D. Working papers submitted to the Working Group on International Payments at its twenty-first session

1. International credit transfers: comments on the draft Model Law on International Credit Transfers: report of the Secretary-General (A/CN.9/WG.IV/WP.46 and Corr.1) [Original: English]

CONTENTS

[A/CN.9/WG.IV/WP.46]

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 which it considered 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 the draft provisions 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 (A/CN.9/317, para. 10).

4. At its eighteenth session held at Vienna from 5 to 16 December 1988 the Working Group began its

consideration of the redraft of the Model Rules prepared by the Secretariat in A/CN.9/WG.IV/WP.39. It renamed the draft Model Rules as the draft Model Law on International Credit Transfers (A/CN.9/318). The Working Group continued its consideration of the draft provisions at its nineteenth session held in New York from 10 to 21 July 1989. During the session a drafting group prepared a restructured text of the draft Model Law (A/CN.9/328, annex I). The restructured text was discussed at the twentieth session of the Working Group. A drafting group revised articles 1 to 9 of the draft Model Law but left articles 10 to 15 unchanged.

5. This report contains a commentary on the draft articles of the text as it emerged from the twentieth session of the Working Group (A/CN.9/329, annex), indicating their history and their relation to other provisions. In some places where the text was not considered at the twentieth session, or was considered but not changed, the commentary may be identical to that in prior reports of the Secretary-General. The report also contains suggestions as to changes that might be made in the text. In some cases the suggestions originated in a communication sent by the delegation of France or of the United Kingdom to the Secretary of the Working Group.

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Title of the Model Law

Prior discussion

A/CN.9/318, paras. 10 to 19
A/CN.9/329, paras. 11 to 15

Comments

1. The current title was adopted by the Working Group at its eighteenth session. The Working Group decided 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). The 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 to 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). At its twentieth session the Working Group reaffirmed its decision to restrict the sphere of application of the Model Law to international credit transfers (A/CN.9/329, paras. 12 to 15). It noted that even though the preparation of a model law applicable to domestic credit transfers was within its mandate, and that some States might wish to apply the Model Law to both domestic and international credit transfers, there were differences between the two types of transfers that justified different treatment of some of the legal issues that arose. Furthermore, appropriate solutions might not be the same in all States for domestic credit transfers. As a result it was believed to be preferable not to confront the difficult political problems that might be created by providing in the Model Law that it applied to all credit transfers.

5. 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 States or, if the originator is a bank, that bank and the beneficiary's bank are in different States.

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

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

Prior discussion

A/CN.9/297, paras. 12 to 23 and 29 to 31
A/CN.9/317, paras. 16 to 24, 30 and 95 to 97
A/CN.9/318, paras. 20 to 34, 53 and 54
A/CN.9/329, paras. 12 to 25 and 194

Comments

1. The general scope of article 1 was adopted by the Working Group at its eighteenth session (A/CN.9/318). It was reconsidered at the twentieth session, where several amendments were adopted (A/CN.9/329).

Internationality of a transfer

2. As indicated by the title, the Model Law will apply only to credit transfers that are international. The basic test of internationality in paragraph (1), and the only test according to article 1 as it was adopted at the eighteenth session, is that the originator's bank and the beneficiary's bank are in different countries. The Working Group decided at its twentieth session to eliminate the result pointed out in A/CN.9/WG.IV/WP.44, article 1, comments 4 to 6 that, since a bank that originated a credit transfer for its own account was an originator and not an originator's bank, a transfer by such a bank to a second bank through a mutual correspondent bank would not fall within the sphere of application of the Model Law even if all three banks were in different States. In order to carry out its

decision, the Working Group decided to add the words "or, if the originator is a bank, that bank and its receiving bank are in different countries" (A/CN.9/329, paras. 16 to 23). That formulation was submitted to the drafting group, which changed it to the current formulation. However, during the adoption of the report of the session, the "Working Group noted that the drafting group appeared not to have correctly implemented the idea expressed . . . above" (A/CN.9/329, para. 194).

3. In a communication to the Secretariat the delegation of the United Kingdom has suggested that the test of internationality adopted at the twentieth session is unsatisfactory because *(a)* there is an apparently arbitrary distinction between originators that are banks and originators that are not, and *(b)* unless information about an originator is included on a payment order, it will probably not be possible to tell if the payment order is covered by the Model Law or not. In order to overcome those problems the following text was suggested:

"(1) This law applies to credit transfers where the first sending bank to issue a payment order and the beneficiary's bank are in different States."

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*(f)*. If either financial institution was considered 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 22 and 23 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 those 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 fell within the sphere of application of the Model Law or would be considered to be domestic and fell outside of it (A/CN.9/318, paras. 25 to 26). It was said in the Working Group that that result was not appropriate since the transfer would otherwise be identical from an economic point of view. This aspect of the criteria of internationality was not further considered at the twentieth session of the Working Group.

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. That 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 might also be possible for settlement to be effected within the country where the two banks were located (A/CN.9/318, para. 21).

7. Since the application of the Model Law depends on the existence of two banks in different countries, normally it 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 States.

8. 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.

9. 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 Model Law are contained in article 15. Further consideration was given to the question in a report that was prepared for the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80.

Consumer transfers

10. 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 that 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.

11. 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 that 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). The footnote was reconsidered at the twentieth session where there was no support for a suggestion that the footnote needed to be made clearer that the Model Law did not cover consumer protection issues or for a suggestion to move the footnote into the body of the article (A/CN.9/329, para. 24).

Effect of contractual agreement

12. At its eighteenth session the Working Group decided that the extent to which the Model Law would be subject to the 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 2*(j)*, 4(2)*(b)*, 4(4), 5(2)*(b)*, 6(5), 7(1)*(b)*, 8(4), 10(3), 10(4), 10(5), 12(7), 14(1), 14(3), 15(1) and 15(2).

Article 2. *Definitions*

For the purposes of this law:

(a) "Credit transfer" means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a designated person. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order. [A credit transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.]

(b) "Payment order" means an instruction by a sender to a receiving bank to place at the disposal of a designated person a fixed or determinable amount of money if:

(i) the instruction contains no conditions other than conditions imposed by the originator that are to be satisfied on or before the issue of a payment order by the originator's bank,

(ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender,

(iii) the instruction is to be transmitted either directly to the receiving bank, or to an intermediary, a funds transfer system, or a communication system for transmittal to the receiving bank, and

(iv) the instruction is not intended to establish a letter of credit.

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

(d) "Beneficiary" means the person designated in the originator's payment order to receive funds as a result of the credit transfer.

(e) "Sender" means the person who issues a payment order, including the originator and any sending bank.

(f) "Bank" means an entity which, as an ordinary part of its business, engages in executing payment orders [and moving funds to other persons].

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

(h) "Intermediary bank" means any receiving bank other than the originator's bank and the beneficiary's bank.

(i) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated 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.

(j) "Authentication" means a procedure established by agreement to determine whether all or part of a payment order [or a revocation of a payment order] was issued by the purported sender.

(k) "Execution date" means the date when the receiving bank is to execute the payment order in accordance with article 9.

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

Prior discussion

A/CN.9/297, paras. 24 to 28
A/CN.9/317, paras. 26 to 47
A/CN.9/318, paras. 35 to 59, 75, 76, 94 and 106
A/CN.9/328, paras. 79 and 88
A/CN.9/329, paras. 26 and 82

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. Various definitions have been considered at the seventeenth, eighteenth, nineteenth and twentieth sessions.

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

Chapeau

3. At the twentieth session the Working Group decided to introduce article 2 with the words "For the purposes of this law", especially since some of the terms such as "bank" may be defined in other ways in the statutory

law of a State that adopts the Model Law (A/CN.9/329, para. 26).

"Credit transfer"

4. The definition as adopted by the Working Group at its eighteenth session was based upon the definition of "funds transfer" in ISO 7982-1. However, certain amendments were made to the ISO definition in order to clarify its meaning. (See A/CN.9/318, paras. 36 to 38 and A/CN.9/WG.IV/WP.44, article 2, comments 4 to 6.)

5. At the twentieth session the Working Group reconsidered the definition, recognizing that it and the associated definition of "payment order" were of particular importance since article 1 on the sphere of application provided that the law applied to credit transfers (A/CN.9/329, paras. 27 to 33). Therefore, the definition of the term serves in part to determine the sphere of application of the Model Law.

6. The first two sentences define a credit transfer in terms of the actions taken in regard to payment orders, and not in terms of the movement of funds as in the prior definition. The types of transfers to be covered by the Model Law are also affected by the definition of "payment order".

7. The third sentence was included in the definition because *(a)* while the current draft of articles 11 and 14 implied the time of completion of the credit transfer, that time is not clearly stated and *(b)* since the definition would state when a credit transfer began, it would be logical for it to state when the credit transfer was completed. In opposition it was said that the time of completion was too important to be found in a definition; it should be in a completely separate provision. Opposition was also expressed to the particular event chosen as the time of completion of the credit transfer. Therefore, the placing of the third sentence in square brackets was intended to indicate that neither the substance of a rule as to when a credit transfer was completed nor the location of such a rule had been decided by the Working Group (A/CN.9/329, para. 33). See also article 14, comments 5 to 11.

"Payment order"

10.* In accordance with a suggestion made at the seventeenth session of the Working Group, the minimum data elements necessary to constitute a payment order were included in the definition of the term submitted to the eighteenth and nineteenth sessions (A/CN.9/317, para. 54). At the nineteenth session the drafting group separated the definition into two elements, a definition in article 2 and the requirements as to the minimum data elements in a payment order in article 3 (A/CN.9/328, para. 145 and annex).

11. At the twentieth session of the Working Group the minimum data elements in a payment order as set out in article 3 were deleted from the draft Model Law (A/CN.9/329, paras. 89 to 93). Nevertheless, the existence of an incomplete payment order has consequences in regard to the credit transfer. Those consequences are considered in articles 5 to 8.

12. The current definition of "payment order" was adopted at the twentieth session to accord with the new definition of "credit transfer" adopted at that session (A/CN.9/329, paras. 34 to 58).

13. It was decided not to make any reference to the form in which the payment order might exist, i.e. written, oral, magnetic, or in which it might be transmitted from the sender to the receiving bank. On the one hand, any listing might exclude new technological advances. On the other hand, in some countries restrictions on the use of particular forms for the existence or transmission of a payment order might be of a regulatory nature. In the absence of any provision on this point in the Model Law, it would be settled under other applicable provisions of national law.

14. The Working Group agreed that the Model Law should not govern conditional payment orders that were to be sent from one bank to another, and decided that such orders would not be considered to be "payment orders" (A/CN.9/329, paras. 40 to 42 and 50 to 53). However, a conditional payment order issued by the originator is a "payment order" if the condition is to be satisfied on or before the issue of a payment order by the originator's bank. The payment order issued by the originator's bank would be a payment order even if the condition set out in the originator's payment order was repeated by mistake in the payment order issued by the originator's bank. Furthermore, it was intended by the Working Group that the receiving bank of the payment order from the originator's bank would have no obligation to inquire whether the condition had been fulfilled. The payment order it received should be considered to be clean. This limited recognition of conditional payment orders was adopted since a complete exclusion of conditional payment orders issued by the originator was thought to have the potentiality of excluding the entire credit transfer from the application of the Model Law.

15. Nevertheless, opposition was expressed in the Working Group to even such a restricted recognition of conditional payment orders as falling within the sphere of application of the Model Law. It was noted that article 5(1) did not give the originator's bank any extra time within which to consider whether it wished to be bound by a conditional payment order before the bank was deemed to have accepted the order (A/CN.9/329, para. 52). In the subsequent discussion of article 9, various periods were considered for the time available to the originator's bank to consider whether to accept or reject a conditional payment order, but resolution of the question was deferred (A/CN.9/329, paras. 173 and 174 and article 9, comment 13, below).

16. Subparagraph (iii) is intended to draw a distinction between debit transfers, which are excluded from the sphere of application of the Model Law, and credit transfers, which are included. In a communication to the

*Paragraph numbers 8 and 9 of the comments are missing due to an error in numbering and no substance was omitted.

Secretariat the delegation of the United Kingdom has questioned whether the desired result is achieved, since a cheque given to a payee could be said to be transmitted "directly . . . to an intermediary . . . for transmittal to the receiving bank". It suggested that the intended policy might be better expressed by the following words:

"(iii) the instruction does not provide that payment is to be made at the request of the designated person."

17. It may be questioned whether subparagraph (iv) is necessary. An instruction to a bank to establish a letter of credit is not an instruction to pay a sum of money but an instruction to issue a promise to pay under the specified conditions. The bank pays the beneficiary because of its own promise, even if that promise was inconsistent with the instruction it received.

"Originator"

18. 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, eighteenth and twentieth sessions (A/CN.9/317, para. 32; A/CN.9/318, para. 41; A/CN.9/329, para. 59). Under the definition a bank that issues a payment order for its own account is an originator. See comments 2 to 4 to article 1 for the consequences on the sphere of application of the Model Law.

"Beneficiary"

19. The definition differs from the wording of ISO 7982-1 in that the beneficiary is the person named as beneficiary in the originator's payment order and a person whose account is credited in error is not a beneficiary (A/CN.9/318, para. 42; A/CN.9/329, para. 69). 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 8(5). Similarly to the rule in regard to an originator, a bank may be the beneficiary of a transfer.

"Sender"

20. 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; see also A/CN.9/329, para. 61). 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"

21. 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.

22. The definition in ISO 7982-1 is that a bank is "a depository financial institution". The Working Group at its eighteenth session 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 have been considered to be banks for the purposes of the Model Law under the definition adopted at the eighteenth session.

23. The Working Group at its twentieth session made three changes in the definition (A/CN.9/329, paras. 62 to 68). First, it replaced the words "financial institution" by the word "entity". It was said that the Model Law was intended to govern a service and not particular systems. The change in the definition was specifically intended to bring under the Model Law those post offices that provide a credit transfer service, even though they may otherwise be governed by different rules because of their administrative status. Secondly, the definition focuses on the execution of payment orders rather than on whether the entity engages in credit transfers. Thirdly, the final words were placed in square brackets by the drafting group.

24. An earlier version of the definition of "bank" provided that "for the purposes of these Rules a branch of a bank is considered to be a separate institution". At the eighteenth session of the Working Group the sentence was deleted and it was decided that consideration would be given in each of the substantive articles whether branches should be treated as banks (A/CN.9/318, para. 54). Paragraphs indicating that branches of a bank are considered as separate banks have been added to articles 1(2), 6(7), 9(5) and 10(9) (A/CN.9/318, paras. 53 and 54; A/CN.9/328, paras. 82 and 110; A/CN.9/329, para. 141).

"Receiving bank"

25. 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. Such a bank must react to the fact of having received the order. (The problem of mis-directed payment orders is addressed in articles 6(3) and 8(2).) A bank to which a payment order is addressed but which does not receive it is not a receiving bank. It would not be appropriate to place upon it the obligation of a receiving bank in regard to a payment order that it did not know about.

"Intermediary bank"

26. The definition was proposed by the Working Group at its seventeenth session and modified at its twentieth session by the drafting group (A/CN.9/317, para. 41;

A/CN.9/329, para. 72). It differs from the definition in ISO 7982-1 in three substantial respects: first, it includes all receiving 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 (A/CN.9/329, paras. 70 and 71).

"Funds" or "money"

27. 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 (A/CN.9/318, para. 59). However, it specifies that the term includes credit in an account, as is proper in the context of this Model Law. The definition was modified by the drafting group at the nineteenth session in accordance with the suggestion contained in A/CN.9/WG.IV/WP.41, article 2, comment 16. At the twentieth session it was noted that the definition included the ECU (A/CN.9/329, para. 73).

"Authentication"

28. The purpose of an authentication procedure is to permit the receiving bank to determine whether the payment order was issued by the purported sender. Even if the payment order was not authorized, 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".

29. 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.

30. The definition 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, even though most authentication techniques that rely upon the use of computers do both. This position was confirmed by the Working Group at its twentieth session because the problems of authentication of a payment order as to its source and verification of the accuracy of its contents were two different legal concepts. In respect of the source of a message, the basic rule in article 4(1) is that the purported sender is not bound by a payment order unless he had in fact issued it or authorized its issue. The concept of authentication and its use in article 4(2) served to describe situations in which the purported sender might be bound by a payment order in spite of the fact that it had not been issued or authorized by him. In respect of errors, the Working Group noted that the general rule was that the sender was bound by what was received by the receiving bank (A/CN.9/329, paras. 77 to 79) (although that conclusion is not specifically stated in the current draft of article 4(1) or of any other provision of the Model Law). The Working Group went on to say that if it was intended that the Model Law should relieve the sender of that responsibility because of the availability of a procedure agreed between the sender and the receiving bank that would detect errors in a payment order or corruption of the contents of a payment order, that intention should be set out separately in the Model Law. The Working Group has not as yet considered the question as to whether such an exception to the responsibility of the sender should be included in the Model Law.

31. The Working Group was in agreement at its twentieth session that, if article 10 was retained, the definition of authentication should apply to the revocation of payment orders. However, since there was opposition to the basic scheme of article 10, the words "or a revocation of a payment order" were placed in square brackets (A/CN.9/329, paras. 76 and 184 to 186).

32. The definition as adopted by the Working Group at its eighteenth session and modified at its twentieth session includes the provision that the authentication procedure is established by agreement (A/CN.9/318, paras. 75, 76 and 94; A/CN.9/329, paras. 74 and 76). That agreement may be embodied in the rules of a clearing house or message system or it may be in the form of a bilateral agreement between the sender and the receiving bank. 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; a sender cannot agree to be bound by a commercially unreasonable procedure. See article 4, comments 4 and 5.

"Execution date"

33. 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 by the receiving bank. 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.

34. The Working Group at its eighteenth and nineteenth sessions engaged in an extensive effort to define properly the term "execution date", especially in connection with its use in article 9 (A/CN.9/318, paras. 104 to 106; A/CN.9/328, paras. 76 to 91; see also A/CN.9/WG.II/WP.44, article 2, comments 27 to 31 where the earlier discussion is summarized). The current definition was adopted by the Working Group at its twentieth session (A/CN.9/329, paras. 81 and 182). As to the date when article 9 requires the receiving bank to execute the payment order, see article 9, comments 5 and 12.

35. The definition makes it clear that the execution date is the date the receiving bank is required to execute the payment order and not the date the receiving bank did execute it, if those dates are not the same.

36. The current draft of the Model Law does not define what constitutes execution of the payment order by the receiving bank. When the bank is not the beneficiary's bank, an order can be assumed to be executed when the receiving bank issues a payment order intended to carry out the order received (compare article 5(2)*(d)* with article 6(2)). When the receiving bank is the beneficiary's bank, execution is probably best understood as acceptance of the order in any of the ways specified in article 7(1). If the sender wishes to specify when the funds are to be placed at the disposal of the beneficiary, a "pay date" should be specified. The term "execute" in one of its various forms is used throughout the draft Model Law in connection with payment orders. In addition, in article 12(2) reference is made to execution of the credit transfer, and a definition is there given of that concept.

"Pay date"

37. 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 when a payment was executed. Such a term was included in the text before the seventeenth session of the Working Group but, since the term was not used further, it was deleted in the revision by the Secretariat submitted to the eighteenth session.

38. 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 funds are to be placed at the disposal of the beneficiary". (See A/CN.9/317, para. 43.) The definition leaves open the question when and under what circumstances funds are placed 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 in that form but not available in cash either as a unit of account or, perhaps, even in the local currency.

39. The definition provides that the pay date is the date specified by the originator. This raises a question as to the significance of a date that purports to be a pay date in an order issued by the originator's bank or an intermediary bank but which is different from the date specified by the originator. See article 9, comments 17 and 18.

Article 3. *Contents of payment order*

(Deleted)

Prior discussion

A/CN.9/297, paras. 37 and 38
A/CN.9/317, paras. 49 to 68
A/CN.9/329, paras. 87 to 93

Comments

1. Article 3 of the draft Model Rules prepared by the Secretariat and submitted to the seventeenth session of the Working Group was entitled "form and content of payment order". In the light of the discussion at that session (A/CN.9/317, paras. 49 to 68), the substance of paragraphs (1) and (2) of article 3 were included in the definition of "payment order" in the redraft prepared for the eighteenth session of the Working Group. In particular, in accordance with a suggestion made in the seventeenth session of the Working Group, the minimum data elements necessary to constitute a payment order were included in the definition of the term (A/CN.9/317, para. 54). Inclusion of the minimum required data elements in the Model Law was expected to have an educational function.

2. At the nineteenth session the drafting group decided to delete the minimum required data elements from the definition of a payment order, since a message might be considered not to be a payment order if any one of the listed data elements was omitted (A/CN.9/328, para. 145; see A/CN.9/WG.IV/WP.41, article 2, comment 18), and to set out the required minimum data elements in article 3.

3. At the twentieth session the Working Group considered whether additional data elements should be made mandatory, and particularly information on cover, and the identification of the originator and the originator's bank (A/CN.9/329, paras. 87 and 88). At the end of the discussion the Working Group decided to delete article 3 entirely (A/CN.9/329, para. 93). Problems of incomplete instruments are now considered in articles 6(4) and 8(3).

4. The Working Group also decided to address in some other provision the need for payment orders to disclose to receiving banks that the payment order formed part of an international credit transfer.

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

(1) A purported sender is bound by a payment order [or a revocation of a payment order] if it was issued by him or by another person who had the authority to bind the purported sender.

(2) Notwithstanding anything to the contrary in paragraph (1) of this article, 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 may 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) of this article 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) of this article 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 subparagraph *(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.

Prior discussion

A/CN.9/297, paras. 39 to 45 and 69
A/CN.9/317, paras. 57, 69 to 79 and 84
A/CN.9/318, paras. 70 to 109
A/CN.9/329, paras. 94 to 111

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. Pursuant to the words "or revocation of a payment order" the purported sender is also bound by a properly authorized revocation of a payment order. Those words have been placed within square brackets subject to a determination whether article 10 will be retained (A/CN.9/329, para. 96).

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, set out in subparagraph *(a)*, is that the authentication provided is commercially reasonable. The discussion in the eighteenth session of 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. At the twentieth session of the Working Group it was suggested that, in view of the imprecision of the term "commercially reasonable" and the unfamiliarity of many legal systems with the concept, any commentary that might be written to accompany the Model Law when it is adopted by the Commission might give a suggestion as to factors to be taken into account (A/CN.9/329, para. 98).

6. The second requirement, set out in subparagraph *(b)*, 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 (A/CN.9/318, paras. 82 and 85 to 87; A/CN.9/329, paras. 100 and 101).

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 and 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. Because of the use of the words "may be", the clause governs 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; A/CN.9/329, para. 102).

8. At the twentieth session a proposal to delete subparagraph *(b)* was rejected (A/CN.9/329, paras. 100 and 101).

In a subsequent communication to the Secretariat the delegation of the United Kingdom again suggested the deletion of subparagraph *(b)* on the grounds that the subparagraph would impose an unreasonable burden on the receiving bank. The United Kingdom said that it was not possible in practice for a bank to monitor a customer's withdrawable credit balance or authorized overdraft during the day. It was suggested that as an alternative a sender who was concerned about his potential liability for uncovered unauthorized payment orders could require a more stringent method of authentication, such as specific telephone confirmation, for payment orders over a given amount.

9. The third requirement is that the receiving bank complied with the authentication. If the bank complied with the authentication but the sender had not, the bank would know that the payment order was not authenticated by the sender and should reject it. It was intended that, if the bank did not comply with the authentication but the payment order was in fact authorized, the purported sender would be bound nevertheless under paragraph (1). However, the words "Notwithstanding anything to the contrary in paragraph (1)" may lead to the contrary result. To avoid that interpretation the *chapeau* to paragraph (2) might read "When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is, nevertheless, bound if:".

Paragraph (3)

10. 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. That was said to be appropriate because it was the receiving bank that usually designed the authentication procedure (see comment 4, above). In general, those who were in favour of placing the major risk on the sender favoured Variant B. That 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).

11. 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 suggestion was made in A/CN.9/WG.IV/WP.44, article 4, comment 12, that 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 he proves that
>
> *(a)* . . .".

12. At the twentieth session a third proposal was made based upon the *chapeau* of Variant A, subparagraphs *(a)* and *(b)* of Variant B followed by subparagraph *(b)* of Variant A (A/CN.9/329, para. 103, where the text of the proposal can be found). The proposal was understood by the proponents of the two original variants in different ways and was not further pursued. During the discussion it was also suggested that the Working Group should have before it article 4A-203(2) and (3) of the Uniform Commercial Code in the form in which it had recently been adopted in the United States. Those two paragraphs are set out in A/CN.9/329, para. 107.

13. As a result of the inability to reach agreement, the Working Group left the text unchanged and decided to return to the question at its next session (A/CN.9/329, para. 108).

14. In a subsequent communication to the Secretariat the delegation of the United Kingdom noted that, while it preferred Variant B, it proposed the following text, which it thought might prove to be more acceptable to the Working Group:

> "(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from:
>
> *(a)* The actions of a person who had gained access to the authentication procedure through the fault of the purported sender, or
>
> *(b)* the actions of a person other than
>
> (i) a present or former employee or agent of the receiving bank, or
>
> (ii) a person who obtained confidential information about the authentication procedure from a source controlled by the receiving bank.
>
> This paragraph is subject to any agreement between the sender and the receiving bank, excluding, limiting, or extending its effect."

15. The delegation of the United Kingdom noted that the wording at the end of its proposal would allow either the sender or the receiving bank to obtain better terms than those set out in article 4(3).

Errors in payment order or corruption of its contents

16. In the working paper submitted to the twentieth session of the Working Group suggestions were made as to how the authentication defined in article 2 and used in article 4 in respect of identification of the sender might also be used in respect of errors in a payment order or corruption of the contents of a payment order during its transmission (A/CN.9/WG.IV/WP.44, article 2, comment 23 and article 4, comment 10). The Working Group did not accept the suggestion that an authentication as defined should be used for both purposes. It said that, if it was intended that the Model Law should relieve the sender of the responsibility for the content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that

would detect the error or corruption, that intention should be set out separately in the Model Law (A/CN.9/329, para. 79). If it would be the desire of the Working Group to include such a rule, it would seem appropriate that it be in article 4 following current paragraph (3).

Paragraph (4)

17. The distinction between creation of the obligation of the sender to pay the receiving bank when the receiving bank accepts the payment order and the maturing of the obligation to pay on the execution date is relevant when the execution date is in the future. The provision raises two separate problems: the obligation of the sender when the receiving bank fails to execute on the execution date and the obligation of the sender when the receiving bank accepts the payment order prior to the execution date.

18. At the eighteenth and twentieth sessions 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*(k)* 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; A/CN.9/329, para. 109). At the twentieth session it was stated in reply that, while the sender should be obligated to pay on the execution date, the sender should receive interest under article 12 for the period of any delay by the receiving bank in executing the order. The latter suggestion appears to have been thought to have been the natural consequence of the text of the Model Law as currently drafted.

19. At the twentieth session it was stated that the sender's obligation to pay should extend only to the amount of the payment order and not to any costs or charges. That issue, however, was not resolved. Reference was made to the treatment of the issue in article 14(3) (A/CN.9/329, para. 110). Compare suggestions in regard to article 14(3) in article 14, comments 12 and 13, below.

20. 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 10(1) and (2)), and becomes 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 14(4), which was said at the twentieth session to be incompatible with article 4(4) (A/CN.9/329, para. 110). See article 14, comments 14 and 15, which includes a suggestion in regard to possible amendment of article 4(4).

Article 5. *Acceptance or rejection of a payment order by receiving bank other than a beneficiary's bank*

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank accepts the sender's payment order at the earliest of the following times:

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given, provided that acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it gives notice to the sender of acceptance, or

(d) when it issues a payment order intended to carry out the payment order received.

(3) A receiving bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (2)*(a)*, is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Prior discussion

A/CN.9/297, paras. 46 to 51
A/CN.9/317, paras. 80 to 84
A/CN.9/318, paras. 110 to 120 and 126 to 134
A/CN.9/WG.IV/WP.42, paras. 7 to 16
A/CN.9/328, paras. 12 to 16
A/CN.9/329, paras. 112 to 127

Comments

1. The drafting group at the nineteenth session substantially restructured the portion of the draft Model Law dealing with acceptance of a payment order by a receiving bank and the statement of the obligations of a receiving bank. Under the new structure articles 5 and 6 deal with a receiving bank that is not the beneficiary's bank while articles 7 and 8 deal with the beneficiary's bank. Since a "receiving bank" is defined in article 2*(g)* in such a way as to include a "beneficiary's bank", it was necessary to include paragraph (1) in this article to make it clear that article 5 does not apply to a beneficiary's bank.

Concept of acceptance

2. In the draft prepared by the Secretariat for the eighteenth session of the Working Group a number of the substantive rules depended on the acceptance of a payment order by the receiving bank. Discussion at that session showed that the Working Group was strongly divided on the desirability of using such a concept. Its use was 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 was said that use of the term "acceptance" was not necessary and that it would

cause difficulties in many legal systems because it seemed to suggest that a contract was created as a result of the receiving bank's actions.

3. In order to help resolve the controversy, the Secretariat prepared a report for the nineteenth session of the Working Group that described the criteria for determining when a receiving bank had accepted a payment order and the consequences of acceptance (A/CN.9/WG.IV/WP.42, paras. 2 to 42). The matter was discussed at length by the Working Group at its nineteenth session, at the conclusion of which the Working Group decided to retain the use of the concept (A/CN.9/328, para. 52).

4. A proposal was made at the twentieth session to define the term "acceptance". The proposal received no support (A/CN.9/329, paras. 112 and 113).

Paragraph (2)

Subparagraph (a)

5. Subparagraph *(a)* is a combination of paragraphs (1) and (2)*(a)* of the text as it emerged from the nineteenth session (A/CN.9/328, annex). Paragraph (1) of that text was in turn composed of elements that had been in articles 5(1) and 7(1) of the text that had emerged from the eighteenth session (A/CN.9/318, annex). Throughout these various forms of presentation the policy, first established at the eighteenth session, has remained unchanged.

6. Except for certain obligations of notification of error set out in articles 6 and 8, the receiving bank is normally not required to act upon a payment order it receives unless it accepts the order. Nevertheless, since the expectation is that a receiving bank will execute a payment order it has received, paragraph (3) provides that the receiving bank is required to notify the sender if it does not accept the order under paragraph (2)*(b)* or *(d)*. Subparagraph (2)*(a)* then provides that the payment order is accepted if no notice of rejection is given.

7. The need to give notice of rejection exists even if the sender has no account relationship with the receiving bank or has even had no prior dealings with it of any kind (A/CN.9/318, paras. 114 to 116; A/CN.9/329, para. 118). There is no requirement that the notification give any reason for the rejection of the payment order.

8. While paragraph (3) states no exception to the need for the receiving bank to notify the sender of the rejection of the payment order, the effect of subparagraph (2)*(a)* is that the bank does not accept the order by reason of a failure to notify if one of its reasons for rejecting the order is insufficient funds. The exception applies even if the receiving bank had additional reasons for rejecting the order (A/CN.9/318, para. 119). At the twentieth session the Working Group considered whether the rule should differentiate between the various fact situations that might constitute insufficient funds, and decided that the receiving bank should never be considered to have accepted a payment order under subparagraph (2)*(a)* until it had received payment from the sender under article 4(4) (A/CN.9/329, paras. 119 to 123 and 175).

9. In a subsequent communication to the Secretariat the delegation of the United Kingdom suggested the deletion of the words "in accordance with article 4(4)". It noted that those words gave rise to a circular problem since article 4(4) provides that the sender is obligated to pay the receiving bank only when the receiving bank accepts the payment order. The sender is always permitted to pay the receiving bank prior to acceptance, which is the situation envisaged in article 5(2)*(a)*.

Subparagraph (b)

10. Subparagraph 2*(b)* was originally in prior article 6(2)*(a)* and was applicable only to the beneficiary's bank. At the eighteenth session of the Working Group it was decided that the provision should be modified by adding to it a requirement that the beneficiary's bank had exhibited a volitional element before the beneficiary's bank was deemed to have accepted the payment order (A/CN.9/318, para. 137). However, the required volitional element was not added to the text at that session. At the nineteenth session of the Working Group the original provision was discussed at length in the context of the beneficiary's bank (A/CN.9/328, paras. 45 to 49). In favor of retaining the original text without any volitional element it was stated that contracts between banks that the receiving bank would execute payment orders when received even if funds were not yet available existed both in regard to multilateral net settlement systems and bilateral banking relations. They were entered into to increase the security of the operation of the funds transfer system. The legal security provided by those contractual obligations would be increased if the receiving bank was considered to have accepted the payment order as soon as it was received.

11. At the conclusion of the discussion at the nineteenth session it was decided to retain the original text as it applied to the beneficiary's bank and to extend the rule to receiving banks that were not the beneficiary's bank (A/CN.9/328, paras. 32 and 49; see also A/CN.9/329, para. 126).

Subparagraph (c)

12. Subparagraph 2*(c)* providing that a receiving bank might expressly accept a payment order was added by the Working Group at its nineteenth session (A/CN.9/328, paras. 29 to 31). In the discussion doubts were raised as to the likelihood that a receiving bank would expressly accept a payment order for future implementation, but it was suggested that in the case of a large transfer a bank might be asked whether it would be prepared to handle the transaction. Its agreement would function as an express acceptance of the order.

Subparagraph (d)

13. Subparagraph 2*(d)* provides for the normal way in which a receiving bank that is not the beneficiary's bank would accept a payment order it had received, i.e. by sending 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 6(2) are simultaneous. However, a receiving bank accepts a payment order even when it sends its own 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.

Paragraph (3)

14. The text of article 7(4) following the eighteenth session of the Working Group provided that "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" (A/CN.9/318, annex). The drafting group at the nineteenth session moved the rule as to when the notice must be given by a receiving bank that is not the beneficiary's bank to article 5(1). In conformity with a decision of the Working Group it deleted the requirement that the notice must be given on the day the decision is made (A/CN.9/328, para. 86). At the twentieth session the rule was moved by the drafting group to the second sentence of paragraph (3).

15. Paragraph (3) now states that, if the receiving bank does not accept the payment order under subparagraph (2)*(b)*, *(c)* or *(d)*, it must give a notice of rejection and that notice of rejection must be given by the execution date. If no required notice of rejection is given, subparagraph (2)*(a)* provides that the receiving bank accepts the payment order (see comments 6 to 8 above). In this case "given" should probably be understood to mean "issued", since the requirement to give notice is linked to the time when the receiving bank should otherwise have executed the payment order. If the word "give" is understood to mean "issue", the provision should also be understood to require the notice to be given by an expeditious means, which would normally mean by telecommunications. Paragraph (3) adds that no notice of rejection need be given if there is insufficient information to identify the sender (A/CN.9/329, para. 117).

16. The text of article 5(1) following the eighteenth session of the Working Group stated that the obligation of the receiving bank to notify the sender of its decision that it would not comply with the sender's payment order was subject to the contrary agreement of the sender and receiving bank. Although the drafting group deleted those words from the current text, the deletion did not indicate a change in policy on the part of the Working Group. At the twentieth session the Working Group took note of the above statement, which had originally been made in A/CN.9/WG.IV/WP.44, comment 9 to article 5 (A/CN.9/329, para. 124).

Article 6. *Obligations of receiving bank other than beneficiary's bank*

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 9, either to the beneficiary's bank or to 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.

(3) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the receiving bank shall give notice to the sender of the misdirection, within the time required by article 9.

(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(5) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(6) 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 credit 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 costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 9 if, in the time required by that article, it enquires of the sender as to the further actions it should take in light of the circumstances.

(7) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 88
A/CN.9/318, paras. 60 to 69, 121, 122 and 144 to 154
A/CN.9/328, paras. 17 to 20 and 75
A/CN.9/329, paras. 128 to 141

Comments

Paragraph (2)

1. Paragraph (2) is prior paragraph (4), drafted in essentially the current form as article 5(3)*(a)* at the eighteenth session (A/CN.9/318, paras. 152 and 154) and redrafted by the drafting group at the nineteenth session. The paragraph states the basic obligation of a receiving bank other than the beneficiary's bank that has accepted a payment order, i.e. to send its own proper order to an appropriate bank within an appropriate period of time. On most occasions when a receiving bank is held liable to its sender it will be for failure to comply with the requirements of

this paragraph. When the receiving bank sends its own payment order to its receiving bank, it becomes a sender and undertakes the obligations of a sender under article 4.

Paragraph (3)

2. Paragraph (3) is identical to prior paragraph (2), which in turn was identical to the first sentence of article 5(1 *bis*) as it was adopted at the eighteenth session, with the exception that at the twentieth session the reference to sending the notice within the time required by article 9 was added.

3. The Working Group decided at its eighteenth session that a receiving bank should be required to notify the sender when the payment order received indicated 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, whether or not the receiving bank accepted the order and whether or not the bank recognized that the payment order had been misdirected (see A/CN.9/328, para. 18).

4. As the result of a concern expressed at the nineteenth session that the bank might not be able to fulfil its obligation even if it wished to, paragraph (3) was modified to provide that the receiving bank is required to notify the sender only if the identity of the sender and its address can be readily ascertained (A/CN.9/328, para. 20).

5. Paragraph (3) was retained at the twentieth session in spite of the argument that an excessive burden was being placed on the receiving bank, especially when the error was that of the sender (A/CN.9/329, paras. 129 to 131). In particular, it was said that when modern means of transmitting payment orders were used, the addressing of the payment order was done primarily by bank identification number and not by name.

6. In a subsequent communication to the Secretariat the delegation of the United Kingdom suggested that the present wording did not seem to implement the policy expressed at the twentieth session that the Model Law should not set forth a duty to detect the misdirection but that it was appropriate to require notification once the misdirection had been detected (A/CN.9/329, para. 130). It suggested the following wording to implement the policy there stated:

> "(3) A receiving bank that detects that a payment order contains information which indicates that it has been misdirected shall give notice to the sender, if the payment order contains sufficient information to identify the sender, within the time required by article 9."

7. The United Kingdom delegation further noted that, if a payment order was received with an execution date some time in the future, the fact that it had been misdirected might not be discovered on the date of receipt. It suggested an amendment to article 9(2) (see article 9, comment 10). The amendment suggested to article 9(2) would read as follows:

> "A notice required to be given under article 6(3) shall be given by the close of business on the day following the day of detection."

8. The United Kingdom delegation further suggested that it should be possible to contract out of the duties imposed by paragraph (3). It noted that agreements between banks often provide that a bank can rely on certain elements of a payment order; they agree that notification is not required even where a discrepancy that is discovered indicates that the payment order might have been misdirected. Effectively the sender is agreeing to bear the risk. The following wording was suggested to be added to the paragraph:

> "This paragraph does not apply if the sender and the receiving bank have agreed that the bank would rely on only certain elements of the payment order."

Paragraph (4)

9. Paragraph (4) was added at the twentieth session (A/CN.9/329, para. 132) to cover a situation that did not fall within the scope of the already existing provisions requiring notice when a message is received that purports to be a payment order but that cannot be executed as such.

10. In a subsequent communication to the Secretariat the delegation of the United Kingdom suggested that the provision as drafted presented two difficulties. First, the Model Law applies only if there is a payment order. Therefore, logically it could not apply to a message that did not meet the definition of a payment order. Secondly, and of greater importance, it was suggested that the provision was too widely drawn because it covered an instruction regardless of whether the receiving bank appreciated that the provision applied. The following wording was suggested:

> "(4) When an instruction is received that appears to be intended to be a payment order but that does not contain sufficient data to be a payment order or, being a payment order, cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 9."

Paragraph (5)

11. Paragraph (5) is essentially the same as prior paragraph (3), which in turn was identical to article 3(1) as it was adopted at the eighteenth session (A/CN.9/318, paras. 60 to 69). If the amount is expressed in both words and figures and there is a discrepancy, the receiving bank is required to notify the sender. The obligation to notify exists whether or not the receiving bank has accepted the payment order. If the receiving bank does not give the required notice and it acts upon the incorrect amount, it is responsible for the consequences, even if it had no knowledge of the discrepancy.

12. At the twentieth session arguments were presented in favour of the rule that, in case of discrepancy, the traditional banking rule should be applied that words controlled over numbers. Other arguments were presented

in favour of the opposite rule that, in regard to modern electronic means of transmitting payment order where the orders were processed by number, the numbers should control the words (A/CN.9/329, para. 133). Both arguments were rejected on the grounds that the current rule was a compromise and if a bank did process payment orders by number only, it could contract with its customers to that effect.

13. 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 (5) 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).

14. The view was expressed in the twentieth session that the paragraph was too restricted in that the amount might be represented in clear text by numbers but might also be part of a code, as a result of which the conflict might be between two sets of numbers (A/CN.9/329, para. 134). The suggestion was made that the reference should be only to a discrepancy in amount without saying how that discrepancy might appear. That suggestion was not implemented by the drafting group.

Paragraph (6)

15. 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 costs or delay in completing the transfer (A/CN.9/328, para. 75). This paragraph gives the receiving bank an opportunity to make such a determination, so long as it does so in good faith (see other suggestions in A/CN.9/329, para. 139).

16. As an alternative, the receiving bank can inquire of the sender as to the actions it should take, but it must do so within the time required by article 9. In a communication to the Secretariat subsequent to the twentieth session of the Working Group the delegation of the United Kingdom suggested that the second sentence did not clearly state that a receiving bank would not be in breach of article 9 if it inquired of the sender in the time specified in article 9. It suggested that the second sentence might read:

> "A receiving bank that is required to take action by a time specified in article 9 shall be taken to have done so if, within that time, it inquires of the sender as to the further actions it should take in the light of the circumstances."

Article 7. *Acceptance or rejection by beneficiary's bank*

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

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given, provided that acceptance shall not occur until the receiving *[beneficiary's]* bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it notifies the sender of acceptance,

(d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary,

(e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit,

(f) when the bank otherwise applies the credit as instructed in the payment order,

(g) 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.

(2) A beneficiary's bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (1)*(a)*, is required to give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Prior discussion

A/CN.9/297, paras. 46 to 51
A/CN.9/317, paras. 80 to 84
A/CN.9/318, paras. 110 to 120 and 135 to 143
A/CN.9/WG.IV/WP.42, paras. 32 to 42 and 59 to 65
A/CN.9/328, paras. 44 to 51, 59 and 60
A/CN.9/329, paras. 142 to 147

Comments

1. As a result of the restructuring of the draft Model Law by the drafting group at the nineteenth session of the Working Group, the provisions on the acceptance or rejection of a payment order by the beneficiary's bank were placed in an article separate from that containing similar provisions in respect of a receiving bank that is not the beneficiary's bank. The changes made to article 5 at the twentieth session were also introduced into article 7. Consequently, the majority of the provisions are identical, with the exception of the way in which the bank is referred to, and the comments to article 5 relative to use of the concept of acceptance and to paragraphs (2)*(a)*, *(b)*, *(c)* and (3) are applicable to article 7(1)*(a)*, *(b)*, *(c)* and (2).

2. Paragraph 1*(c)*, *(d)*, *(e)*, *(f)* and *(g)* represent various forms of volitional act by the beneficiary's bank to accept the payment order received by it. Subparagraphs *(d)* to *(g)* were carried over from article 6(2) as adopted at the eighteenth session. At the twentieth session a suggestion was made, but was not acted upon, that subparagraphs *(d)* to *(g)* could be replaced by words to the effect "when the

beneficiary's bank placed the funds at the disposal of the beneficiary" (A/CN.9/329, paras. 143 and 147).

3. At the nineteenth session the Working Group deleted from what is currently paragraph (1)*(d)* the words that had been in square brackets "[without reserving a right to reverse the credit if cover is not furnished]" (A/CN.9/328, para. 49). Those words recognized a practice in some countries to allow a receiving bank, including a beneficiary's bank, to give the credit party provisional credit awaiting the receipt of cover from the sending bank.

4. The discussion at the nineteenth session recognized that the granting of provisional credit to the credit party had the advantage of making the processing of credit transfers more efficient in the vast majority of cases in which cover arrived at an appropriate time. Since the receiving bank was never required to grant provisional credit as a matter of law, it would do so only where it made the credit judgment that it was highly likely to receive the cover or that, if it did not, it could recover the provisional credit from the credit party. Such a credit judgment might be reflected in an agreement with a credit party to grant such provisional credit. Such an agreement would always authorize the receiving bank to re-evaluate its decision to grant provisional credit, although the bank might be required to give advance notice of its decision that it would no longer do so.

5. The discussion at the nineteenth session also noted that the possibility that provisional credit might be reversed introduced elements of insecurity into the funds transfer system that affected not only the credit party, but in extreme cases might endanger the functioning of the entire system. Therefore, the Working Group decided that it was undesirable for a receiving bank, including the beneficiary's bank, to be allowed to reverse a credit (A/CN.9/328, paras. 59 to 60).

6. In an associated discussion at the nineteenth session the Working Group engaged in a preliminary discussion of the desirability of introducing a provision on netting into the Model Law. The Working Group noted that important studies on this issue were taking place elsewhere, and particularly in a committee of the central banks of the Group of Ten, presided by the General Manager of the Bank for International Settlements. Therefore, the Secretariat was requested to follow those developments and to report to the Working Group on the conclusions that had been reached, including the submission of a draft text for possible inclusion in the Model Law if that seemed appropriate (A/CN.9/328, paras. 61 to 65; see A/CN.9/WG.IV/WP.42, paras. 47 to 57). No conclusions had been reported by the Bank for International Settlements as of 15 May 1990.

Article 8. *Obligations of beneficiary's bank*

(1) The beneficiary's bank is, upon acceptance of a payment order received, obligated to place the funds at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary.

(2) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the beneficiary's bank shall give notice to the sender of the misdirection, within the time required by article 9.

(3) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(4) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the beneficiary's bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(5) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank shall give notice, within the time required by article 9, to its sender and to the originator's bank, if they can be identified.

(6) The beneficiary's bank shall on the execution date give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, if the bank has sufficient information to give such notice.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 89 to 92
A/CN.9/318, paras. 64, 66 and 156 to 159
A/CN.9/328, paras. 17 to 20
A/CN.9/329, paras. 148 to 167

Comments

Paragraph (1)

1. The Working Group discussed at its nineteenth and twentieth sessions the issue of the extent to which the Model Law should be concerned with the relationship between the beneficiary and the beneficiary's bank (A/CN.9/328, paras. 37 to 43; A/CN.9/329, paras. 151 to 159; see A/CN.9/WG.IV/WP.42, paras. 58 to 68). The majority of the discussion at the nineteenth session related to the extent to which the Model Law should have rules in respect to the civil consequences of the credit transfer as in current article 14, but the discussion was generally relevant to the question as to whether the Model Law should include rules on the obligation of the beneficiary's bank to the beneficiary in respect of the credit transfer. At the conclusion of the discussion at the nineteenth session the Working Group decided to defer any decision on the question until it had discussed the time when acceptance took place. It returned to the question at the twentieth session at which time the current text was adopted.

2. Paragraph (1) provides only that the funds must be placed at the disposal of the beneficiary in accordance with the payment order and the applicable law governing

the relationship between the bank and the beneficiary. The paragraph serves primarily as a reminder that the ultimate purpose of a credit transfer is to make funds available to the beneficiary.

3. A proposal to include a more detailed statement of the obligations of the beneficiary's bank to the beneficiary was rejected at the twentieth session (A/CN.9/329, paras. 151 to 153). The limited approach taken in paragraph (1) conformed to the general policy that the Model Law should set forth the rights and obligations of the parties up to the moment when the beneficiary's bank accepted the payment order. However, the Model Law should not enter into the account relationship between the beneficiary and the beneficiary's bank, including in respect of issues that are closely related to the credit transfer, such as whether the bank must give the beneficiary notice of receipt of the credit (A/CN.9/329, paras. 165 and 166; see comments 12 and 13, below, for the notice requirement when there is no account relationship).

4. Notice by the beneficiary's bank to the beneficiary that it has the right to withdraw the funds or use the credit (or any of the other actions set out in article 7(1)*(c)* to *(g)*) would constitute acceptance of the payment order, if the payment order had not already been accepted in some other manner. To that extent the Model Law gives legal significance to the notice, in addition to any legal significance it may have under other applicable rules of law. However, the Model Law leaves it to those other applicable rules of law to determine the circumstances when notice might be required.

Paragraphs (2), (3) and (4)

5. The restructuring of the text by the drafting group at the nineteenth and twentieth sessions of the Working Group led to the duplication in article 8(2), (3) and (4) of the text of article 6(3), (4) and (5) with appropriate changes in the references to the relevant banks. Therefore, the comments to those paragraphs are relevant to the corresponding paragraphs of article 8.

Paragraph (5)

6. Paragraph (5) 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 they are 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 9(2), i.e. on the day the payment order is received, subject to articles 9(3) and (4). 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.

9. In a communication to the Secretariat the delegation of the United Kingdom suggested that banks be permitted to contract out of the notice obligation in paragraph (5) by adding the following words:

> "This paragraph does not apply if the sender and the bank have agreed that the bank would rely either upon the words or figures."

10. The delegation of the United Kingdom also noted that paragraph (5) was the only notice provision to require that notice be given directly to the originator's bank. It suggested that if the reason for such a requirement was that a discrepancy in the manner of identifying the beneficiary was particularly indicative of fraud, such a requirement might be included in other notice provisions and particularly article 8(4). Furthermore, it suggested that in any event it seemed sensible to notify the originator's bank when the sender could not be identified.

11. The delegation of the United Kingdom also suggested that there seemed to be an overlap between paragraphs (3) and (5) and that they might be rationalized.

Paragraph (6)

12. Any duty to notify a beneficiary who had an account with the beneficiary's bank could be left to their agreement or to the law applicable to the account relationship. Although the sender may have an interest that the beneficiary's bank notify the beneficiary of the credit, that interest is not recognized in the Model Law (A/CN.9/329, para. 165).

13. However, there is apt to be no rule as to the obligation of the beneficiary's bank to notify a beneficiary who had no account relationship with the bank that the funds were available. Such a duty is set out in paragraph (6), but it applies only if the beneficiary's bank has accepted the payment order and if the bank has sufficient information to give such notice (A/CN.9/329, paras. 165 and 166). Contrary to the rule in article 9(2) in respect of the time when other required notices must be given, the notice specified in this paragraph must be given on the execution date (A/CN.9/329, para. 172; compare the notice requirement in articles 5(3) and 7(2), i.e., "not later than on the execution date").

Beneficiary's right to reject credit transfer

14. At the twentieth session the Working Group decided that in principle the Model Law should provide that the beneficiary would have a right to reject the credit transfer (A/CN.9/329, para. 164). One of the participants was requested to prepare a text, which would deal with the time within which the beneficiary would be permitted to act and the costs of any credit transfer returning the funds. It

is the understanding of the Secretariat that a preliminary draft has been prepared, but as of 15 May 1990 it had not been received for incorporation into this report.

Obligation to make funds available on pay date

15. At the twentieth session the Working Group considered, but did not decide, the issue of whether the beneficiary's bank should have a duty either to its sender or to the originator to make funds available on a pay date specified on the payment order (A/CN.9/329, para. 167).

Article 9. *Time for receiving bank to execute payment order*

(1) A receiving bank is required to execute the payment order on the day it is received, unless

(a) a later date is specified in the order, in which case the order shall be executed on that date, or

(b) the order specifies a pay date and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the pay date.

(2) A notice required to be given under article 6(3), (4) or (5) or article 8(2), (3), (4) or (5) shall be given on the day the payment order is received.

(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) 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.

(5) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Prior discussion

A/CN.9/297, paras. 65 to 68
A/CN.9/317, paras. 94 to 107
A/CN.9/328, paras. 76 to 91
A/CN.9/329, paras. 168 to 183

Comments

1. Following the discussion at the nineteenth session of the Working Group of the draft of prior article 7, which had been prepared by the Secretariat for the eighteenth session, a new draft was prepared by a small group (A/CN.9/328, para. 88). Following discussion of the draft late in the nineteenth session, the small group further revised the draft article for discussion at the twentieth session, taking into account the restructuring of the draft Model Law being undertaken by the drafting group (A/CN.9/328, paras. 89 to 91). Article 9 was further revised at the twentieth session.

Purpose of paragraph (1)

2. The purpose of paragraph (1) is to state the time within which a receiving bank must execute a payment order; it is not intended to state an obligation to execute the order.

Same day execution

3. The general rule stated in the *chapeau* to paragraph (1) is that a payment order is to be executed on the day the payment order is received.

4. The Working Group has at all times accepted the appropriateness of the general rule. Such a rule might not have been appropriate when credit transfers, including international credit transfers, were paper based. However, the vast majority of international credit transfers are currently transmitted by electronic means, and especially by on-line data transfer. In such an environment rapid execution by the receiving bank should normally be expected (A/CN.9/329. paras. 176 and 177).

5. Nevertheless, the rule is strict and it is necessary that it be mitigated by several supplementary provisions. The first, found in paragraph (1) itself, is that the payment order may indicate that later execution is intended, either by specifying a later execution date or by specifying a pay date that indicates that later execution is appropriate.

6. The second is the general rule that a receiving bank is not required to execute any payment order it receives simply by virtue of its reception (article 6, comment 6). Therefore, the obligation to execute the payment order by a certain time arises only if the receiving bank has accepted the order pursuant to article 5(2) or 7(1). A particularly important application of this rule is that, since a bank does not accept a payment order for failure to give notice of rejection under article 5(2)*(a)* or 7(1)*(a)* when one of the reasons for the failure to execute is that there were insufficient funds to pay the receiving bank for the payment order received, a receiving bank that receives sufficient funds on a day later than the day the order is received and executes the payment order on that day is not in breach of its obligations under article 9(1). It would be in breach of those obligations if it had agreed with the sender that it would execute payment orders from the sender upon receipt, since in such situations the receiving bank would have accepted the payment order when the order was received (articles 5(2)*(b)* and 7(1)*(b)*).

7. The third mitigating rule found in paragraph (3) recognizes that banks establish cut-off times for the processing of payment orders for same day execution. There may be different cut-off times for different types of payment orders, and a bank might establish its cut-off time for certain types of payment orders by adhering to the rules of a funds transfer system. Any order received after the cut-off time is treated as having been received the following day the bank executes that type of payment order. There is no limit on the discretion of a bank (or funds transfer system) in establishing a cut-off time, and it is not unusual for cut-off times to be as early as noon (A/CN.9/329, para. 178).

8. The fourth mitigating rule found in paragraph (5) is that a branch of a bank, even if in the same State, is treated as being a separate bank for these purposes. Where the branches of a bank process payment orders on a decentralized basis, a payment order that is sent from one branch to a second branch requires the same amount of time to be executed at the branch as if the order was to be sent to a different bank (A/CN.9/328, para. 82).

Notices

9. According to paragraph (2), notices must be given on the day the payment order is received, except for the notice required by articles 5(3), 7(2) and 8(6). The notice by the beneficiary's bank to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, required by article 8(6), must be given on the execution date.

10. In a communication to the Secretariat in which the delegation of the United Kingdom suggested several changes to the notice provision in article 6(3) (see article 6, comments 6 to 8), it suggested that the time within which the notice that a payment order received had been misdirected, as required by article 6(3), might be too short. If a payment order was received with an execution date considerably later than the date of receipt, the fact that it had been misdirected might not be discovered on the day of receipt. It suggested that article 9(2) should be amended as follows:

"A notice required to be given under article 6(3) shall be given by the close of business on the day following the date of detection."

11. The delegation of the United Kingdom made a similar suggestion in regard to article 8(2) that it had made in regard to article 6(3). However, since the delegation was of the belief that the beneficiary's bank would generally verify whether it was the correct bank, a somewhat different wording was suggested as follows:

"A notice required to be given under article 8(2) shall be given by the close of business on the day following the date on which it was, or ought reasonably to have been, detected that the payment order contained information indicating that it had been misdirected."

Execution date

12. According to article 2*(k)*, the execution date is the date when the receiving bank is to execute the payment order in accordance with article 9. The execution date may be any of three different dates. Normally the execution date is the day the payment order is received. If a later execution date is specified on the order, the execution date is that date. If a pay date is specified on the payment order, the execution date for a receiving bank other than the beneficiary's bank is the day that is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the pay date.

13. At the twentieth session the Working Group deferred to its next session the question whether any special time period would have to be given to an originator's bank that received a conditional payment order or whether the proper result would be achieved by an interpretation of paragraph (1) (A/CN.9/329, paras. 173 and 174).

14. If the receiving bank executes the order prior to the execution date, the payment order is accepted (articles 5(2)*(d)* and 7(2)*(d)*) and the sender would no longer have the possibility to revoke the order (article 10(1)*(b)* and (2)*(b)*). At the nineteenth session it was stated that the sender should not lose its power to revoke its payment order prior to the execution date even if the order had been prematurely executed by the receiving bank (A/CN.9/328, para. 78). However, no provision to that effect was introduced into the draft Model Law by the drafting group. The question was again raised at the twentieth session, where it was said that such a rule would have its most important effects in cases of insolvency. The Working Group decided to keep the issue in mind in its consideration of articles 10 and 12 (A/CN.9/329, paras. 168 and 169). In this regard it should be noted that the sender is not required to pay the receiving bank until the execution date (article 4(4)).

15. If a provision were introduced into the Model Law permitting a sender to revoke its payment order until the execution date, the sender would presumably be entitled to recover any funds it had already paid the receiving bank and the right of the sender to recover funds from the beneficiary would be assigned to the bank (compare article 10(6) and (7)).

16. The receiving bank's failure to execute a payment order on the execution date would lead to liability under article 12. The receiving bank might execute the payment order late because the order was received late. Under the prior text of article 7(2) the bank that received the order late complied with its obligations if it executed the order on the day received. Although no objection was expressed to that paragraph at the nineteenth session (A/CN.9/328, paras. 81 and 82), the paragraph was not included in the article as it was restructured by the drafting group. At the twentieth session the Working Group decided that the substance of prior article 7(2) was currently covered in the *chapeau* of article 9 where it was stated that a receiving bank was required to execute the payment order on the day it was received (A/CN.9/329, para. 170).

Pay date

17. According to article 2(l) the pay date is "the date specified by the originator when funds are to be placed at the disposal of the beneficiary". The pay date is of immediate importance in the payment order issued to the beneficiary's bank, since it is that bank that must place the funds at the disposal of the beneficiary. A pay date in a payment order sent to the beneficiary's bank functions as though it was the execution date.

18. Article 2(l) recognizes that the pay date is originally specified by the originator. The obligation of the originator's bank and any intermediary banks in regard to a payment order they receive that contains a pay date is to execute the order in sufficient time for the beneficiary's

bank to be able to place the funds at the disposal of the beneficiary on the pay date.

Derogation by contract

19. In response to a suggestion made at the twentieth session that the sender and the receiving bank should be able to derogate from the provisions of paragraph (1) by agreement, it was stated that such a possibility would make it impossible for orginator's banks to predict how long it would take for international credit transfers to take when they had to go through several intermediary banks (A/CN.9/329, para. 180).

Article 10. *Revocation*

(1) A revocation order issued to a receiving bank other than the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before the execution of the payment order to enable the receiving bank, if it acts as promptly as possible under the circumstances, to cancel the execution of the payment order, and

(c) it was authenticated in the same manner as the payment order.

(2) A revocation order issued to the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before acceptance of the payment order to enable the beneficiary's bank, if it acts as promptly as possible under the circumstances, to refrain from accepting the payment order, and

(c) it was authenticated in the same manner as the payment order.

(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received by an earlier point of time than provided in paragraphs (1) and (2).

(4) If a revocation order is received by the receiving bank too late to be effective under paragraph (1), the receiving bank shall, as promptly as possible under the circumstances, revoke the payment order it has issued to its receiving bank, unless that payment order is irrevocable under an agreement referred to in paragraph (3).

(5) A sender who has issued an order for the revocation of a payment order that is not irrevocable under an agreement referred to in paragraph (3) is not obligated to pay the receiving bank for the payment order:

(a) if, as a result of the revocation, the credit transfer is not completed, or

(b) if, in spite of the revocation, the credit transfer has been completed due to a failure of the receiving bank or a subsequent receiving bank to comply with its obligations under paragraphs (1), (2) or (4).

(6) If a sender who, under paragraph (5), is not obligated to pay the receiving bank has already paid the receiving bank for the revoked payment order, the sender is entitled to recover the funds paid.

(7) If the originator is not obligated to pay for the payment order under paragraph (5)*(b)* or has received a refund under paragraphs (5)*(b)* or (6), any right of the originator to recover funds from the beneficiary is assigned to the bank that failed to comply with its obligations under paragraphs (1), (2) or (4).

(8) The death, bankruptcy, or incapacity of either the sender or the originator does not affect the continuing legal validity of a payment order that was issued before that event.

(9) A branch of a bank, even if located in the same country, is a separate bank for the purposes of this article.

Prior discussion

A/CN.9/297, para. 79 and 92 to 95
A/CN.9/317, paras. 68 and 120 to 133
A/CN.9/328, paras. 92 to 116
A/CN.9/329, paras. 184 to 186

Comments

1. Article 10 provides a framework for the revocation of payment orders after they have been received by the receiving bank. At the nineteenth session of the Working Group it was suggested that, since international credit transfers are almost always sent by on-line telecommunications and are processed by computer, there would be little opportunity for the sender to revoke the payment order before the order was executed by the receiving bank and that it was, therefore, unnecessary to have any provision on the subject. The reply was given that a revocation that did not arrive in time because of the use of high-speed electronic systems would not be effective. That was not, however, considered to be sufficient reason to preclude the originator or other sender from having the opportunity to attempt to revoke the order (A/CN.9/328, paras. 93 and 94).

2. The text presented to the nineteenth session of the Working Group had one set of rules that covered both the revocation and the amendment of payment orders. At the nineteenth session it was noted that the amendment of payment orders might raise additional policy issues to those raised by the revocation of orders (A/CN.9/328, para. 100). As a result article 10 refers only to the revocation of payment orders and no provision is made in the current draft for their amendment.

3. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that the policy not to permit an amendment of a payment order was not sufficiently clear in the text and that the following wording might be added to paragraph (2):

"A revocation order is not effective if it is expressed to cover part only of a payment order."

4. At the twentieth session the Working Group took note of a proposal that would terminate the right to revoke or amend a payment order once it had been received by the receiving bank, but which would also permit a receiving bank that was not the beneficiary's bank to cooperate with the request of the sender regardless of whether or not the payment order had been accepted or a beneficiary's bank to so cooperate if it had not already accepted the payment order (A/CN.9/329, paras. 184 to 186). However, no action was taken since it had been agreed that the discussion of article 10 at that session was to be only exploratory.

5. Also at the twentieth session the words "or a revocation of a payment order" were placed in square brackets in articles 2*(j)* and 4(1) because of opposition in the Working Group to the basic scheme of article 10 (A/CN.9/329, paras. 76 and 96).

Paragraphs (1) and (2)

6. Paragraphs (1) and (2) provide essentially the same rules for the revocation of a payment order sent to a receiving bank that is not a beneficiary's bank and to a receiving bank that is a beneficiary's bank. In both cases the revocation can be sent only by the sender of the payment order; neither the originator nor an earlier bank in the credit transfer chain can revoke the order even though it may be the party interested in having the order revoked. In a communication to the Secretariat the delegation of the United Kingdom suggested the addition of the words "or other person who had the authority to bind the sender" to both subparagraphs (1)*(a)* and (2)*(a)*.

7. In both cases the payment order can be revoked only if the revocation is received by the receiving bank in time. In the case of a receiving bank that is not the beneficiary's bank, the event that marks the termination of the right to revoke is the execution of the order by the receiving bank. Although the current draft of the Model Law does not define what constitutes execution of the order by the receiving bank, it can be assumed to be the sending of its own payment order intended to carry out the order received (compare article 5(2)*(d)* with article 6(2)). While sending its own order would also constitute acceptance of the order received, other forms of acceptance under article 5(2) would not constitute execution of the order received. In the case of the beneficiary's bank, the event that marks the termination of the right to revoke is the acceptance of the order by the bank in any of the ways described in article 7(1).

8. In a communication to the Secretariat the delegation of the United Kingdom suggested that subparagraph (1)*(b)* should read as follows:

"*(b)* if it was received in sufficient time to enable the receiving bank, if it acts as promptly as is reasonable in all the circumstances, to refrain from executing the payment order, and"

while subparagraph (2)*(b)* should read as follows:

"*(b)* it was received in sufficient time to enable the beneficiary's bank, if it acts as promptly as is reasonable in all the circumstances, to refrain from accepting the payment order, and".

9. The receiving bank is given a certain period of time to act upon the revocation received. This period must be "sufficient" to enable the bank "if it acts as promptly as possible under the circumstances", to cancel the execution of its own order or to refrain from accepting the order received, as the case may be. The length of the period as so defined is by its nature indefinite, since it depends on the ability of the receiving bank to act (A/CN.9/328, paras. 96 and 116). The time required will vary from one bank to another, indeed from one branch of a bank to another, and depend on the nature of the payment order and the means of communication of the revocation.

10. The revocation must be authenticated in the same manner as the payment order. This implies that the revocation must be sent by the same means of communication as was the payment order. When this wording was questioned at the nineteenth session of the Working Group, citing the case of a paper-based payment order that was revoked by a tested telex, the reply was given that an attempt had been made to draft a requirement that the authentication had to be as good as or better than the authentication of the payment order being revoked, but that it had not proven possible to do so (A/CN.9/328, para. 114).

11. In a communication to the Secretariat the delegation of the United Kingdom suggested that it would be desirable to add to the end of subparagraphs (1)*(c)* and (2)*(c)* the words "or as otherwise agreed by the sender and receiving bank".

12. At the nineteenth and twentieth sessions of the Working Group it was stated that the sender should not lose its power to revoke its payment order prior to the execution date even if the order had been prematurely executed by the receiving bank (A/CN.9/328, para. 78; A/CN.9/329, paras. 168 and 169; see article 9, comment 14).

Paragraph (3)

13. Paragraph (3) was introduced into the draft Model Law at the nineteenth session of the Working Group (A/CN.9/328, para. 98). Agreements restricting the right of a sender to revoke a payment order are common in multilateral payment arrangements, especially where there is delayed net settlement, and in batch processing systems where it may be difficult, if not impossible, to extract a single payment order from the batch. Paragraph (3) probably does not apply to a restriction in a telecommunications message system that prohibits the withdrawal of a message once sent. Even a telex cannot be withdrawn as a message from the public telecommunications system once it has been sent; however, the order contained in the message can be revoked under paragraph (1) or (2).

14. When paragraph (3) was introduced at the nineteenth session of the Working Group, concern was expressed over its effect since the originator might not know that there were agreements between particular banks through which the credit transfer might pass that made a payment order between those banks irrevocable (A/CN.9/328, para. 115). An agreement of a clearinghouse, for example, through which the originator's bank sent the payment order to an intermediary bank that restricted the right to revoke the order would preclude the originator from revoking the credit transfer even though the beneficiary's bank had not yet accepted an order to carry out the transfer. That result is explicitly provided in paragraph (4).

Paragraph (4)

15. If a receiving bank has already issued its own payment order intended to carry out the payment order received, paragraph (4) provides that it shall revoke its own order to its receiving bank. The obligation is automatic and is not dependent upon the request of the sender, but it is dependent on there not being an agreement restricting the right of the receiving bank as a sender to revoke its own order as described in paragraph (3). The effectiveness of the revocation is tested under paragraph (1) or (2). The series of messages can go from bank to bank until a payment order is revoked or the beneficiary's bank is reached. The credit transfer can no longer be interrupted by revocation of a payment order once the beneficiary's bank has accepted an order implementing the transfer.

16. In a communication to the Secretariat the delegation of the United Kingdom has suggested a redraft of paragraph (4) in which the most important change would be that the revocation would have to be issued "as promptly as is reasonable in all the circumstances".

Paragraphs (5) and (6)

17. These two paragraphs specify that a sender who has sent a revocation that was or should have been effective is not obligated to pay for the payment order, as he would otherwise be under article 4(4), and is entitled to recover any funds paid. At the nineteenth session it was suggested that the sender should be entitled to receive back the original amount of the transfer less costs. This was said to be a question that arose in respect of the reimbursement of the funds in case of an unsuccessful credit transfer as well and that it would need to be addressed at a later stage (A/CN.9/328, para. 115). It may be thought that a sender who has a right to a refund under paragraph (6) should also have a right to interest on the funds for the period of time the sender was deprived of the use of those funds. Compare article 12, comments 15 to 17.

18. In a communication to the Secretariat the delegation of the United Kingdom suggested that subparagraphs (5)*(a)* and *(b)* should be redrafted as follows:

> "*(a)* if, as a result of the revocation, the payment order has not been accepted by the beneficiary's bank, or
>
> *(b)* if, in spite of the revocation, the payment order has been accepted due to a failure of the receiving bank or a subsequent receiving bank to comply with its obligations consequent upon the operation of paragraphs (1) and (2) or under paragraph (4)."

19. The delegation of the United Kingdom also suggested the addition of the words "from the receiving bank" to the end of paragraph (6).

Paragraph (7)

20. If a bank has executed a payment order in spite of receipt of an effective revocation, there is a likelihood that the funds will eventually be credited to the account of the beneficiary. Paragraph (7) gives the bank that made the error and was required to reimburse its sender the means to recover the funds by being assigned any right the originator may have had to recover the funds from the beneficiary.

21. Under some circumstances paragraph (7) will not give the bank the full protection that was anticipated and the originator may have an unjustified profit. Although the sender has a complete right to recover the funds from the bank that made the error under paragraph (6), the originator may not have a right to recover the funds from the beneficiary because it owed that amount to the beneficiary. The right assigned to the bank that made the error could be no greater than the right of the originator.

22. To some degree paragraph (7) is a replacement for prior article 8(7), that was deleted by the Working Group at its nineteenth session (A/CN.9/328, para. 106). That provision would have given the beneficiary's bank a right to reverse a credit entered to the beneficiary's account that met certain objective criteria of being the result of an error or fraud. (For the origin of prior article 8 see A/CN.9/297, para. 79 and A/CN.9/317, para. 68.) The current text of paragraph (7) is severely restricted in its field of application compared to the earlier provision.

23. In order to avoid the problems mentioned in comment 21 and because the reference in paragraph (7) to paragraph (6) was said to be incorrect, since paragraph (6) refers to paragraph (5), and paragraph (7) cannot apply if subparagraph (5)*(a)* applies, the delegation of the United Kingdom in a communication to the Secretariat suggested the following redraft:

> "(7) If the originator has received a refund under paragraph (5)*(b)*, the bank whose failure to comply with its obligations under paragraphs (1), (2) or (4) resulted in the completion of the credit transfer shall have such rights to recover from the beneficiary as the originator would have had if he had not received a refund. If the originator has not paid for his payment order and under paragraph (5)*(b)* is not obliged to do so, that bank shall have the same rights under this paragraph as if the originator had paid for the payment order and had received a refund."

Paragraph (8)

24. In order to make the provision clearer and to assure that the word "bankruptcy" is not understood in a restricted

sense (as in English law where it is restricted to personal insolvency), the delegation of the United Kingdom in a communication to the Secretariat suggested the following revision:

"(8) The death, bankruptcy, or incapacity of either the sender or the originator does not, of itself, operate to revoke a payment order or terminate the authority of the sender. The word 'bankruptcy' includes all forms of personal and corporate insolvency."

Paragraph (9)

25. This paragraph should be revised in line with the similar wording in the earlier articles.

New proposal

26. Former article 8(8) provided that a bank has no obligation to release the funds received if ordered by a competent court not to do so. When it deleted that paragraph at its nineteenth session the Working Group decided that it would consider a proposal that was to be presented authorizing courts to restrain a bank from acting on a payment order if proper cause was shown (A/CN.9/328, para. 109).

27. A proposal presented to the nineteenth session but not yet considered by the Working Group provided:

"For proper cause and in compliance with applicable law, a court may restrain:

(a) a person from issuing a payment order to initiate a funds transfer;

(b) an originator's bank from executing the payment order of the originator, or

(c) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing funds.

A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a credit transfer, but a bank has no obligation if it acts in accordance with the order of a court of competent jurisdiction."

CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS

Article 11. *[Assistance and refund]*

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

(a) where a payment order is issued to a beneficiary's bank in an amount less than 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;

(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.

Prior discussion

A/CN.9/318, paras. 151 to 154
A/CN.9/328, paras. 54 to 58

Comments

1. Article 11 sets forth the basic obligations of a receiving bank to rectify the situation if problems arise in the implementation of a credit transfer. It contains prior article 5(3)*(b)* and *(c)* as they were drafted during the eighteenth session (A/CN.9/318, para. 154) with the order of the two subparagraphs reversed. The drafting group at the nineteenth session could not decide on a proper title for this new article, so it placed the provisional title in square brackets. The article was not considered at the twentieth session.

Subparagraph (a)

2. The first obligation of a receiving bank when the credit transfer has not been successfully carried out is to take the necessary steps to cause it to be carried out. If the receiving bank is the cause of the difficulties, it would carry out its obligation under subparagraph *(a)* by taking the necessary actions itself. If the difficulties occurred at a subsequent bank in the credit transfer chain, the receiving bank would be obligated to assist in causing the transfer to be carried out properly by such actions as finding out where the problem had occurred or sending new instructions to the subsequent bank.

3. Subparagraph *(a)* was adopted at the eighteenth session of the Working Group and was not discussed at the nineteenth session. However, the drafting group at the nineteenth session made a minor change in the text by referring to the issuance of a payment order for an amount "less" than, rather than an amount "different" from, the amount in the originator's payment order. That change made the provision more precise but did not change its substantive application, since the prior wording could itself have been applied only when the payment order had been for less than the correct amount. Consideration might be given to extending the subparagraph to the case where no payment order has been issued to the beneficiary's bank, a result that cannot be reached by interpretation of the current text.

Subparagraph (b)

4. Subparagraph *(b)* sets forth one of the most important rules in the draft Model Law; if the credit transfer is not

carried out in a manner consistent with the payment order issued by the originator, the sender has a right to a refund of any funds it has paid to the receiving bank. This right ultimately accrues to the benefit of the originator as the sender of the first payment order in the credit transfer chain.

5. Two different situations are envisaged under subparagraph *(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 *(b)* as drafted would also apply where the payment order was for too small an amount, but in such a case the subparagraph should normally apply only to the deficiency and only if subparagraph *(a)* does not remedy the situation. It might apply to the entire amount in the rare situation where the transfer of too small an amount rendered the transfer commercially valueless.

6. 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 on one of the payment orders in the transfer chain 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. If the credit to the beneficiary's account is for an amount greater than the amount specified in the originator's payment order, subparagraph *(b)* should be interpreted to permit the sender to recover the payment it had made in excess of the correct amount, and it might be desirable to say so explicitly.

7. Although the general policy decision made by the Working Group at its sixteenth session, and affirmed by it on several occasions, that the originator should be able to hold its bank responsible for proper performance of the credit transfer is still open to discussion (A/CN.9/297, paras. 55 to 60; see A/CN.9/328, paras. 66 to 74 and 144 and A/CN.9/329, para. 188, question 4), the application of that policy to the return of the principal sum where the credit transfer failed was strongly endorsed at the nineteenth session (A/CN.9/328, paras. 54 to 58). The obligation of the receiving bank is absolute and the exemptions of article 13 would not apply. At the eighteenth session 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.

8. At the nineteenth session a suggestion was made that the amount of the funds to be returned should be the original amount of the transfer less costs. It was said that this issue would have to be addressed at a later time (A/CN.9/328, para. 115). The Working Group may also wish to consider whether the sender would have a right to interest on the amount to be repaid to it. Compare the discussion at the nineteenth session, (A/CN.9/328, paras. 121 to 132.)

9. In a communication to the Secretariat the delegation of the United Kingdom suggested a revision of the article as follows:

"(1) If no payment order consistent with the payment order issued by the originator to the originator's bank and containing instructions necessary to implement the credit transfer in an appropriate manner is issued to the beneficiary's bank, each receiving bank shall:

(a) assist the originator and each subsequent sending bank, and seek the assistance of its receiving bank, to obtain the issue to the beneficiary's bank of a payment order which is so consistent and contains such instructions;

(b) refund to its sender any funds received from its sender for payment for the payment order, or, where excess funds are received, refund the excess.

(2) Paragraph (1)*(b)* also applies where a payment order is rejected by the beneficiary's bank."

Article 12. *Liability and damages*

[(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 9.

(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 9.

(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 or execution date stated in the order, as provided in article 9.

(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) If a receiving bank fails to notify the sender of a misdirected payment order as provided in article 6(2)[(3)] or 8(1)[(2)], 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.

(7) 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.

(8) 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.

Prior discussion

A/CN.9/297, paras. 55 to 63 and 70 to 72
A/CN.9/317, paras. 137 to 150
A/CN.9/328, paras. 66 to 74 and 117 to 144
A/CN.9/329, paras. 187 and 188

Comments

1. The current text of article 12 is essentially the text as prepared by the Secretariat for the eighteenth session in A/CN.9/WG.IV/WP.39 on the basis of the discussion at the seventeenth session (A/CN.9/317). Certain amendments introduced at the nineteenth session are referred to below at the appropriate places. At the twentieth session a small group consisting of four delegations was asked to consider the liability provisions in general and to attempt to formulate an agreed position that might be considered by the Working Group, but they were unable to reach such an agreed position. Instead they identified four major issues and each of the delegations submitted their separate views for the consideration of the Working Group (A/CN.9/329, paras. 187 and 188). The Working Group did not have the opportunity to consider the matter further at the twentieth session.

2. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested a redraft of article 12. The suggested redraft is set out at comment 28.

Paragraph (1)

3. Paragraph (1) provides that a receiving bank is liable for its failure to fulfil its own obligations under article 5. Since there is a reference to article 5, the receiving bank contemplated is not the beneficiary's bank. The liability of the beneficiary's bank is considered in paragraph (4). At its nineteenth session the Working Group decided to retain the principle of paragraph (1), but to place it in square brackets until it had completed its consideration of the entire article on liability and damages in the expectation that it might be substantially redrafted (A/CN.9/328, para. 131).

Paragraph (2)

4. 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. That 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 13 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 could 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.

5. It was decided at the seventeenth session of the Working Group that the originator should also be able to hold an intermediary bank directly 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).

6. This system of liability was discussed at length at the nineteenth session without a final decision being reached as to whether it should be retained, abandoned or modified (A/CN.9/328, paras. 66 to 74 and 144). At the twentieth session the four delegations requested to reach an agreed position in respect of article 12 were in general in agreement that the responsibility for loss should be that of the bank where the events occurred that caused the loss (A/CN.9/329, para. 188, question 4).

7. Other decisions that have been made by the Working Group in respect of liability and damages, especially at the nineteenth session, may have a bearing on the significance

*Consideration may be given to allowing recovery of reasonable costs of legal representation even if they are not recoverable under the law of civil procedure.

of the provision. It has been decided that when a credit transfer is not carried out successfully, the originator has a right to a return of the principal sum transferred without regard to the reasons for the failure (article 11*(b)*). Although article 11*(b)* could be considered to implement the policy of paragraph (2), it is not considered to be a liability provision.

8. At the nineteenth session the Working Group decided that it would consider providing in the Model Law that, when there was a delay in a credit transfer, the beneficiary would have a direct right to recover interest resulting from the delay against the bank that had caused the delay. A similar right to recover for exchange losses is also to be considered (A/CN.9/328, paras. 131 and 132). A text that might implement those suggestion can be found in the working paper submitted by the Secretariat to the twentieth session (A/CN.9/WG.IV/WP.44, article 12, comment 17). If those proposals were accepted, the only remaining losses that would be subject to the procedures envisioned in paragraph (2) would be the expenses for a new payment order and reasonable costs of legal representation under paragraph (5)*(c)*, the indirect losses envisioned under paragraph (5)*(d)* and any interest or exchange losses that were not fully compensated by payment to the beneficiary.

Paragraph (3)

9. Paragraph (3) places a limit on the effect of paragraph (2) when the credit transfer is completed 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 would have obligations under article 11 to assist in correcting the situation.

Paragraph (4)

10. The beneficiary's bank might cause loss to the beneficiary by such actions as failing to fulfil its obligations under article 8(4), by failing to accept a payment order it is obligated by contract with the beneficiary to accept or by accepting a payment order the beneficiary has instructed it not to accept.

11. It is a matter of judgment whether the Model Law should contain provisions covering such losses. On the one hand the losses would arise out of the failure in respect of the credit transfer. On the other hand it may be thought that it is not necessary to establish rules on the liability of the beneficiary's bank to the beneficiary, especially when those rules might differ from the domestic rules governing liability for an otherwise identical failure by the bank. Paragraph (4)*(a)* takes a middle position by referring to the existence of such liability but leaves the substance of the rules governing the liability to the law that governs the account relationship. At the seventeenth session the Working Group decided to defer any decision whether to retain or to delete the subparagraph until it had a more complete view of the entire text (A/CN.9/317, para. 150). The paragraph has not been subsequently considered by the Working Group. However, at the twentieth session the Working Group considered a similar problem in connection with article 8 (see article 8, comments 1 to 4).

12. The beneficiary's bank might cause loss to the sender or to the originator by failing to give one of the notices required by article 8. Failure to give a notice of rejection required by article 7(2) would not cause loss to the sender or to the originator since it would lead to acceptance of the payment order by the beneficiary's bank. In addition, as indicated in paragraph (4)*(b)*, the beneficiary's bank might cause loss to the sender or to the originator by failing to place funds at the disposal of the beneficiary in accordance with an execution or pay date. Compare article 8, comment 15.

Paragraph (5)

13. 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.

14. Losses arising out of unauthorized payment orders are allocated by article 4(2) and (3). Liability for losses arising out of failure to give the notice required by articles 6(3) and 8(2) is set out in paragraph (6). 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 11*(b)*.

Interest, subparagraph (a)

15. Interest losses may be suffered in several different ways as a result of a credit transfer that does not work as intended. If a receiving bank receives funds from its sender but delays execution of the payment order, the sender (who may be either the originator or a sending bank) may be said to have suffered a loss of interest because it has been deprived of funds earlier than was necessary for the bank to execute the payment order. If the receiving bank receives funds late from its sender but executes the order without waiting for the funds, the receiving bank suffers the loss of interest. If the result of a delay or error of any kind at a receiving bank is that the entire credit transfer is delayed, the beneficiary could be said to have suffered the loss of interest. If the beneficiary could recover loss of interest from the originator because of late payment of the underlying obligation, the originator would be able to recover it from the bank where the delay occurred under paragraph (1) or from the originator's bank under paragraph (2).

16. The Working Group considered the problem extensively at the nineteenth session (A/CN.9/328, paras. 122 to 131). It agreed that, in any case where the beneficiary had been credited later than it should have been because of a delay in the transfer, the receiving bank causing the delay should not benefit from the use of the funds during the period of the delay (paragraph 122). It noted that it was current banking practice in many important banking centres for a bank at which a transfer was delayed to add an appropriate amount of interest to the amount being

transferred. As a result the beneficiary would automatically receive it. This was said to be efficient and expeditious, not requiring any inquiry into the facts of the underlying transaction but giving a remedy that would normally be approximately equal to the loss suffered, and a practice that the legal system should recognize (paragraph 126).

17. At the conclusion of the discussion the Working Group decided that it would be useful to consider providing in the Model Law that the beneficiary would have a direct right to recover interest resulting from the delay against the bank that caused the delay. Since the proposal raised a number of questions that would require consultation, the Working Group requested the Secretariat to prepare a draft of a provision for its consideration at its twentieth session (paragraph 131). A provision was suggested in the working paper submitted by the Secretariat to the twentieth session, A/CN.9/WG.IV/WP.44, article 12, comment 17, but it was not considered at that session.

Exchange losses, subparagraph (b)

18. The second most likely form of loss arising out of delayed international credit transfers are exchange losses, as provided in subparagraph (5)*(b)*. There was strong opposition in the nineteenth session of the Working Group to providing that exchange losses would be recoverable, especially in view of the fact that such losses were rare, usually arising only when the originator's bank was a small bank that did not often engage in international transfers or when the currency of the transfer was in a currency that was not frequently used for international transfers, and that neither the fact that such losses would occur nor the potential amount of loss was foreseeable (A/CN.9/328, paras. 133 and 134). Nevertheless, it was decided that the Secretariat should include in the provision it was to prepare giving the beneficiary a direct right to recover for interest losses a right to recover for loss caused by a change in exchange rates during the delay (paragraph 132).

19. At the twentieth session the four delegations that were to reach an agreed position in respect of article 12 divided equally as to whether exchange losses could under any circumstances be considered to be an item of loss that should be recoverable (A/CN.9/329, para. 188, question 2).

Proposed new provision

20. In the working paper submitted to the twentieth session the Secretariat included a proposed text to reflect the decisions that had been taken in respect of liability for interest and exchange losses (A/CN.9/WG.IV/WP.44, article 12, comment 17). The Working Group may wish to consider the Secretariat's suggested text at the current session. Several of its features have been included in the text proposed by the delegation of the United Kingdom in comment 28.

Expenses of new payment order and legal representation, subparagraph (c)

21. It was suggested at the nineteenth session of the Working Group that the first part of subparagraph (5)*(c)* was not of great importance because the amounts of money involved were minor, and the receiving bank might well have to bear the expenses of a new payment order as part of its obligation under article 11*(a)* to help rectify a credit transfer that had not been carried out properly. The second part of the subparagraph was put in brackets and the footnote was added because of the difficulties of formulating a rule that reflected the various means by which the costs of legal representation were distributed in the different legal systems (A/CN.9/328, paras. 137 to 139).

Other losses, subparagraph (d)

22. In respect of paragraph (5)*(d)* 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). That decision was reaffirmed in another context at the eighteenth session of the Working Group (A/CN.9/318, paras. 146 to 150). As suggested at the seventeenth session 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.

23. At the nineteenth session retention of the essence of the provision was again reaffirmed (A/CN.9/328, paras. 140 to 143). However, the formulation of the subparagraph was criticized as being imprecise. It was said that the subparagraph was not clear as to the types of losses that were to be covered or that those losses should have been the direct consequence of the failure on the part of the bank. The formula taken from article 8 of the Hamburg Rules for limiting the right to recover was said not to reflect properly the problems of making credit transfers (paragraph 142). After discussion the Working Group decided to place square brackets around the words "any other loss" and around the words taken from the Hamburg Rules to indicate its intention to redraft the provision.

24. At the twentieth session three of the four delegations that were asked to formulate an agreed position were in favour of retaining the provision in one form or another, while one delegation was in favour of deleting the provision (A/CN.9/329, para. 188, question 3).

Paragraph (6)

25. 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 paragraph (5). When the Working Group adopted the provision requiring a receiving bank to notify its sender of a misdirected payment order, articles 6(3) and 8(2) in the current draft, it noted that the harm suffered might not always be easy to measure. Nevertheless, it was of the view that there should be a sanction for a bank's failure to notify the sender where that failure to notify delayed the transfer (A/CN.9/318, para. 122). Where the receiving bank was in possession of funds during the period it failed to notify the sender of the misdirection, the obligation to pay interest is in the nature

of restitution of what the bank can be assumed to have earned from having been in possession of the funds as well as what the sender can be assumed to have lost. Where the receiving bank was not in possession of funds, the requirement to pay interest for up to 30 days serves only as a measure of the loss the sender can be assumed to have suffered.

Paragraph (7)

26. Paragraph (7) provides an important rule setting forth the extent to which the provisions of this article can be varied by agreement of the parties.

Paragraph (8)

27. Paragraph (8), 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). Without such a provision some legal systems might permit other remedies based on general theories of obligation, thereby destroying the uniformity of law the Model Law seeks to achieve.

Suggested redraft presented by the delegation of the United Kingdom

28. In a communication to the Secretariat the delegation of the United Kingdom has suggested the following redraft of the entire article following the basic numbering of the current text:

"(1) [This paragraph has been deleted.]

(2) A receiving bank is liable to its sender and to the originator for the losses as set out in paragraphs (5) and (6) caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. A credit transfer is improperly executed if any receiving bank fails to comply with any obligation imposed by this law in the time required by this law.

(3) A receiving bank is not liable under paragraph (2) if the payment order received by each subsequent receiving bank was consistent with the payment order received by it and neither it nor any subsequent receiving bank failed to execute the payment order it received within the time required by article 9 or comply with any notification obligation mentioned in paragraph (6). A receiving bank that does not accept a payment order is liable under paragraph (2) only in respect of its failure to notify rejection in accordance with article 5(3).

(4) [This paragraph has been deleted. Subparagraph *(a)* is now paragraph (6C) and subparagraph *(b)* is included in paragraph (2) above.]

(5) If a bank is liable under this article to the originator or to its sender, and paragraph (6) does not apply to it, it is obliged to compensate for

(a) loss of interest,

(b) expenses incurred for a new payment order,

(c) any other loss that has 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 loss, or recklessly and with knowledge that such loss might result.

(6) This paragraph applies to a receiving bank which is liable only in respect of its failure or the failure of a subsequent receiving bank to comply with any of the following notification obligations:

(a) to notify rejection in accordance with article 5(3) or 7(2), where payment has not been received from the sender;

(b) to notify misdirection in accordance with article 6(3) or 8(2);

(c) to notify a lack of sufficient data in accordance with articles 6(4) or 8(3);

(d) to notify an inconsistency between the words and figures that describe the amount of money in accordance with article 6(5) or 8(4).

If a bank to which this paragraph applies is liable under this article to the originator or to its sender, it is obliged to compensate only for loss of interest for a maximum of 7 days or the period during which it held the funds, whichever is the longer.

(6A) If a sender delays paying its receiving bank, the sender is liable to compensate the receiving bank for loss of interest.

(6B) If a credit transfer is delayed by the improper execution of a payment order that has been accepted by a receiving bank other than the beneficiary's bank, the bank is liable to compensate the beneficiary for loss of interest. The liability of the bank to the beneficiary is discharged to the extent that it transfers to its receiving bank an amount in addition to that it received from its sender.

(6C) The beneficiary's bank is liable to the beneficiary, to the extent provided by the law governing the relationship between them, for its improper execution or its failure to execute a payment order it has accepted or, if the beneficiary does not maintain an account with the bank, for its failure to notify him in accordance with article 8(6) that it is holding funds for his benefit.

(6D) In this article 'loss of interest' includes interest which the person entitled to compensation is obliged to pay a third party.

(6E) If the non-execution or improper execution of the credit transfer was caused by more than one bank, any bank obliged to pay compensation under this article shall be entitled to an appropriate contribution from the other bank or banks. The total liability of a bank under paragraph (6) and this paragraph shall be limited to the amount specified in paragraph (6).

(7) Banks may vary the provisions of this article by agreement so as to increase, reduce or exclude their liability to other banks but not so as to reduce or exclude their liability under paragraph (5)*(c)*. A bank may agree to increase its liability to an originator that is not a bank but may not reduce or exclude its liability to such an originator.

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

Article 13. *Exemptions*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 12 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 credit transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

Prior discussion

A/CN.9/297, para. 60
A/CN.9/317, paras. 151 to 156

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 13 provides the receiving bank with its sole basis of defence in such cases.

2. Article 13 does not apply to the obligation of a receiving bank under article 11*(b)* to refund to its sender any funds received from the sender when a payment order consistent with the contents of the payment order issued by the originator was not issued or accepted by the beneficiary's bank. It also does not seem to apply to the bank's obligation to pay "any other loss" under article 12(5)*(d)*, since that provision has its own strict limitation on liability. (See article 12, comments 22 to 24.) Furthermore, it can be questioned whether the application of article 13 to loss of interest would be consistent with the decision of the Working Group at its nineteenth session that a bank that caused a delay in a credit transfer should not be allowed to earn interest on the funds that were in its possession because of the delay (A/CN.9/328, para. 122) or with the decision at the seventeenth session that the receiving bank that fails to notify its sender of a misdirected payment order should be liable for interest. See article 12, comment 25.

3. Under article 13 the bank must prove the exempting condition. Although there is a list of specific circumstances that might exempt the bank from liability, the reference to "other circumstances" indicates that the list is not exhaustive. The current draft of article 13 has not been discussed by the Working Group.

4. In a communication to the Secretariat the delegation of the United Kingdom has suggested a redraft as follows:

"A receiving bank and any bank to which the receiving bank is liable under article 12 is exempt from liability for a failure to perform any of its obligations under that article if the bank proves that the failure was due to circumstances which were beyond the bank's control and which it could neither avoid nor overcome."

CHAPTER IV. CIVIL CONSEQUENCES OF CREDIT TRANSFER

Article 14. *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 obligation 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.

Prior discussion

A/CN.9/317, paras. 157 to 164
A/CN.9/328, paras. 37 to 43
A/CN.9/329, paras. 189 to 192

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 credit 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 (A/CN.9/328, para. 41).

2. At the end of the short discussion on article 14 held at the twentieth session, delegations were invited to propose alternative texts for an article 14 that would fulfil the

needs of the Model Law for a rule on the effect of a completed credit transfer without raising the kinds of concerns that had been raised about the current text. The delegation of France has proposed a text which is set out at comment 11.

Paragraph (1)

3. 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 at its seventeenth session that it would be appropriate to include such a rule (A/CN.9/317, para. 158).

4. The Working Group agreed at its seventeenth session 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). At the nineteenth session the question was raised as to whether the provision would limit the beneficiary's right to require payment to it in legal tender or to reject a specific payment made by means of a credit transfer (A/CN.9/328, para. 38). In reply it was pointed out that some States had tax laws that required commercial payments to be made by cheque, credit transfer or other similar means, while many other States had statutory provisions similar to paragraph (1) (A/CN.9/328, para. 40). At the twentieth session the general view was that paragraph (1) should be deleted because it attempted to state a rule that might be generally followed in practice, but that violated deeply held feelings about the appropriate legal rules on the subject (A/CN.9/329, para. 190). However, since it had been decided that the discussion was to be only for the purpose of laying a foundation for a more thorough discussion at the twenty-first session, no action was taken.

Paragraph (2)

5. 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.

6. In the seventeenth session of 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). At the nineteenth session the desirability of having the beneficiary's bank become indebted to the beneficiary at the same time any obligation of the originator was discharged was restated (A/CN.9/328, para. 41).

7. Nevertheless, at the nineteenth session of the Working Group the text of paragraph (2) was said to raise problems. Although some obligations could be partially discharged by payment of a part of the money due, other obligations were indivisible. Furthermore, the law governing the means by which and the extent to which an obligation could be discharged might be that of a State in which neither the originator's bank nor the beneficiary's bank was located (A/CN.9/328, para. 39). In reply it was suggested that the provision on discharge might indicate that the obligation would be discharged to the extent that payment of the same amount of money would discharge the obligation, thereby taking no position as to whether an obligation could be partially discharged (A/CN.9/328, para. 42).

8. In the working paper submitted to the twentieth session the Secretariat suggested two possible reformulations of paragraph (2), one of which provided a specific rule on discharge and the other of which stated only when the transfer was completed (A/CN.9/WG.IV/WP.44, article 14, comments 7 and 8). The second approach would leave to other rules of law any conclusions as to the effect on the discharge of the obligation, if the transfer was for the purpose of discharging an obligation.

9. At the twentieth session both proposals received some support, but the view was also expressed that the first one would be unacceptable in some States as a matter of legislative policy because of the very fact that it set out a rule for the discharge of obligations (A/CN.9/329, para. 191). In a communication to the Secretariat the delegation of France raised additional objections, i.e., that a rule on discharge is applicable only if the transfer is for the purpose of discharging an obligation and not, for example, a cash consolidation operation; a rule on discharge should be subject to the parties agreement specifying a different means of discharge of the obligation or transfer to a different account than the one to which the transfer was made; the methods of discharge of an underlying obligation are already exhaustively specified by law in some legal systems and the proposed rule on discharge would change the law of contract, even though that should be beyond the scope of the Model Law.

10. As a result of these objections raised to the inclusion in the Model Law of any rule on discharge of an obligation by funds transfer, only the second of the two Secretariat proposals submitted to the twentieth session is repeated here:

> "The beneficiary's bank becomes indebted to the beneficiary and the transfer of funds from the originator to the beneficiary is completed when the beneficiary's bank accepts a payment order ordering payment to the beneficiary."

11. In the communication to the Secretariat referred to in comment 9 the delegation of France proposed a

different formulation for what is presently paragraph (2). In the French proposal paragraphs (1), (3) and (4) as well as the third sentence of article 2*(a)* would be deleted. The French proposal is as follows:

"Unless otherwise agreed by the sender and the beneficiary, a transfer is completed when the beneficiary's bank places the funds at the beneficiary's disposal or notifies him that it is holding the funds for his benefit, in accordance with article 8(1) or (6)."

Paragraph (3)

12. 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 that 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 the charges, which often occurs, the originator would be obligated to reimburse the beneficiary for them.

13. In a communication to the Secretariat the delegation of the United Kingdom suggested that paragraph (3) did not seem to be sensible either commercially or as a matter of legal principle. It said that the statement that the beneficiary may then recover the shortfall from the sender is likely merely to lead to a further credit transfer and more confusion. The delegation of the United Kingdom, as well as the delegation of France in a separate communication, recommended the deletion of the paragraph. See also article 4, comment 19, above, for the converse question as to whether the sender should be responsible to pay for the costs and charges.

Paragraph (4)

14. Paragraph (4) is the corollary to paragraph (2) in that it provides 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 which, in the usual situation for a receiving bank that is not the beneficiary's bank, is when it executes the payment order by sending a new payment order to the next bank. 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. This paragraph should be considered in the light of article 4(4) (see article 4, comment 20, above).

15. At the twentieth session it was suggested that paragraph (4) was not entirely consistent with article 4(4) since article 14(4) spoke of the acceptance of the payment order by the receiving bank (A/CN.9/329, para. 110). In a communication to the Secretariat the delegation of the United Kingdom made essentially the same point that the two were inconsistent, but stated that it was because payment under article 4(4) was not due until execution. It suggested that if that objection was overcome, and if it was felt by the Working Group that a statement about when a sender's account should be deemed to have been debited was needed (for example for the reasons given above), the provision should be adapted and incorporated in article 4(4). In a separate communication to the Secretariat the delegation of France recommended the deletion of paragraph (4).

CHAPTER V. CONFLICT OF LAWS

Article 15. *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 originator 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.

Prior discussion

A/CN.9/297, paras. 34 to 36
A/CN.9/317, para. 165
A/CN.9/WG.IV/WP.42, paras. 69 to 80

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 has not been considered by the Working Group as yet.

2. The problem of conflict of laws is considered in more detail in the report of the Secretary-General to the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80. That report considers the issues 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.

3. The report states that the Model Law might include a provision on its territorial application and that, in addition, consideration might be given to a provision governing the conflict of laws where the dispute arises in a State that has adopted the Model Law but the other State or States concerned have not, or where the text of the Model Law does not govern the issue at hand (paragraph 71). The report concludes that in general the law applicable to any given segment of the credit transfer should be the law of the receiving bank, but goes on to give illustrations from the text of the draft Model Law as it was before the eighteenth session of cases in which the law of a different State might be appropriate (paragraphs 75 to 77). While the text of the draft Model Law has changed substantially in presentation since that time, the conclusions as to the appropriate law to be applied to the different problems would seem to remain valid.

4. In a communication to the Secretariat the delegation of the United Kingdom suggested that paragraph (1) be amended to add the words "or of the State in which the place of sending or receipt is situated" after "denominated" and the words "law of the State where the payment order is received" be substituted for "the law of the State of the receiving bank" in the penultimate line.

5. If the Working Group was to decide to redraft article 14(2) so as to delete any rule on discharge of an obligation (see article 14, comments 7 to 11), it would seem to be clear that article 15(2) would be deleted from the Model Law.

[A/CN.9/WG.IV/WP.46/Corr.1]

Article 2

Paragraph numbers 8 and 9 of the comments are missing due to an error in numbering and no substance was omitted.

2. International credit transfers: proposal of the United States of America: note by the Secretariat (A/CN.9/WG.IV/WP.47) [Original: English]

INTERNATIONAL CREDIT TRANSFERS

Proposal of the United States of America
Note by the Secretariat

1. At the twentieth session of the Working Group the delegation of the United States suggested the possibility of restructuring the Model Law into two parts: one applicable to high-speed systems and another applicable to slower systems (A/CN.9/329, para. 197). The delegation has now submitted its proposal as to how such a restructuring might be accomplished.

2. This note contains in the annex the covering letter from the United States delegation plus its proposal with explanatory comments.

ANNEX

Covering letter from the United States, dated 6 June 1990

We have enclosed several proposed modifications to the draft Model Law for international credit transfers being prepared by the Working Group on International Payments.

Together with many other delegations, we have seen the preparation of this Model Law as an important opportunity for UNCITRAL to be among the first international bodies to achieve harmonization in international trade law in the new field of electronic commerce. A project of this nature is of course difficult, since it must deal with the conflict between newly emerging commercial practices and traditional laws and obligations.

At the conclusion of the last Working Group session on this subject, which took place in Vienna, 27 November-8 December 1989, the US delegation expressed serious concern as to the direction the draft Model Law was taking, and whether as then drafted it was compatible with new electronic banking and clearing systems. We believe that any proposed international rules must recognize high-speed systems and the changed legal relationships that result. Otherwise, the rules if adopted would have the effect of impeding new commercial methods, rather than facilitating world trade. In the latter case, such rules may be unlikely to achieve widespread acceptance by States, and UNCITRAL would have lost an opportunity to be a leader in setting norms for modern electronic commerce.

Bank credit transfers, which are an important part of the new electronic commerce, can play a role in expanding services and lowering costs for commercial parties in all nations, regardless of their state of economic development or particular trade interest. With respect to commercial users, as distinct from consumers, modern electronic transfers today offer the option of high-speed, low cost transactions. Such transactions may depend on electronic clearing houses which, through computer-assisted high-speed systems, are able to handle very large volumes of transactions daily. At the same time, these computer-assisted systems, because of their very high volume, operate on a "best-efforts" basis and cannot undertake the same obligations that may accompany traditional funds transfers.

The latter may involve conditional payments, bank verification of transactions, reversibility, indeed many other facets may involve direct intervention by bank personnel. Commercial customers are likely to want the option of using either more traditional transfer methods, which may also use electronic means but would involve a wider range of responsibilities by banks and involve higher costs, or the newer high-speed systems at low cost. In the latter case, customers are likely to absorb certain risks in order to use those services; for example, computer-assisted systems at high speed and volume cannot normally accommodate reversal and do not allow for individual transaction monitoring and consequent exposure to responsibilities for errors or failures in the same manner as do traditional credit transfer methods. The sheer volume of transactions places real burdens on banks and clearing houses with respect to notice obligations and liability for damages, which must be taken into account if any proposed rules are to be compatible with the newly emerging electronic clearing systems.