is insufficient (A/CN.9/317, para. 82).

4. However, the exception also applies to payment orders issued by the originator's bank or an intermediary bank to

an intermediary bank or to the beneficiary's bank. There may be insufficient funds because the sending bank's balance in its account with the receiving bank is insufficient. There may be insufficient funds because the sending and receiving banks are in a net settlement arrangement and the sending bank's intra-day net credit limit has been reached. There may also be insufficient funds because the receiving bank has not received notice of the credit to its account with its correspondent bank. From the viewpoint of the receiving bank, the situation is the same as when it is the originator's account that is insufficient. From the viewpoint of the originator the situation is quite different since the originator has no way to know that the credit transfer is being delayed. Especially in the case of delayed notice of credit where the difficulty may be unknown to the sending bank, it may be thought that the credit transfer should not be delayed indefinitely without notice to it.

5. If a receiving bank is required to give a notice but does not give it within the time required by article 7, it may no longer give such notice and is bound to execute the order. Failure to execute the order would make the receiving bank subject to the liabilities set forth in article 9.

6. Furthermore, according to article 6(1)*(b)*, if the receiving bank is not the beneficiary's bank, it has accepted the order, with the consequence that it has the obligations of article 5(3). The current text of article 6(2) does not have a similar rule when the receiving bank is the beneficiary's bank.

Paragraph (1 bis*)*

7. The Working Group decided at its eighteenth session that a receiving bank should be required to notify the sender when the payment order received indicates that it had been misdirected. The imposition of such a duty will help assure that the funds transfer system will function as intended (A/CN.9/318, para. 122). The duty applies whether or not the sender and the receiving bank have had any prior relationship.

8. In most cases of breach of duty under the Model Law the harm that is suffered is reasonably clear and the remedy of the injured party can be left to the general provisions of article 9. That is not true in respect of a breach of the duty to notify the sender of a misdirected payment order. Therefore, the Working Group decided to prepare a special provision and, for the time being, to retain it in square brackets in article 5(1 *bis*). It is expected that it will subsequently be transferred to an appropriate location in article 9.

Paragraph (3)

9. At the eighteenth session of the Working Group former paragraphs (2) and (3) were deleted and the current paragraph (3) was adopted (A/CN.9/318, paras. 151 to 154). The new organization of article 5 includes within it only the provisions relevant to the actions a receiving bank should take to carry out the credit transfer and the actions necessary to rectify the situation if problems arise. This paragraph, dealing with the obligations of a receiving bank other than the beneficiary's bank that has accepted a payment order, groups those obligations into three categories corresponding to the three subparagraphs: *(a)* to send a proper payment order to a proper bank within the proper time, *(b)* to refund what it had been paid by its sender if the credit transfer is not successfully carried out, and *(c)* to assist in seeing that a credit transfer that was originally carried out for an amount less than that provided in the originator's payment order is successfully carried out for the proper amount.

10. The first obligation of the receiving bank set out in subparagraph (3)*(a)* is the normal obligation of the receiving bank to execute the order it has accepted. When it sends its own payment order to its receiving bank it becomes a sending bank and undertakes the obligations of such a bank under article 4.

11. Two different situations are envisaged under subparagraph (3)*(b)*: no payment order was accepted by the beneficiary's bank (perhaps because none was issued to it) and a payment order was accepted but it was inconsistent with the originator's payment order in some manner other than that it was for too small an amount. Subparagraph (3)*(b)* as drafted would also apply where the payment order was for too small an amount, but in such a case the subparagraph should apply only to the deficiency and only if subparagraph (3)*(c)* does not remedy the situation.

12. The reason a credit transfer is not carried out successfully may be that the indication of the beneficiary or of the beneficiary's bank was incorrect by reason of error or fraud. Other reasons why a credit transfer may fail to be carried out successfully are that the imposition of currency restrictions prevents the transfer from being made, for some reason a transfer cannot be made to the beneficiary's bank or to the country where the beneficiary's bank is located, the beneficiary's bank refuses to accept the payment order addressed to it or the account of the beneficiary is no longer open to receive credit transfers. In most cases where the indication of the incorrect beneficiary or beneficiary's bank was the result of an error, it could be expected that the error would be corrected and the credit transfer would be carried out as directed, though perhaps late. Where resolution of the error or fraud calls for reversal of the transfer, article 8(7) provides that the beneficiary's bank may reverse a credit if it was entered to an account other than the account specified by the originator. Subparagraph (3)*(b)* provides the mechanism for passing the refund up the chain of banks.

13. If the credit to the beneficiary's account is for an amount greater than the amount specified in the originator's payment order, subparagraph (3)*(b)* of this article and article 8(7) would permit recovery of the excess payment.

14. Subparagraph (3)*(b)* implements the policy decision that has been repeatedly affirmed by the Working Group that the originator can hold its bank responsible for proper performance of the credit transfer. While the originator's bank may properly debit the originator's account once it has executed the originator's payment order, it must recredit the originator's account if the credit transfer is not properly carried out. In turn, it has a right of reimburse-

ment from its receiving bank for any funds it has paid to that bank. As a result of this basic policy decision, the Working Group rejected a suggestion that the obligation of a receiving bank should be to assign to its sender the right of reimbursement it would have from its receiving bank (A/CN.9/318, para. 153). The result of that suggestion would have been to place on the originator the obligation to pursue its claim for reimbursement from a subsequent bank in the transfer chain and to bear the risk that the reimbursement could not be fully recovered.

15. Although subparagraph (3)*(c)* refers to a payment order issued to the beneficiary's bank in an amount different from the amount in the payment order issued by the originator to the originator's bank, it would apply only if the amount in the payment order to the beneficiary's bank was for a lesser amount. Consideration might be given to extending the subparagraph to the case where no payment order has been issued to the beneficiary's bank. The obligation on the receiving bank to assist in seeing that the credit transfer is completed for the correct amount does not place the receiving bank at risk. A credit transfer completed under subparagraph (3)*(c)* will normally be late in respect of the original deficiency in amount and there may be liability for the delay under article 9.

Paragraph (4)

16. Except for the opening words the Working Group did not have the time to consider paragraph (4) at its eighteenth session. The opening words were modified to make them consistent with the opening words of paragraph (3) (A/CN.9/318, para. 156).

17. The Working Group has not as yet decided on the extent to which the Model Law should be concerned with the relationship between the beneficiary and the beneficiary's bank. The propriety of including paragraph (4) within the Model Law might depend upon the ultimate decision as to whether the credit transfer was considered to be completed, with the legal consequences that would follow, when the beneficiary's bank accepted the payment order or only when the beneficiary's bank credited the beneficiary's account or performed a similar act. In the first case paragraph (4) might not be needed, leaving those rules to the law that governed the account relationship. In the latter case, paragraph (4) would fulfil an important role in defining the obligations of the beneficiary's bank in regard to the credit transfer. Furthermore, if it was felt useful to provide in the Model Law when the funds were available to the beneficiary, thereby fulfilling the obligations of the various banks when the originator has specified a "pay date", paragraph (4) would be relevant (see articles 2*(m)* and 8(1)*(c)* and *(d)*).

18. While paragraph (4) sets forth the type of actions to be taken, it sets out neither the manner in which they are to be accomplished nor the time when they are to be accomplished. Those two elements are left to other rules of law or to agreement between the beneficiary and the bank. The single exception is a reference to certain provisions in article 7 as to when the beneficiary's bank must act.

Paragraph (5)

19. Although a receiving bank is normally bound to follow any instructions in the payment order specifying an intermediary bank, funds transfer system or means of transmission, it can happen that it is not feasible to follow the instructions or that doing so would cause excessive delay in completing the transfer. This paragraph gives the receiving bank an opportunity to make such a determination, so long as it does so in good faith. As an alternative the receiving bank can enquire of the sender as to the actions it should take, but it must do so within the time required by article 7.

Article 6. *Acceptance of a payment order*

(1) A receiving bank that is not the beneficiary's bank accepts the sender's payment order at the earliest of the following times:

(a) when it sends a payment order intended to carry out the payment order received; or

(b) when it should have given the notice required by article 5(1).

(2) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place [or a course of action to that effect has been established between them];

(b) Deleted

(c) *Variant A*

When the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

Variant B

Deleted

Variant C

When the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

(d) when the bank otherwise applies the credit as instructed in the payment order;

(e) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

Comments

1. Since a receiving bank, including the beneficiary's bank, is generally not required to comply with the sender's payment order, obligations of the receiving bank (other than certain obligations to give notice) arise only if the receiving bank has accepted the payment order (article 5(3) and (4)). In the current draft acceptance of the payment order is also used to determine when the sender's obligation to pay the receiving bank for the payment order arises (article 4(4)), to place a limit on the right to revoke or amend a payment order (article 8(3)), to determine

when the obligation of the debtor is discharged (article 11(2)) and to provide a rule for deeming that an account has been debited (article 11(4)).

2. Article 6 sets forth the actions of the receiving bank that constitute acceptance. Article 7 provides the time within which a payment order must be accepted or notice given. Article 9 sets forth the liability of a person who has failed to perform his obligations, including obligations undertaken by acceptance of the payment order.

3. The use of the concept of "acceptance" was discussed at length in the eighteenth session of the Working Group without final resolution as to whether it should be retained. In favour of its retention it was pointed out that the concept served the purpose of describing in a single word a number of different actions of different receiving banks, so that the word might be used in various substantive provisions. In opposition it was suggested that it would be better to rely on the execution of the payment order by the receiving bank as the legally significant event. It was also suggested that use of the term "acceptance" caused difficulties in many legal systems because it seemed to suggest that a contract was created as a result of the receiving bank's actions (A/CN.9/318, paras. 127 to 130). The significance of the use of the concept of acceptance is discussed further in the companion report, A/CN.9/WG.IV/WP.42.

Paragraph (1)

4. The usual means by which a receiving bank that is not the beneficiary's bank accepts a payment order is to send its own payment order intended to carry out the payment order received. If the payment order sent is consistent with the payment order received, the undertaking of obligations by the receiving bank and the execution of the most important of those obligations under article 5(3)*(a)* are simultaneous. However, a receiving bank accepts a payment order even when it sends an order for the wrong amount, to an inappropriate bank or for credit to the account of the wrong beneficiary so long as the payment order sent was intended to carry out the payment order received. If such an inconsistent payment order is sent, the undertaking of obligations and the failure to carry out those obligations are also simultaneous.

5. Acceptance of a payment order occurs through passage of time when a receiving bank is required to give notice under article 5(1)*(b)* and fails to do so in the required period of time. Article 5(1)*(b)* provides that the receiving bank may no longer give such notice and is bound to execute the order. Article 6(1)*(b)* provides that the receiving bank has accepted the payment order with the consequences that follow upon acceptance.

6. In addition to the two means of accepting a payment order set forth in paragraph (1), article 4(4) anticipates that a receiving bank might accept on day 1 a payment order that has an execution date of day 5 (see A/CN.9/318, para. 100). It could be expected that an acceptance in such a situation would be in the form of an overt act on the part of the receiving bank, perhaps by notifying the credit party of its intention to execute the order.

Paragraph (2)

7. Acceptance of the payment order by the beneficiary's bank is of particular importance because it signals the essential completion of the credit transfer. The sender can no longer revoke or amend the payment order (article 8(3)), the beneficiary's bank is indebted to the beneficiary and the underlying obligation, if there is one, is discharged (article 11(2)).

8. The discussion of paragraph (2) in the eighteenth session of the Working Group proceeded along two lines. The first line of approach was to discuss and modify the draft text before the Working Group in A/CN.9/WG.IV/WP.39 (A/CN.9/318, paras. 135 to 141). Following that discussion, a small working party prepared a new draft that did not use the word "accept" but set forth the situations in which the beneficiary's bank would be obligated to execute the payment order. The Working Group noted the proposal but did not have time to consider it in substance (A/CN.9/318, paras. 142 and 143). Therefore, the text remains as presented to the Working Group and modified by it at its eighteenth session.

9. If the bank and the sender have agreed that the bank will execute payment orders received from the sender without notification that cover is in place, the major reason for the bank's failure to accept the order no longer exists. Subparagraph *(a)* provides that when such an agreement exists, the beneficiary's bank accepts the payment order when it receives it. The bank could not reject the payment order after reception for any reason. Former subparagraph *(b)* gave the same result if the beneficiary's bank received notice that cover was available.

10. That result raised concerns in the eighteenth session of the Working Goup where it was emphasized that under all circumstances even a beneficiary's bank should have the opportunity to reject a payment order if, for example, it was not satisfied with the cover (relevant to former subparagraph *(b)*), it believed the particular payment order was part of a money laundering scheme or the beneficiary had instructed the bank not to accept the particular order or that class of orders. As a result former subparagraph *(b)* was deleted and a decision was made to add a volitional requirement to subparagraph *(a)*. However, in view of the effort to draft an alternative provision, the proposed addition was not undertaken at the eighteenth session of the Working Group.

11. The Working Group noted that variants A and C of subparagraph *(c)* were compatible and might both be retained in the Model Law. So as not to introduce new forms of drafting at this stage, they have been temporarily retained in their original form. The draft prepared in the Working Group that was not considered for lack of time suggested that the beneficiary's bank should also be considered to become bound to execute the payment order when the bank prepares a credit to be entered into the account or when a provisional or reversible credit becomes irrevocable or irreversible except for purposes of correcting an error (A/CN.9/318, para. 142).

Article 7. *Time to accept and execute payment order or give notice*

(1) A receiving bank that is obligated under article 5 to accept a payment order or to give notice that it will not do so must accept and execute the payment order or give the required notice within the time consistent with the terms of the order, in particular, as follows:

(a) When a payment order states an execution date, the receiving bank is obligated to execute the order on that date. When the payment order states a value date but no execution date, the execution date shall be deemed to be the value date. Unless otherwise agreed, the receiving bank may not charge the sender's account prior to the execution date.

(b) When no value or pay date is stated on a payment order, the execution date of that order shall be deemed to be the date the order is received, unless the nature of the order indicates that a different date is appropriate.

(c) When a pay date is stated on the payment order accepted by the originator's bank, the obligation of the originator's bank is that the beneficiary's bank accept the payment order by that date. An intermediary bank that accepts a payment order with a pay date is obligated to use its best efforts to cause the beneficiary's bank to accept the payment order by that date. A beneficiary's bank that accepts a payment order on or before the pay date is obligated to place the funds at the disposal of the beneficiary on that date.

(d) When no pay date is stated on the payment order accepted by the originator's bank, the obligation of the bank is that the beneficiary's bank accept a payment order within an ordinary period of time for that type of order.

(2) A receiving bank that receives a payment order too late to execute it in conformity with the provisions of paragraph (1) nevertheless complies with those provisions if it executes the order on the day received regardless of any execution, value or pay date specified in the order.

(3) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank executes that type of payment order.

(4) A notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order.

(5) If a receiving bank is required to take an action on a day when it is not open for the execution of payment orders of the type in question, it must take the required action on the following day it executes that type of payment order.

Comments

1. Article 7 was not considered by the Working Group at its eighteenth session except that a portion of article 7(1)*(b)* was deleted and added to the definition of "execution date" in article 2*(b)* (A/CN.9/318, paras. 104 to 106). At that time the Working Group decided that the rest of article 7(1)*(b)* would be considered later.

2. The second sentence of subparagraph (1)*(a)* considers a problem that raises considerable difficulties, i.e. the significance of a "value date" on a payment order. The definition of "value date" in article 2*(n)*, "the date when funds are to be at the disposal of the receiving bank", is consistent with ISO 7982-1 and general international usage. However, in some countries it is understood that the receiving bank is expected to execute the payment order when it is received with value as of the value date while in other countries it is understood to be an instruction to execute the payment order only on the value date. This draft chooses the latter interpretation. While a uniform interpretation of this term would be of great importance, the choice of one or the other interpretation does not affect other provisions of the Model Law.

3. Subparagraph (1)*(c)* is consistent with the provision of article 9(2) that an originator's bank that accepts a payment order containing a pay date is responsible for the timely execution of the transfer. An intermediary bank is obligated only to use its best efforts.

4. The definition of "pay date" in article 2*(m)* says that it is the date the funds are to be at the disposal of the beneficiary. Subparagraph (1)*(c)* of this article is consistent with the general philosophy of the current draft of the Model Law that the originator's bank and the intermediary banks have fulfilled their obligations once the beneficiary's bank has accepted the payment order.

5. Although under article 11(2) any obligation of the originator to the beneficiary would also be discharged when the beneficiary's bank accepts the payment order received by it, the originator who has specified a pay date will often have other reasons for wishing the funds to be at the disposal of the beneficiary on that date. Therefore, subparagraph (1)*(c)* goes on to provide that the obligation of the beneficiary's bank is to make the funds available on that date. The beneficiary's bank would be liable to its sender and to the originator if the bank failed to place the funds at the disposal of the beneficiary in accordance with the pay date. Such an obligation to the originator would seem to be appropriate even if the credit transfer is normally considered to be completed when the beneficiary's bank accepts the payment order.

6. Subparagraph (1)*(d)* places an obligation on the originator's bank for the timely completion of the credit transfer when no special instructions have been given to it by the originator by means of an execution or pay date. No standard is provided for determining what is an ordinary period of time, but it could be expected that in most situations an ordinary period of time would be determinable with reasonable objectivity.

Article 8. *Revocation and amendment of payment order*

(1) A revocation or amendment of a payment order issued to a receiving bank that is not the beneficiary's

bank is effective if it is received in sufficient time for the receiving bank to act on it before the receiving bank has re-transmitted the order.

(2) A sender may require a receiving bank that is not the beneficiary's bank to revoke or amend the payment order the receiving bank has re-transmitted. A sender may also require a receiving bank to instruct the subsequent bank to which it re-transmitted the order to revoke or amend any order that the subsequent bank may in turn have re-transmitted.

(3) A revocation or amendment of a payment order issued to the beneficiary's bank is effective if it is received in time for the bank to act on it before the bank has accepted the order.

(4) A sender may revoke or amend a payment order after the time specified in paragraph (1) or (3) only if the receiving bank agrees.

(5) A sender who has effectively revoked a payment order is not obligated to reimburse the receiving bank [except for costs and fees] and, if the sender has already reimbursed the receiving bank for any part of the payment order, it is entitled to recover from the receiving bank the amount paid.

(6) Neither the death nor incapacity of either the sender or the originator affects the continuing legal validity of a payment order.

(7) The beneficiary's bank may reverse the credit entered to the beneficiary's account to the extent that the credit was in excess of the amount in the originator's payment order, was the result of a duplicate credit arising out of the same payment order by the originator or was entered to an account other than the account specified by the originator.

[(8) A bank has no obligation to release the funds received if ordered by a competent court not to do so [because of fraud or mistake in the funds transfer].]

Comments

1. Article 8 was not considered by the Working Group at its eighteenth session.

Paragraphs (1) to (3)

2. Paragraphs (1), (2) and (3) provide the basic rules for the revocation or amendment of a payment order. Under paragraph (1) the originator as a sender can revoke or amend its payment order until the originator's bank as a receiving bank has issued its own payment order intended to execute the originator's order. It may be noted that this will usually, but not always, be the same time the originator's bank has accepted the order under article 6(1). Since the originator's bank will need some period of time to act, the revocation or amendment is effective only if it is received in sufficient time for the bank to act on it before the bank's own payment order is issued.

3. If the originator's bank has already issued its own payment order, paragraph (2) provides that it can be instructed to issue its own revocation or amendment to its receiving bank. The effectiveness of that revocation or amendment is tested under paragraph (1). This series of messages can go from bank to bank until a payment order is revoked or amended or the beneficiary's bank is reached. The credit transfer can no longer be interrupted by revocation or amendment of a payment order once the beneficiary's bank has accepted an order implementing the transfer.

Paragraph (4)

4. Even though the sender may no longer have the right to revoke a payment order under paragraph (1) or (3), the receiving bank may be willing to recognize the revocation or amendment, especially where it knows that it can recover any credit already granted to its credit party. In particular, the beneficiary's bank has the authority under paragraph (7) to reverse the credit under certain circumstances.

Paragraph (6)

5. Even though legal incapacity in international credit transfers is most likely to arise in connection with insolvency proceedings, the Working Group decided at its seventeenth session not to attempt to deal with that problem at that time (A/CN.9/317, para. 132).

Paragraph (7)

6. If the credit to the beneficiary's account is not in accord with the originator's payment order, one of the banks in the credit transfer chain has made an error or there has been fraud. Paragraphs (1) to (4) on revocation or amendment of the payment order are relevant if the error was made by a bank prior to the beneficiary's bank and was found prior to acceptance of the payment order by the beneficiary's bank. Paragraph (7) is relevant if the error was made by the beneficiary's bank or, if made by a prior bank, was found too late to revoke or amend the payment order prior to acceptance by the beneficiary's bank.

7. Paragraph (7) permits, but does not require, the beneficiary's bank to reverse the credit it has entered to the beneficiary's account. It goes beyond a provision that would give the beneficiary's bank a right of recovery that might have to be exercised in judicial proceedings if the beneficiary was not willing to allow the credit to be reversed. However, the right of reversal is available under paragraph (7) only if the credit to the account was objectively inconsistent with the originator's payment order.

Paragraph (8)

8. The Working Group decided to place paragraph (8) in square brackets pending a decision by the Commission whether it would undertake consideration of the problem in the context of stand-by letters of credit and guarantees (A/CN.9/317, para. 133).

CHAPTER III. LIABILITY

Article 9. *Liability of receiving bank*

(1) A receiving bank that fails in its obligations under article 5 is liable therefor to its sender and to the originator.

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 7.

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and it executed the payment order received by it within the time required by article 7.

(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank], and

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date, execution date or value date stated in the order, as provided in article 7.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

(a) loss of interest,

(b) loss caused by a change in exchange rates,

(c) expenses incurred for a new payment order and for reasonable costs of legal representation,

(d) any other loss that may have occurred as a result, if the improper [or late] execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result.

(6) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)*(d)*. A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

(7) The remedies provided in this article do not depend upon the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available.

Comments

Paragraph (1)

1. Paragraph (1) sets forth the liability of a receiving bank for its own failure to fulfil its own obligations under article 5.

Paragraph (2)

2. The general system of liability in paragraph (2) is that the originator can hold the originator's bank liable for the proper performance of the credit transfer. This means that the bank would be responsible to the originator for loss wherever the loss occurred. In order to avoid liability the originator's bank would have to show that one of the exempting conditions in article 10 was relevant. If the loss for which the originator's bank is liable to the originator was caused by events that occurred at a subsequent bank in the credit transfer chain, the originator's bank can recover the loss from its receiving bank and each bank in turn could recover from its receiving bank until under paragraph (3) a bank could show that the payment order received by the beneficiary's bank was consistent with the payment order received by the bank in question.

3. This system of liability can be compared with the obligation of a receiving bank under article 5(3)*(b)* to refund to its sender any funds received from the sender where the credit transfer is not completed successfully.

4. It was decided at the seventeenth session of the Working Group that the originator should also be able to hold an intermediary bank liable for the losses suffered, since there may be occasions when recovery from the originator's bank may not be possible (A/CN.9/317, para. 139).

Paragraph (3)

5. Paragraph (3) places a limit on the effect of paragraph (2) when the credit transfer is completed, but in a manner inconsistent with the originator's payment order. No bank that is subsequent to the error or fraud that caused the inconsistency has any liability for the fact that the credit transfer was carried out improperly. However, such a bank may have obligations under article 5(3)*(b)* or *(c)* to aid in correcting the situation.

Paragraph (4)

6. The person who suffers loss as a result of a failure of the beneficiary's bank depends in large measure on the rules on completion of the transfer. Under the current text the transfer is complete when the beneficiary's bank accepts the payment order. Any obligations of the beneficiary's bank to make the funds available to the beneficiary are subsequent to the transfer. Under that view, subparagraph (4)*(a)* may be thought to fall outside the sphere of application of the Model Law. At the seventeenth session the Working Group decided to defer any decision to delete the subparagraph until it had a more complete view of the entire text (A/CN.9/317, para. 150). Compare article 5(4) and comment 17 to article 5.

7. Even though the transfer may normally be completed when the beneficiary's bank accepts the payment order received by it, the payment order may contain a pay date, execution date or value date. Especially when a pay date has been stated, but also when an execution or value date has been stated, the originator or the sender has indicated that the time when the beneficiary's bank is to act is important to it. If the beneficiary's bank fails in that

performance, the loss may be suffered by the originator or by the sender of the payment order, as well as by the beneficiary. Subparagraph (4)*(b)* provides for that case.

Paragraph (5)

8. In essence, paragraph (5) applies to losses caused by late or non-completion of a credit transfer. In this sense, timely completion of a transfer for less than the full amount may be considered to be a late transfer for the difference between the proper amount and the amount transferred in fact.

9. Losses arising out of unauthorized payment orders are allocated by article 4(2) and (3). The obligation of each receiving bank to refund to its sender any funds received from the sender where the transfer was not successfully completed is set forth in article 5(3)*(b)*. A special rule applicable to the failure of a receiving bank to notify the sender that a misdirected payment order has been received is temporarily to be found in article 5(1 *bis*).

10. Interest losses may be suffered in several different ways as a result of a credit transfer that does not work as intended. The bank may have received funds from its sender and delayed execution of the payment order. In this case the sender (who may be either the originator or a sending bank) may be said to have suffered a loss of interest. If the result of the delay is that the entire credit transfer is delayed, the beneficiary could be said to have suffered the loss of interest. If the beneficiary can recover this loss of interest from the originator because of late payment of the underlying obligation, it would seem that the originator should be able to recover this amount from the originator's bank.

11. The second most likely form of loss arising out of delayed international credit transfers are exchange losses, as provided in subparagraph (5)*(b)*.

12. The Working Group decided at its seventeenth session that, in exchange for a relatively strict regime of liability, the bank liable would not be responsible for indirect losses unless more stringent requirements were met than for the other elements of loss (A/CN.9/317, paras. 115 to 117). This decision was re-affirmed in another context at the eighteenth session of the Working Group (A/CN.9/318, paras. 146 to 150). The formula used in the current text was taken from article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). In order to recover the indirect losses, the claimant would have to prove the intent or the reckless behaviour of the bank.

13. One minor difficulty and another more important difficulty exist in the provision. The minor difficulty is that under the current wording the intent or reckless behaviour would seem to have to be that of the defendant bank rather than of "a" bank in the credit transfer chain. The more difficult problem is that, while a bank would be able to recover with relative ease from its receiving bank reimbursement for the amount of compensation it had been required to pay under subparagraphs *(a)* to *(c)* where the error, fraud or delay occurred at a subsequent point in the transfer chain, it may have more difficulty doing so under subparagraph *(d)*. In the recourse action its receiving bank may contest both the grounds of liability and the amount.

Paragraph (6)

14. Paragraph (6) provides an important rule setting forth the extent to which the provisions of this article can be varied by agreement of the parties.

Paragraph (7)

15. Paragraph (7), making the liability provisions of this article not dependent on a contractual relationship and making them exclusive, was added at the suggestion of the Working Group at its seventeenth session (A/CN.9/317, para. 119).

Article 10. *Exemption from liability*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 9 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to have taken into account at the time of the funds transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

Comments

1. Since the liability of a receiving bank for the interest loss, loss caused by a change in exchange rates and expenses incurred for a new payment order would arise out of the simple fact of failure of the transfer, article 10 provides the receiving bank with its sole basis of defence in such cases.

2. The bank must prove the exempting condition. Although there is a list of specific circumstances that might exempt the bank from liability, other circumstances not listed might also do so.

CHAPTER IV. CIVIL CONSEQUENCES OF FUNDS TRANSFER

Article 11. *Payment and discharge of monetary obligations; obligation of bank to account holder*

(1) Unless otherwise agreed by the parties, payment of a monetary obligation may be made by a credit transfer to an account of the beneficiary in a bank.

(2) The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank when the payment order is accepted by the beneficiary's bank.

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the ob-

ligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.

(4) To the extent that a receiving bank has a right of reimbursement from a sender by debit to an account held by the receiving bank for the sender, the account shall be deemed to be debited when the receiving bank accepts the payment order.

Comments

1. This article contains a number of important provisions that are associated with the credit transfer, though they do not have to do with the credit transfer itself. In many countries such provisions would not be included in a law governing funds transfers, while in others they would be included. They are included in this draft because it is important to keep them in mind even if it is decided at a later time to exclude some or all of this article from the final text of the Model Law. Furthermore, if any portion of this article is excluded from the final text, consideration might be given to preparing a separate text containing provisions on these issues so as to be sure that these rules would be consistent with the rules on the credit transfer itself.

Paragraph (1)

2. Paragraph (1) deals with the important rule that monetary obligations can be discharged by interbank credit transfers leading to credit to an account. While this general proposition is widely recognized today, remnants of the objections arising out of legal tender legislation still arise on occasion. Furthermore, in some countries it is not clear that any person other than the account holder has the right to deposit funds to an account. As a result the Working Group agreed that it would be appropriate to include such a rule (A/CN.9/317, para. 158).

3. The Working Group agreed that paragraph (1) should be restricted to providing that an obligation could be discharged by a transfer without considering to what account the debtor-originator might have the funds sent (A/CN.9/317, para. 159).

Paragraph (2)

4. Paragraph (2) provides that the obligation of the debtor is discharged when the beneficiary's bank accepts the payment order. At the same time the beneficiary's bank becomes indebted to the beneficiary. The use of acceptance of the payment order as the relevant point of time is consistent with articles 7(1)*(c)* and *(d)* and 8(3).

5. In the Working Group it was pointed out that in some countries an obligation was considered to be discharged when the originator's bank received the payment order with cover from the debtor-originator. It was thought that other countries might provide that the discharge would be later in time than as provided in paragraph (2). Therefore, the Working Group decided to consider at a future session what effect such national laws on discharge of the underlying obligation should have on the appropriate rules on finality of the credit transfer, keeping in mind its position that the rules on discharge, whether under the Model Law or under national law, and the rules governing finality should be consistent (A/CN.9/317, paras. 160-162).

Paragraph (3)

6. Paragraph (3) is concerned with a difficult problem when credit transfers pass through several banks. The originator is responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international credit transfer, it cannot provide for this eventuality. Therefore, paragraph (3) provides that the obligation is discharged by the amount of the charges that have been deducted as well as by the amount received by the beneficiary's bank; the originator would not be in breach of contract for late or inadequate payment. Nevertheless, unless the beneficiary agrees to pay these charges, which often occurs, the originator would be obligated to reimburse the beneficiary for them.

Paragraph (4)

7. Paragraph (4) is the corollary to paragraph (2) in that it gives the rule as to when the account of a sender, including but not limited to the originator, is to be considered debited, and the amount owed by the bank to the sender reduced or the amount owed by the sender to the bank increased. That point of time is when the receiving bank accepts the payment order. It may be before or after the bookkeeping operation of debiting the account is accomplished. Paragraph (4) may have its most important application in determining whether credit is still available in the account holder's account if legal process has been instituted against the account or insolvency proceedings have been instituted against the sender. In the usual situation for a receiving bank that is not the beneficiary's bank, that point of time is when it executes the payment order by sending a new payment order to the next bank. This paragraph should be considered in the light of article 4(4).

CHAPTER V. CONFLICT OF LAWS

Article 12. *Conflict of laws*

(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an origina-

tor and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.

Comments

1. The Working Group at its seventeenth session requested the secretariat to prepare a draft provision on conflict of laws (A/CN.9/317, para. 165). The draft provision set out above was prepared for the eighteenth session of the Working Group, but it was not considered at that session.

2. The problem of conflict of laws is considered in more detail in the accompanying report of the Secretary-General, A/CN.9/WG.IV/WP.42, especially in light of the decisions of the Working Group at its eighteenth session that the text under preparation should be in the form of a model law for adoption by national legislative bodies and that it should be restricted to international credit transfers.

C. International credit transfers: major issues in the Model Law on International Credit Transfers: report of the Secretary-General[a] (A/CN.9/WG.IV/WP.42) [Original: English]

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1. The discussion at the eighteenth session of the Working Group indicated general satisfaction with the overall structure of the draft Model Law on International Credit Transfers as it appears in the annex to the report of that session of the Working Group (A/CN.9/318). The discussion at the eighteenth session also showed that there were certain major issues that did not lend themselves to proper solution by an article-by-article analysis. This report is intended to give the basis for a discussion of those issues in a more comprehensive manner.

[a]Working paper submitted to the Working Group on International Payments at its nineteenth session.

I. ACCEPTANCE

2. The strongest controversy in the Working Group has been whether the concept of acceptance of a payment order by the receiving bank should be retained in the Model Law. Use of the concept has been advocated as a convenient means to describe in a single word a number of different actions of different receiving banks that should have the same legal consequences, making it possible to use the word in various substantive provisions. In response, it has been said that use of the term "acceptance" is not necessary and that it would cause difficulties in many legal systems because it seems to suggest that a