(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 articles 6(3) or 8(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.

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.

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.

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.

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

(A/CN.9/WG.IV/WP.44) [Original: English]

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INTRODUCTION

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

2. The Working Group undertook the task at its sixteenth session held at Vienna from 2 to 13 November 1987 at 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 for discussion at the twentieth session of the Working Group. The new text of the Model Law is contained in annex I to that report (A/CN.9/328, para. 145).

5. This report contains a commentary on the draft articles of the text as restructured by the drafting group at the nineteenth session, indicating their history and their relation to other provisions. In some places where the text was not considered at the nineteenth session, or was considered but not changed, the commentary may be identical to that in the report of the Secretary-General before the nineteenth session (A/CN.9/WG.IV/WP.41). The report also contains suggestions by the Secretariat as to changes that might be made in the text.

6. The comments to a number of the articles raise drafting or presentation problems of varying degrees of importance. In addition to those issues, which should be common to all language versions, problems of terminology and drafting exist within all of the individual language versions. Now that many of the basic policy decisions have been made in the Working Group, it is to be hoped that a drafting group can be constituted at the twentieth session to resolve many of those problems.

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Prior discussion

A/CN.9/318, paras. 10 to 19

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). The criteria for determining whether a credit transfer is international are to be found in article 1.

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

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

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

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/WG.IV/WP.41, article 1, comments 16 and 18

Comments

1. Article 1 was adopted in its current form by the Working Group at its eighteenth session (A/CN.9/318). It was not considered at the nineteenth session.

Internationality of a transfer

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

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

4. The rule that the Model Law does not apply where the originator and the beneficiary have their accounts in the same bank applies as well to a bank that effects a transfer for its own account. Such a bank is an originator. Although the term "originator's bank" is not defined, the logic of the words suggests that an originator's bank is the bank where the originator has its account. Therefore, a bank that is an originator cannot be at the same time the originator's bank. Similarly a bank that receives credit for its own account is a beneficiary and not a beneficiary's bank.

5. Therefore, a credit transfer by Bank A as an originator to Bank B as the beneficiary made by instructing their mutual correspondent Bank C to debit and credit the appropriate accounts held with it is not an international credit transfer and the Model Law would not apply even if the three banks were in different States.

6. If the transfer in the example above was to Bank B for the credit of its customer, Bank C would be the originator's bank and Bank B would be the beneficiary's bank. The transfer would be international if Bank B and Bank C were in different States.

7. If it is considered desirable for the Model Law to apply whenever two banks are involved in different States, consideration could be given to introducing a definition of originator's bank as "(1) the receiving bank to which the payment order of the originator is issued if the originator is not a bank or (2) the originator if the originator is a bank" with a similar definition of "beneficiary's bank". If this suggestion is adopted, the use of the term "originator's bank" would have to be reconsidered in articles 2*(a)*, 2*(g)*, 8(3), 11*(a)* and 12(2). Similarly, the use of the term "beneficiary's bank" would have to be reconsidered.

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

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

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 12 and 13 to article 2.

9. 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 fall within the sphere of application of the Model Law or would be considered to be domestic and fall outside of it (A/CN.9/318, paras. 25 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. Although the definition of a credit transfer in article 2*(a)* as comprising "a complete movement of funds from the originator to the beneficiary" might lead to the result that the Model Law would apply to all elements of a credit transfer that was international under article 1, the provision on the territorial application of the Model Law might lead to a different result. See comment 12, below.

10. 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).

11. 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.

12. 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

13. 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.

14. 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).

Effect of contractual agreement

15. 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 4(2)*(b)*, 5(2)*(b)*, 7(2)*(b)*, 8(2), 8(4)*(a)* Variant B, 12(7), 14(1), 14(3), 15(1) and 15(2).

Article 2. *Definitions*

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

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

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

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

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

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

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

(h) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an inter-

governmental institution or by agreement of two or more States, provided that this Law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(i) "Payment order" means a message, whether written or oral, that contains an order to the receiving bank to pay, or to cause another bank to pay, to a designated person a fixed or determinable amount of money.

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

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

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

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

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

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

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 and nineteenth 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. It may be useful 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.

"Credit transfer"

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

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

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

7. Athough the definition as derived from ISO 7982-1 probably does not cause any confusion, the concerns expressed at the eighteenth session may lead to its further precision. Consideration might be given to defining a credit transfer as consisting "of a series of actions commencing with issue of the originator's payment order, taken for the purpose of transferring funds to the beneficiary." It may be thought not to be necessary to include a reference to the existence of one or more payment orders, as in the current definition. While a credit transfer in general may involve only one payment order, an international credit transfer subject to the Model Law requires the existence of at least two payment orders, one from the originator to the originator's bank and a second from the originator's bank to the beneficiary's bank in another country. The proposed definition would mark the beginning of the credit transfer as being the issue of a payment order by the originator. While the credit transfer is completed by acceptance of an appropriate payment order by the beneficiary's bank, it may not be necessary for the definition to so indicate. Compare article 14, comment 8.

"Originator"

8. The definition differs from the wording of the definition in ISO 7982-1, but not from its meaning. It was approved by the Working Group at its seventeenth and eighteenth sessions (A/CN.9/317, para. 32; A/CN.9/318, para. 41). Under the definition a bank that issues a pay-

ment order for its own account is an originator. See comments 4 to 7 to article 1 for the consequences on the sphere of application of the Model Law and for a suggestion as to a definition of "originator's bank" and of "beneficiary's bank".

"Beneficiary"

9. The definition differs from the wording of ISO 7982-1 in that a person whose account is credited in error is not a beneficiary (A/CN.9/318, para. 42). Although it is not stated in the definition, it would seem that the person intended to receive the funds is the person named as beneficiary in the originator's payment order. For the situation where the identity of the beneficiary is expressed both by words and by account number and there is a discrepancy between them, see article 8(3). Similarly to the rule in regard to an originator, a bank may be the beneficiary of a transfer.

"Sender"

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

"Bank"

11. 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.

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

13. The extension of the definition to such financial institutions has the potential to extend the sphere of application of the Model Law. If a given brokerage firm met the definition of a bank, it would be either an originator's bank or a beneficiary's bank (since it can be assumed that such institutions would not function as intermediary banks), and the payment orders given to it by its customer would be governed by this Law rather than by some other body of law. If another brokerage firm was not considered to be a bank under the definition, its payment order to a bank to make a transfer would be as an originator, even if in the given case the order was given for the account of one of its customers. The order from the customer to the brokerage firm would be outside the sphere of application of the Model Law. Compare comment 8 to article 1.

14. An earlier version of the draft Model Law 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), 9(4) and 10(9) (A/CN.9/328, paras. 82 and 110).

"Receiving bank"

15. Although the Working Group at its eighteenth session modified the wording of the definition from that found in ISO 7982-1, the meaning remained the same (A/CN.9/318, paras. 55 to 57). A bank that receives a payment order is a receiving bank even if the payment order was not addressed to it. (The problem of mis-directed payment orders is addressed in articles 6(2) and 8(1).) A bank to which a payment order is addressed but which does not receive it is not a receiving bank.

"Intermediary bank"

16. The definition was proposed by the Working Group at its seventeenth session (A/CN.9/317, para. 41). It differs from the definition in ISO 7982-1 in three substantial respects: first, it includes all banks other than the originator's bank and the beneficiary's bank, whereas ISO 7982-1 includes only those banks between the given receiving bank and the beneficiary's bank; secondly, ISO 7982-1 includes only those banks between the receiving bank and the beneficiary's bank "through which the transfer must pass if specified by the sending bank"; and thirdly, reimbursing banks are included in this definition, even though the transfer may be considered not to pass through them and they are not in the chain of payment orders from the originator to the beneficiary's bank.

"Funds" or "money"

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

"Payment order"

18. 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. The sentence as found in the current text became the definition. The requirements as to the minimum data elements in a payment order are set out in article 3.

19. Although there was some hesitancy at the seventeenth session of the Working Group as to whether it was necessary to specify that the payment order could be either written or oral (A/CN.9/317, para. 53), the words have been retained since they seem to add clarity to the definition. However, it may be preferable if the definition were to provide that the payment order could be "in any form", since it may be questionable whether a payment order in computer readable form is in written form.

"Authentication"

20. 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".,

21. The definition makes it clear that an authentication of a payment order does not refer to formal authentication by notarial seal or the equivalent, as it might be understood in some legal systems. The definition also differs from the definition of "message authentication" in ISO 7982-1 in that authentication as here defined does not include the aspect of validating "part or all of the text" of a payment order. That may be appropriate, even though most authentication techniques that rely upon the use of computers do both, since this Model Law also applies to paper-based payment orders. However, a definition of authentication that included validation of part or all of the text might be desirable if it was thought desirable to extend the result of article 4(2) to the content of the payment order. See comment 10 to article 4. Moreover, the definition of "authentication" should extend to revocations of payment orders. See comment 6 to article 10.

22. The definition as adopted by the Working Group at its eighteenth session includes the provision that the authentication procedure is the product of an agreement (A/CN.9/318, paras. 75, 76 and 94). 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 even if the authentication used was agreed to by the sender.

23. The Working Group may wish to consider modifying the definition as follows:

"'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 or whether there has been an error in its transmission or in its content."

"Cover"

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

25. Concern over use of the word "cover" has been expressed in the Working Group on several occasions. In the current draft the word is used in articles 4(2)*(b)* (different meaning), 5(2)*(b)* and 7(2)*(b)*.

"Execution date"

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

27. At the eighteenth session of the Working Group the second sentence, which had been part of article 7(1)*(b)*, was added to the definition (A/CN.9/318, paras. 104, 106). At the nineteenth session a proposal for a redrafting of article 7 (currently article 9), which was adopted in principle by the Working Group, would have deleted the second sentence of the definition (A/CN.9/328, para. 88). However, in the restructuring of the text by the drafting group, article 9 was modified substantially. As a consequence, the drafting group did not delete the second sentence of the definition pending further discussion of the text by the Working Group.

28. Since article 9(1)*(a)* provides that in the absence of a later execution date, the payment order must be executed on the day received, that aspect of the second sentence of the definition might be deleted. However, deletion of that portion of the second sentence would leave the definition of "execution date" restricted to the date specified by the sender, which might not be desirable. Depending on how the definition might be changed, consideration should be given as to whether that portion of the second sentence might be technically inconsistent with article 9(1)*(b)*.

29. It would seem from the first sentence that the sender might specify the execution date either on the payment order or in a separate or standing instruction. The second sentence would seem to require the specification of the execution date by the sender to be on the payment order itself.

30. The current text of article 9 does not contain the element found in the second sentence of the definition of "execution date" that there may be something in the nature of the order to indicate that a date other than the date of receipt would be the appropriate execution date. That phrase, which was first added to the rule before the sphere of application of the Model Law was restricted to international credit transfers, can be easily applied to bulk credit transfers of low value sent through a system that operates on a set time schedule, such as execution on the third day after receipt of the payment orders on magnetic

tape. It may be less applicable to international credit transfers which are, at least at present, less likely to follow such a time schedule.

31. 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, execution of an order can be assumed to be the sending by the receiving bank of a payment order intended to carry out the order received (compare article 5(2)*(d)* with article 6(4)). 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(2). 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"

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

33. The definition of "pay date" differs from that in ISO 7982-1 in that in the latter the pay date is the "date on which the funds are to be available to the beneficiary for withdrawal in cash". In the Model Law definition the pay date is the date "when the funds are to be at the disposal of the beneficiary". (See A/CN.9/317, para. 43.) The definition leaves open the question when and under what circumstances the funds are at the disposal of the beneficiary, but they may be at the disposal of the beneficiary even though they are not available for withdrawal in cash. The most obvious example is when the transfer is in a unit of account that may be at the disposal of the beneficiary for further transfer in that form but not available in cash either as a unit of account or, perhaps, even in the local currency.

"Value date"

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

35. In the discussions in the nineteenth session concerning article 7 (currently article 9), the Working Group agreed with the definition. It was suggested, however, that the value date only provided information to the receiving bank as to when it could expect to receive funds from the sender, but that it did not by itself establish any obligations since the receiving bank would have no obligation to accept the order or give notice of rejection until it had in fact received sufficient funds (A/CN.9/328, para. 79). In the text as restructured by the drafting group, the term "value date" is not used and the definition might be deleted as unnecessary.

Article 3. *Contents of payment order*

A payment order is required to contain, either explicitly or implicitly, at least the following data:

(i) identification of the sender;

(ii) identification of the receiving bank;

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

(iv) identification of the beneficiary;

(v) identification of the beneficiary's bank.

Prior discussion

A/CN.9/297, paras. 37 and 38
A/CN.9/317, paras. 49 to 68
A/CN.9/WG.IV/WP.41, article 2, comment 18.

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). However, the minimum data elements required by the Model Law are now set out in article 3.

3. Authentication is not included as a required data element in a payment order. It is, however, defined in article 2*(j)*. In accordance with the suggestion at the seventeenth session of the Working Group, the consequences of a failure to authenticate a payment order or other message are considered in article 4 on the obligations of a sender (A/CN.9/317, para. 55).

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

5. A preliminary version of ISO Draft Proposal 7982-2, "Universal Set of Data Segments and Elements for Electronic Funds Transfer Messages" contained in document ISO/TC68/SC5/N230, dated 8 August 1988, proposes a set of mandatory data elements. Under the proposal, those mandatory data elements that would always be required to appear in the message are labelled "Mandatory Explicit". The data elements that would be required either to appear in the message or be derivable from another mandatory data segment and/or data element in the message or from the processing conventions of the system used are referred to in the proposal as "Mandatory Implicit". The document lists several data elements as being either mandatory explicit or mandatory implicit that are not set out in article 3, e.g. the date and time the message was delivered to a receiving bank by a communications service.

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

(1) *Variant A*

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

Variant B

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

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

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

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

(c) the receiving bank complied with the authentication.

(3) *Variant A*

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

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

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

Variant B

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

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

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

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

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

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

Comments

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

Paragraph (1)

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

3. Paragraph (1) might be amended to make it applicable to the revocation of a payment order in accordance with the proposed modification of paragraph (2) suggested in comment 10, below.

Paragraph (2)

4. 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.

5. The first requirement is that the authentication provided is commercially reasonable. The discussion in the Working Group proceeded on the basis that it was the receiving bank that determined the type of authentication it was prepared to receive from the sender. Therefore, it

was the receiving bank's responsibility to assure that the authentication procedure was at least commercially reasonable. The sender and the receiving bank could not provide for a lower standard by agreement (A/CN.9/318, para. 75).

6. 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.

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

8. 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. Furthermore, it was thought to apply to the situation in some countries where the agreements between banks and their customers provide that the bank is permitted, but not required, to create an overdraft when it receives a payment order from its customer (A/CN.9/318, paras. 84 and 86). However, the imperative nature of the words "are to be executed" may leave the latter case outside the clause as currently drafted.

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

10. Difficulties were experienced at the nineteenth session in stating the authentication requirements of a revocation of a payment order (see article 10, comment 6). Those difficulties might be overcome, and authentication might be extended to the detection of errors in payment orders, by adopting the proposed new definition of "authentication" in article 2, comment 22, and by modifying paragraph (2) of this article as follows:

"Notwithstanding anything to the contrary in paragraph (1), when a payment order or a revocation of 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 to determine whether all or part of a payment order or a revocation of a payment order was issued by the purported sender or whether there was error in its transmission or in its content,

(b) . . .

(c) . . ."

Paragraph (3)

11. 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 5, 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).

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

"A purported sender [that is not a bank] is not bound under paragraph (2) if he proves that

(a) . . .".

Paragraph (4)

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

14. It can be doubted whether receiving banks will often accept payment orders for future execution prior to the execution date, unless the sender has already paid for the order. However, if the receiving bank executes the payment order prior to the execution date, it accepts the order at the time of its execution. While the sender can no longer revoke the order (article 10(1) and (2)), and is obligated to pay for it, the receiving bank may not debit the sender's account or otherwise require payment for the order until the execution date. See, however, article 14(4).

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

(1) If a receiving bank decides not to accept a sender's payment order, it is required to notify the sender of the rejection, unless one of the reasons is insufficient funds. A notice of rejection of a payment order must be given not later than on the execution date.

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

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given,

(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 without notification that cover is in place,

(c) when it notifies the sender of acceptance, or

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

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

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.

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).

Paragraph (1)

4. Paragraph (1) contains elements that were previously in articles 5(1) and 7(1). However, it expresses the same substantive rules as in the prior text.

5. Except for certain obligations of notification of error set out in articles 6(2) and (3) and 8(1), (2) and (3), the receiving bank is 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, as a general principle it must notify the sender of its decision not to accept the order. However, the notification need not give any reason for the decision not to accept.

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

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

8. The Working Group discussed these issues at its nineteenth session without deciding whether they warranted a change in the current use of the words "insufficient funds" (A/CN.9/328, para. 15).

9. 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.

10. 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 in respect of a receiving bank that is not the beneficiary's bank to article 5(1). In doing so it deleted the requirement that the notice must be given on the day the decision is made in conformity with a decision of the Working Group (A/CN.9/328, para. 86).

Paragraph (2)

11. Paragraph (2) contains the substance of former article 6(1), but substantially enlarged by the Working Group at its nineteenth session.

12. Acceptance of a payment order occurs through passage of time under paragraph 2*(a)* when a receiving bank is required to give notice of rejection under paragraph (1) and fails to do so in the required period of time. Once the order has been accepted, the receiving bank is bound on the order and will be liable for the consequences that would follow from a failure to execute it.

13. Paragraph 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 favour 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.

14. At the conclusion of the discussion 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).

15. Paragraph 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.

16. Paragraph 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(4) 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.

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

(1) The provisions of this article apply to a receiving bank other than the beneficiary's bank.

(2) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify and trace the sender, the receiving bank shall notify the sender of the misdirection.

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

(4) 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, to either the beneficiary's bank or an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

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

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

Comments

Paragraph (2)

1. Paragraph (2) is identical to the first sentence of prior article 5(1 *bis*).

2. 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).

3. 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 (2) 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).

Paragraph (3)

4. Paragraph (3) is prior article 3(1). 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 do so and it acts upon the incorrect amount, it is responsible for the consequences, even if it had no knowledge of the discrepancy.

5. 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 (3) 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).

6. Paragraph (3) makes the general rule subject to the agreement of the sender and the receiving bank that the receiving bank will act upon either the words or the figures, as the case may be. Such an agreement could be anticipated to provide that the bank would act upon the amount in figures.

Time to give notice required by paragraphs (2) and (3)

7. No indication is given in either paragraph as to when the required notice must be given. Presumably it must be given by the execution date, as for a notice of rejection in article 5(1) or 7(1). See discussion in article 9, comments 17 to 19.

Paragraph (4)

8. Paragraph (4) is prior article 5(3)*(a)*, drafted in essentially the current form 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 (5)

9. 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. As an alternative, the receiving bank can enquire of the sender as to the actions it should take, but it must do so within the time required by article 9.

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

(1) If the beneficiary's bank decides not to accept a sender's payment order, it is required to notify the sender of the rejection, unless one of the reasons is insufficient funds. A notice of rejection of a payment order must be given not later than on the execution date.

(2) 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,

(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place,

(c) when it notifies the sender of acceptance,

(d) when the bank credits the beneficiary's account or otherwise pays the beneficiary,

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

(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.

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, 44 to 51, 59 and 60

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 majority of the provisions are identical, with the exception of the way in which the bank is referred to. Consequently, the comments to article 5 relative to use of the concept of acceptance and to paragraphs (1) and (2)*(a)*, *(b)* and *(c)* are applicable to article 7.

2. Paragraph 2*(c)*, *(d)*, *(e)*, *(f)* and *(g)* represents 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 prior article 6(2).

3. At the nineteenth session the Working Group deleted from what is currently paragraph (2)*(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).

Article 8. *Obligations of beneficiary's bank*

(1) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify and trace the sender, the beneficiary's bank shall notify the sender of the misdirection.

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

(3) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank must notify, within the time prescribed in article 9, paragraph (4), its sender, and also the originator's bank if it is identified on the payment order.

(4) *Variant A*

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.

Variant B

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

(a) if the beneficiary maintains an account at the beneficiary's bank into which funds are normally credited, by, in the manner and within the time prescribed by law, including article 9, or by agreement between the beneficiary and the bank

(i) crediting the account,

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

(iii) notifying the beneficiary; or

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

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

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

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

Comments

1. The restructuring of the text by the drafting group at the nineteenth session of the Working Group led to the duplication in article 8(1) and (2) of the text of article 6(2) and (3) with appropriate changes in the references to the relevant banks. Therefore, the comments to those paragraphs are relevant to article 8.

Paragraph (3)

2. Paragraph (3) 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.

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

4. 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(4), i.e. on the day the decision is made, but not later than the day the receiving bank was required to execute the order. It is anticipated that within a reasonable time the beneficiary's bank would receive further instructions as to the proper identification of the beneficiary, or an indication that the transfer was fraudulent.

Time to give notice required by paragraphs (2), (3) and (4)

5. Paragraph (3) states that the notification there required must be given within the time prescribed in article 9(4). The reference is in error; the paragraph cited (prior article 7(4)) was deleted in the redrafting of the draft Model Law at the nineteenth session.

6. As in respect of article 6 no indication is given in either paragraph (1) or (2) as to when the notice must be given, nor is there an effective time indicated in paragraph (3). Presumably the notice must be given by the execution date, as for a notice of rejection in article 5(1) or 7(1). See discussion in article 9, comments 17 to 19.

Paragraph (4)

7. The Working Group discussed at its nineteenth session 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; see A/CN.9/WG.IV/WP.42, paras. 58 to 68). The majority of the discussion 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 that discussion was generally relevant to the question as to whether paragraph (4) of article 8 should be retained in the Model Law. At the conclusion of the discussion the Working Group decided to defer any decision in respect of the consequences of acceptance of the payment order by the beneficiary's bank until it had discussed the time when acceptance took place. It did not have an opportunity to return to the question at the nineteenth session.

8. The text of paragraph (4) has not been considered by the Working Group, except for the opening words at the eighteenth session (A/CN.9/318, para. 156). However, the drafting group at the nineteenth session designated the prior text as Variant B and added a Variant A for consideration of the Working Group.

9. In A/CN.9/WG.IV/WP.41, article 5, comment 17 it was said that the propriety of including paragraph (4) within the Model Law might depend upon the ultimate decision as to whether the credit transfer was considered to be completed, with the legal consequences that would follow, when the beneficiary's bank accepted the payment order or only when the beneficiary's bank credited the beneficiary's account or performed a similar act. If the credit transfer is completed only when the beneficiary's bank credits the account or performs a similar act, there is less need to specify any further acts to be performed by the bank. Any further legal requirements as to the actions of the bank might be left to the law governing the account relationship.

10. However, at the nineteenth session the Working Group decided that in at least the situation when the sender and the receiving bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place, acceptance takes place on receipt of the payment order, prior to any volitional act on the part of the beneficiary's bank. As a result it may be thought useful to have some reference to the obligations of the beneficiary's bank towards the beneficiary. Furthermore, if it was felt useful to provide in the Model Law when the funds were available to the beneficiary, thereby fulfilling the obligations of the various banks when the originator has specified a "pay date", paragraph (4) would be relevant (see articles 2*(m)*, 9(1)*(b)* and 12(4)*(b)*).

11. Variant A proposed by the drafting group at the nineteenth session refers only to the obligation of the beneficiary's bank to place the funds at the disposal of the beneficiary. The funds must be placed at his disposal in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary. Such a provision would serve primarily as a reminder that the ultimate purpose of a credit transfer is to make funds available to the beneficiary.

12. Variant B is more detailed in that it sets forth the type of actions to be taken by the beneficiary's bank. However, it sets out neither the manner in which they are to be accomplished nor the time when they are to be accomplished. Those two elements are left to other rules of law or to agreement between the beneficiary and the bank. The single exception is a reference to certain provisions in article 9 as to when the beneficiary's bank must act.

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 execution date is specified in the order, in which case the order shall be executed on that date,

(b) the order contains a specification of 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 by the pay date.

(2) 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.

(3) 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.

(4) 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, paras. 65 to 68
A/CN.9/317, paras. 94 to 107
A/CN.9/328, paras. 76 to 91

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). That draft was in turn discussed by the Working Group late in the nineteenth session. Suggestions were made for the small group to use in a further revision of the draft article which was to be presented for discussion at the twentieth session. It was recognized in the Working Group that, since the time when a receiving bank must act in respect of a payment order received affected several provisions, the restructuring of the draft Model Law being undertaken by the drafting group might affect the structure of paragraphs (1) and (2) (paras. 89 to 91). The current text of article 9 was prepared by the drafting group in the light of the comments made in the Working Group on the draft of article 7.

Purpose of paragraph (1)

2. The purpose of paragraph (1) is to state the times within which action must be taken in certain circumstances; it is not intended to state a substantive obligation to take action. That distinction is not always easy to preserve in the presentation of the provision, and it may not have been preserved in the opening words of paragraph (1). The various drafts prepared by the Secretariat and in the Working Group, and the various provisions of the current text, also reflect a difficulty in expressing the time limits within which the receiving bank must act.

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 it is received. That rule is repeated in substance in the second sentence of the definition of "execution date" in article 2(l): "When no execution date is stated on a payment order, the execution date of that order shall be deemed to be the date the order is received . . ."

4. By virtue of articles 5(1) and 7(1) "a notice of rejection of a payment order must be given not later than on the execution date", i.e. on the date the order was received according to the second sentence of article 2(l). Although the same result would be anticipated by reference to paragraph (1) of article 9, the wording used leaves the result uncertain.

5. The Working Group has at all times accepted the appropriateness of the general rule that a payment order must be executed, or notice of rejection given, on the day the order is received. 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.

6. Nevertheless, the rule is strict and it is necessary that it be mitigated by several supplementary provisions. The first is the general rule that a receiving bank is not required to execute any payment order it receives, and is not required to give notice of rejection, if the reason for the failure to execute is that there are insufficient funds to pay the receiving bank for the payment order received. Therefore, 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 received from the sender without notification that cover was in place, since in such situations the receiving bank would have accepted the payment order when the order was received (articles 5(2)*(b)* and 7(2)*(b)*).

7. The second mitigating rule found in paragraph (2) recognizes that banks, and funds transfer systems of different types, 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. 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 when the cut-off time might be, and it is not unusual for cut-off times to be as early as noon.

8. The third mitigating rule found in paragraph (4) is that a branch of a bank, even if in the same country, 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).

9. A fourth mitigating rule found in the definition of "execution day" in article 2*(l)* is that the nature of the payment order may indicate that it would be appropriate to execute the order on a day other than the day the order was received. That phrase, which was first added to the rule before the sphere of application of the Model Law was restricted to international credit transfers, can be easily applied to bulk credit transfers of low value sent through a system that operates on a set time schedule, such as execution on the third day after receipt of the payment orders on magnetic tape. It may be less often applicable to international credit transfers which are, at least at present, less likely to follow such a time schedule.

Execution date, pay date and value date

10. The execution date, pay date and value date are defined in article 2*(l)*, *(m)* and *(n)*. All substantive rules governing the use of any one of the three dates were set forth in prior article 7. At the nineteenth session it was suggested that the value date only provided information to the receiving bank as to when it could expect to receive funds from the sender (A/CN.9/328, para. 79). As a result, even though the term is defined, article 9 contains no provision governing its use. The term has also been deleted from the other articles where it appeared.

11. The execution date is the date when the receiving bank is to execute the payment order as specified by the sender (article 2*(l)*). Although it would seem appropriate that the execution date could be specified either on the payment order or in a separate or standing instruction, the second sentence of article 2*(l)* seems to require that it be specified on the payment order. If no execution date has been specified by the sender, article 9(1) provides that the payment order is to be executed on the day it is received, subject to article 9(2) on cut-off times.

12. 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. Nevertheless, the sender is not required to pay the receiving bank until the execution date (article 4(4)).

13. 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)).

14. 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. Therefore, under a strict reading of the current text the only safe course for the bank would be to reject the order, although even then the bank might be considered to have given a notice of rejection too late since the notice of rejection must be given by the same date as would be required for execution.

15. A pay date in a payment order sent to the beneficiary's bank should function as though it was the execution date. That would undoubtedly be the result where the funds were placed at the disposal of the beneficiary later than the pay date. The result is not clear under the current drafting of paragraph (1)*(b)* if the funds were placed at the disposal of the beneficiary prior to the pay date since the text refers to placing the funds at the disposal of the beneficiary "by the pay date". This latter wording seems to be in conflict with the definition in article 2*(m)*.

16. While 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, the pay date will almost assuredly have been specified by the originator. Article 2*(m)* recognizes this fact and incorporates it into the definition. 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. A provision to that general effect was included in prior article 7(1) and considerably more clearly in the proposal presented to the Working Group at the nineteenth session (see A/CN.9/328, para. 88, proposed article 7(1)*(b)*). Article 9 as presented by the drafting group at the nineteenth session does not include such a provision.

Time within which notices must be given

17. Prior article 7(4) provided

"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."

18. At the nineteenth session of the Working Group it was decided to delete any requirement of early notice of rejection in article 7(4) (A/CN.9/328, para. 86). The drafting group deleted the paragraph entirely, and put the requirements as to the time when notice of rejection must be made into articles 5(1) and 7(1).

19. Neither in the prior draft nor in the current draft is there provision for the time when the notices required by articles 6(1) and (2) and 8(1) and (2) must be given. As to the notice required by article 8(3), see article 8, comment 5.

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

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.

Paragraphs (1) and (2)

3. 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. The means of revoking a credit transfer when it is too late to revoke the specific payment order are considered in paragraph (4).

4. 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(4)). 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(2).

5. 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 period as so defined is by its nature subjective, 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.

6. 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). An appropriate result might be more easily achieved by amending the definition of "authentication" and of article 4(2) as suggested in article 2, comment 23 and article 4, comment 10.

7. At the nineteenth session 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; see article 9, comment 12).

Paragraph (3)

8. 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).

9. 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 clearing-house, 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)

10. 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 issue its own revocation 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.

Paragraphs (5) and (6)

11. 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, comment 14.

Paragraph (7)

12. 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.

13. 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.

14. 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.

New proposal

15. 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).

16. A proposal presented to the nineteenth session but not considered by the Working Group at that time 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)* with the order of the two subparagraphs reversed. The drafting group could not decide on a proper title for this new article, so it placed the provisional title in square brackets.

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 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), 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.)

Article 12. *Liability of receiving bank*

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

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

*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.

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

Comments

Paragraph (1)

1. 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)

2. The general system of liability in paragraph (2) is that the originator can hold the originator's bank liable for the proper performance of the credit transfer. 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 can recover the loss from its receiving bank and each bank in turn could recover from its receiving bank until, under paragraph (3), a bank could show that the payment order received by the beneficiary's bank was consistent with the payment order received by the bank in question.

3. 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).

4. 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 or abandoned (A/CN.9/328, paras. 66 to 74 and 144).

5. 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 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.

6. 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 comment 17, below. If those proposals are 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)

7. Paragraph (3) places a limit on the effect of paragraph (2) when the credit transfer is completed, but in a manner inconsistent with the originator's payment order. No bank that is subsequent to the error or fraud that caused the inconsistency has any liability for the fact that the credit transfer was carried out improperly. However, such a bank would have obligations under article 11 to assist in correcting the situation.

Paragraph (4)

8. 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.

9. 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 was not considered at either the eighteenth or nineteenth session of the Working Group.

10. 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(1), (2) or (3). Failure to give a notice of rejection required by article 7(1) 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 10.

Paragraph (5)

11. 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.

12. 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(2) and 8(1) 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)

13. 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).

14. 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 (para. 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 (para. 126).

15. 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 next session (para. 131). For the suggested provision, see para. 17, below.

Exchange losses, subparagraph (b)

16. 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 (para. 132).

Proposed new provision

17. The Secretariat suggests the following provision to implement the suggestions made:

"If a sender is in delay in paying its receiving bank, the sender is liable to the receiving bank for interest. If a credit transfer is delayed by the improper execution of a payment order that has been accepted by a receiving bank, the bank is liable to the beneficiary for interest and any exchange losses resulting from late execution of the transfer. The liability of the bank to its receiving bank and to the beneficiary is discharged to the extent it transfers to its receiving bank an amount in addition to that it received from its sender."

18. The suggested provision combines two ideas that are theoretically separate but which overlap in practice. First, the bank may make funds available to its receiving bank subsequent to an expressed value date or subsequent to the execution or pay date. In such a case it would be expected that the receiving bank would normally execute the payment order received, thereby paying its credit party prior to the time it received funds from its sender. This is the situation in which a sending bank is most likely to add to the amount of the transfer an amount calculated to compensate its receiving bank for the delay. In some banking systems the rate of interest to be applied in such cases is established by interbank agreement.

19. If the receiving bank executes the payment order received without waiting for payment from its sender, the credit transfer as a whole may not be delayed. However, the credit transfer as a whole may be delayed when the receiving bank waits to receive the funds before it executes the payment order or when there is other improper execution of the payment order by the sending bank. In such a case the proposed provision gives the beneficiary a direct right against the sending bank for interest and for any exchange losses suffered as a result.

20. The question arises as to the effect on the sending bank's liability to the beneficiary when it adds a sum to the amount of the transfer for the interest loss caused by the delay. It should be evident that the sending bank's action would have at least the effect of discharging the sending bank's liability to the extent of the sum added if the sum is passed on to the beneficiary, and it should not be necessary to say so in the Model Law. However, it is possible to conclude that the sum, if it is an appropriate amount of interest in the interbank lending market that would discharge its obligation to its receiving bank, would constitute a complete discharge of the sending bank's obligation to the beneficiary even though the interest loss to the beneficiary is greater than the interest loss to the receiving bank would have been. The proposed provision rejects such a conclusion.

21. Moreover, it is possible to conclude that if the receiving bank were to retain the additional sum to compensate itself for the sending bank's delay, the sending bank's obligation to the beneficiary would remain intact. The proposed provision rejects that conclusion as well. The sending bank's obligation would be discharged to the extent of the additional sum and the beneficiary would have to look to the receiving bank that retained the sum for that amount. It would be the expectation of the Secretariat that this situation would be rare, but it has no empirical evidence to justify its expectation.

22. The proposed provision leaves open several questions that did not seem to require a statutory solution. The first is that just discussed, i.e. the right of the beneficiary against the receiving bank that retained the sum representing the interest for the delay. A second is the effect on any claim the beneficiary may have against the originator for late payment of the underlying obligation. While there would not seem to be great difficulty in concluding that payment of interest to the beneficiary for the delay in the credit transfer would reduce by an equal amount any claim against the originator on the underlying obligation, the question is unlikely to be of great economic significance. While the originator might delay payment of an underlying obligation for such a significant period of time that substantial interest is due to the beneficiary, it would be unusual for the transfer to be for such a substantial amount of money and the delay to be for such a substantial period of time that the difference in interest between that due on the underlying obligation for the period of the delay and the amount added to the transfer by the bank causing the delay would be of great economic significance.

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

23. 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)

24. 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.

25. At the nineteenth session retention of the essence of the provision was again re-affirmed (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 United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) for limiting the right to recover was said not to reflect properly the problems of making credit transfers (para. 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 of redrafting the provision.

Paragraph (6)

26. 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(2) and 8(1) 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)

27. 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)

28. 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.

Article 13. *Exemption from liability*

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 24 and 25.) 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 26.)

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, other circumstances not listed might also do so. The current draft of article 13 has not been discussed by the Working Group.

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

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).

Paragraph (1)

2. Paragraph (1) deals with the important rule that monetary obligations can be discharged by interbank credit transfers leading to credit to an account. While this general proposition is widely recognized today, remnants of the objections arising out of legal tender legislation still arise on occasion. (See comment 3, below). 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).

3. 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) (para. 40).

Paragraph (2)

4. Paragraph (2) provides that the obligation of the debtor is discharged when the beneficiary's bank accepts the payment order. At the same time the beneficiary's bank becomes indebted to the beneficiary.

5. 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).

6. 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 (para. 42).

7. The Working Group may wish to consider whether paragraph (2) might be re-worded as follows in order to satisfy the concerns noted above:

> "The beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it. If the transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash."

8. Under yet another approach the question of discharge of an obligation might be affected without stating a specific rule by the following text:

> "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."

Paragraph (3)

9. 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.

Paragraph (4)

10. Paragraph (4) is the corollary to paragraph (2) in that it gives the rule as to when the account of a sender, including but not limited to the originator, is to be considered debited, and the amount owed by the bank to the sender reduced or the amount owed by the sender to the bank increased. That point of time is when the receiving bank accepts the payment order 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 book-keeping 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).

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 was not considered either at that session or at the nineteenth.

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 (para. 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 (paras. 75 to 77).