United Nations Commission on International Trade Law

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The footnote numbering follows that used in the original documents on which this *Yearbook* is based. Any footnotes added subsequently are indicated by lower-case letters.

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Part Three. Annexes

INTRODUCTION

This is the twenty-second volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL)[1]

The present volume consists of three parts. Part one contains the Commission's report on the work of its twenty-fourth session, which was held at Vienna from 10 to 28 June 1991, and the action thereon by the United Nations Conference on Trade and Development (UNCTAD) and by the General Assembly.

In part two most of the documents considered at the twenty-fourth session of the Commission are reproduced. These documents include reports of the Commission's Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were before the Working Groups.

Part three contains the draft UNCITRAL Model Law on International Credit Transfers, summary records of meetings of the Commission on the draft Model Law on International Credit Transfers, a bibliography of recent writings related to the Commission's work, a list of documents before the twenty-fourth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook.*

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[1]To date the following volumes of the *Yearbook of the United Nations Commission on International Trade Law* (abbreviated herein as *Yearbook* [year]) have been published:

Volume	*Years covered*	*United Nations publication, Sales No.*
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8
XX	1989	E.90.V.9
XXI	1990	E.91.V.6

THE TWENTY-FOURTH SESSION (1991)

A. Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session

(Vienna, 10-28 June 1991) [Original: English][a]

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[a]*Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17* (A/46/17) (28 August 1991) (hereinafter referred to as "Report").

INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-fourth session, held at Vienna from 10 to 28 June 1991.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-fourth session on 10 June 1991.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 10 December 1985 and 19 October 1988, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1]

Argentina (1992), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1992), China (1995), Costa Rica (1995), Cuba (1992), Cyprus (1992), Czechoslovakia (1992), Denmark (1995), Egypt (1995), France (1995), Germany (1995), Hungary (1992), India (1992), Iran (Islamic Republic of) (1992), Iraq (1992), Italy (1992), Japan (1995), Kenya (1992), Lesotho (1992), Libyan Arab Jamahiriya (1992), Mexico (1995), Morocco (1995), Netherlands (1992), Nigeria (1995), Sierra Leone (1992), Singapore (1995), Spain (1992), Togo (1995), Union of Soviet Socialist Republics (1995), United Kingdom of Great Britain and Northern Ireland (1995), United States of America (1992), Uruguay (1992) and Yugoslavia (1992).

5. With the exception of Costa Rica, Cyprus, Iraq, Kenya, Lesotho, Sierra Leone, Togo and Uruguay, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Australia, Austria, Bolivia, Botswana, Brazil, Byelorussian Soviet Socialist Republic, Colombia, Democratic People's Republic of Korea, Ecuador, Finland, Holy See, Indonesia, Israel, Malaysia, Myanmar, Namibia, Oman, Pakistan, Panama, Peru, Philippines, Poland, Qatar, Republic of Korea, Saudi Arabia, Sudan, Sweden, Switzerland, Thailand, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Viet Nam, Yemen and Zaire.

7. The session was also attended by observers from the following international organizations:

(*a*) *United Nations organs*

International Monetary Fund

(*b*) *Intergovernmental organizations*

Bank for International Settlements
Commission of the European Communities
Hague Conference on Private International Law

(*c*) *Other international organizations*

Argentine-Uruguayan Institute of Commercial Law
European Banking Federation
Society for Worldwide Interbank Financial Telecommunication

[1]Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected by the Assembly at its fortieth session on 10 December 1985 (decision 40/313) and 17 were elected by the Assembly at its forty-third session on 19 October 1988 (decision 43/307). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its fortieth session will expire on the last day prior to the opening of the twenty-fifth regular annual session of the Commission, in 1992, while the term of those members elected at its forty-third session will expire on the last day prior to the opening of the twenty-eighth regular annual session of the Commission, in 1995.

C. Election of officers[2]

8. The Commission elected the following officers:

Chairman:	Mr. Kazuaki Sono (Japan)
Vice-Chairmen:	Mr. José M. Abascal Zamora (Mexico) Mr. Miroljub Savic (Yugoslavia) Ms. Christiane Verdon (Canada)
Rapporteur:	Mr. M. O. Adediran (Nigeria)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 439th meeting, on 10 June 1991, was as follows:

1. Opening of the session.
2. Election of the officers.
3. Adoption of the agenda.
4. International Payments: draft Model Law on International Credit Transfers.
5. New international economic order: draft Model Law on Procurement.
6. International contract practices: draft Uniform Law on Guarantees and Stand-by Letters of Credit.
7. Countertrade.
8. Decade of International Law.
9. Electronic Data Interchange.
10. INCOTERMS 1990.
11. Coordination of work.
12. Status of conventions.
13. Training and assistance.
14. General Assembly resolutions on the work of the Commission.
15. Other business.
16. Date and place of future meetings.
17. Adoption of the report of the Commission.

E. Adoption of the report

10. At its 466th meeting, on 28 June 1991, the Commission adopted the present report by consensus.

[2]The elections took place at the 439th, 446th, 450th and 453rd meetings, on 10, 13, 17 and 19 June. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), para. 14 (*Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970* (United Nations publication, Sales No. E.71.V.1), part two, I, A, para. 14).

II. DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

A. Introduction

11. 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 Negotiable Instruments, which it renamed the Working Group on International Payments.[3] The Working Group carried out its work at its sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second sessions. The Working Group completed its work by adopting the draft text of a Model Law on International Credit Transfers at the close of its twenty-second session after a drafting group had established corresponding language versions in the six languages of the Commission.

12. The text of the draft Model Law as adopted by the Working Group was sent to all Governments and to interested international organizations for comment. The Secretariat of the Commission also prepared a commentary on the draft text. The commentary was prepared on the basis of the English language version of the draft Model Law.

13. At its current session, the Commission had before it reports of the Working Group on International Payments on the work of its twenty-first and twenty-second sessions (A/CN.9/341 and A/CN.9/344, respectively), a report of the Secretary-General containing a compilation of comments by Governments and international organizations on the draft text of a Model Law on International Credit Transfers (A/CN.9/347 and Add.1) and a report of the Secretary-General containing a commentary on the draft Model Law prepared by the Secretariat (A/CN.9/346). The text of the draft Model Law presented by the Working Group to the Commission is contained in the annex to the report of the Working Group of its twenty-second session (A/CN.9/344).

14. The Commission expressed its appreciation to the Working Group on International Payments for having elaborated the draft text of a Model Law on International Credit Transfers that was in general favourably received and regarded as an excellent basis for the deliberations of the Commission.

B. Discussion of articles

Article 1

15. The text of draft article 1 as considered by the Commission was as follows:

[3]*Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 230.

"Article 1. *Sphere of application**

"(1) This law applies to credit transfers where a sending bank and its receiving bank are in different States.

"(2) For the purpose of determining the sphere of application of this law, branches and separate offices of a bank in different States are separate banks."

*"This law does not deal with issues related to the protection of consumers."

Paragraph (1)

16. A suggestion was made that the Model Law should apply to all credit transfers regardless of whether a specific credit transfer could be split up into "international" or "domestic" segments. The test of internationality contained in paragraph (1) was said to be formalistic and therefore potentially under- or over-inclusive. The test of internationality also created operational problems in presuming that a receiving bank was cognizant of the geographic location of all sending banks earlier in the chain. Moreover, the division between international and domestic transfers was contrary to the goal of uniformity.

17. A concern was expressed that the definition as presently formulated would give rise to difficulties when both the originator's bank and the beneficiary's bank were located in the same State and a foreign intermediary bank was involved. It was suggested that the originator would not always be able to foresee the involvement of an intermediary bank in another State, an international element triggering application of the Model Law. Transfers of that kind should not be regarded as rare, particularly in view of the establishment of a single market by the European Economic Community and in view of the operations of global banks. The Commission noted that the Working Group had attempted to find an acceptable solution to that concern but had been unable to do so, in particular because of the need to promote as broad a sphere of application for the Model Law as possible. It was also noted that the problem of foreseeability in such cases was mitigated by the fact that an originating bank could specify the route that a credit transfer was to take.

18. One suggestion to address the concern was to modify the definition so as to allow exclusion from the Model Law of domestic segments of a credit transfer. Another suggestion was that enacting States where such credit transfers were likely to arise might consider using an approach analogous to that provided in article 94 of the United Nations Convention on Contracts for the International Sale of Goods. Under that provision, two or more Contracting States which have the same or closely related legal rules on matters governed by the Convention may declare that the Convention is not to apply to contracts of sale where the parties have their places of business in those States.

19. The Commission did not accept either suggestion. It was noted, however, that it might not be desirable for a State to 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 were no domestic credit transfers or the domestic elements of international transfers were segregated from purely domestic transfers. In other countries domestic credit transfers and the domestic elements of international transfers were processed through the same banking channels. It was suggested that in those countries it would be desirable for the two sets of legal rules to be reconciled to the greatest extent possible or for the Model Law to be adopted for both domestic and international credit transfers. It was agreed that it should be made clear, by means of a footnote or in a commentary to the Model Law, that countries would have the option to adopt the provisions of the Model Law for both international and domestic credit transfers.

20. A suggestion was made that the Model Law should be limited to electronic transfers and thus be geared to high-speed, high-value credit transfers. The difference between such transfers and transfers that are paper-based or made by telex was said to lie not only in their speed, with its consequences on time-periods and notice requirements, but also in the value and volume of the transfers that created a totally different operating environment, with funds transfer systems acting as central data managers.

21. The Commission did not accept that suggestion, for the same reasons that had prevailed in the Working Group, namely: the difficulty of distinguishing clearly between electronic and other transfers, taking into account the fact that a given credit transfer may comprise segments of both types of communication; the difficulty of defining clearly high-speed, high-value transfers; the inappropriateness of expressing a preference for one technology over others in a rapidly developing area. It was pointed out that, where special features of certain credit transfers called for different rules, the provisions of draft article 3 on variation by agreement were of particular importance, especially in inter-bank relationships.

22. After deliberation, the Commission adopted paragraph (1) unchanged.

Paragraph (2)

23. A suggestion to replace the words "a bank" by the words "the same bank" was referred to the Drafting Group. Subject to this possible modification, paragraph (2) was adopted. In the subsequent discussion of the definition of a "bank", a new paragraph (2) was adopted and current paragraph (2) was renumbered paragraph (3) (see paragraph 62 below).

Footnote: Consumer transfers

24. A view was expressed that it was unclear whether the text of the footnote meant that the Model Law applied to consumers unless the internal laws of a particular State otherwise governed the transaction. As regards a possible conflict between the consumer protection laws of a State with provisions of the Model Law, the question was raised whether the Model Law might apply to part of a credit transfer while a State's consumer protection laws applied to other parts of the transaction. With a view to clarifying

such issues, it was proposed to amend the footnote as follows:

"The consumer protection laws of a particular State may further govern the relationship between the originator and the originator's bank, or between the beneficiary and the beneficiary's bank, within the State, but may not impair the rights of other parties to a credit transfer located in a different State, as provided in this law."

25. In reply, it was stated that the current footnote was clear and that the question that had been raised was to be answered in the affirmative. Moreover, the proposed amendment created new problems. For example, it would unduly confine the operation of consumer protection laws to relationships at the beginning and at the end of the transfer chain, and only within a given State, and exclude intermediary relationships. The Model Law should not appear to discourage States from enacting consumer protection legislation. After discussion, the Commission was agreed that the existing text was sufficiently clear and decided to maintain the footnote as currently drafted.

Article 2

26. The text of draft article 2 as considered by the Commission was as follows:

"Article 2. *Definitions*

"For the purposes of this law:

"*(a)* 'Credit transfer' means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order. [The term does not include a transfer effected through a point-of-sale payment system.]

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

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

"(ii) the instruction does not provide that payment is to be made at the request of the beneficiary.

"When an instruction is not a payment order because it is issued subject to a condition but the condition is subsequently satisfied and thereafter a bank that has received the instruction executes it, the instruction shall be treated as if it had been unconditional when it was issued.

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

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

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

"*(f)* 'Bank' means an entity which, as an ordinary part of its business, engages in executing payment orders. An entity is not to be taken as executing payment orders merely because it transmits them.

"*(g)* A 'Receiving bank' is a bank that receives a payment order.

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

"*(i)* 'Funds' or 'money' includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

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

"*(k)* 'Execution date' means the date when the receiving bank should execute the payment order in accordance with article 10.

"*(l)* 'Execution' means, with respect to a receiving bank other than the beneficiary's bank, the issue of a payment order intended to carry out the payment order received by the receiving bank.

"*(m)* 'Payment date' means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary."

(a) "Credit transfer"

27. A proposal was made to delete the second sentence on the ground that it was unnecessary and presented the danger that a court might interpret the sphere of application of the Model Law as defined in its article 1 in a restrictive manner, for example, by applying the Model Law only to the element of the transfer effected between the sending bank and the receiving bank situated in different States. It was agreed that the Model Law should make it clear that when one segment of the credit transfer was international, the entire credit transfer was subject to the Model Law.

28. The Commission agreed with a proposal to replace the words "series of operations" in the first sentence with the words "series of payment orders". It was suggested that, in addition to contributing to a more precise definition, such a change might meet the concern underlying the proposal to delete the second sentence.

29. Another issue considered by the Commission was whether transfers made for the purpose of reimbursing a receiving bank for executing a payment order should be treated as separate credit transfers. It was noted that the question was of importance for the sphere of application of the Model Law. Were reimbursement transfers not to be considered as separate credit transfers, a credit transfer

would be considered international and subject to the Model Law where the originator's bank in State A sends its payment order directly to the beneficiary's bank in State A and reimburses the beneficiary's bank the amount of the payment order by sending a second payment order to its correspondent bank in State B with instructions to credit the beneficiary bank's account at the correspondent bank.

30. According to one view, the definition was satisfactory because it was not desirable for the Model Law to explicitly exclude reimbursement relationships. Some transfer systems operated on the basis of a simultaneous, "the message is the money" approach, involving the simultaneous transmission of a payment order with the transfer of payment, and funds transfer systems currently using non-simultaneous reimbursement might in the future adopt the simultaneous approach. From that standpoint, exclusion of the reimbursement relationship might be seen as impeding the application of the Model Law to transfer systems using the simultaneous approach and thereby hindering rather than fostering high-value, high-volume transactions. The prevailing view, however, was that reimbursement transfers should be regarded as separate credit transfers. Reasons cited for that view were that inclusion of such transfers would give rise to results contrary to the anticipation of a party, in particular the application of the Model Law to an otherwise wholly domestic credit transfer; that it would contradict common usage in banking practice; and that it might cause confusion in the Model Law.

31. In order to implement the decision to treat a reimbursement transfer as a different credit transfer, it was proposed that the second sentence of the definition should be deleted and that the definition in article 2*(h)* of "intermediary bank" should be modified so as to make it clear that a reimbursing bank is not to be considered an intermediary bank. It was proposed that that should be done by adding the words "that receives and issues payment orders" at the end of article 2*(h)*. It was felt, however, that the second sentence was an important element in the definition of "credit transfer" and should be retained in some form. Suggested modifications included the amendment of the words "intended to carry out" and the addition of language defining reimbursement transfers as different credit transfers. It was suggested that an appropriate modification of the second sentence would obviate the need to modify article 2*(h)*.

32. A proposal was made to refer in the definition to the ending point of a credit transfer. It was suggested that, in order to avoid misunderstanding, it would be more appropriate to include the reference to the ending point of a credit transfer in the present definition rather than, as in the current draft, in the first sentence of article 17(1). The Commission decided to defer its consideration of this proposal until its consideration of article 17.

33. The Commission considered whether to retain the sentence in square brackets at the end of the definition excluding transfers effected through a point-of-sale system. In support of retaining the language, it was stated that such transfers should be excluded because they were debit transfers and therefore outside the purview of the Model Law. Another reason given for exclusion was that such transfers were essentially utilized for consumer purposes, while the Model Law had been prepared with commercial credit transfers in view.

34. The prevailing view, however, was that the sentence should be deleted. In support of that view it was stated that point-of-sale systems could not be generally classified only as debit transfers or only as credit transfers. The classification of a given point-of-sale transfer system depended on its particular characteristics and those that met the criteria for payment orders in the Model Law should not be excluded. It was also felt that a specific reference to point-of-sale transfers was inappropriate in the absence of a definition in the Model Law of such transfers and in view of the fact that such transfers were still in the process of technological innovation.

35. After deliberation, the Commission decided to retain the first two sentences of the definition of "credit transfer", subject to drafting changes, and to delete the third sentence that had been placed between square brackets.

36. The Commission requested an ad hoc Working Party composed of the representatives of Finland, Mexico and the United Kingdom to prepare a draft text of paragraph 2*(a)* that would implement the decisions of the Commission. The following text proposed by the Working Party was adopted by the Commission:

> "*(a)* 'Credit transfer' means a series of payment orders, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to implement the originator's payment order. A payment order issued for the purpose of effecting payment for such an implementing order is considered to be included in a separate credit transfer."

(b) *"Payment order"*

37. Divergent views were expressed as to how the Model Law should deal with conditional payment orders. According to one view, the present definition was unsatisfactory because it required payment orders to be unconditional, thus excluding conditional instructions from coverage by the Model Law. Inclusion of conditional payment orders in the Model Law was said to be desirable because such payments orders were a financial service that banks were increasingly interested in offering to their customers. By excluding that type of transfer, the Model Law might hinder commercial developments and would lead to legal fragmentation since two bodies of law would be needed, one governing non-conditional payment orders and another governing conditional instructions. It was also pointed out that even with inclusion of conditional payment orders banks would remain free to reject them.

38. A number of suggestions were made designed to include conditional payment orders in the Model Law. One suggestion was to remove from the definition the requirement of unconditionality, to address the issue of acceptance or rejection of a conditional payment order and

to define the duties of banks with respect to the fulfilment of conditions. A second suggestion was to deal with conditional payment orders as a contractual exception under article 3 to the general principle of unconditionality. A third suggestion was to include a general provision to the effect that the Model Law was applicable to conditional payment orders to the extent that the conditional character so permitted.

39. The view that conditional payment orders should be included in the Model Law did not receive wide support. After deliberation, the Commission endorsed the decision of the Working Group that the Model Law should not govern conditional payment orders and that such payment orders would not be considered "payment orders", except in certain limited circumstances. Furthermore, it was felt that the proposals made to include conditional payment orders did not address all of the modifications that would be required.

40. At the same time, it was noted that it was neither the intention nor the effect of the Model Law to void or to discourage conditional payment orders. The Commission endorsed the principle contained in the second sentence of the present definition that, under certain circumstances, a payment order that started out as a conditional instruction would be subject to the Model Law. According to that provision, when the condition attached to an instruction was satisfied and thereafter a receiving bank executed the instruction, the payment order was to be treated as if it had been unconditional from the outset, thereby triggering applicability of the Model Law. However, it was generally felt that requiring the fulfilment of the condition for application of the Model Law to conditional instructions ran counter to the principle that the Model Law should deal only with questions related to payment, and should not deal with issues relating to the determination of whether a condition had been fulfilled. The determination of the fulfilment of the condition, as well as the consequences of the execution of a conditional instruction in violation of the condition, were subject to laws outside of the Model Law. Accordingly, the Commission decided to delete the words "but the condition is subsequently satisfied", with the result that a conditional instruction would become subject to the Model Law upon execution by the receiving bank, whether or not the condition had been satisfied. Without such an approach, if the credit transfer was not carried out properly for reasons unconnected with the condition, any rights the customer might have would arise from rules outside of the Model Law.

41. Another concern widely shared in the Commission was that the second sentence, in particular the provision that the conditional payment order was to be treated as if it had been unconditional "when it was issued", might lead to the anomalous result of a retroactive application of the Model Law. It was noted that the words "when it was issued" had been added to ensure that the sender of a conditional instruction would have the same rights as any other originator. Nevertheless, it was felt that, with the present language, a retroactive application could result, leading, for example, to a claim under article 10 that a receiving bank had not executed a payment order within the prescribed time. In order to address that concern, it was proposed that the words "the instruction shall be treated" should be replaced by the words "the instruction shall thereafter be treated".

42. It was noted that, while the Working Group had assumed that the reference to conditional instructions should extend only to those issued by the originator to the originator's bank and not to those sent from one bank to another, the definition did not make that distinction clear. The Commission decided, however, not to limit the provision to conditional instructions issued by the originator since conditional instructions could also be issued to intermediary banks. It recognized, however, the concern that the Model Law should not impose responsibility on banks further down the chain. It was thus agreed that the execution of a conditional instruction must itself be unconditional in order to trigger application of the Model Law. It was proposed that that should be done by adding the word "unconditionally" after the words "a bank that has received the instruction executes it" in the second sentence.

43. The Commission established an ad hoc Working Party composed of the representatives of Finland, Mexico and the United Kingdom and requested it to reformulate subparagraph *(b)* in the light of the decisions concerning the treatment of conditional payment orders.

44. The ad hoc Working Party implemented the decisions of the Commission by preparing a draft text of a new article 2 *bis*. On the basis of the draft prepared by the ad hoc Working Party, the Commission adopted the following text of article 2 *bis:*

> "(1) When an instruction is not a payment order because it is subject to a condition but a bank that has received the instruction executes it by issuing an unconditional payment order, the sender of the instruction thereafter has the same rights and obligations under this law as the sender of a payment order and the beneficiary designated in the instruction shall be treated as the beneficiary under article 2*(d)*.
>
> "(2) This law does not govern the time of execution of a conditional instruction received by a bank, nor does it affect any right or obligation of the sender of a conditional instruction that depends on whether the condition has been satisfied."

45. A suggestion was made that the definition should clarify that a payment order could be transmitted to a receiving bank by any method of communication. Some apprehension was expressed about the suggestion on the ground that it might be seen as obligating banks to accept payment orders transmitted through commercially unacceptable methods of communications. It was pointed out, however, that a bank would remain free to reject a payment order transmitted by a method deemed unacceptable by the bank. It was generally agreed that the definition already implied that various methods of transmission could be used and that the suggestion raised a question of drafting that should be considered by the ad hoc Working Party.

46. A view was expressed that subparagraph *(b)*(i) was superfluous and did not belong in the definition since it

dealt with the legal consequences of the execution of a payment order, a subject dealt with in article 4. In reply, it was pointed out that the subparagraph had been included as necessary to ensure exclusion from the Model Law of debit transfers. It was agreed that the subparagraph should be retained.

47. A concern was expressed that the requirement in subparagraph *(b)*(ii), which was intended to exclude debit transfers, would have the unintended effect of excluding credit transfers made to a beneficiary who did not have an account at the beneficiary's bank and therefore bearing the instruction that the beneficiary's bank was to "pay on application". In order to address that concern, it was proposed that a provision along the following lines should be added after subparagraph (ii):

> "Subparagraph (ii) shall not prevent an instruction from being a payment order merely because it directs the beneficiary's bank to hold funds for a beneficiary that does not maintain an account with it until the beneficiary requests payment."

48. A question was raised whether the proposed formulation imposed a condition on the payment order. It was stated in reply that the proposed paragraph referred to the mechanism of payment rather than to a condition. The proposal was generally regarded as a helpful clarification that should be incorporated, and it was referred to the ad hoc Working Party.

49. The Commission adopted the following text of paragraph (2)*(b)* prepared by the ad hoc Working Party:

> "*(b)* 'Payment order' means an unconditional instruction, in whatever form, by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money if:
>
> "(i) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and
>
> "(ii) the instruction does not provide that payment is to be made at the request of the beneficiary."

(c) "Originator"

50. A proposal was made to replace throughout the Model Law the words "issuer" and "to issue" by the words "sender" and "to send". It was stated that in the law of negotiable instruments in many common law countries the terms "issuer" and "to issue" had been given a technical meaning that included an element of mental volition to transfer as well as a physical element of transfer of possession or delivery. The words "to send" or "sender" would raise no risk that the unwanted technical meanings of "to issue" or "issuer" might be applied in the context of the Model Law.

51. It was stated in reply that the words "issuer" and "to issue" had been deliberately chosen by the Working Group and that they should be interpreted in the neutral sense of giving a payment order. Moreover, the suggested terms "sender" and "to send" would be inappropriate in those cases where, for example, the originator gave its payment order over the telephone or handed a written payment order to the receiving bank.

52. The Commission did not accept a more limited proposal which was to replace merely in article 2*(c)* the word "issuer" by the word "sender". After deliberation, the Commission decided to retain the text of the subparagraph as currently drafted.

(d) "Beneficiary"

53. The Commission adopted the text of the subparagraph as currently drafted.

(e) "Sender"

54. A suggestion was made to replace the words "the person" by the words "a person" in order to reflect the fact that payment orders could be made by various persons. In reply, it was stated that, although various payment orders corresponding to the different phases of the credit transfer might be sent, every particular payment order would be issued by one sender only. The Commission adopted the text of the subparagraph, subject to review by the Drafting Group, in particular, on that point.

(f) "Bank"

55. A view was expressed that the current definition was too broad in that it included telecommunications carriers, possibly certain securities firms, and other entities that did not maintain the same standard as banks and were not subject to similar regulatory regimes. It was therefore proposed that the current definition should be replaced by the following text, which was said to be based on the text of the 1988 Basle Capital Accord:

> "A bank is defined as an institution that:
>
> "(i) engages in the business of banking;
>
> "(ii) is recognized as a bank by the bank supervisory or monetary authorities of the country of its organization or principal banking operations;
>
> "(iii) receives deposits to a substantial extent in the regular course of business; and
>
> "(iv) has the power to accept demand deposits."

56. The proposal was objected to on the ground that the Model Law should be applicable to all entities that, as an ordinary part of their business, engaged in executing payment orders, even though such entities might not otherwise be considered as "banks" under locally applicable law. It was further stated that the proposed reference to bank supervisory authorities would be inappropriate since it would introduce an element of public law into the Model Law, which was devoted to private law matters, and since it would leave out of the scope of the Model Law such entities as postal services or even central banks, which in many countries executed payment orders as a normal part of their business without being "recognized" or "licensed" by bank supervisory authorities. Yet another objection to the proposal was that the definition of a "bank" under the Model Law should be as broad as possible so that all entities that normally engaged in the execution of payment orders and might be in the situation

of competing with each other would be faced with the same rights and obligations under the Model Law. It was also stated that the proposal did not take into account the fact that, in many countries, there existed banks that had no power to accept demand deposits but were merely credit institutions. A concern was expressed that while the Commission had discussed banking procedures with respect to all articles, it had not done so with respect to other entities and that it would therefore be inappropriate to label the Model Law or its articles as applying to "banks". After discussion, the Commission did not adopt the proposal.

57. The Commission endorsed the policy decision made by the Working Group that the Model Law should cover all entities that, although they were not considered to be "banks" under the applicable rules of local law, engaged in executing payment orders as an ordinary part of their business. The Commission was agreed, however, that such a policy decision, currently implemented in the text of the Model Law by means of a broad definition of the term "bank", should not result in bringing within the scope of the Model Law all institutions that might handle or process payment messages in the course of a credit transfer although they did not actually engage in the execution of payment orders. A widely shared view was that, should such a broad definition of the term "bank" be retained in the final text of the Model Law, it would be desirable to replace the word "bank" by a more appropriate wording, encompassing all entities that functionally executed credit transfers as an ordinary part of their business, and thereby to avoid the potentially misleading connotations that might be carried by the word "bank" under the laws of some countries.

58. The Commission considered how the definition of a "bank" might be drafted so as to implement in a clear manner the above policy decision. It was stated that the second sentence of the subparagraph was intended to make it clear that message carriers and data managers were not covered by the Model Law, but that this sentence did not sufficiently take into consideration the situation of value-added networks, such as CHIPS and CHAPS, that did more than merely "transmit" the message but were none the less intended to be left out of the scope of the Model Law. A proposal was made to add to the current text of the subparagraph the following sentence:

> "An entity that is a payment management system is not to be taken as executing payment orders, including a wire transfer network, automated clearing house or other communications system which transmits payment orders on behalf of its participants".

59. While there was general agreement that message carriers such as the Worldwide Interbank Financial Telecommunication (SWIFT) did not normally engage in executing payment orders and therefore would not be covered by the Model Law, divergent views were expressed as to whether automated clearing houses should be left out of the scope of the Model Law. One view was that automated clearing houses were mere data managers that should not be covered by the Model Law. Another view was that automated clearing houses should be covered since they were, in some countries, registered as banks, operated under the supervision of bank supervision authorities and were obliged to maintain reserves with the central bank. Some netting systems already performed functions similar to those of central banks and, in the future, automated clearing houses might be expected to perform an increasing number of banking activities in relation to the netting of payment orders issued for the execution of financial agreements such as swap agreements involving different currencies or interest rates. After deliberation, the Commission did not adopt the proposal.

60. The question was raised as to whether the Model Law should address the situation of entities which, although they did not engage in executing payment orders as an ordinary part of their business, might occasionally do so. It was considered by the Commission that such an entity should be covered by the Model Law only if the execution of the payment order would be related to the normal course of its business.

61. The Commission considered the possibility of implementing the above-stated policy decision without including a definition of the term "bank" in the Model Law. A proposal was made to delete the subparagraph altogether, thus allowing each country that would adopt the Model Law to give to the word "bank" its ordinary meaning under the local banking law, and to add in article 1 a new provision on the scope of the Model Law to the effect that the Model Law would apply "to other entities that, as an ordinary part of their business, engage in executing payment orders as it applies to banks". Wide support was expressed in favour of the proposal. It was stated, however, that the wording of the provisions referring to a "sending bank", a "receiving bank" or an "intermediary bank" might have to be reviewed so as to ensure their application to non-bank entities. Moreover, the reference to "other entities" added to article 1 of the Model Law should be drafted in a manner that would avoid the implication that those entities would be submitted to the regulatory rules applicable to banks. After discussion, the Commission adopted the proposal in substance and referred it to an ad hoc Working Party composed of the representatives of Finland, Singapore, the United Kingdom and the United States.

62. The following text was proposed by the ad hoc Working Party and adopted by the Commission as new paragraph (2) of article 1, while current paragraph (2) would be renumbered as paragraph (3):

> "(2) This law applies to other entities that as an ordinary part of their business engage in executing payment orders as it applies to banks."

(g) "Receiving bank"

63. The Commission adopted the text of the subparagraph unchanged.

(h) "Intermediary bank"

64. The Commission adopted the text of the subparagraph unchanged.

(i) "Funds" or "money"

65. The Commission adopted the text of the subparagraph unchanged.

(j) "Authentication"

66. A proposal was made to amend the current definition of "authentication" by deleting the words "all or part of" and by inserting the words "an amendment of a payment order" after the words "payment order", so that the subparagraph would read as follows:

> "'Authentication' means a procedure established by agreement to determine whether a payment order, an amendment of a payment order, or a revocation of a payment order, was issued by the purported sender."

67. In support of the proposal to delete the current reference to a possible authentication of part of a payment order, it was stated that the use of an authentication procedure was always aimed at authenticating the payment order in its entirety, even though the authenticating device might be appended to a specific part of that payment order only. After discussion, the Commission adopted that part of the proposal.

68. In support of the proposed addition of a reference to possible amendments of payment orders, it was stated that, in current banking practice, amendments to payment orders were authenticated in the same way as original payment orders and that that practice should be reflected in the Model Law. In reply, it was stated that the Model Law currently contained no reference to amendments of payment orders. It was recalled that the Working Group had considered a set of draft rules that covered both the revocation and the amendment of payment orders and had noted that the amendment of payment orders might raise additional policy issues to those raised by the revocation of orders. As a result it had been decided by the Working Group to refer only to the revocation of payment orders and no provision had been made for their amendment. After discussion, the Commission did not adopt that part of the proposal. (See paragraphs 217-221 below, further discussion of amendments to payment orders.)

69. It was suggested that the case where a payment order would be authenticated by a handwritten signature to be compared with a specimen should not be covered by the provisions of article 4, paragraphs (2) to (4), but that the situation should be governed by article 4, paragraph (1) only. It was therefore proposed that the following words should be added to the current definition of authentication: "The term does not include comparison of a signature with a specimen." An alternative proposal was that wording to the same effect should be inserted in article 4, paragraph (2). It was stated in support that the provisions of article 4, paragraphs (2) to (4) put a heavy burden on the purported sender of a payment order subject to authentication. The sender of a payment order authenticated by a handwritten signature would be particularly vulnerable since a signature, once appended to a document, cannot be kept secret and can easily be forged.

70. In reply, it was stated that, although a handwritten signature might not be a commercially reasonable method of authentication for high-value credit transfers, parties should still be free to agree to use it. The Model Law was also intended to regulate other forms of payment orders for which the use of signatures as a method of authentication might be commercially reasonable, particularly in the case of low-value credit transfers. It was also thought that any attempt to define the term "signature" in this context would lead to considerable additional difficulties. After deliberation, the Commission decided not to adopt the proposal, at least for the time being, and to reconsider the matter in connection with its discussion on article 4.

71. A proposal was made to enlarge the definition of "authentication" by re-expressing the existing requirement so that the procedure was able to confirm the identity of the sender, and by adding words to extend the meaning of the term to include procedures to detect error, omission or alteration in the text of the payment order, and erroneous duplication of a payment order, now addressed separately in paragraph (5) of article 4. No support was expressed for the proposal.

(k) "Execution date"

72. It was proposed that the reference to article 10 should be deleted on the ground that the inclusion in definitions of references to substantive provisions dealing with the term being defined was a practice to be avoided. It was also pointed out that the present definition was the only one to include such a reference. A differing view was that such references were acceptable as long as the article being referred to in the definition did not itself contain a reference back to the definition. The Commission decided to delete the reference and noted that, as a consequence of the deletion, the words "should execute" needed to be replaced by the words "is required to execute".

73. The view was expressed that the provisions of the Model Law relating to payment, execution and acceptance were circular in that under article 4(6) a sender was not obligated to pay for a payment order until the execution date, but it was implicit in article 10 that a payment order did not have to be executed until it had been accepted and under articles 6(2)*(a)* and 8(1)*(a)* acceptance did not take place (assuming no other action on the part of the receiving bank) until payment was received. It was said that the problem was also relevant to the present definition. The Commission noted that amendments were to be proposed to articles 4(6) and 10 that were intended to overcome the problem.

74. The Commission adopted subparagraph *(k)* subject to the deletion of the reference to article 10 and the consequential change in wording. The Drafting Group subsequently substituted a definition of "execution period" in place of "execution date" to take account of the decisions taken in regard to article 10(1) permitting a receiving bank to execute a payment order on the day following the day of receipt (see paragraphs 198-204 below).

(l) "Execution"

75. The Commission considered whether to expand the definition to include the notion that a payment order could be "executed" by the beneficiary's bank. It was noted that the Working Group had not provided for execution of a payment order by the beneficiary's bank since, from the viewpoint of the Model Law, the credit transfer was completed when the beneficiary's bank accepted the payment order. The Working Group had not had time, however, to review the entire text to see whether all references to "execution" were compatible with that approach and decided to bring the potentially inconsistent uses of that term to the attention of the Commission by placing them in square brackets.

76. The principal reason cited in favour of not expanding the definition was that the actions of the beneficiary's bank that might be referred to as execution of a payment order were beyond the ambit of the Model Law. According to that view, credit transfers were, pursuant to article 17(1), considered completed upon acceptance of a payment order by the beneficiary's bank. Any actions to be taken by the beneficiary's bank subsequent to acceptance were, as provided in article 9(1), a matter of the relationship between the beneficiary's bank and the beneficiary and subject to rules of law outside of the Model Law. In response, it was pointed out that the Model Law did contain provisions governing that relationship, in particular the obligation placed on the beneficiary's bank to place the funds at the disposal of the beneficiary upon acceptance of a payment order. Another consideration advanced in support of expanding the definition was the need to be able to speak in terms of execution of payment orders by the beneficiary's bank in view of the definition in article 2*(f)* of a bank as an entity that engages in executing payment orders. It was also suggested that providing for execution of payment orders by the beneficiary's bank would have the practical advantage of permitting the retention of the use of the term "execution" at various points in the text where it had been placed in square brackets.

77. The Commission requested an ad hoc Working Party composed of the representatives of Finland, Japan and the United Kingdom to attempt to revise the definition so as to encompass execution of payment orders by the beneficiary's bank. The ad hoc Working Party proposed that execution of payment orders by the beneficiary's bank should be defined in terms of the following actions of the beneficiary's bank listed in article 8*(d)*, *(e)*, *(f)* and *(g)*: crediting the beneficiary's account or otherwise placing the funds at the disposal of the beneficiary; giving the beneficiary notice that it had the right to withdraw the funds or use the credit; otherwise applying the credit as instructed in the payment order; applying the credit to a debt of the beneficiary owed to the beneficiary's bank or applying it in conformity with an order of a court. A suggestion was made that it was necessary to add to the proposal the stipulation that execution would take place upon the earliest of those actions.

78. It was widely felt that the approach proposed by the ad hoc Working Party was problematic in that it defined "execution" of a payment order by the beneficiary's bank by reference to actions that, under article 8, constituted methods of acceptance of a payment order. Such an approach could lead to a confusion in the Model Law of the notion of acceptance of a payment order by the beneficiary's bank, which was within the ambit of the Model Law, and the notion of execution of the payment order, which was, pursuant to articles 9(1) and 17(1), outside of the Model Law. Another concern was that the proposal would complicate the Model Law and make it difficult to understand.

79. Similar concerns were expressed about a second proposal, according to which a beneficiary's bank would be considered to execute a payment order by accepting it. That proposal differed from the proposal of the ad hoc Working Party in that it defined execution of payment orders by the beneficiary's bank not only in terms of article 8*(d)*, *(e)*, *(f)* and *(g)*, but also in terms of paragraphs *(a)*, *(b)* and *(c)* of article 8. It was suggested that the inclusion in a definition of "execution" of substantive elements of article 8*(a)*, *(b)* and *(c)* was inappropriate because those provisions referred to events that constituted acceptance by the beneficiary's bank of a payment order without the taking of any action to place funds at the disposal of the beneficiary.

80. The attempt to formulate a definition of execution by the beneficiary's bank revealed difficulties in separating in such a definition elements of the acceptance of a payment order by the beneficiary's bank from elements of the execution of a payment order by the beneficiary's bank. Those difficulties arose because under the Model Law certain factual events constituted both acceptance and execution. The Commission therefore decided that it would not be possible to expand the definition. It was agreed, however, that the definition should not imply that execution of payment orders was confined solely to receiving banks other than the beneficiary's bank. With such an approach, the word "execution" could be used in the Model Law in its ordinary sense with respect to actions of the beneficiary's bank, and in terms of the meaning set forth in the definition in relation to receiving banks other than the beneficiary's bank. In order to implement that approach, it was suggested that the words "with respect to a receiving bank other than the beneficiary's bank" should be moved to the beginning of the definition. A further suggestion was that the need for the definition as a whole should be re-evaluated in conjunction with the review of article 6(2)*(d)*.

81. The Commission adopted the definition, subject to the decision that the definition, in defining "execution" by receiving banks other than the beneficiary's bank, should not exclude the use of the term in its ordinary sense with respect to actions by the beneficiary's bank. The Drafting Group subsequently placed the definition in square brackets.

(m) "Payment date"

82. A proposal was made to delete the definition. In support of that proposal it was pointed out that the term was used in articles 10(1), 10(3), 11(2) and 16(5) and that,

with the exception of article 10(1), it would be more appropriate to refer to the "execution date". It was further suggested that there would be little point in keeping the defined term for use only in article 10(1). It would be sufficient there to refer to "a date when the funds are to be placed at the disposal of the beneficiary". Such a complete avoidance of the use of the term "payment date" was also desirable in view of the fact that SWIFT payment messages did not contain a field for a payment date and since the term as presently defined was inconsistent with the International Organization for Standardization (ISO) standard, which used the same term to refer to what was referred to in the Model Law as the "execution date". In view of the foregoing, the Commission decided to delete the definition.

Additional definitions

"Purported sender"

83. A proposal was made to define the term "purported sender" with a view to achieving clarity, particularly in the application of article 4. It was agreed to consider the proposal if, during the later discussion of article 4, a need for such a definition became evident.

"Beneficiary's bank"

84. It was noted that the Secretariat in the comments on the draft Model Law had described certain problems that might make it advisable to define the term "beneficiary's bank" (A/CN.9/346, comment 49 to article 2). It was agreed that the need for such a definition should be considered after the discussion of the substantive articles of the Model Law.

"Interest"

85. The Commission considered whether it would be appropriate to include in the Model Law a provision defining the term "interest" and to establish a method for calculating the amount of interest due under article 16 and possibly other provisions of the Model Law. It was generally agreed that a provision of that type was desirable because it would increase predictability as to the rights and obligations of the parties under the Model Law, thereby limiting disputes.

86. The Commission initially considered two proposals for a provision on interest, both of which were based to a varying extent on the *Guidelines on International Interbank Funds Transfer and Compensation* of the International Chamber of Commerce ("ICC Guidelines"; ICC Publication No. 457). The first proposal was to include in article 2 a definition of "interest" consisting of a formula for calculating interest, namely, the interbank rate in the currency of the State in which the receiving bank was located. That proposal expressly referred to the right of the parties to vary the provision by agreement. The second proposal, which was more closely patterned on the ICC Guidelines, was to add a separate article on interest. The proposed article defined interest as the time value of the transaction amount in the country of the currency involved and provided for that calculation at the rate customarily accepted by the local banking community of that country. It also contained provisions identifying the account to be credited and defining the period of time for which interest was payable.

87. In the consideration of those proposals a number of questions emerged. One question was whether the Model Law should attempt to define "interest". A view was expressed that the term could not be defined by a simple reference to "time value", as in the second proposal, since interest was also calculated on the basis of other factors such as risk and inflation. The prevailing view, however, was that inclusion of a definition was desirable. It was further felt that the reference to "time value" was an appropriate definition because the relatively short periods for which interest was typically paid in credit transfers reduced the importance of other factors such as inflation.

88. Another question concerned the manner in which the amount of interest was to be calculated, a question in respect of which the two proposals differed. The first proposal referred to the interbank rate of the currency of the State in which the receiving bank was located, while the second proposal referred to the currency of the transfer and the rate customarily accepted by the local banking community of the country of that currency. It was noted that the two proposals would lead to different results when the currency of the credit transfer was different from the currency of the country where the receiving bank was located. It was stated in support of the first proposal that it would provide greater predictability and certainty, while the second proposal was supported on the ground that it was more flexible, that interest was generally linked to a currency and not to the place where a person receiving the funds was located, and that the interbank rate was not necessarily appropriate as a general rule because originators and beneficiaries in credit transfers covered by the Model Law were often not banks and their needs could not so easily be accommodated through a uniform rate designed for interbank transfers. A concern raised with regard to both proposals was that the use of the term "currency", and in particular the reference to the currency of the country in which the receiving bank was located, presented a difficulty for credit transfers denominated in units of account.

89. The Commission requested an ad hoc Working Party composed of the representatives of Mexico and the United States of America to formulate a further proposal in the light of the proposals and the views put forth thus far. The ad hoc Working Party proposed treating the question of interest in a separate provision, article 16 *bis*, with the following content:

> "Unless otherwise agreed, 'interest' means the time value of the transaction amount in the funds or money involved. Interest shall be calculated at the rate and on the basis customarily accepted by the local banking community for the funds or money involved."

90. The Commission noted that the use of the words "funds or money", instead of the word "currency", covered units of account in accordance with article 2*(i)*. Coverage of units of account was also accommodated by

the fact that the provision calculated interest on the basis of the funds or money involved, rather than on the basis of the currency of the country where the receiving bank was located.

91. While the text proposed by the ad hoc Working Party received wide support, a number of concerns were expressed, with particular regard to the use of the term "transaction amount", which was not defined in the Model Law, and the reference to "local banking community". Use of the latter term was questioned both on the ground that the reference should more properly be to the international banking community and on the ground that it was not clear as to the place being referred to. It was also stated that, because there were a variety of possible interest rates, including commercial bank, savings bank and interbank rates, the definition of interest needed to be more precise. In an attempt to meet some of those concerns, it was proposed that the words "time value of the transaction amount" should be replaced by the words "time value of the amount of the payment order". That proposal was accepted, subject to deletion of the reference to the payment order in view of the cases envisaged in articles 13 and 16(3) in which interest was due only on the amount actually transferred and not on the amount on the face of the payment order. It was also agreed that the word "local" preceding the words "banking community" should be deleted. A concern was expressed that the reference to the parties' right to vary the provision by agreement could lead to instances in which, in the name of varying interest provisions, a bank would reduce its liability to a non-bank originator or beneficiary in violation of article 16(7). The Commission decided to retain the reference to contractual freedom and to take up this concern when considering article 16(7).

92. The Commission decided to further modify the proposal of the ad hoc Working Party so as to permit inclusion of the provision on interest as a definition in article 2. The text adopted by the Commission read as follows:

> "Unless otherwise agreed, 'interest' means the time value of the amount in the funds or money involved, which is calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved."

Article 3

93. The text of draft article 3 as considered by the Commission was as follows:

> "Article 3. *Variation by agreement*
>
> "Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party."

94. Divergent views were expressed as to the appropriateness of the approach taken to the principle of freedom of contract in article 3, which provided that the parties may vary their rights and obligations under the Model Law subject to the exceptions set forth in individual provisions of the Model Law. According to one view, it was necessary to accord the parties the maximum possible degree of freedom of contract and the approach in article 3 did not go far enough in that direction. Restricting contractual freedom was said to limit competition by depriving banks of the opportunity to develop different offers for payments, and to have the potential for deterring the use of credit transfers. It was also suggested that restrictions on contractual freedom would limit the adaptability of the Model Law to future technical developments in international payments. It was suggested that all mandatory provisions in the Model Law could be deleted because the focus of the Model Law was to establish rules of a private law character for commercial parties who were in a position to protect their interests in negotiating the contractual terms of their credit transfer relationships. Provisions of the Model Law would serve as a measure of the reasonableness of contractual arrangements without having to be made mandatory.

95. At the other end of the spectrum was the view that the freedom of contract as accorded to the parties in the current draft had to be restricted to a significant degree because a large portion of the provisions were either not logically capable of being varied or were an essential part of the structure of the Model Law. It was suggested that the approach in article 3 should be reversed, so that the parties would be free to vary their rights and obligations only where individual provisions of the Model Law permitted them to do so. According to that view, such a restraint of freedom of contract was needed because the credit transfer mechanism in the Model Law would function properly only if all the parties implemented their responsibilities as set forth in the Model Law. Another element that figured prominently in that view was the concern that broad freedom of contract with regard to credit transfers could be injurious to third parties.

96. The prevailing view in the Commission was that the approach developed by the Working Group should be retained because it struck a reasonable balance between the need, on the one hand, to recognize freedom of contract, and, on the other hand, to make some provisions of the Model Law mandatory. Nevertheless, the Commission recognized the need to examine each article in order to assess whether any additional limits on freedom of contract were needed, or whether any existing limits should be lifted.

97. The Commission's deliberations revealed a degree of uncertainty as to whether the words "by agreement of the affected party" constituted a statement that a variation by agreement of parties pursuant to article 3 required the agreement of third parties affected by the variation. A view was expressed that article 3 should reiterate the principle of general contract law that two parties cannot by their own contract alter the rights and obligations of a third party. Such a provision would ensure that enactment of the Model Law would not compromise that principle. It was agreed that, if it was the intention of article 3 to make such a statement, the present wording was not sufficiently clear. Wording along the following lines was proposed for encompassing the notion of agreement by affected third parties: ". . . by agreement, with the consent of the affected party."

98. The prevailing view was that article 3 should not refer to the need for agreement of third parties affected by a variation agreed upon by the parties to the credit transfer. It was felt that the question should be left to general contract law, in which it was widely recognized that alteration of the rights and obligations of third parties required the agreement of those third parties. The Commission having decided to limit the application of the article to the parties to the credit transfer and to exclude references to third parties, it remained to find a formulation reflecting that decision. It was generally agreed that use of the word "affected" was unsatisfactory because it was not clear whether that word referred to a particular type of legal, economic or other adverse effect on a party and because it could be interpreted as including persons, other than the parties to the credit transfer, that were indirectly affected. Accordingly, it was agreed that the words "by agreement of the affected party" should be replaced by the words "by agreement of the parties concerned."

99. After deliberation, the Commission adopted the text of article 3, subject to replacing the words "of the affected party" by the words "of the parties concerned."

Proposal for an additional article on interpretation

100. It was proposed that an additional article along the following lines on uniform interpretation should be included in the Model Law:

"Article X. Interpretation

"In the interpretation of this law, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith."

101. In support of the proposal it was said that such a provision, which was found in conventions formulated by UNCITRAL, should also be included in a model law. The proposal was intended to diminish the degree to which inconsistent national interpretations of the Model Law would restrain harmonization of international trade law. Such a provision would do so by serving as a useful reminder of the international ambit of the relationships regulated by the Model Law, and thereby foster uniform interpretation. It was stated that the inclusion of a provision on uniform interpretation would be in line with the interest expressed by the Commission in the uniform interpretation and application of legal texts prepared by UNCITRAL, as evidenced by its decision to collect and disseminate information on decisions interpreting such texts, including Model Laws.

102. Reservations were expressed as to the advisability of including the proposed provision. In particular, it was stated that such a provision, while appropriate in a convention, could not properly be included in the Model Law, which was destined to be adopted as a piece of national legislation. In a number of countries enactment into national legislation of a provision of this type on interpretation would not be possible, unless the legislation implemented a convention. It was also suggested that inclusion of a provision of this type in the Model Law would complicate the application of the Model Law to domestic transfers where an enacting State wished to do so.

103. As a refinement to the proposal, it was suggested that the provision should refer to the "international character of the relationships regulated by this Law" in place of referring to the "international character" of the Model Law. Another suggestion was that the substance of the proposed provision should be included in a preamble. However, those suggestions did not generate wide support, and the Commission, in view of the reservations that had been voiced, decided against inclusion of the proposed article. (The Commission briefly returned to the issue in the context of article 11. See paragraphs 220 and 222 below.)

Article 4

104. The text of draft article 4 as considered by the Commission was as follows:

"Article 4. *Obligations of sender*

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

"(2) When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless bound if:

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

"*(b)* the receiving bank complied with the authentication.

"(3) The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable.

"(4) A purported sender is, however, not bound under paragraph (2) if it proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

"(5) A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, if the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates or errors in a payment order, the sender is not bound by the payment order if use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate or the error. If the error that the bank would have detected was that the sender instructed payment of an amount greater than the amount intended by the sender, the sender shall be bound only to the extent of the amount that was intended.

"(6) 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."

Paragraph (1)

105. A view was expressed that it was not clear whether article 4 applied to a case where the terms of an authorized payment order were altered by an unauthorized person. It was proposed that the issue could be clarified by deleting the first sentence of paragraph (5) and by replacing in paragraph (1) the words "bound by a payment order" by the words "bound by the term of a payment order". That proposal did not gain support because it was viewed as intermingling the notion of authentication of source with the notion of error.

Paragraph (2)

106. A view was expressed that the term "commercially reasonable" in subparagraph *(a)* was too vague a standard for measuring the adequacy of authentication methods. It was stated that additional precision would be obtained by adding the words "safe and" before the words "commercially reasonable". Use of that formulation was questioned on the ground that it might suggest that there existed flawless authentication methods. A similar proposal was to insert the word "reliable" before the words "commercially reasonable". The Commission concluded that those types of qualifying words were not appropriate since the concepts of safety and reliability were themselves an integral part of the notion of commercial reasonableness. A view was expressed that, under some circumstances, parties might reasonably agree to have no security because of commercial considerations. Another proposal was to include in the provision factors to be taken into account in assessing whether an authentication procedure met the standard. There was general agreement with the basic thrust of the proposal; yet, as the proposed factors related to the circumstances surrounding a credit transfer, the Commission decided that it would suffice to add the words "under the circumstances" after the words "the authentication method provided is".

107. The Commission resumed its discussion of the status under the Model Law of authentication by comparison of a handwritten signature with a specimen. It noted that it had begun the discussion in connection with the definition of "authentication" in article 2*(j)* (see paragraphs 69 and 70 above). It was generally felt that the Model Law should not exclude such a method from the coverage of the Model Law or pass judgment on its commercial reasonableness; as had been pointed out in the earlier discussion, the commercial reasonableness of such a method of authentication depended on the circumstances of each case. Rather, the issue to be decided in the context of article 4 was the extent to which the provisions on allocation of risk contained, in particular, in paragraphs (2) to (4) should cover the case of a forged signature.

108. The view was expressed that article 4 should apply in its entirety to authentication by comparison of signatures, in particular because new electronic methods of comparison of handwritten signatures promised to make such authentication increasingly reliable. For reasons that had been stated in the earlier discussion, however (see paragraph 69 above), the prevailing view was that the Model Law should follow the traditional rule that a sender did not bear the risk of a forgery. Accordingly, the Commission decided to add a provision expressly excluding the application of paragraphs (2) to (4) to authentication by comparison of signatures. As a result of that decision, only paragraph (1) remained governing authentication by comparison of signatures. At the same time, it was recognized that the parties could vary the exclusion of paragraphs (2) to (4) by agreement pursuant to article 3.

109. As regards subparagraph *(b)*, it was proposed that the words "complied with" should be replaced by the words "performed properly". That modification was intended to address a concern that the provision did not provide a clear answer to the allocation of risk in cases where the authentication result was incorrect due to a technical malfunction at the receiving bank. However, the existing text was not modified because it was generally felt that the reference to compliance with an authentication method covered the problem of technical malfunctions and that the proposed language would not result in additional clarity.

Paragraph (3)

110. A proposal was made to delete the paragraph. It was stated in support that the Model Law should not set a binding standard as to what would constitute a commercially reasonable authentication procedure. In practice, the commercial reasonableness of an authentication procedure depended on factors related to the individual payment order, such as whether the payment order was paper-based, oral, telex or data transfer, the amount of the payment order and the identity of the purported sender, and any statement of the parties in their agreement that they chose to use a procedure that was less protective than others available, especially if they explained the reasons why they had made that decision. The Model Law should not discourage the use of a given method of authentication for the sole reason that it would be less secure than other methods available, particularly if the receiving bank offered the sender at a reasonable price another authentication procedure that clearly was commercially reasonable, but the sender chose to use the less secure procedure for reasons of its own. Another reason given for the deletion of the paragraph was that, because paragraph (2) dealt only with payment orders subject to authentication, the current text would readily make it possible for the parties to vary the terms of the Model Law as they related to an unauthenticated payment order. It was also stated that, as long as there would be no case law to determine the content of a commercially reasonable method of authentication, parties could have no certainty as to the legal validity of the agreements they might enter into regarding methods of authentication.

111. The proposal was objected to on the grounds that the current text of the paragraph established a minimum standard and that, should it be deleted, the entities that engaged in the execution of payment orders would be allowed to impose on their customers standard terms

providing that senders of payment orders would be bound by the contents of payment orders that were not authenticated by the use of a reasonable authentication procedure, even if those payment orders had been issued by unauthorized persons. It was stated that such a result would contradict a general rule that existed in many legal systems.

112. The Commission then considered an intermediate proposal, which was to add appropriate wording to the current text of the paragraph to the effect that parties would be free to derogate from paragraph (2) by a specific individually negotiated agreement but not by means of standard forms of contract. Although some support was expressed for the proposal, it was widely felt that the definition of a specific agreement as opposed to standard forms or general conditions would be difficult to formulate with precision and that the proposed distinction might cause problems in those jurisdictions where the use of standard forms was not fully developed.

113. The Commission was agreed that the minimum standard currently contained in the paragraph should be maintained but that it should be made sufficiently flexible to allow parties to agree on the use of a lower standard if such an agreement was justified by the circumstances. The Commission accepted a proposal to add at the end of paragraph (3) the words "under the circumstances", so that paragraph (3) as adopted by the Commission read as follows:

> "(3) The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable under the circumstances."

Paragraph (4)

114. It was suggested that the reference to "a present or former employee of the purported sender" was undesirably narrow since it might exclude a person that, in some legal systems, might not be regarded as an employee, e.g., a director, an officer or another person whose relations with the purported sender might have enabled him or her to obtain improper access to the authentication or other operations of the purported sender.

115. Another view was that the reference to "a present or former employee of the purported sender" was undesirably wide as it covered any employee regardless of his or her position in the company. However, it was widely felt that all employees should be covered since all of them might have had access to the authentication procedure. Yet another view was that the reference should be expanded so as to cover all agents of the purported sender, including independent agents such as sending facilitators. It was stated, in reply, that the term "agent" was imprecise due to the varying interpretations of the term in different jurisdictions. Moreover, those agents that belonged to the inside circle to be covered by the reference would be included if the above suggestion (see paragraph 114 above) was accepted.

116. After deliberation, the Commission adopted the above suggestion in substance and agreed that it should not be limited to situations of "improper" access. Accordingly, it decided to add to the reference to "a present or former employee of the purported sender" wording along the following lines "or other person whose relations with the purported sender enabled it to obtain access to the authentication procedure".

Paragraph (5)

117. It was proposed that the scope of the paragraph should be expanded so as to include a revocation of a payment order. The Commission adopted the substance of the proposal and referred it to the Drafting Group.

118. It was observed that paragraph (5) covered errors in transmission of a payment order, and did not cover, as did paragraphs (1) to (4), fraudulent alterations of a payment order by a third person. It was suggested that that interpretation of the text should be expressed by adding at the beginning of paragraph (5) wording such as "Subject to paragraphs (1) to (4)". While the Commission agreed with the observation, it did not consider it necessary to express that interpretation of the text by adding words to paragraph (5).

Paragraph (6)

119. A view was expressed that paragraph (6) should not specify the date when the sender's obligation to pay the receiving bank became due, because contractual arrangements governing the relationship between senders and receiving banks often stipulated that date. Moreover, a rule on the date on which the sender's obligation to pay the receiving bank became due was meaningless in the situation where the receiving bank was deemed to have accepted a payment order on the day the bank received payment for that payment order. The opposing view was that settling the due date in the Model Law was necessary for cases where the date was not determined by a contractual arrangement between the sender and the receiving bank. It was not prudent to leave the determination of that date to rules outside the Model Law since those rules might contain provisions that were inappropriate for international credit transfers.

120. The Commission adopted the latter view and consequently retained the text as prepared by the Working Group. The Commission decided to remove the square brackets and to retain the words "execution date".

Article 5

121. The text of draft article 5 as considered by the Commission was as follows:

> "Article 5. *Payment to receiving bank*
>
> "Payment of the sender's obligation under article 4(6) to pay the receiving bank occurs:
>
> "*(a)* if the receiving bank debits an account of the sender with the receiving bank, when the debit is made; or
>
> "*(b)* if the sender is a bank and subparagraph *(a)* does not apply,

"(i) when a credit that the sender causes to be entered to an account of the receiving bank with the sender is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or

"(ii) when a credit that the sender causes to be entered to an account of the receiving bank in another bank is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or

"(iii) when final settlement is made in favour of the receiving bank at the central bank of the State where the receiving bank is located, or

"(iv) when final settlement is made in favour of the receiving bank

"a. through a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally and the settlement is made in accordance with applicable law and the rules of the system, or

"b. in accordance with a bilateral netting agreement with the sender; or

"*(c)* if neither subparagraph *(a)* nor *(b)* applies, as otherwise provided by law."

Opening words

122. It was proposed that the opening words of the article should indicate that its provisions would apply only in the context of articles 6(2)*(a)* and 8(1)*(a)* or, alternatively, that the article should be deleted and its current provisions embodied in the text of articles 6(2)*(a)* and 8(1)*(a)*. In support of the proposal, it was stated that, in the Model Law, the time of payment was of direct relevance only in the context of deemed acceptance. It was also stated that the current wording did not indicate that the function of the article was limited to such a narrow purpose but suggested that the article was intended to determine the time of payment for a more general purpose. In particular, it could be construed that article 5 was intended to affect the application of insolvency law to a sender or receiving bank that had become insolvent, a result that was said to be inappropriate. It was stated that in contexts outside articles 6(2) and 8(1) it might cause problems to state as a general rule that, where the sender credited an account of the receiving bank with the sender, "payment" by the sender to the receiving bank "occurred" on the day following the day on which the credit became available. That rule would be inappropriate, for example, in the context of article 17. Moreover, the current draft of subparagraphs *(b)*(i) and *(b)*(ii) of article 5 seemed to confuse the question of when payment occurred with the question of when the receiving bank was in a position to determine whether the credit provided constituted acceptable cover.

123. The proposal was objected to on the grounds that the Model Law should indicate the time of payment not only in the case when acceptance resulted from the failure of the receiving bank to act upon receipt of a payment order but also in the situations where acceptance resulted from a positive act by the receiving bank. It was stated that in all cases it would be useful for the sender to know when payment occurred because the time of payment would be the time when the sender fulfilled its obligation to pay the receiving bank.

124. Another proposal was to state in the opening words that the article would only be applicable "for the purposes of this law" and thus not have any bearing on issues outside the scope of the Model Law (e.g. insolvency). After discussion, the Commission adopted the proposal.

Subparagraphs (a) *to* (b)*(ii)*

125. A view was expressed that the provisions of article 5 might be inconsistent with the principles contained in article 17. For example, where the sender paid the receiving bank through a third bank, there might be an inconsistency between the time when payment was made to the receiving bank under article 5*(b)*(ii) and the time when the obligation was discharged under article 17(2).

126. In reply, it was stated that the conflict between the provisions of articles 5*(b)*(ii) and 17(2) might be solved if the reference to "another bank" in article 5*(b)*(ii) were to be interpreted as indicating a bank with which the beneficiary did not have a banking relationship, while the "beneficiary's bank" mentioned in article 17(2) would be considered as a bank with which the beneficiary normally held an account relationship. It was suggested that such interpretation might be easier if the words "another bank" were replaced by the words "another bank with which there is no account relationship". A different view was that no conflict existed between those two provisions since they dealt with different issues: article 5*(b)*(ii) dealt with the time when the sender paid the receiving bank while article 17(2) dealt with the time when the originator discharged its obligation to the beneficiary. The Commission decided to postpone its discussion until it had considered article 17(2).

Subparagraph (b)*(iii)*

127. A proposal was made to amend the paragraph as follows:

"when final settlement is made in favour of the receiving bank at a central bank at which the receiving bank maintains an account, or".

128. In support of the proposal, it was stated that, in many instances, a receiving bank could obtain "central bank settlement" at the central bank of countries other than the country in which the receiving bank was located. If the basis of the rule laid down in the subparagraph was that a settlement through an account at a central bank was equivalent to a settlement in cash, all cash settlements at central banks should be treated in the same way, irrespective of whether the central bank involved was that of the country in which the receiving bank was located. After discussion, the Commission adopted the proposal.

129. Another proposal was that the subparagraph should be amended to limit the effect of central bank settlement to the situation where the account of the receiving bank credited at a central bank was freely available for use and not, for example, subject to any foreign exchange prohibition. It was stated in reply that the Model Law should not deal with possible exchange regulations or banking regulations and that the proposed amendment would create more problems than it would solve. After discussion, the Commission decided not to adopt the proposal.

Subparagraph (b)*(iv)*

130. A proposal was made to delete the reference to "applicable law". It was recalled that netting schemes were instituted only by contractual agreement between all the parties concerned. While those agreements would have to be in conformity with the law to be enforceable, it was noted that they did not necessarily have to receive approval of the banking authorities. It was also recalled that the *Report of the Group of Experts on Payments Schemes of the Central Banks of the Group of Ten Countries,* which met under the auspices of the Bank for International Settlements (BIS), stated that the internal rules creating the netting schemes should be in conformity with the laws of all of the States from which there were parties to the agreement. The monetary settlement that took place between a sending bank and a receiving bank linked by a netting scheme could be in accordance only with the internal rules of the netting scheme. After discussion, the Commission decided to delete the reference to applicable law.

131. A concern was expressed that unqualified reference to netting schemes should not result in validating a netting scheme that would conform neither with national laws nor with generally accepted rules, such as the ones set out in the report of the Group of Experts. The prevailing view, however, was that the validity of bilateral or multilateral netting schemes could safely be left to be determined by whatever rules would be applicable in the different countries concerned.

132. The Commission took note of the recommendation by the Working Group (see A/CN.9/344, para. 61) to national legislators that domestic laws, especially laws dealing with bankruptcy and insolvency, should be reviewed with the objective of supporting interbank netting of payment obligations.

Subparagraph (c)

133. The Commission adopted the text of the subparagraph unchanged.

Article 6

134. The text of draft article 6 as considered by the Commission was as follows:

"Article 6. *Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank*

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

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

"*(a)* when the time for execution under article 10 has elapsed without notice of rejection having been given, provided that: (i) where payment is to be made by debiting an account of the sender with the receiving bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the amount of the payment order; or (ii) where payment is to be made by other means, acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 5*(b)* or *(c),*

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

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

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

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

Paragraph (1)

135. The Commission adopted the paragraph unchanged.

Paragraph (2)

136. A proposal was made to delete subparagraph (2)*(a),* which contained the rule often referred to as "deemed acceptance rule". It was stated in support that a sender was expected to know whether it had made adequate provision for paying the receiving bank. Moreover, although the concept of deemed acceptance was intended to favour the sender, it might also adversely affect the sender's situation by creating a link between the sender and a receiving bank that acted in a dilatory manner upon receipt of a payment order. It was also stated that, since deemed acceptance would establish a binding link between a sender and a receiving bank that might be unsuitable to the sender, it would seem more appropriate to rely on the concept of deemed rejection. The proper way of addressing the issue of inactivity by a receiving bank was not to deem the payment order to be accepted but to state the conditions under which the inactive receiving bank might be held liable to the sender under article 16 of the Model Law. A further problem with deemed acceptance was that even when the payment order was received before the bank's cut-off time, the bank might be unable to execute it on the same day if "deemed acceptance" under paragraph (2)*(a)* occurred too late in the day. (In this connection, see the decision to add an extra day within article 10(1), as reported in paragraphs 198-204 below).

137. In opposition to the deletion of the deemed acceptance rule, it was recalled that the mechanism of deemed acceptance was intended to discourage receiving banks from remaining inactive upon receipt of payment orders, and thus to contribute to the elimination of uncertainties and delays that might affect the credit transfer process. The deemed acceptance rule was in the interest of the sender since it gave him a claim for consequential damages in the case where the receiving bank had failed to notify rejection of a payment order. It was stated that a notice of rejection was needed to inform a good faith sender that there was a problem that needed to be rectified and that otherwise might have remained unknown. After discussion, the Commission decided to retain the concept of deemed acceptance.

138. As regards subparagraphs (2)*(a)* to *(d)*, a proposal was made to modify the order of the subparagraphs. Since current subparagraphs *(b)* to *(d)* dealt with situations in which acceptance resulted from a positive action of the receiving bank, they should be placed before current subparagraph *(a)*, which dealt with the case where acceptance was deemed to have occurred as a result of the receiving bank's inactivity. After discussion, the Commission adopted the proposal.

139. A proposal was made to add a new subparagraph to paragraph (2) as follows:

> "( ) when the receiving bank makes a debit to an account of the sender with the receiving bank in order to cover the payment order;".

140. In support of the proposal, it was stated that a bank should not be allowed to debit the sender's account, and thus pay itself for the amount of the payment order, without being considered as having thereby accepted the payment order. However, it was stated that the use of the word "cover" might be inappropriate since the Model Law did not define the concept of "cover". After discussion, the Commission adopted the proposed new paragraph amended as follows:

> "( ) when the receiving bank makes a debit to an account of the sender with the receiving bank as payment for the payment order;".

141. The Commission also decided to replace the words "to cover" in subparagraph (2)*(a)* by the words "for payment of".

Paragraph (3)

142. It was suggested that a receiving bank should be given an extra day to consider the possibility of rejecting a payment order and to comply with its obligation to notify such rejection. Accordingly, it was proposed that in paragraph (3) the words "must be given not later than on the execution date" should be replaced by the words "must be given not later than on the business day following the execution date", and that in paragraph (2)*(a)* the words "when the time for execution under article 10 has elapsed" should be replaced by the words "when the time for giving notice of rejection under paragraph (3) below has elapsed".

143. In support of the proposal, it was stated that payment orders specifying that they were to be executed on the same day were often received by receiving banks together with payment from the sender so late in the day that it was impossible for the receiving bank to complete, within that day, the investigations that might have to be undertaken before a decision could be made as regards the possible rejection of the payment order. Under those circumstances, the rule currently found in subparagraph (2)*(a)* might overly burden the receiving bank by providing that failure to notify rejection of the payment order on the day it had been received would result in the receiving bank being deemed to have accepted that payment order. Furthermore, it was stated that giving the additional day for considering acceptance of a payment order was necessary for the Model Law to remain in harmony with national and international rules aimed at detecting "money laundering" transactions. An example was given of a rule that required a bank in certain circumstances to inform an authority about a suspicious payment order and to delay executing the payment order for a certain period of time to permit the authority to determine the action it would take.

144. After discussion, the Commission adopted the proposal in principle. It was noted, however, that the issue of time of acceptance of payment orders could not be finally determined separately from the issue of time of execution of payment orders under article 10(1), since a payment order could not be executed before it was accepted. For the later discussion on article 10(1), see paragraphs 198 to 204, below.

145. A proposal was made to amend the current text of the paragraph so that the receiving bank would be under no obligation to notify its rejection of a payment order if it had not received payment for the payment order from the sender. In support of the proposal, it was stated that it would unduly burden the banks and might eventually slow down the entire credit transfer process to state that the receiving bank had a duty to notify the sender of a rejection even though sufficient funds had not been provided for payment of the payment order. In most cases the funds were provided soon thereafter. It was also noted that the current text contained no sanction relating to the failure by a receiving bank to comply with its obligation to notify the sender of a rejection where no funds had been received for payment. The proposal was objected to on the grounds that it might still be useful to maintain the principle of such an obligation in order to encourage action by receiving banks throughout the credit transfer chain and to provide certainty as to whether or not the payment order had been rejected. After discussion, the Commission adopted the proposal and referred it to the Drafting Group.

146. An additional proposal was made to insert a time limit after which payment orders would no longer be regarded as valid if the receiving bank had not received the corresponding payment. It was suggested that the validity period for such payment orders might be limited to five days. Another suggestion was that the matter should be left to agreement between the parties. After discussion, the Commission decided to adopt a provision to the effect that the validity of payment orders in the case

where no payment had been provided to the receiving bank would, in principle, be determined by contract or other applicable legal rules and that, absent such a contract and such rules, the validity of such payment orders would be limited to five days.

147. An ad hoc Working Party, entrusted by the Commission to prepare a draft text reflecting those decisions, submitted the following text of paragraph (3) and a new paragraph (4):

"(3) A receiving bank that does not accept a payment order is required to give notice of the rejection no later than on the business day following the execution date unless:

"(i) where payment is to be made by debiting an account of the sender with the receiving bank, there are insufficient funds available in the account to pay for the payment order; or

"(ii) where payment is to be made by other means, payment has not been received; or

"(iii) there is insufficient information to identify the sender.

"(4) A payment order is cancelled if it is neither accepted nor rejected under this article before the expiry of any period determined by law, agreement, or rule of a funds transfer system. If no such period is so determined, the payment order is cancelled at the close of business on the fifth business day after the execution date."

148. The Commission adopted the substance of the provisions submitted by the ad hoc Working Party and referred them to the Drafting Group.

149. It was observed that, by extending by one day the time period for giving notice of rejection, as it was done in the new version of paragraph (3), the question arose whether the receiving bank was allowed to benefit from keeping the funds it received from the sender as cover for the payment order without having to pay interest for the funds ("float") until the bank was deemed to have accepted the payment order. The Commission adopted the position that a bank ought not to benefit by not reacting to a payment order on the day it received it. The Commission agreed to add in article 10 a provision that would address the issue of "float" in accordance with that position of the Commission.

150. A view was expressed that the adoption of a rule limiting the validity of payment orders to a certain period of time might call for an additional rule determining the order in which the validity of different payment orders received on the same day would expire. For example, the matter might be settled either by a first-in/first-out rule or by a last-in/first-out rule. After discussion, the Commission was agreed that the Model Law should not attempt to regulate that matter, which would presumably be addressed by other provisions of national law.

151. The Commission adopted a proposal to replace the words "a sender's payment order" by the words "a payment order" and, as a consequence, the words "that sender" by the words "the sender".

Article 7

152. The text of draft article 7 as considered by the Commission was as follows:

"Article 7. *Obligations of receiving bank that is not the beneficiary's bank*

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

"(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

"(3) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the receiving bank shall give notice to the sender of the misdirection, within the time required by article 10.

"(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10.

"(5) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

"(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 10 if, in the time required by that article, it enquires of the sender as to the further actions it should take in light of the circumstances.

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

Paragraph (1)

153. The Commission adopted the text of the paragraph unchanged.

Paragraph (2)

154. It was proposed that a provision should be added to paragraph (2) requiring the receiving bank to execute

the transfer in the currency or in the unit of account stipulated by the sender. The purpose of the addition was to clarify that intermediary banks were not allowed, without the consent of the interested party, to convert the funds received into a currency other than that in which the order was denominated. It was stated, in support, that, as a result of the automatic conversion of currencies by receiving banks in implementing credit transfers, customers might suffer loss and that the Model Law should contain a rule protecting the interests of customers. It was further stated that the automatic conversion of currencies was a source of disputes when the conversion had not been anticipated by the originator or the beneficiary. It was noted that banks that were not in a position to implement payment orders in different currencies had the possibility to reject the payment order or to derogate from the requirement in accordance with article 3.

155. In opposition to the proposal it was said that banks in some States, in acting upon incoming payment orders denominated in a foreign currency, regularly converted the amounts of the orders into the currency in which the bank normally operated. The proposed rule would interfere with that practice and in all likelihood would be contrary to the expectations of the beneficiary. Furthermore, the approach taken in drafting the Model Law had been to avoid dealing with issues concerning foreign exchange, and the adoption of the proposal would not be consistent with that approach. It was thought to be more appropriate to leave the question of conversion to the banking practice and to the laws governing the operations of the bank in question. It was further suggested that it was up to the originator and the beneficiary of a payment order to take into account such banking practices and laws and to make prior arrangements with the banks involved to ensure that a payment order would be implemented in a particular currency.

156. The Commission did not adopt the proposed addition to paragraph (2). While the Commission expressed understanding for the legislative policy that sought to protect the interests of customers who did not expect their payment orders to be converted into another currency, it considered it preferable not to deal in the Model Law with issues of foreign exchange and not to interfere with existing rules and practices on the matter. The Commission noted that, in light of the existing text of paragraph (2), according to which the receiving bank was obligated to implement a payment order in a manner that was "consistent with the contents of the payment order received", there could exist cases where the conversion of the currency of the payment order would not be regarded as a proper implementation of the payment order.

157. There was support for the proposal to add to paragraph (2) a provision according to which a receiving bank that accepted a payment order was obligated to take the steps necessary to ensure that funds for the implementation of the payment order were available to the next bank in the chain of the credit transfer. Such a provision was said to be desirable in order to ensure that the next bank would not delay the implementation of the payment order on the ground that it had not received funds to cover the order.

158. The prevailing view, however, was not to accept the proposal. It was considered to be sufficient for the Model Law to establish (in article 4(6)) an obligation of the sender to pay the receiving bank upon the acceptance by the receiving bank of the payment order. Furthermore, it was noted that it was implicit in paragraph (2), which provided that a receiving bank had to issue a payment order that "contained the instructions necessary to implement the credit transfer in an appropriate manner", that the receiving bank had to issue a payment order that had a reasonable chance of being accepted by the next bank in the credit transfer chain.

159. The Commission adopted the text of paragraph (2) subject to changing the words "an appropriate intermediary bank" to "an intermediary bank".

Paragraph (3)

160. A proposal was made to delete the paragraph. In support of the proposal, it was stated that the problem of misdirected payment orders did not need to be addressed in the Model Law. It was stated that, under article 16(3), failure to give notice of misdirection of a payment order would have consequences only if payment had also been received. It was stated that, should such misdirection of both the payment order and the funds occur, the receiving bank would be under an obligation to notify rejection of the payment order under article 6(2)*(a)*. After discussion, the Commission decided to delete the paragraph.

Paragraph (4)

161. A proposal was made to modify the current text as follows:

> "(4) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order or being a payment order cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10."

162. In support of the proposal, it was stated that the current text was too widely drawn and covered instructions regardless of whether the receiving bank had appreciated that the provision applied. It was suggested that the proposed text should be amended to make it clear that the obligation of the bank to notify the sender of the insufficiency of the instruction would arise only if the bank had detected the insufficiency, while the bank would have no obligation to make specific enquiries for the detection of such insufficiency. It was noted that the Model Law provided no sanction for breach of the duty imposed on the receiving bank under the paragraph. Only if the receiving bank had been paid for the payment order might it have to pay interest under the Model Law. After discussion, the Commission adopted the proposal as amended and referred it to the Drafting Group. (As regards the reference to article 10, see the decision to add an extra day in article 10(1) as reported in paragraphs 198-204 below).

Paragraph (5)

163. The view was expressed that, in case of an inconsistency in a payment order between the words and the figures that describe the amount of money to be transferred, the Model Law should indicate whether words or figures should prevail. It was stated in support that the current provision was not restricted to situations where the inconsistency between the words and figures was in fact detected and the payment order was not executed but that it also governed cases where the inconsistency was not detected and the payment order was executed. It was not clear what the consequences were for the receiving bank or the sender in such a case. Any inconsistency between words and figures describing the amount of the payment order could properly be solved only by establishing a rule as to which description would govern. As to which description would govern, one proposal was to apply the traditional banking rule that words controlled over figures; another proposal was that, with a view to modern electronic means of transmitting payment orders where the orders were processed by number, the figures should control over the words.

164. The prevailing view, however, was not to accord priority to either words or figures. The current rule was the result of a delicate and balanced compromise; and if a bank did process payment orders by number only, it could contract with its customers to that effect.

165. A view was expressed that the first sentence was too restrictive and should be amended to cover, for example, the situation where the amount would be expressed in some form of code. The following wording was proposed:

"(5) If there is an inconsistency in the information relating to the amount of money to be transferred, the receiving bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified."

166. It was suggested that the proposed text should be amended to make it clear that the obligation of the bank to notify the sender of the inconsistency between the words and the figures would arise only if the bank had detected the inconsistency, while the bank would have no obligation to make specific enquiries for the detection of such an inconsistency. After discussion, the Commission accepted the thrust of the proposal as amended.

167. The Commission subsequently considered a further proposal intended to reflect the deliberations and decisions on paragraph (5). That proposal read as follows:

"(5) When a receiving bank detects that there is an inconsistency in the information relating to the amount of money to be transferred, it shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. If a bank detects such an inconsistency but executes the payment order, it is also in breach of paragraph (2). Any interest payable under article 16(3) for failing to give the notice required by this paragraph shall be deducted from any interest payable under article 16(1) for failing to comply with paragraph (2). A bank that does not detect such an inconsistency and executes the payment order is not in breach of paragraph (2) if it otherwise complies with that paragraph."

168. With regard to the first sentence of the proposal, the Commission noted that the reference to article 10 needed to be reformulated so as to make it clear that reference was being made to article 10(2) and not to article 10(1). Subject to such a modification, the sentence was found to be acceptable. Dissatisfaction was expressed with regard to the rule in the second sentence on the ground that, in view of existing banking practice, it would place an undue burden on receiving banks involved in high-speed, high-volume, low-cost credit transfers, thus slowing down such transfers and raising their cost. Other grounds for dissatisfaction were that the second sentence failed to indicate what a receiving bank should do upon detection of an error and to distinguish between inconsistencies that were obvious on the face of the payment order and those that were more difficult to detect. In view of those reservations, the Commission decided to delete the second sentence.

169. Dissatisfaction was expressed with regard to the fourth sentence on the ground that a view was that it established a broad rule of immunity for banks that executed payment orders containing undetected inconsistencies without taking into account the possibility that failure to detect resulted from negligence or that the undetected inconsistency was obvious. In order to address that concern, it was suggested that the words "if the inconsistency is not obvious" should be added to the beginning of the sentence. It was pointed out, however, that the fourth sentence could be read as implying that execution of a payment order after detection of an inconsistency constituted a breach of paragraph (2) and it should thus be deleted in view of the deletion of the second sentence. A contrary view was that banks in a high-speed system should be permitted to execute on the basis of figures and that the fourth sentence could be interpreted as preventing that. In view of those observations, the Commission decided to delete the fourth sentence.

170. After deliberation, the Commission adopted the first and third sentences of the text of paragraph (5) as embodied in the final proposal it had considered, and referred the paragraph to the Drafting Group.

Paragraph (6)

171. It was suggested that the Model Law should not allow a receiving bank to disregard the instructions of a sender, in particular regarding the use of a designated intermediary bank. It was stated that, in cases where the beneficiary's bank relied upon the receipt of funds at a designated intermediary bank, and consequently drew down on its account with the intermediary bank in reliance upon the expected receipt, an overdraft might be created and overdraft interest charges and other damages might result. The current text did not make it clear whether a receiving bank was entitled to choose another route without contacting the sender provided it acted in good faith, or whether it had to enquire of the sender what action it should take, in which case unilateral action would be at its

own risk. As a consequence, a proposal was made to amend the paragraph as follows:

"(6) If a receiving bank determines that it is not feasible 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, or that following such an instruction would cause excessive costs or delay in completing the credit transfer, the receiving bank shall be taken to have complied with paragraph (2) if it enquires of the sender what further actions it should take in the light of the circumstances, within the time required by article 10."

172. The proposal was objected to on the grounds that it would not permit the receiving bank to substitute its judgment for that of the sender, not only as regards the choice of an intermediary bank as did the current text, but also as regards the choice of a funds transfer system or means of transmission to be used in carrying out the credit transfer. A discussion ensued on whether the sender might be harmed by the receiving bank's unilateral decision not to follow the sender's instructions as regards the choice of a funds transfer system or a means of transmission. While support was given to the proposal that the receiving bank should have no freedom to deviate unilaterally from the instructions contained in the payment order, the prevailing view was that the receiving bank should be allowed to change unilaterally the means of transmission of the payment order, for example, if the purpose of the change was to permit timely execution of the payment order. It was therefore proposed that the words "or means of transmission" should be deleted from the proposal.

173. After discussion, the Commission adopted the proposal as amended and referred it to the Drafting Group. It also adopted the additional proposal to delete the reference to article 10 from the paragraph so that no extra day would be given to the receiving bank to act in the circumstances described in the paragraph.

174. The Commission adopted the proposal to relocate the paragraph between paragraph (2) and paragraph (4).

Paragraph (7)

175. The Commission adopted the text of the paragraph unchanged.

Article 8

176. The text of draft article 8 as considered by the Commission was as follows:

"Article 8. *Acceptance or rejection by beneficiary's bank*

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

"*(a)* when the time for [execution] under article 10 has elapsed without notice of rejection having been given, provided that: (i) where payment is to be made by debiting an account of the sender with the beneficiary's bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the amount of the payment order; or (ii) where payment is to be made by other means, acceptance shall not occur until the beneficiary's bank has received payment from the sender in accordance with article 5*(b)* or *(c)*,

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

"*(c)* when it notifies the sender of acceptance,

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

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

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

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

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

Paragraph (1)

177. The Commission decided that subparagraphs *(a)* to (c) should be aligned with article 6(2), including the new subparagraph added to article 6(2) (see paragraphs 139 and 140 above). It referred the matter to the Drafting Group.

178. A proposal was made that subparagraphs *(d)*, *(e)* and *(g)* should be deleted since the actions described by those subparagraphs were already addressed in article 9(1). In reply, it was stated that article 9(1) addressed those actions as a part of the obligations of a beneficiary's bank that had accepted a payment order; the subparagraphs should be maintained under article 8 since they provided certainty as to the time when the beneficiary's bank accepted the payment order.

179. After discussion, the Commission adopted the text of subparagraphs *(d)* to *(f)*. As regards subparagraph *(g)*, a proposal was made to delete the words "to a debt of the beneficiary owed to it" so as to prevent a possible interpretation of the text that would allow the beneficiary's bank to accept the payment order by applying the credit to a debt of the beneficiary owed to it. It was stated that such an interpretation was not acceptable since the beneficiary's bank, when accepting a payment order, came under the obligation to transmit the credit for the disposal of the beneficiary. The bank should not, without the beneficiary's permission, be entitled to use the funds to settle its differences with the beneficiary. In reply, it was stated that, in view of article 9(1), the Model Law could

not be interpreted as allowing the beneficiary's bank to set off the credit with a debt of the beneficiary, but only as stating that, should such a set-off be allowed, it would constitute payment under the Model Law. After discussion, the Commission did not adopt the proposal.

180. As regards the reference to an order of a court in subparagraph *(g)*, a view was expressed that legal demands for the credit could be given not only by a court but also by other public authorities. A proposal was made to replace the words "in conformity with an order of a court" by the words "in conformity with an order of a court or another competent legal authority". After discussion, the Commission adopted the proposal.

Paragraph (2)

181. The Commission adopted the text of the paragraph subject to drafting changes to ensure conformity with the text of article 6(3). The matter was referred to the Drafting Group.

Article 9

182. The text of draft article 9 as considered by the Commission was as follows:

"Article 9. *Obligations of beneficiary's bank*

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

"(2) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be [executed] because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 10.

"(3) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the beneficiary's bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

"(4) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank shall give notice, within the time required by article 10, to its sender and to the originator's bank, if they can be identified.

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

Paragraph (1)

183. A view was expressed that paragraph (1) might need redrafting to avoid conflict with article 8(1). It was stated that the paragraph was too broadly worded in that it implied, for example, that the beneficiary's bank would be under the obligation to place the funds at the disposal of the beneficiary even where, under article 8(1)*(g)*, a court order might enjoin the bank from placing the funds at the disposal of the beneficiary. A proposal was made to add at the end of the paragraph the words "or to apply the credit in accordance with the applicable law". The Commission referred the proposal to the Drafting Group and recalled that the text of the paragraph should conform with the text of article 7.

Paragraphs (2) and (3)

184. The Commission adopted the text of paragraphs (2) and (3), subject to drafting changes by the Drafting Group so as to align the text of the paragraphs with article 7.

Paragraph (4)

185. It was suggested that it was not necessary to require a notice to be given to the originator's bank. The Commission agreed with the suggestion and adopted paragraph (4) subject to that modification.

186. It was observed that, with respect to the identity of the beneficiary, many banks processed payment orders on the basis of figures only. That practice was comparable to the practice of processing the amount of the payment orders by figures only (see paragraph 163 above). The Commission decided to take the approach taken in respect of article 7(5), i.e., to make it clear in article 9(4) that the beneficiary's bank would not be obligated to give notice if the bank operated on the basis of figures only and did not detect the inconsistency with the description of the beneficiary in words (see paragraph 166 above).

187. The Commission then considered the following proposed text intended to incorporate the decisions with regard to paragraph (4):

"(4) When the beneficiary's bank detects that there is an inconsistency in the information that identifies the beneficiary, it shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. If a bank detects such an inconsistency but executes the payment order, it is also in breach of paragraph (1). A bank that does not detect such an inconsistency and executes the payment order is not in breach of paragraph (1) if it otherwise complies with that paragraph."

188. In line with the decision with respect to article 7(5), the first sentence was found to be acceptable. On the same ground that it had been decided to delete the second sentence in the final proposed text of article 7(5), the Commission decided to delete the second sentence of the proposed text of paragraph (4). As regards the last sentence, a view was expressed that the reference to compliance with paragraph (1) was unsatisfactory because paragraph (1), rather than setting forth the substance of obligations of the beneficiary's bank, contained a reference to the applicable law governing the relationship between the bank and the beneficiary. It was also suggested that the last sentence was inadequate because it

failed to provide for notification of the originators's bank in cases where the receiving bank's sender was itself an intermediary bank and did not possess the information needed to clarify the inconsistency. After deliberation, the Commission decided to delete the last sentence on the same ground as and in line with its decision to delete the last sentence of the final proposed text of article 7(5).

Paragraph (5)

189. The provision was supported since it expressed a duty that was in the interest of the proper functioning of credit transfers and that was owed by the beneficiary's bank to the sender.

190. Opposition was expressed to providing an obligation such as the one expressed in paragraph (5), and it was proposed that paragraph (5) should be deleted. It was stated that on a given day a major bank might receive hundreds of payment orders concerning beneficiaries who did not maintain an account at that bank. In such a case it should be left to the bank to decide how it would discharge its obligation to execute the payment order. The bank might, for example, engage another bank to make the payment or to notify the beneficiary, or choose to pay by sending a cheque to the beneficiary. Since such acceptable practices might not be interpreted as discharging the obligation of giving notice as provided in paragraph (5), the Model Law would unduly interfere with them. It was noted that, since in the hypothesis of paragraph (5) there was no account relationship between the bank and the beneficiary, the bank had no practical possibility of modifying its duty through an agreement with the beneficiary.

191. It was observed that paragraph (5) provided that the bank was to give notice on the execution date, and that the time available to the bank for giving the notice was too short if the provision was interpreted to the effect that the notice was to reach the beneficiary on that date. It was therefore suggested that it should be made clear that the notice must be dispatched on the execution date, thereby putting the risk for loss or delay of the message on the beneficiary. The Commission agreed with the suggestion.

192. The Commission was agreed that, when the beneficiary's bank was instructed to make payment upon application by the beneficiary, the giving of notice as specified in paragraph (5) should not be required. It was decided to express that idea by inserting an opening phrase in paragraph (5) along the following lines: "(5) Unless the payment order states otherwise, the beneficiary's bank shall . . .".

193. The Commission, after discussion, decided to adopt paragraph (5), subject to the modifications indicated in the preceding two paragraphs.

194. It was noted that article 16(6) referred to the liability for failure to perform the obligation of giving notice specified in article 9(5) and that such liability might entail an obligation to pay unliquidated damages by the beneficiary's bank. The Commission was agreed that the question of liability for failure to give notice under paragraph (5) would be considered in the context of article 16(6).

Article 10

195. The text of draft article 10 as considered by the Commission was as follows:

"Article 10. *Time for receiving bank to [execute] payment order and give notices*

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

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

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

"(2) A notice required to be given under article 7(3), (4) or (5) shall be given on or before the day the payment order is required to be executed.

"(3) A notice required to be given under article 9(2), (3) or (4) shall be given on or before the [payment date].

"(4) 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.

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

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

Paragraph (1)

196. The Commission decided to remove the square brackets around the word "execute" or "executed" in the article heading, the opening phrase of paragraph (1) and subparagraph *(a)*.

197. The Commission reworded subparagraph *(b)* in the following way:

"*(b)* the order specifies a date when the funds are to be placed at the disposal of the beneficiary and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and execute it on that date."

198. The Commission engaged in a discussion whether paragraph (1) should provide that the receiving bank was required to execute a payment order on the day it received the order ("same-day rule") or whether paragraph (1) should require the receiving bank to execute the order as soon as possible but not later than the day following the day it received the order ("next-day rule").

199. The following arguments were advanced in favour of the same-day rule. The rule supported and stimulated the use of efficient banking procedures. Furthermore, a bank that was unable to process all payment orders on the day they were received could ensure, through the establishment of a suitable cut-off time according to paragraph (4), that payment orders received after a certain hour of a business day would be treated as having been received on the following day. In addition, article 3 of the Model Law allowed banks to derogate, by agreement with the customer or by an appropriate clause in the bank's general conditions, from the one-day rule and to establish a longer time period. Furthermore, the next-day rule enabled the receiving bank to extend the period of the "float", i.e. the period during which the bank had the use of the funds without having to pay interest for them; in that connection, it was suggested that, if the next-day rule were to be adopted, it should be provided that, if the bank executed an order later than on the day the order was received, the bank should be obligated to credit the interest for the funds held by the bank more than one day. Moreover, it was noted that where there were several intermediary banks in the chain of a credit transfer, giving each receiving bank more than one day to execute orders may considerably slow down the funds transfer from the originator to the beneficiary. It was also said that, in view of the increased use of efficient electronic equipment in banking operations in developing as well as in developed countries, the Model Law would soon become outdated if it did not recognize the need for a rapid processing of payment orders.

200. The following arguments were advanced in favour of the next-day rule. The rule was realistic in that it took into account the fact that small or medium-size banks might not be in a position to comply with the same-day rule. The same-day rule might be appropriate for an electronic banking environment but not for the processing of paper-based payment orders. Furthermore, certain recommendations adopted in the European Communities for trans-border banking operations recognized the next-day rule. In addition, alleviating the rigour of the same-day rule by establishing a cut-off time according to paragraph (4) was not a good approach since it stimulated banks to set the cut-off hour early in the day. It was more appropriate to stimulate banks to set a late cut-off hour and execute as many payment orders as possible on the day the orders were received, while allowing the banks to postpone execution of certain kinds of orders to the next day. Furthermore, derogation from the same-day rule in accordance with article 3 was not a suitable way to allow banks to extend the period for execution of payment orders since they would have to explain and justify the derogation. By adopting a next-day rule, the Model Law would be acceptable also in States in which banks were not in a position to comply with the same-day rule. Moreover efficient banks would be able to improve their competitive position if they would make known that they were executing payment orders promptly.

201. After deliberation, the Commission adopted the solution according to which the receiving bank should in principle be obligated to execute a payment order on the day the order was received, but that an exception to that principle should allow execution of an order on the following day. Furthermore, it was decided that the bank executing an order on the following day should be obligated to enter the transaction in its books in such a way that the bank would not have the benefit of the use of the funds for an extra day without crediting interest for that day.

202. An ad hoc Working Party, entrusted by the Commission to prepare a draft text reflecting those decisions, submitted to the Commission a draft text to replace the opening phrase of paragraph (1) and a draft text of a new paragraph (1 *bis*) as follows:

> "(1) The receiving bank is required to execute the payment order on the business day it is received or, if not, at the latest on the business day after it is received, unless
>
> "*(a)* . . .
>
> "*(b)* . . .
>
> "(1 *bis*) When the receiving bank executes the payment order on the business day after it is received, otherwise than pursuant to subparagraph (1)*(a)* or *(b)*, the receiving bank must do so for value on the date of receipt."

203. As to the opening phrase of paragraph (1), the Commission agreed with the policy that, on the one hand, it was desirable for the receiving bank to execute payment orders on the day they were received, but that, on the other hand, the bank should not be put in a position that it would have to justify execution of a payment order made on the following day. A proposal was made to express more clearly in paragraph (1) that it was desirable to execute payment orders on the day they were received. The proposal was to add, after the words "The receiving bank is required to execute the payment order" the words "if normally practicable" or "if reasonably practicable". While the proposal received some support, it was not accepted since it might bring into question the policy of not obliging the bank to justify execution of a payment order on the following day. The Commission decided, subject to review by the Drafting Group, to insert, in the opening phrase of paragraph (1), after the words "to execute the payment order", the words "in principle", and to replace here and in other appropriate places the term "business day" by the term "banking day".

204. As to the suggested paragraph (1 *bis*), it was pointed out that particular care was needed in translating the expression "for value on the date of receipt" in order to ensure that it would be understood properly. It was noted that, in obligating the bank to execute the order for value on the date of receipt, paragraph (1 *bis*) did not deal with the question whether the bank owed interest for executing the order a day later than on the day of receipt of the order. Paragraph (1 *bis*) required that the credit to the account should be made as if the order had been executed on the day of receipt of the order. The consequences of the requirement would be, for example, that the holder of the account could issue, on the day of execution of the order, a cheque against that credit, or could include, on that day, the credit in its financial reserve. The

question whether the credit to the account bore interest, and at what rate, were separate questions that were not addressed by the Model Law. The Commission adopted paragraph (1 *bis*) and referred it to the Drafting Group.

Paragraphs (2) and (3)

205. It was proposed that paragraphs (2) and (3) should be reformulated along the following lines:

"(2) A notice required to be given under article 7(4) or (5) shall be given as soon as possible but not later than the business day after the day the payment order is required to be executed.

"(3) A notice required to be given under article 9(2), (3) or (4) shall be given as soon as possible but not later than the business day after the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary."

206. It was suggested that an instruction mentioned in article 7(4), or in the equivalent provision in article 9(2), might not be considered a payment order because it did not contain sufficient data to be a payment order. The Commission agreed with the suggestion and requested the Drafting Group to formulate paragraphs (2) and (3) of article 10 in such a way that they would embrace payment orders as well as instructions that were not considered payment orders.

207. The Commission discussed the effect of, and possible interpretations that might be given to, the expression "as soon as possible" in paragraphs (2) and (3). After considering possible alternative wordings such as "in a reasonable period of time" or "promptly", the Commission decided to delete the expression since it was not necessary in view of the ultimate time limit provided in the two paragraphs.

208. It was suggested that the expression "execution date" should be used in paragraph (3) instead of the phrase "date specified in the payment order when the funds are to be placed at the disposal of the beneficiary".

209. In view of the adoption of the rule contained in article 10(1) allowing the receiving bank to use an extra day for the execution of a payment order (see paragraph 201 above), the question was raised whether the time-period in paragraphs (2) and (3) would be calculated from the day the payment order was received or from the following day. The Commission understood that the period should be calculated from the last day on which the payment order was to be executed. The Commission requested the Drafting Group to express that understanding in paragraphs (2) and (3).

210. Subject to the above decisions, the Commission adopted the substance of paragraphs (2) and (3).

Paragraph (4)

211. The Commission decided to remove the square brackets around the word "executes" and adopted paragraph (4).

Paragraph (5)

212. The Commission adopted paragraph (5).

Paragraph (6)

213. The Commission adopted paragraph (6). The question was raised whether, by treating branches and separate offices of a bank as separate banks for the purposes of article 10, a branch could, by routing electronic messages through the main office or another branch, in effect prolong the time periods provided in article 10. The Commission understood that such prolongation of time periods was not possible since the fact that a message received or sent by a branch was processed by or passed through the electronic communication system of the main office or of another branch did not make that message a further payment order or a message directed to another bank.

Article 11

214. The text of draft article 11 as considered by the Commission was as follows:

"Article 11. *Revocation*

"(1) A payment order may not be revoked by the sender unless the revocation order is received by a receiving bank other than the beneficiary's bank at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act before the later of the actual time of execution and the beginning of the execution date.

"(2) A payment order may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner sufficient to afford the bank a reasonable opportunity to act before the later of the time it accepts the payment order or the beginning of the payment date.

"(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) A revocation order must be authenticated.

"(5) A receiving bank other than the beneficiary's bank that executes or a beneficiary's bank that accepts a payment order that has been revoked is not entitled to payment for that payment order and, if the credit transfer is completed in accordance with article 17(1), shall refund any payment received by it.

"(6) If the recipient of a refund under paragraph (5) is not the originator of the transfer, it shall pass on the refund to the previous sender.

"(7) If the credit transfer is completed in accordance with article 17(1) but a receiving bank [executed] a revoked payment order, the receiving bank has such rights to recover from the beneficiary the amount of the credit transfer as are otherwise provided by law.

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

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

Paragraphs (1) and (2)

215. A view was expressed that the article might need redrafting as a result of the change introduced in the rule contained in article 10(1) allowing the receiving bank to use an extra day for the execution of a payment order. It was stated that, although the current text of the Model Law provided no definition of the execution date, the text would, in all likelihood, be interpreted as providing that execution should take place by the end of the day following the day when the payment order was received. It was stated that the beginning of the execution date referred to in the paragraphs would, under those circumstances, be interpreted by the banks as the beginning of the last day open for effective execution of the payment order. Thus, if a revocation order could be binding upon the banks if received by the beginning of the second day, banks would tend to protect themselves against a possible liability by executing all payment orders on the second day provided in article 10(1). It was stated that, while the Commission had decided to maintain the principle of same-day execution under article 10, the above interpretation would introduce a bias toward later execution.

216. A proposal was made to replace the words "and the beginning of the execution date" at the end of paragraph (1) and "or the beginning of the payment date" at the end of paragraph (2) by the words "and the earliest of the dates provided for execution under article 10(1)". Although support was given to the proposal, the prevailing view was that a reference to two possible dates of execution would contradict the principle of same-day execution. For the same reason, the Commission decided not to replace the reference to the execution date by a reference to an execution period and not to rely on a distinction between the day when the bank was entitled to execute and the day when it was obligated to execute. After discussion, the Commission decided to replace the ending words of the paragraphs by the words "or the beginning of the day on which the payment ought to have been executed under article 10(1)*(a)* or *(b)*, if later".

217. A discussion took place as to whether the Model Law should address the legal issues arising out of a possible amendment of a payment order. It was recalled that the Working Group had noted that amendment of payment orders might raise additional policy issues to those raised by the revocation of payment orders. It was stated that, should the issues of amendment be addressed, there would be a need for a complete set of rules governing the content of the amendment and the rights and obligations of the bank that received an amendment, and for providing a sanction for those rights and obligations. It was suggested that it might be too late to consider such new issues. It was noted that, while amendments were not expressly mentioned by the current text, they were not precluded by the Model Law and that the matter could be dealt with by agreement between the parties to a credit transfer.

218. A concern was expressed that some difficult issues might arise regarding amendments, for example, in the case where the purpose of the amendment was to increase the amount of the credit transfer. In reply, it was stated that most funds transfer systems would regard such an amendment as a new payment order issued as a complement of the first one for the extra amount, whereas most other amendments would be analysed as the combination of a revocation order concerning the initial payment order, followed by a new payment order containing the new instructions. It was thus stated that, under most circumstances, amendments could be dealt with under the rules concerning the issuance or the revocation of payment orders.

219. It was stated, however, that in current banking practice, amendments of payment orders were considerably more numerous than revocations and that there existed no reason why the Model Law should focus on the issues of revocation without addressing those of amendment. It was also stated that the legal problems raised by amendments of payment orders could easily be dealt with in the Model Law. In most cases, the matter could appropriately be taken care of by mentioning that the rules applicable to revocation would also apply to an amendment.

220. It was suggested that, if the Commission decided not to include a provision on amendment in the Model Law, it should at least adopt a general provision along the lines of article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods, to the effect that the question of amendment as well as other questions concerning matters governed by the Model Law that would not be expressly settled in it would be settled in conformity with the general principles on which it was based. (See paragraphs 100-103.)

221. After discussion, the Commission decided to add the following provision to the text of the article:

"The principles contained in this article will apply to the amendment of a payment order".

222. It also decided to discuss the possible insertion of a general provision along the lines of article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods at a later stage of its proceedings.

Paragraph (3)

223. The Commission adopted paragraph (3).

Paragraph (4)

224. Some support was expressed for the deletion of paragraph (4). It was thought to be unnecessary since it was understood that, for a bank to act upon a revocation order, the bank would have to be assured that the order was issued by or on behalf of the sender. The prevailing view, however, was that paragraph (4) was useful in that it clarified that the bank had a right to require a revocation order to be authenticated. Such a right was necessary since

the bank had no other choice but to act upon a revocation order whereas it was authorized to reject an unauthenticated payment order.

225. It was generally understood that the method of authenticating a revocation order did not have to be the same as the method of authenticating the payment order being revoked. The Commission decided that that understanding should be expressed in paragraph (4) and requested the Drafting Group to prepare an appropriate formulation.

Paragraph (5)

226. The Commission adopted the paragraph, subject to making it clear in the text that, for paragraph (5) to operate, the revocation had to be effective under the provisions of paragraphs (1) and (2) of article 11. The Drafting Group was requested to revise the text of paragraph (5) accordingly.

Paragraph (6)

227. The Commission adopted the substance of paragraph (6). The Commission requested the Drafting Group to revise the paragraph with a view to ensuring that it was clear that the provision operated repeatedly with respect to each recipient in order to ensure that the refund would be returned to the originator. It was suggested that the Drafting Group should replace in paragraph (6) the word "transfer" by the expression "credit transfer".

New paragraph (6 bis)

228. A proposal was made to include in article 11 a rule that would take into account the possibility that a bank making a refund would consider it appropriate to skip the previous sender and would make the refund directly to the originator or to another sender in the chain of the credit transfer. It was proposed that such a rule ("skip-rule") might be drafted along the following lines:

> "(6 *bis*) Without prejudice to its obligations under any agreement that nets obligations bilaterally or multilaterally, a bank that is obliged to make a refund to its sender under paragraph (5) is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent."

229. A purpose of the proposed skip-rule was said to be to provide a solution when the direct refund to an intermediary bank or to the originator was the most practical solution. Another purpose was to allow the refunding bank not to pay the refund to an intermediary bank that had become insolvent; a refund to such a bank might defeat the ultimate purpose of the refund, which was to transfer the money back to the originator.

230. It was noted that the scope of the proposed text was limited in two directions. First, the opening phrase made it clear that the skip-rule did not operate when it was inconsistent with any bilateral or multilateral agreement through which banks netted their obligations arising out of payment orders. Secondly, the rule did not constitute a general authorization for a refund to a sender other than the previous sender; the rule merely provided that, when a bank chose to skip a sender, which the bank would do taking into account the circumstances of the case and its obligations towards the participants in the particular credit transfer chain, the bank would be discharged from its obligation to make the refund.

231. The proposed text of the skip-rule was opposed on the ground that the rule might be incompatible with the rules of a funds transfer system or the rights and obligations of an intermediary bank participating in a bilateral or multilateral netting arrangement. It was stressed that the future development of international credit transfers, in particular computer-assisted credit transfers, would place greater emphasis on multilateral and bilateral netting arrangements, and that a provision such as the one proposed might interfere with such arrangements. It was also stated that such a rule could not operate with certain funds transfer systems and that the rule would therefore conflict with emerging commercial methods. Furthermore, the Model Law should not attempt to deal in an incomplete and unsuitable manner with a situation that involved national laws on insolvency and bankruptcy.

232. In support of the proposed text, it was said that, once the payment orders relating to a particular credit transfer were settled, the manner in which any refund would be made would not affect the netting arrangement. Since the settlements under the computer-assisted netting arrangements were usually made daily, the possibility of interference of the skip-rule with the netting arrangement was not substantial. To the extent the possibility of such interference existed, the opening phrase making the skip-rule subject to any agreement binding upon the bank making the refund should ensure that interference did not in fact occur.

233. An observation was that the concept of netting, which was referred to in the opening phrase, was vague and that the question of the effectiveness of netting schemes could not be fully resolved by the Model Law since several national legal systems might be relevant in determining that question. The Commission took note of the observation and decided that the opening phrase should not specifically mention netting.

234. After deliberation, the Commission adopted the substance of the proposal and decided that the text should read along the following lines:

> "(6 *bis*) A bank that is obliged to make a refund to its sender under paragraph (5) is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent. This paragraph does not apply to a bank if it would affect the bank's rights or obligations under any agreement or rule of a funds transfer system."

235. An additional proposal was made for providing that the originator had a direct claim for refund against the bank that was obligated to make the refund as a result of a revocation of the payment order. Such a direct claim was considered necessary to protect the interests of the

originator who might otherwise find it difficult to prevent (e.g., through court ordered interim measures) the refund being made to an intermediary bank that might not be able, because of insolvency, to make the next refund. A direct claim by a non-bank originator would also have the possible advantage of falling under a national deposit insurance scheme. The Commission adopted the substance of the proposal and referred it to the Drafting Group.

Paragraph (7)

236. The Commission adopted the paragraph. (As to the later decision to replace the words "as are otherwise provided by law" by the words "as may otherwise be provided by law", see paragraph 276 below).

Paragraph (8)

237. A question was raised as to the necessity for referring to the originator since, in accordance with article 2*(e)*, the term "sender" encompassed an originator. In response, it was pointed out that the independent reference to the originator was intended to make clear that death, bankruptcy or incapacity of an originator, as distinct from senders such as the originator's bank or an intermediary bank, would not result in a termination of authority relating to payment orders issued by such senders.

238. The appropriateness of the term "revocation" was questioned on the ground that revocation of a payment order required a degree of initiative beyond the capacity of a dead, bankrupt or incapacitated originator or sender. It was decided to retain the present formulation since its meaning was clear and since in some legal systems events of the type referred to in the paragraph may operate to revoke a payment order by operation of law.

239. A suggestion was made to broaden the language of the paragraph so as to indicate that the occurrence of an event of the type referred to would not result in the revocation of the credit transfer, rather than merely not resulting in the revocation of a payment order. It was decided, however, that the proposed change was unnecessary because the meaning of the provision was sufficiently clear. A further reason for not adopting the proposed language was that the Model Law recognized the concept of the revocation of a payment order, but did not contain any provisions on revocation of a credit transfer.

240. It was suggested that the reference to "corporate insolvency" needed to be elaborated to make clear that the paragraph referred to insolvency of all types of legal entities that might act as originators or senders. That suggestion was referred to the Drafting Group.

241. After deliberation, the Commission adopted the text of the paragraph and referred it to the Drafting Group.

Paragraph (9)

242. A view was expressed that the paragraph was drafted in an overly broad fashion. In particular, it was suggested that the scope of the rule that branches and separate offices of a bank were to be considered separate banks for the purposes of article 11 should be limited to paragraphs (1) and (2), since some of the obligations treated in other paragraphs were of a monetary nature. With respect to such obligations it would not necessarily be appropriate to treat branches of a bank as separate banks. In response, it was pointed out that application of the rule in paragraph (9) to paragraphs (5) and (6) would also be appropriate. The Commission decided to adopt the paragraph with the understanding that it related to operational matters and that questions of financial liability and similar matters concerning branches or the head office of a bank were beyond its purview.

Article 12

243. The text of draft article 12 as considered by the Commission was as follows:

"Article 12. *Duty to assist*

"If the credit transfer is not completed in accordance with article 17(1), each receiving bank is obligated to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the credit transfer."

244. Divergent views were expressed concerning the duty to assist. One view was that the provisions of the article should not be left open to variation by agreement between the parties. The provisions of article 12 should constitute a minimum standard of protection of the originator against the consequences of a failure in the credit transfer.

245. Another view was that the article should be deleted. In support of the proposal, it was stated that the current rule on the duty to assist was vaguely worded and that it was unclear whether there existed a sanction to it. The whole matter of assistance should be left to good banking practice and to competition in the banking market. It was suggested that, should the article be maintained, the extent of the duty to assist should be limited so that a receiving bank would have a duty to assist only its sending bank and its receiving bank. Moreover, the article should indicate clearly that there existed no liability for failure to comply with the duty to assist.

246. The prevailing view, however, was that the principle of a duty for the receiving banks to assist in case of non-completion of a credit transfer should be retained. A suggestion was that, if the credit transfer was not completed, it would be indispensable to collect information as to the location of the funds or the cause of the failure. Thus, the words "in particular by offering and gathering necessary information such as the whereabouts of the funds" should be added before the words "in completing the credit transfer". In reply, it was stated that there was no need to adopt the proposal since the duty to collect information was already implied in the text.

247. Another proposal was that the words "If the credit transfer is not completed in accordance with article 17(1)" should be replaced by the words "Until the credit transfer is completed in accordance with article 17(1)". It was

stated that, while the duty to refund under article 13 arose only where it was clear that the transfer would not be completed, the duty to assist should continue until the credit transfer was completed. After discussion, the Commission adopted the proposal.

248. As regards the scope of the duty to assist, the view was expressed that the Model Law should not attempt to modify the existing banking practice but simply take that practice into account. It was stated that the current wording might suggest that the purpose of the article was to create a legal duty that, under different jurisdictions, might be regarded either as a statutory duty or as an implied contractual duty and might entail liability of the receiving bank in case of breach of that duty. A concern was expressed that such misinterpretation of the article might lead to burdening the receiving bank with an unlimited duty that might, for example, include the obligation to join legal procedures that the originator might have started as a consequence of the failure of the credit transfer. A proposal was made to replace the words "each receiving bank is obligated to assist" by the words "each receiving bank is obligated to use its best efforts to assist". In support of the proposal, it was stated that such wording would mitigate the concern expressed about the possible liability of the receiving bank. Another proposal to the same effect was to replace the words "the receiving bank is obligated to assist" by the words "the receiving bank has a duty to assist" and the words "in completing the credit transfer" by the words "in completing the banking procedures of the credit transfer". After discussion, the Commission adopted the latter proposal.

249. As regards the possible sanction of the duty to assist, it was stated that article 16(8) should make it clear that it did not apply to failure by a bank to comply with its duty to assist under article 12. Although a concern was expressed that the Model Law should also indicate, particularly for the use of bank supervisory authorities, what the sanction of article 12 might be, the Commission decided not to indicate any sanction for breach of the duty to assist.

Article 13

250. The text of draft article 13 as considered by the Commission was as follows:

"Article 13. *Duty to refund*

"(1) If the credit transfer is not completed in accordance with article 17(1), the originator's bank is obligated to refund to the originator any payment received from it, with interest from the day of payment to the day of refund. The originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund.

"(2) The provisions of paragraph (1) may not be varied by agreement. However, a receiving bank shall not be required to make a refund under paragraph (1) if it is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund. The sender that first specified the use of that intermediary bank shall have the right to obtain the refund from the intermediary bank."

Article as a whole

251. It was noted that the policy behind the duty to refund as established by article 13 was to strengthen the trust by the users in the credit transfer system. It was stated, however, that that goal could also be achieved by other legal solutions and that such a policy would not justify the restriction of the freedom of contract.

252. Several concerns were expressed with respect to article 13, which permitted the bank to escape the duty to refund only in the narrowly circumscribed situation of paragraph (2). One concern was that the rule introduced an absolute obligation that did not depend on any wrongdoing by the bank obligated to make the refund; in effect, the rule placed on that bank a risk for actions of another bank on which the first bank might not have any influence. A view was expressed that the rule would contradict basic principles of law in some countries. A related concern was that actions of banks in an economically unstable country, or actions of banks that were not run properly, might place in a precarious position a bank that was economically sound and run properly. A further concern was that a bank, in order to avoid the risk imposed on it by article 13, might be tempted to encourage customers to send funds by cheque rather than by a credit transfer system. Furthermore, article 13 might have repercussions in the area of company law and the law of liability of bank directors and employees towards their bank for their decisions that resulted in the bank having to make the refund. In addition, national insurance schemes for certain types of risks in banking operations normally covered only claims from non-bank customers; the claims made under the second sentence of article 13(1), which were inter-bank claims, would thus not be covered by such national insurance schemes. It was also stated that the money-back guarantee might have repercussions on the requirement for capital imposed by banking supervisory law in some countries. In that connection, however, it was noted that, in response to an inquiry, the Secretary of the Basle Committee on Banking Supervision had written to the Secretary of the Commission that members of the Committee did not feel that the 1988 Capital Accord would require banks to include any risks arising out of article 13 as a contingent liability with capital weight. The letter had gone on to say that a further review of the question might become necessary both by supervisors in particular countries and perhaps by the Committee should the risk become material (see A/CN.9/347/Add.1).

253. In light of those concerns, four proposals were made. One proposal was to allow the parties, in accordance with article 3, to agree that the provisions of the Model Law on the money-back guarantee would not apply. Another proposal was to allow the banks to offer to their customers an alternative between one type of credit transfer under which the bank would assume the risk established by article 13 and the other type under which the bank would contract out of that risk. To reflect the

risk, the bank would charge more for the first type of credit transfer. The third proposal was to not impose an absolute liability on the originator's bank, but instead to establish a direct claim for refund by the originator against the bank which held the funds after it had been established that the credit transfer could not be completed. Such a direct claim would avoid the need for inter-bank claims envisaged in the second sentence of article 13(2) and would have the advantage that it might be covered by a national insurance scheme covering the liability of the bank. The fourth proposal was to limit the obligation of the originator's bank to make the refund when the credit transfer was not completed because of a malfunction in the system for the electronic transfer of messages between the banks. In such a case, the entity operating the electronic message system was likely to have excluded or limited its liability. Article 13 should not be allowed to operate when the originator's bank would be unable to recover the amount to be refunded to the originator from the entity operating the electronic message system.

254. In reply to those concerns and proposals, and in support of the concept of article 13, it was said that a rule comparable to the one contained in article 13 had been introduced in the legal system of a country with active credit transfer systems and that the rule did not appear to have created problems. Furthermore, to allow banks to offer two types of credit transfers might discourage many customers from using the transfer that included the obligation under article 13, in particular if that kind of transfer would be offered at an excessive price; low volume of such transfers, in turn, might lead to a further increase in the charges, which might make the price for a transfer that offered the protection of article 13 prohibitive. Such a result, it was stressed, would be contrary to the policy of article 13 to increase the trust of customers in the credit transfer system. By way of counter-argument, and in support of allowing the banks to charge an additional fee for payment orders that enjoyed the protection of article 13, it was suggested that article 13 might require the bank to offer that protection against adequate or reasonable charge. A further statement in support of article 13 was that, by allowing a wide possibility of contracting out, the originator would bear the risk of having to seek refund through litigation in a foreign country, a risk that the originator's bank was better equipped to bear. It was also observed that article 13 was important in maintaining the balance between the provisions of the Model Law that accommodated the interests of the banks and the provisions that protected the interests of the customers.

255. In order to bridge the opposing views, a proposal was made to add an exception to the prohibition to contract out of article 13(1). The proposal was to modify the first sentence of paragraph (2) along the following lines:

> "The provisions of paragraph (1) may not be varied by agreement, except where a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfer".

256. A concern was expressed that the proposed modification might create uncertainty in interpreting the concepts of "prudent bank" and "significant risk". Furthermore, banks might attempt to contract out of their duty by routinely including clauses in their contracts to the effect that the payment order in question gave rise to such a degree of risk that a prudent bank would not accept the order. Such a clause, even if it would ultimately not be recognized as valid in court, would shift onto the customer the burden of proving that the bank was not permitted to contract out of its obligation under article 13(1).

257. Some of those who shared those concerns were in favour of retaining article 13 as prepared by the Working Group. Others supported a suggestion according to which the proposed modification of the first sentence of paragraph (2) should be amended so as to make it clear that contracting out was allowed only in exceptional circumstances and in the case of an unusual risk. That suggestion initially received considerable support. In subsequent discussion, however, observations were made that, if contracting out was possible only in exceptional cases and where there was an unusual risk, the bank would not be able to contract out when risks in credit transfers to a certain country or through certain banks were not exceptional or unusual. In view of those observations, the Commission decided not to adopt the amendment referring to exceptional circumstances and unusual risks. In reaction to that decision, it was pointed out that, by not adopting the amendment, which would restrict contracting to only exceptional circumstances, the door might be opened to systematic contracting out by banks.

258. After deliberation, the Commission decided to adopt the proposal reflected above in paragraph 255.

Second sentence of paragraph (1)

259. It was stated that the sentence did not deal with the bank that had rejected a payment order. While it was obvious that the receiving bank had an obligation to return any funds that might have been paid to it, it was stated that this should be done without the receiving bank being obliged to pay interest.

260. A suggestion was made to provide that the right to the return of any funds pursuant to the second sentence of paragraph (1) should not be given to the bank that, because of an error or fraud, issued a payment order that identified a wrong person as the beneficiary. By the suggested provision, the risk of recovery of the money paid to the wrong person would fall upon the bank at which the problem occurred, i.e., the bank that had issued a payment order inconsistent with the payment order accepted by it.

261. In opposition to the suggestion it was stated that article 13 was addressed to the situation in which, at the moment it became known that the transfer would not be completed, the funds were held by one of the banks in the credit transfer chain. The suggested provision, on the other hand, dealt with a case where the money was in the hands of a third person. The case in which money was to be recovered from a third person, whose refusal to return the money was in all likelihood not in good faith, gave rise to considerations that fell outside the purview of article 13. Furthermore, the proposal introduced an element of

wrongdoing, while article 13 operated irrespective of any wrongdoing by a bank. In addition, it was noted that article 13 did not cover some other situations in which the originator might claim the return of money (e.g., when the bank to which a person made a payment to cover a credit transfer refused to accept the payment order, or when a bank legitimately contracted out of article 13). In those situations the return of money might be based on rules other than article 13 (e.g. rules on unjust enrichment).

262. After deliberation, the Commission decided not to adopt the suggested provision and to leave the case envisaged by it and other similar cases to the applicable law.

Second sentence of paragraph (2)

263. A suggestion was made to mention the beneficiary's bank, in addition to the intermediary bank, in the second sentence of paragraph (2). The Commission did not adopt the suggestion for two reasons. First, originators, when making out payment orders, virtually always indicated the beneficiary's bank; they usually did so not because they had a preference for that bank, but because the beneficiary requested the payment to be made to that bank. In such circumstances it would be unfair to let operate the exception provided in the second sentence of paragraph (2). Secondly, a non-reimbursing receiving bank would be the beneficiary's bank only if that bank had received payment for the payment order from its sender but had not accepted the order, a situation that would rarely arise.

264. Another suggestion was to deal in the second sentence of paragraph (2) with a situation in which a bank that had suspended payment or was prevented by law from making the refund was not the bank through which the originator directed the transfer to be made. The suggestion was to provide that the duty of the originator's bank to make the refund would fall away always when the originator "directed" the use of a bank even if that bank was not the one that had suspended payment or was prevented by law from making the refund. The Commission did not adopt the suggestion.

265. The Commission considered a possibility that the duty to make a refund might be excluded where an originator's bank systematically caused all or the majority of its customers to "direct" the bank as to the routing to be used to effect the credit transfer. In order to give effect to such practice, the Commission decided to add a new sentence between the second and third sentences of paragraph (2) along the following lines:

> "A receiving bank is not considered to have been directed to use the intermediary bank unless the receiving bank proves that it does not systematically cause the type of senders or payment orders involved in the transfer to instruct it as to the intermediary bank or banks to be used."

Proposal for including "skip-rule"

266. It was recalled that the Commission had decided to include in article 11 a skip-rule, according to which a bank making a refund could skip the previous sender and make the refund to an earlier sender in the credit transfer chain (see paragraphs 228-235 above). There was wide agreement that a similar rule should be adopted in article 13, in particular for the purpose of allowing the refunding bank to avoid making the refund to an intermediary bank that had become insolvent. The proposed skip-rule for article 13 was opposed on essentially the same grounds as the rule was opposed in the context of article 11 (see paragraphs 231 and 233 above).

267. The Commission decided to add to article 13(1) a rule along the following lines:

> "A bank subsequent to the originator's bank which is obliged to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent. This paragraph does not apply to a bank if it would affect the bank's rights or obligations under any agreement or rules of a funds transfer system."

268. The Commission also decided to adopt the substance of the additional proposal to accord to the originator a direct claim against the obligated bank, as done in respect of the skip-rule in the context of article 11 (see paragraph 235 above).

Article 14

269. The text of draft article 14 as considered by the Commission was as follows:

> "Article 14. *Correction of underpayment*
>
> "If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted, it is obligated to issue a payment order for the difference between the amounts of the payment orders."

270. A proposal was made to delete the words "the credit transfer is completed in accordance with article 17(1), but". In support of the proposal, it was stated that, subject to the provisions of article 17(3), a credit transfer could not be seen as completed in the case where the full amount stipulated by the originator had not been transferred. A view was expressed that there could be no partial completion of the credit transfer and the opening words of the article thus contradicted both paragraphs (1) and (3) of article 17 (see paragraphs 280-286 below).

271. It was also stated that the proposal to delete the reference to the completion of the credit transfer in accordance with article 17(1) would need to be considered in relation with article 16(5) and that a similar proposal would be made regarding article 16(5). After discussion, the Commission decided to adopt the proposal, subject to reconsideration after discussion of articles 16(5) and 17(1).

272. Another proposal was that the article should be deleted altogether since the obligation for a receiving bank to issue a payment order for an amount identical to that

of the payment order it had received already existed under article 7(2). The proposal was objected to on the grounds that article 7(2) did not specify with sufficient clarity the action required of a receiving bank for correcting underpayment. After discussion, the Commission decided to postpone its final decision regarding the article until it had discussed the issues arising under articles 16(5) and 17. Subsequently, the Drafting Group deleted the words as suggested in paragraph 270.

Article 15

273. The text of draft article 15 as considered by the Commission was as follows:

"Article 15. *Restitution of overpayment*

"If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is greater than the amount of the payment order it accepted, it has such rights to recover from the beneficiary the difference between the amounts of the payment orders as are otherwise provided by law."

274. The Commission considered the possibility of deleting article 15 on the ground that, in view of the reference to completion of the credit transfer in accordance with article 17(1), article 15 dealt with a situation outside of the scope of the Model Law. It was also suggested that the provision could be regarded as superfluous because the right of restitution of overpayment was implicit in article 7(2). A question was also raised as to the justification for including an express provision on one particular case while other situations in which a need for restitution of payment might arise were not dealt with. Based on that question, it was suggested that the article might be expanded to regulate other situations in which a need for restitution of payment might arise, for example, where an error by some bank had resulted in payment to the wrong person. The prevailing view, however, was that retention of a text along the lines of the present article was desirable. It was felt that such a provision would provide an answer as to the disposition of the overpayment. It was also felt that retention of article 15 was necessary in light of article 16(8), which provided that the remedies under the Model Law were exclusive.

275. A concern was expressed that retention of the reference in article 15 to completion of the credit transfer in accordance with article 17(1), while a similar reference was deleted in article 14, might have the unintended effect of giving rise to the inference that a credit transfer resulting in an underpayment was not to be deemed completed (see paragraph 270 above). It was felt that such an inference would be inappropriate because the factors used in article 17(1) to determine completion of a credit transfer referred to the moment of acceptance of the payment order by the beneficiary's bank and not to the quantity of the payment order. It was suggested that the Drafting Group should review the text with a view to addressing that concern.

276. It was proposed that article 15 should be narrowed so that restitution would be obligatory only if the beneficiary was aware of the overpayment and had been unjustly enriched. It was agreed, however, that the Model Law did not have to address that matter since, pursuant to article 15, such particular questions would be governed by the applicable law other than the Model Law. It was felt to be necessary, however, to replace, in the reference to the applicable law, the words "as are otherwise provided by law" by the words "as may otherwise be provided by law" in order to avoid the implication that restitution of overpayment would be available in all national legal systems. A similar modification of article 11(7) was also agreed upon.

277. After deliberation, the Commission adopted the text of article 15, subject to replacing the words "as are otherwise provided by law" by the words "as may otherwise be provided by law".

Article 16

278. A proposal was made to replace the text of the article by the following provisions:

"Article 16. *Liability for interest*

"(1) A receiving bank other than the beneficiary's bank that fails to comply with its obligations under article 7(2) is liable to the beneficiary if the credit transfer is completed under article 17(1). The liability of the receiving bank is to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure. However, if the delay concerns only part of the amount of the payment order, the liability shall be to pay interest on the amount that has been delayed.

"(2) The liability of a receiving bank under paragraph (1) may be discharged by payment to its receiving bank or by direct payment to the beneficiary. If a receiving bank receives such payment but is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to the next receiving bank or, if it is the beneficiary's bank, to the beneficiary.

"(2 *bis*) For the purposes of this law and notwithstanding article 4(6) a bank is considered to have failed to comply with its obligation under article 7(2) if a delay is caused by its failure to pay for a payment order. Where payment is to be made by debiting the bank's account with its receiving bank, failure to pay means failure to put funds in the account sufficient to pay for the order.

"(2 *ter*) If the originator has paid interest to the beneficiary on account of a delay in the completion of the credit transfer, the originator may recover such amount, to the extent that the beneficiary would have been entitled to but did not receive interest in accordance with paragraphs (1) and (2), from the originator's bank or the bank liable under paragraph (1). The originator's bank and each subsequent receiving bank that is not the bank liable under paragraph (1) may recover interest paid to its sender from its receiving bank or the bank liable under paragraph (1).

"(3) A receiving bank other than the beneficiary's bank that does not give a notice required under article 7(4) or (5) shall pay interest to the sender on any payment that it has received from the sender for the period during which it retains the payment.

"(4) A beneficiary's bank that does not give a notice required under article 9(2), (3) or (4) shall pay interest to the sender on any payment that it has received from the sender, from the day of payment until the day that it provides the required notice.

"Article 16 *bis*. *Nature of remedies*

"The remedies provided in this law do not depend on the existence of a pre-existing relationship between the parties, whether contractual or otherwise."

279. Due to a lack of time, the Commission did not discuss article 16 and decided to resume consideration of the draft article and of the above proposal at the next session.

Article 17

280. The text of draft article 17 as considered by the Commission was as follows:

"Article 17. *Completion of credit transfer and discharge of obligation*

"(1) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

"(2) 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.

"(3) A credit transfer shall be considered complete notwithstanding that the amount of the payment order accepted by the beneficiary's bank is less than the amount of the originator's payment order because one or more receiving banks have deducted charges. The completion of the credit transfer shall not prejudice any right of the beneficiary under the applicable law to recover the amount of those charges from the originator."

Paragraph (1)

281. A concern was expressed that the notion of "completion" of a credit transfer left room for confusion with the question of discharge of the underlying payment obligation. In response to that concern, it was stated that the purpose of paragraph (1) was merely to establish the moment of completion of a credit transfer and that the question of the discharge of the underlying payment, to the extent it was addressed in the Model Law, was referred to in paragraph (2).

282. It was suggested that the first sentence needed to be modified to make clear that a credit transfer was to be considered completed only if the acceptance of the payment order by the beneficiary's bank was for the benefit of the beneficiary designated in the originator's payment order. In the discussion of that proposal it was suggested that such a modification of the first sentence had to be considered in the light of a number of other provisions in the Model Law. In particular, it was pointed out that article 9(1) obligated the beneficiary's bank to place funds at the disposal of the beneficiary named in the payment order received by the beneficiary's bank. At the same time, it was also noted that, under article 2*(d)*, the term "beneficiary" was defined as referring to the person designated in the originator's payment order to receive funds as a result of the credit transfer. It was further suggested that the proposed revision might have implications for the concept of acceptance of a payment order by the beneficiary's bank as set forth in article 8(1), particularly with regard to paragraphs (1)*(a)*, *(b)* and *(c)*, which referred to various situations in which a payment order would be deemed accepted by the beneficiary's bank prior to any crediting of a beneficiary's account. Yet another question was whether the proposed revision would have any implications for the situation in which the beneficiary failed to detect a discrepancy in a payment order between the name and account number of a beneficiary.

283. It was also suggested that the first sentence, in addition to being modified so as to indicate that the credit transfer was to be deemed completed only upon acceptance for the benefit of the beneficiary designated in the originator's payment order, should indicate that the payment order accepted by the beneficiary's bank had to be consistent with the originator's payment order in terms of amount. It was suggested that such an approach might be implemented by providing that the credit transfer would be considered completed to the extent that the amount indicated in the originator's payment order had been placed at the disposal of the beneficiary.

284. The Commission recalled that a specific rule as to when the credit transfer was completed was originally introduced into the Model Law in the definition of "credit transfer" in article 2*(a)*. The view was expressed that some of the difficulties that had been raised with regard to the first sentence of paragraph (1) might be alleviated if the rule on completion were returned to its original location in article 2*(a)* or, alternatively, if a reference to article 2*(a)* were added to paragraph (1).

285. A view was expressed that the second sentence was unnecessary and should therefore be deleted.

286. Due to a lack of time, the Commission suspended its discussion of article 17 and decided to resume consideration of the draft article at the next session.

Payment orders for illicit purposes

287. During the discussion of the Model Law, various statements were made to the effect that in drafting its provisions the Commission should be mindful of the problem of "money-laundering", i.e. transactions the purpose of which was to conceal or diguise the illicit nature and

source of funds derived from illegal activities such as illicit traffic in narcotic drugs. Key stages of money-laundering operations often included transfers of funds through banks. Those stages were, in particular, when cash entered into the domestic financial system, when it was sent abroad to be integrated into the financial systems of regulatory havens, and when it was repatriated in the form of transfers of legitimate appearance.

288. It was pointed out that a number of States had rules aimed at preventing money laundering and that such rules were also contained in several international instruments. Those rules addressed issues such as responsibilities of banks and of supervisory authorities with respect to detection of suspicious transactions, keeping records of transactions, and identification of bank customers. It was said that the Model Law, with its aim to facilitate, speed up and reduce the cost of international payments, should be in harmony with rules designed to prevent money laundering.

C. Report of Drafting Group

289. The text of articles 1 to 15 discussed by the Commission was referred to the Drafting Group. The text of those articles as revised by the Drafting Group, as well as the text of articles 16 to 18 as they were submitted by the Working Group to the Commission, is contained in annex I.

D. Future work on draft Model Law on International Credit Transfers

290. The Commission noted that it had not completed its consideration of the draft Model Law and decided to place the draft Model Law on the agenda of the next session.

III. PROCUREMENT

291. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order.[4] The Working Group commenced its work on the topic at its tenth session, held at Vienna from 17 to 25 October 1988 (A/CN.9/315), by considering a study of procurement prepared by the Secretariat. The Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125).

292. At its eleventh session, held in New York from 5 to 16 February 1990, the Working Group considered the draft of a model law on procurement (A/CN.9/331) and, at the close of that session, requested the Secretariat to prepare for the twelfth session a revised draft of the model law based on the discussions during its eleventh session. The Working Group also requested the Secretariat to prepare draft provisions dealing with redress for actions and decisions taken by the procuring entity contrary to the provisions of the model law (A/CN.9/331, para. 222).

293. At its current session, the Commission had before it the report of the Working Group on the work of its twelfth session, held in Vienna from 8 to 19 October 1990 (A/CN.9/343). The report indicated that the Working Group had continued its consideration of the draft model law. At the close of the twelfth session the Working Group requested the Secretariat to revise articles 1 through 27 of the model law to take into account the discussions concerning those articles at the twelfth session and decided that at the thirteenth session it would resume consideration of the draft model law by taking up articles 28 to 35, as well as the draft provisions on redress.

294. Noting that the preparation of a model law on procurement was particularly timely in view of the fact that an increasing number of States were considering reform of their procurement laws, the Commission expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously.

IV. GUARANTEES AND STAND-BY LETTERS OF CREDIT

295. The Commission, at its twenty-second session, held in 1989, decided that work on a uniform law on guarantees and stand-by letters of credit should be undertaken and entrusted that task to the Working Group on International Contract Practices.[5]

296. At its twenty-third session (1990), the Commission noted that the Working Group had commenced its work by considering possible issues of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Commission also noted that the Working Group had engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit.[6]

297. At its current session, the Commission had before it the reports of the Working Group on the work of its fourteenth and fifteenth sessions (A/CN.9/342 and A/CN.9/345). The Commission noted that the Working Group had examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67) and that the Working Group had also considered the issues discussed in three notes by the Secretariat relating to further issues of a uniform law: amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68); fraud and other objections to payment, injunctions and

[4]Ibid., para. 243.

[5]Ibid., *Forty-fourth Session, Supplement No. 17* (A/44/17), para. 244.

[6]Ibid., *Forty-fifth Session, Supplement No. 17* (A/45/17), para. 31.

other court measures (A/CN.9/WG.II/WP.70); conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71).

298. The Commission noted that the Working Group had requested the Secretariat to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft of articles 1 to 7 of the uniform law, as well as a first draft set of articles with possible variants on the other issues considered. The Commission further noted that, when discussing the appropriateness of including provisions on conflicts of law and jurisdiction in the uniform law, the Working Group had requested the Secretariat to consult with the Hague Conference on Private International Law on possible methods of cooperation in that field.

299. The Commission expressed its appreciation for the progress made by the Working Group so far and requested it to continue carrying out its task expeditiously.

V. INTERNATIONAL COUNTERTRADE

300. At its nineteenth session, in 1986, the Commission considered, in the context of its discussion of a note by the Secretariat entitled "Future work in the area of the new international economic order" (A/CN.9/277), its future work on the topic of countertrade and requested the Secretariat to prepare a preliminary study on the subject.[7]

301. At its twenty-first session, in 1988, the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302). The Commission made a preliminary decision that it would be desirable to prepare a legal guide on drawing up countertrade contracts. In order for it to make a final decision, the Commission requested the Secretariat to prepare for the Commission at its twenty-second session a draft outline of such a legal guide.[8]

302. At its twenty-second session, in 1989, the Commission considered the report entitled "Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts" (A/CN.9/322). It was decided that such a legal guide should be prepared by the Commission, and the Secretariat was requested to prepare for the next session of the Commission draft chapters of the legal guide.[9]

303. At its twenty-third session, in 1990, the Commission had before it a report entitled "Draft legal guide on drawing up contracts in international countertrade transactions: sample chapters" (A/CN.9/332 and Add.1-7). The report contained a proposed structure of the legal guide (A/CN.9/332, para. 6), an outline of the chapter entitled "Introduction to legal guide" (A/CN.9/332/Add.1), and the following draft chapters: "II. Scope and terminology of legal guide" (A/CN.9/332/Add.1); "III. Contracting approach" (A/CN.9/332/Add.2); "IV. General remarks on drafting" (A/CN.9/332/Add.3); "V. Type, quality and quantity of goods" (A/CN.9/332/Add.4); "VI. Pricing of goods" (A/CN.9/332/Add.5); "IX. Payment" (A/CN.9/332/Add.6); and "XII. Security for performance" (A/CN.9/332/Add.7). Draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), was submitted to but not considered by the Commission. There was general agreement in the Commission with the overall approach taken in preparing the draft chapters, both as to the structure of the legal guide and as to the nature of the description and advice contained therein. The Commission decided that the remaining draft chapters should be discussed by the Working Group on International Payments at its twenty-fifth session, to be held in New York from 3 to 13 September 1991.[10]

304. At the current session, the Secretariat reported orally to the Commission that, in addition to draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), the following materials would be before the Working Group on International Payments at its forthcoming session in New York: document A/CN.9/WG.IV/WP.51, setting out, in paragraph 9, the revised proposed structure of the legal guide, and containing in its addenda the following draft chapters: "VIII. Participation of third parties" (A/CN.9/WG.IV/WP.51/Add.1); "X. Restrictions on resale of goods" (A/CN.9/WG.IV/WP.51/Add.2); "XI. Liquidated damages and penalty clauses" (A/CN.9/WG.IV/WP.51/Add.3); "XIII. Failure to complete countertrade transaction" (A/CN.9/WG.IV/WP.51/Add.4); "XIV. Choice of law" (A/CN.9/WG.IV/WP.51/Add.5); and "XV. Settlement of disputes" (A/CN.9/WG.IV/WP.51/Add.6). The Working Group will also have before it sample draft illustrative provisions for the legal guide (A/CN.9/WG.IV/WP.51/Add.7).

305. The Commission took note with appreciation of the progress made in the preparation of a legal guide on countertrade.

VI. LEGAL PROBLEMS OF ELECTRONIC DATA INTERCHANGE

306. The Commission, at its seventeenth session, in 1984, decided to place the subject of the legal implications of automatic data processing for the flow of international trade on its programme of work as a priority item.[11] It did so after considering a report of the Secretary-General entitled "Legal aspects of automatic data processing" (A/CN.9/254), which identified several legal issues, relating, namely, to the legal value of computer records, the requirement of a writing, authentication, general conditions and bills of lading.

307. At its eighteenth session, in 1985, the Commission had before it a report by the Secretariat entitled "Legal

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[7]Ibid., *Forty-first Session, Supplement No. 17* (A/41/17), para. 243.

[8]Ibid., *Forty-third Session, Supplement No. 17* (A/43/17), paras. 32-35.

[9]Ibid., *Forty-fourth Session, Supplement No. 17* (A/44/17), paras. 245-249.

[10]Ibid., *Forty-fifth Session, Supplement No. 17* (A/45/17), paras. 11-18. A summary of the discussion in the Commission on the draft chapters (A/CN.9/332/Add.1-7) is contained in annex I to A/45/17.

[11]Ibid., *Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 136.

value of computer records" (A/CN.9/265). The report came to the conclusion that, on a global level, there were fewer problems in the use of data stored in computers as evidence in litigation than might have been expected. It noted that a more serious legal obstacle to the use of computers and computer-to-computer telecommunications in international trade arose out of requirements that documents had to be signed or be in paper form. At that session, the Commission recommended to Governments, *inter alia,* that they should eliminate unnecessary obstacles to the use of computers in trade, and recommended to international organizations elaborating legal texts related to trade that they take account of the need to eliminate unnecessary obstacles to the use of computers in trade.[12] That recommendation was endorsed by the General Assembly in its resolution 40/71 of 11 December 1985.[13]

308. At its nineteenth and twentieth sessions, in 1986 and 1987, the Commission had before it two further reports on the legal aspects of automatic data processing (A/CN.9/279 and A/CN.9/292), which described and analysed the work of international organizations active in the field of automatic data processing.

309. At its twenty-first session, in 1988, the Commission considered a proposal to examine the need to provide for the legal principles that would apply to the formation of international commercial contracts by electronic means. It was noted that there currently existed no refined legal structure for the important and rapidly growing field of formation of contracts by electronic means and that future work in that area could help to fill a legal vacuum and to reduce uncertainties and difficulties encountered in practice. The Commission requested the Secretariat to prepare a preliminary study on the topic.[14]

310. At its twenty-third session (1990), the Commission had before it a report entitled "Preliminary study of legal issues related to the formation of contracts by electronic means" (A/CN.9/333). The report summarized work that had been undertaken in the European Communities and in the United States of America on the requirement of a writing as well as other issues that had been identified as arising in the formation of contracts by electronic means. The efforts to overcome some of those problems by the use of model communication agreements were also discussed. The report suggested that the Secretariat might be requested to submit a further report to the twenty-fourth session of the Commission indicating developments in other organizations relevant to the legal issues arising in electronic data interchange (EDI). The Commission requested the Secretariat to continue its examination of the legal issues related to the formation of contracts by electronic means and to prepare for the Commission at its twenty-fourth session a report that would analyse existing and proposed model communication agreements with a view to recommending whether a model agreement should be available for world-wide use and, if so, whether the Commission should undertake its preparation. The Commission expressed the wish that the report would give it the basis on which to decide what work might be undertaken by the Commission in the field.[15]

311. At the current session, the Commission had before it the report it had requested, entitled "Electronic Data Interchange" (A/CN.9/350). The report described the current activities in the various organizations involved in the legal issues of EDI and analysed the contents of a number of standard interchange agreements already developed or being currently developed. It also pointed out that such documents varied considerably according to the various needs of the different categories of users they were intended to serve and that the variety of contractual arrangements had sometimes been described as hindering the development of a satisfactory legal framework for the business use of EDI. It suggested that there was a need for a general framework that would identify the issues and provide a set of legal principles and basic legal rules governing communication through EDI. It concluded that such a basic framework could, to a certain extent, be created by contractual arrangements between parties to an EDI relationship and that the existing contractual frameworks that were proposed to the community of EDI users were often incomplete, mutually incompatible, and inappropriate for international use since they relied to a large extent upon the structures of local law.

312. The report noted that, although many efforts were currently being undertaken by different technical bodies, standardization institutions and international organizations with a view to clarifying the issues of EDI, none of the organizations that were primarily concerned with worldwide unification and harmonization of legal rules had, as yet, started working on the subject of a communications agreement. With a view to achieving the harmonization of basic EDI rules for the promotion of EDI in international trade, the report suggested that the Commission might wish to consider the desirability of preparing a standard communications agreement for use in international trade. It pointed out that work by the Commission in that field would be of particular importance since it would involve participation of all legal systems, including those of developing countries that were already or would soon be confronted with the issues of EDI.

313. The report also suggested that possible future work for the Commission on the legal issues of EDI might concern the subject of the replacement of negotiable documents of title, and more particularly transport documents, by EDI messages. That was the area where the need for statutory provisions seemed to be developing most urgently with the increased use of EDI. The report suggested that the Secretariat might be requested to submit a report to a further session of the Commission on the desirability and feasibility of preparing such a text.

[12]Ibid., *Fortieth Session, Supplement No. 17* (A/40/17), para. 360.

[13]Reprinted in *Yearbook of the United Nations Commission on International Trade Law,* 1985, vol. XVI, Part One, D. (United Nations publications, Sales No. E.87.V.4).

[14]*Official Records of the General Assembly, Forty-third Session, Supplement No. 17* (A/43/17), paras. 46 and 47, and ibid., *Forty-fourth Session, Supplement No. 17* (A/44/17), para. 289.

[15]Ibid., *Forty-fifth Session, Supplement No. 17* (A/45/17), paras. 38-40.

314. The Commission expressed its appreciation for the report submitted to it. It was agreed that the legal issues of EDI would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field.

315. As regards the suggestions reflected above, there was wide support for the suggestion that the Commission should undertake the preparation of a general framework identifying the legal issues and providing a set of legal principles and basic legal rules governing communication through EDI. The Commission was agreed that, given the number of issues involved, the matter needed detailed consideration by a Working Group.

316. As regards the preparation of a standard communication agreement for world-wide use in international trade, support was given to the idea that such a project might be appropriate for the Commission. However, divergent views were expressed as to whether the preparation of such a standard communications agreement should be undertaken as a priority item. Under one view, work on a standard agreement should be undertaken immediately for the reasons expressed in the report, namely that no such document existed or seemed to be prepared by any of the organizations that were primarily concerned with world-wide unification and harmonization of legal rules and that the Commission would be a particularly good forum since it involved participation of all legal systems, including those of developing countries that were already or would soon be confronted with the issues of EDI. The prevailing view, however, was that it was premature to engage immediately in the preparation of a standard communications agreement and that it might be preferable, until the next session of the Commission, to monitor developments in other organizations, particularly the Commission of the European Communities and the Economic Commission for Europe. It was pointed out that high-speed electronic commerce required a new examination of basic contract issues such as offer and acceptance, and that consideration should be given to legal implications of the role of central data managers in international commercial law.

317. After deliberation, the Commission decided that a session of the Working Group on International Payments would be devoted to identifying the legal issues involved and to considering possible statutory provisions, and that the Working Group would report to the Commission at its next session on the desirability and feasibility of undertaking further work such as the preparation of a standard communications agreement. The Commission also took note of the suggestion by the Secretariat to prepare a uniform law on the replacement of negotiable documents of title, and more particularly transport documents, by EDI messages.

VII. COORDINATION OF WORK

318. The Commission had before it a note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/352). The note reported on the progress of the Secretariat's efforts to collect information on the extent to which multilateral and bilateral development organizations might be involved in activities whose objective was that of modernizing commercial law in developing countries. It was the understanding of the Secretariat that various multilateral and bilateral development agencies had aided developing countries to prepare legislation in various aspects of commercial law including such matters as maritime law, commercial arbitration, and intellectual property. It was the understanding of the Secretariat that projects of that nature had been undertaken at the request of both individual Governments and groups of Governments. It was thought that it would, therefore, be of great value to have a global picture of those activities. The note reported that while a number of organizations that had been solicited for information replied to the Secretariat, the information received was disappointing. The Secretariat proposed to continue the investigations and to report its findings to the Commission at its twenty-fifth session.

319. The Commission noted with appreciation the efforts of the Secretariat to obtain information on the extent to which multilateral and bilateral development organizations might be involved in activities relating to the modernization of commercial law in developing countries.

VIII. STATUS OF CONVENTIONS

320. The Commission considered the state of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods ("the Limitation Convention"), the Protocol amending the Limitation Convention, the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention"), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration. The Commission had before it a note by the Secretariat on the status of those Conventions and of the Model Law as at 5 June 1991 (A/CN.9/353).

321. The Commission was pleased to note that, since the report submitted to the Commission at its twenty-third session, in 1990, Guinea had ratified the Limitation Convention and its amending Protocol. As a result of those actions eight States were now parties to the Limitation Convention as amended by the Protocol, while four States were parties to the unamended Convention.

322. The Commission took pleasure in noting that an additional two States, namely, Guinea and Malawi, had acceded to the Hamburg Rules, bringing the total number of parties to 19. The Secretary of the Commission reaffirmed the expectation of the Secretariat that the one additional ratification or accession necessary for the Convention to come into force would be deposited in the near future.

323. With respect to the United Nations Sales Convention, the Commission noted with satisfaction that the following seven additional States had become parties to the Convention: Bulgaria, Canada, Guinea, Netherlands, Romania, Spain, and Union of Soviet Socialist Republics.

324. The Commission noted with pleasure the accessions by Côte d'Ivoire and Guinea to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

325. The Commission noted with pleasure that Guinea had acceded to the United Nations Convention on International Bills of Exchange and International Promissory Notes.

326. The Commission noted with pleasure that Mexico, Philippines and Spain had signed the United Nations Convention on Liability of Operators of Transport Terminals in International Trade on 19 April 1991, at the close of the diplomatic conference at which the Convention had been adopted.

327. With respect to the UNCITRAL Model Law on International Commercial Arbitration, the Commission noted with pleasure that legislation based on the Model Law had been enacted in Scotland.

328. Representatives and observers of a number of States reported that official action was being taken with a view to adherence to the United Nations Sales Convention and to adoption of legislation based on the UNCITRAL Model Law on International Commercial Arbitration.

IX. TRAINING AND ASSISTANCE

329. The Commission had before it a note by the Secretariat that set out the activities that had been carried out in respect of training and assistance during the prior year as well as possible future activities in that field (A/CN.9/351). The note indicated that since the statement of the Commission at its twentieth session, in 1987, "that training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past",[16] the Secretariat had endeavoured to devise a more extensive programme of training and assistance than had been previously carried out. In doing so the Secretariat had kept in mind the decision of the Commission at its fourteenth session, in 1981, that a major purpose of the training and assistance activities should be the promotion of the texts that had been prepared by the Commission.[17]

330. A series of seminars was organized by the Comisión Centroamericana de Transporte Marítimo (COCATRAM) in the member States of COCATRAM (Costa Rica, Guatemala, El Salvador, Honduras and Nicaragua) on the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules). The seminars were co-sponsored by the Commission's Secretariat. Lectures were given by a professor from Chile and a member of the Secretariat.

331. At the seminars held in Costa Rica and Honduras, the participants requested the organization of a meeting of experts from the five Central American republics so that they might consider together the action that might be taken in regard to the Hamburg Rules. COCATRAM organized the meeting in Puerto Cortés, Honduras, on 18 and 19 March 1991. Fourteen experts from Costa Rica, El Salvador, Guatemala and Nicaragua attended the meeting in addition to approximately twenty participants from Honduras. A member of the Commission's Secretariat also participated. At the close of the meeting the participants adopted a "Declaration of Puerto Cortés" in which it was stated that it was necessary for the Central American countries to exert a strong effort to bring the Hamburg Rules into force by their ratification, adhesion and incorporation into their internal legal orders. The Declaration also called on COCATRAM to bring the Declaration to the attention of the next Meeting of Central American Ministers responsible for transport and to request their support for the ratification of the Convention by the five Central American States in the shortest time possible.

332. As announced to the twenty-third session of the Commission (1990),[18] a regional seminar on international trade law was held at Douala, Cameroon, from 14 to 18 January 1991. The seminar was organized for the francophone States of North and West Africa with the collaboration of the Government of Cameroon. The seminar was organized with the financial assistance of the Governments of Canada, France and Luxembourg. It was open to participants from Algeria, Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Congo, Gabon, Guinea, Mali, Mauritania, Morocco, the Niger, Senegal, Togo, Tunisia and Zaire. Approximately 50 participants attended the seminar, plus a number of observers from Cameroon. Participants were principally from the Ministry of Foreign Affairs, Ministry of Justice, Ministry of Trade, Chamber of Commerce and Industry and the University. The seminar, which was conducted in French, considered the conventions and other legal texts prepared by the Commission. Lectures were given by one current and one former representative to the Commission and by two members of the Secretariat. Representatives who had given lectures to the seminar expressed their satisfaction with it.

[16]Ibid., *Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

[17]Ibid., *Thirty-sixth Session, Supplement No. 17* (A/36/17), para. 109.

[18]Ibid., *Forty-fifth Session, Supplement No. 17* (A/45/17), para. 56.

333. A subregional seminar on international trade law was held at Quito, Ecuador, from 19 to 21 February 1991. The seminar was organized by the Andean Pact (Colombia, Ecuador, Bolivia, Peru and Venezuela) and the Andean Federation of Users of Transport Services and co-sponsored by the UNCITRAL Secretariat. While the seminar covered the full range of activities of the Commission, the work of UNCITRAL in the area of international transport law was the topic of greatest interest to the seminar. One of the purposes of the seminar was to inform the private sector in the Andean region of the importance of the Hamburg Rules and the United Nations Convention on the Multimodal Carriage of Goods prepared by UNCTAD. As a result, there was a large representation of participants from the private sector. Lectures were given in Spanish by one representative to the Commission, one professor who had spent an internship with the Secretariat in 1985 and a member of the Secretariat.

334. As had been reported to the Commission at its twenty-third session, in 1990, a symposium on the work of the Commission was held during the second week of the Commission's session, from 17 to 21 June 1991. Approximately 168 applications for the Symposium were received from 86 countries. Funds were available to award 30 scholarships to cover the travel expenses of participants from developing countries. An additional 38 individuals participated without financial support from UNCITRAL. Lectures on the conventions and other legal texts prepared by the Commission were given by representatives and observers who had participated in the preparation of the texts and by members of the Secretariat.

335. The Secretariat reported that the participants had expressed their appreciation of the opportunity to learn more about the work of the Commission. Participants, particularly from developing countries, had emphasized that the Commission's programme on training and assistance was an important vehicle through which to spread knowledge and expertise in international trade law and to promote the adoption and use of the texts prepared by the Commission. Representatives and observers at the session who had given lectures to the Symposium expressed their satisfaction with the interest shown by the participants and with the high quality of the discussion at the Symposium.

336. The Commission expressed its appreciation to Austria, Canada, Denmark and Finland for their contributions to the financing of the Symposium, and to Switzerland, whose general contribution had also been used for that purpose. The Commission also expressed its appreciation to those who had given lectures at the Symposium, as well as to those who had organized it. A suggestion was made that announcements concerning the holding of UNCITRAL Symposia should be more widely disseminated so as to reach a wider audience worldwide.

337. The Commission was informed that the Secretariat expected to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade law, especially for developing countries. In view of the interest in the Symposium held during the current session and of the advantages of holding symposia in connection with the sessions of the Commission when they were held at the location of the Commission's Secretariat at Vienna, it was intended to organize a symposium on the occasion of the twenty-sixth session of the Commission, in 1993.

338. As announced to the twenty-third session of the Commission (1990),[18] a seminar will be organized in cooperation with the South Pacific Forum at Suva, Fiji. The seminar is planned for 21 to 25 October 1991. The seminar is being coordinated with the annual Australian Trade Law Seminar, which will be held this year on 18 and 19 October 1991, and is being organized with the financial assistance of the Australian Government.

339. The Secretariat plans to increase the programme of specific country seminars. It was recalled that a seminar was held at Conakry, Guinea, from 27 to 29 March 1990, for participants from Guinea. It was noted that on 23 January 1991 Guinea deposited its instrument of accession to five conventions that had been the subject of the seminar, i.e., the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) and its 1980 amending Protocol; the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) and the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988). The Secretariat was of the view that country seminars were relatively cost-effective from a financial point of view, since the only expense was normally the travel cost of lecturers. However, country seminars required a significantly greater expenditure of time for each country where a seminar was held than did regional seminars. Therefore, an appropriate balance between regional seminars and country seminars would depend to some degree on the balance between the financial resources available to the Secretariat and the amount of time that could be devoted to the organization and holding of such seminars.

340. It was suggested that the Secretariat might consider the possibilities of cooperating in the holding of seminars and symposia with other international organizations working in the field of harmonization and unification of law such as the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law.

341. The Commission expressed its appreciation to all those who had participated in the organization of UNCITRAL symposia and seminars and in particular to those States that had given financial assistance to the programme of seminars and symposia. The Commission also expressed its appreciation to the Secretariat for its efforts to conduct an increased programme of seminars and symposia.

X. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS

A. General Assembly resolution on the work of the Commission

342. The Commission took note with appreciation of General Assembly resolution 45/42 of 29 January 1991 on the report of the United Nations Commission on International Trade Law on the work of its twenty-third session. In particular, the Commission noted the decision of the General Assembly expressed in that resolution requesting the Secretary-General, in consultation with the Commission's Secretariat, to prepare a report to be submitted to the General Assembly at its forty-sixth session analysing possible ways by which assistance could be given to developing countries that were members of the Commission, in particular to the least developed countries, so that they could attend meetings of the Commission and its working groups.

B. Decade of International Law

343. The General Assembly, by its resolution 44/23 of 17 November 1989, declared the period 1990 to 1999 as the United Nations Decade of International Law. During its forty-fifth session, the General Assembly adopted, in its resolution 45/40 of 28 November 1990, the "Programme for the activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law".

344. The Commission, at its twenty-third session in 1990, engaged in a preliminary discussion of implications of the Decade for its future work. While various suggestions were made how the Commission could contribute to the Decade, no firm conclusions were reached at that session.[19]

345. At the current session, the Commission had before it a note by the Secretariat (A/CN.9/349) on the matter. The note, in recapitulating the actions that the Commission and the General Assembly had taken so far on the Decade, pointed out that the initiative for implementation of the Programme would rest in large measure with the various international organs and organizations interested in international law. As a result, it was suggested in the note that the Commission might wish to respond to the invitation of the General Assembly contained in resolution 45/40 by preparing a programme of activities for the Decade that was specifically related to international trade law. The note proposed that, as a first step in the preparation of such a programme, the Commission might organize a Congress on International Trade Law to be held in the context of the twenty-fifth session of the Commission in 1992.

346. The Commission welcomed the proposal that it would be useful to organize a Congress on International Trade Law and that the Congress should be organized in the context of the twenty-fifth session of the Commission in 1992, to be held in New York in May 1992 (see paragraph 354 below). The Commission agreed that one week of the session should be devoted to the Congress. The Commission considered that speakers at the Congress should be from all the major legal systems and geographical regions of the world and should include both individuals currently or formerly associated with the Commission and individuals not associated with the Commission but who had particular expertise.

347. Since the Congress would be an integral part of the twenty-fifth session of the Commission, all States and all interested international organizations would automatically be invited to attend. The Commission expressed the hope that all States and concerned international organizations would take the opportunity to send delegates to the Congress to consider the accomplishments achieved in the progressive unification and harmonization of international trade law during the past 25 years and the needs that could be foreseen for the next 25 years. The Commission was agreed that the programme of the Congress should be such that specialists in international trade law who were not associated with a delegation would be interested in attending. It was considered desirable to attract the interest of ultimate users of uniform legal texts, such as practising lawyers, corporate counsel, ministry officials, judges and teachers of law.

348. Various suggestions were made concerning the objectives and orientation of the Congress. There was general agreement that the Congress should be practically oriented. In particular, it should provide an opportunity to ultimate users of legal texts relating to international trade to express their opinion on the current state in selected areas of international trade law and to voice their practical needs. As examples of the areas that might be discussed, the following were mentioned: sale of goods, supply of services, transport by sea and other modes of transport, international payments, and electronic data interchange. Views of practitioners should be an integral part of the discussions at the Congress on the future programme of work of the Commission. The Congress should also provide to practitioners information and guidance concerning the principal legal texts offered to them. Suggestions were made that among the questions to be discussed at the Congress the following should be included: the merits of various techniques for the unification and harmonization of rules on international trade; methods of work of the Commission and its subsidiary bodies; promotion of the adoption and use of existing legal texts; application of texts relating to international trade law in national legal systems; harmonization between the universal and the regional codification of international trade law; and methods of improved coordination of the activities of international organizations active in the field of unifications of law.

349. The Commission entrusted its Secretariat with the organization of the Congress and requested it to prepare, by the autumn of 1991, an outline of the programme of the Congress. Note was taken of a request that any

[19]Ibid., para. 74.

suggestions and observations that Governments and international organizations may wish to make concerning the preparations of the Congress should be given to the Secretariat not later than mid-September 1991.

C. INCOTERMS 1990

350. The Commission was notified of a request from the Acting Secretary-General of the International Chamber of Commerce (ICC) that the Commission consider endorsing INCOTERMS 1990 for world-wide use. In order to allow consideration of that request, the Commission had before it the text of INCOTERMS 1990 (document A/CN.9/348).

351. It was recalled that the Commission, at its second session in 1969, had endorsed INCOTERMS 1953. Reference was made to the importance of INCOTERMS as a widely used practical tool and to the need for wider awareness of INCOTERMS. Furthermore, appreciation was expressed for the efforts made by ICC to revise INCOTERMS in order to stay abreast of changes in transportation techniques and trade documentation.

352. However, while several delegations indicated their desire to endorse the text of INCOTERMS at the present session, some delegations indicated that, owing to the fact that late publication of document A/CN.9/348 had prevented them from carrying out the consultations required prior to endorsement, they were not prepared to endorse the text of INCOTERMS at that session. The Commission regretfully felt obliged to postpone consideration of endorsement until the next session.

D. Bibliography

353. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/354).

E. Date and place of the twenty-fifth session of the Commission

354. It was decided that the Commission would hold its twenty-fifth session from 4 to 22 May 1992 in New York.[20] It was further decided that the Congress on International Trade Law (see paragraph 349 above) would take place during the last week of that session (i.e. 18 to 22 May 1992).

[20] The dates originally agreed on, namely 11 to 29 May 1992, had to be changed for technical reasons.

F. Sessions of the working groups

355. The Commission recalled its decision that the Working Group on International Contract Practices would hold its sixteenth session from 4 to 15 November 1991 at Vienna, and agreed that the Working Group would hold its seventeenth session from 6 to 16 April 1992 in New York.

356. The Commission recalled its decision that the Working Group on the New International Economic Order would hold its thirteenth session from 15 to 26 July 1991 in New York and its fourteenth session from 2 to 13 December 1991 at Vienna, and agreed that the Working Group would hold its fifteenth session from 3 to 14 August 1992 in New York.

357. The Commission noted that the Working Group on International Payments would hold its twenty-third session from 3 to 13 September 1991 in New York to consider draft chapters of the legal guide on drawing up contracts in international countertrade transactions and decided that the Working Group would hold its twenty-fourth session from 27 January to 7 February 1992 at Vienna to take up its work on electronic data interchange.

G. Retirement of Secretary of Commission

358. It was noted that the current session was the last one at which Mr. Eric E. Bergsten was serving as Secretary of the Commission. The Commission expressed its appreciation to Mr. Bergsten, who was due to retire from the Secretariat, for the contribution he had made to the accomplishments of the Commission during his years of service to the Commission both as a member of the Secretariat and as Secretary.

ANNEX I

Draft UNCITRAL Model Law on International Credit Transfers

[Annex reproduced in part three, I, of this volume.]

ANNEX II

List of documents before the Commission at its twenty-fourth session

[Annex reproduced in part three, IV, A, of this volume.]

B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board on the first part of its thirty-eighth session (TD/B/1309, Vol.II)*

"D. *Progressive development of the law of international trade: twenty-fourth annual report of the United Nations Commission on International Trade Law* (item 8 (d))

Action by the Board

425. At its 791st meeting, on 25 September 1991, the Board took note of the report of the United Nations Commission on International Trade Law on its twenty-fourth session (A/46/17), which was before the Board under cover of a note by the UNCTAD secretariat (TD/B/1303)."

Official Records of the Trade and Development Board, Thirty-eighth Session, First Part, Supplement No. 1A (Part I).

C. General Assembly: report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session: report of the Sixth Committee (A/46/688)

I. INTRODUCTION

1. The item entitled "Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session" was included in the provisional agenda of the forty-sixth session of the General Assembly pursuant to General Assembly resolution 45/42 of 28 November 1990.

2. At its 3rd plenary meeting, on 20 September 1991, the General Assembly on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee.

3. In connection with the item, the Sixth Committee had before it the report of the Commission,[1] which was introduced by the Chairman of the Commission at the 4th meeting of the Sixth Committee, on 26 September 1991, as well as the report of the Secretary-General on possible ways of assisting developing countries to attend meetings of the United Nations Commission on International Trade Law (A/46/349), which was introduced by the Chairman of the Sixth Committee at its 21st meeting, on 25 October 1991.

4. The following communication was also circulated under the item: letter dated 21 October 1991 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General (A/46/587).

5. The Sixth Committee considered the item as its 4th to 6th, 21st and 41st meetings, on 26, 27 and 30 September, 25 October and 20 November 1991. The summary records of those meetings (A/C.6/46/SR.4-6, 21 and 41) contain the views of the representatives who spoke on the item.

II. CONSIDERATION OF DRAFT RESOLUTION A/C.6/46/L.11

6. At the 41st meeting, on 20 November, the representative of *Austria* introduced and orally amended a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session" (A/C.6/46/L.11), sponsored by *Argentina, Australia, Austria, Bahrain, Belarus, Brazil, Chile, Colombia, Czechoslovakia, Ecuador, Egypt, Finland, France, Greece, Italy, Morocco, Poland, Spain* and *Turkey*, later joined by *Canada, Cyprus, Denmark, Germany, Guinea, Hungary, India, Kenya, Myanmar,* the *Netherlands,* the *Sudan, Sweden, Thailand* and *Uruguay*.

7. At the same meeting, the Committee adopted draft resolution A/C.6/46/L.11, as orally amended, without a vote (see para. 9).

8. The representatives of Cameroon, India and Ghana made statements in explanation of position before the adoption of the draft resolution.

III. RECOMMENDATION OF THE SIXTH COMMITTEE

9. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

[Text was not reproduced in this section. The draft resolution was adopted, with editorial changes, as General Assembly resolution 46/56 (see part D, below).]

[1] *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17* and corrigendum (A/46/17 and Corr.1).

I. INTERNATIONAL PAYMENTS

A. International credit transfers: comments on the draft Model Law on International Credit Transfers: report of the Secretary-General (A/CN.9/346) [Original: English]

CONTENTS

INTRODUCTION

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

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

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

4. At its eighteenth session held at Vienna from 5 to 16 December 1988 the Working Group began its consideration of the redraft of the Model Rules prepared by the Secretariat in A/CN.9/WG.IV/WP.39. It renamed the draft Model Rules as the draft Model Law on International Credit Transfers (A/CN.9/318). The Working Group continued its consideration of the draft provisions at its nineteenth session held in New York from 10 to 21 July 1989. During the session a drafting group prepared a restructured text of the draft Model Law (A/CN.9/328, annex I). The restructured text was discussed at the twentieth session of the Working Group held at Vienna from 27 November to 6 December 1989. A drafting group revised articles 1 to 9 of the draft Model Law but left articles 10 to 15 unchanged (A/CN.9/329, annex). The Working Group continued its discussion of the draft Model Law at its twenty-first session held in New York from 9 to 20 July 1990 where a certain number of changes in the text were adopted. In a number of other cases the Working Group decided that the draft Model Law should be changed to reflect a certain policy decision, but did not adopt a specific text to reflect that decision (A/CN.9/341, annex). The Working Group completed its consideration of the draft Model Law at its twenty-second session held at Vienna from 26 November to 7 December 1990. Texts were adopted to implement the policy decisions made at prior meetings, several important articles received a final review and the drafting group made important textual changes in a number of articles (A/CN.9/344).

5. This report contains a commentary on the draft articles of the Model Law as they were adopted by the Working Group at its twenty-second session and presented to the Commission for its consideration at the current session (A/CN.9/344, annex). The commentary indicates the history of the provisions and its relationship to other provisions. Similar commentaries were prepared for the use of the Working Group. In each case the commentary was prepared on the draft articles of the Model Law in their then current state. Therefore, where this commentary indicates the history of a provision, where the text of an article was not considered at the twenty-second session, or where the text of an article was considered but not changed, the commentary on that provision is often identical to the commentary prepared for the twenty-second session of the Working Group, A/CN.9/WG.IV/WP.49. The commentary has been prepared on the basis of the English language version of the draft Model Law. Although the drafting group at the twenty-second session of the Working Group took great care to assure the concordance of the six language versions of the draft Model Law, a certain number of differences in the text may remain. This commentary may serve to bring some of those differences to light so that they can be rectified by the Commission.

6. This commentary provides for comparison references to the relevant provisions in Article 4A of the Uniform Commercial Code of the United States. Article 4A is the equivalent of a chapter in most codes, being comprised of thirty-eight sections. Article 4A governs the same kinds of credit transfers as does the draft Model Law, except that Article 4A is not limited either to domestic or to international credit transfers. The principal interest in Article 4A arises out of the fact that it is the only legislative text in existence that provides a basic legal structure for credit transfers. In all other States, including those States where credit transfers have been the principal means of interbank payments, the law of credit transfers is derived from a multitude of sources. As a result, the draft of Article 4A that was current at the time of a meeting of the Working Group was often a source of ideas for the consideration of the Working Group.

7. The preparation of Article 4A began in the United States somewhat before the beginning of the preparation of the Model Law. The final text of Article 4A was adopted by its sponsoring organizations in August 1989 and soon thereafter was presented to the individual states within the United States for adoption. It has been adopted by a number of those states, including the state of New York, where the Clearing House Interbank Payments System (CHIPS) is located. It also governs the operations of the Federal Reserve System wire transfer network (FEDWIRE) as a result of the incorporation of Article 4A into Regulation J of the Federal Reserve System.

8. Summary comparisons of provisions in the Model Law and Article 4A are often difficult because of the differences in the purpose, in the structure and in the drafting style of the two texts. Since Article 4A governs domestic credit transfers in the United States as well as international transfers where it is the applicable law, a number of its provisions are based upon specific features of the banking system and the legal system of the United States. Compared to the draft Model Law, which tends to enunciate a general rule on a given point, Article 4A tends to provide for a number of detailed implementing sub-rules and for many of the more important exceptions to the general rule. These implementing sub-rules and exceptions are often important. Furthermore, the complexity of

the text, often brought about by the level of detail contained in it, has led to extensive explicit and implicit cross-referencing. The full context of the Article 4A rules cannot be set out in the summary comparisons stated in this report; it can be appreciated only by resort to the full text of Article 4A itself.

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Title of the Model Law

Prior discussion

A/CN.9/318, paras. 10 to 19 (eighteenth session, 1988)
A/CN.9/329, paras. 11 to 15 (twentieth session, 1989)

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). At the twenty-first session, while no suggestion was made that the Model Law should not apply to paper-based credit transfers, there was general agreement that the Model Law should be drafted so as to meet the operating needs of high speed electronic credit transfers (A/CN.9/341, para. 28; see also paras. 24 to 27 and 56).

4. The Working Group at the eighteenth session decided that the Model Law should be restricted to international credit transfers and that that decision should be reflected in the title (A/CN.9/318, para. 18). At its twentieth session the Working Group reaffirmed its decision to restrict the sphere of application of the Model Law to international credit transfers (A/CN.9/329, paras. 12 to 15). It noted that the preparation of a model law applicable to domestic as well as international credit transfers was within its mandate. However, it also noted that there were differences between the two types of transfers that justified different treatment of some of the legal issues that arose. Furthermore, appropriate solutions might not be the same in all States for domestic credit transfers. As a result it was believed to be preferable not to confront the difficult political problems that might be created by providing in the Model Law that it applied to all credit transfers. Nevertheless, some States might wish to apply the Model Law to both domestic and international credit transfers.

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

6. The Commission may wish to consider changing the name to "UNCITRAL Model Law on International Credit Transfers" to indicate that the Model Law was prepared by the Commission. The addition of "UNCITRAL" would be consistent with the name of other texts adopted by the Commission.

7. *Comparison with Article 4A.* The title of Article 4A, "Funds transfers", and the definition of that term in Article 4A-104, are an indication that in the greatest respect the substantive spheres of application are almost identical. Although Article 4A was prepared because of the recent development of high-speed high-value credit transfers in the United States, it would apply to transfers made by any technology. For example, Article 4A-302*(a)*(2) anticipates the execution of a payment order "by first class mail" under certain circumstances. However, since there has never been an interbank paper-based credit transfer system in the United States, and since the credit transfer system based on the bulk exchange of payment orders, especially by the physical exchange of magnetic tapes and similar devices, is of comparatively minor importance, the substantive rules are oriented towards the exchange of individual high-speed high-value payment orders.

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

(1) This law applies to credit transfers where a sending bank and its receiving bank are in different States.

(2) For the purpose of determining the sphere of application of this law, branches and separate offices of a bank in different States are separate banks.

*This law does not deal with issues related to the protection of consumers.

Prior discussion

A/CN.9/297, paras. 12 to 23 and 29 to 31 (sixteenth session, 1987)
A/CN.9/317, paras. 16 to 24, 30 and 95 to 97 (seventh session, 1988)
A/CN.9/318, paras. 20 to 34, 53 and 54 (eighteenth session, 1988)
A/CN.9/329, paras. 12 to 25 and 194 (twentieth session, 1989)
A/CN.9/341, paras. 57 to 65 (twenty-first session, 1990)
A/CN.9/344, para. 129 (twenty-second, 1990)

Comments

1. The general scope of article 1 was adopted by the Working Group at its eighteenth session (A/CN.9/318). It was reconsidered at the twentieth and twenty-first sessions, where several amendments were adopted (A/CN.9/329 and A/CN.9/341). A minor textual change to

paragraph (1) was made by the drafting group at the twenty-second session.

Internationality of a transfer

2. As indicated by the title, the Model Law will apply only to credit transfers that are international. However, at the twentieth session the Working Group noted that some States might wish to apply the Model Law to both domestic and international transfers (A/CN.9/329, para. 14).

3. In order for a State to apply the Model Law to both domestic and international credit transfers, article 1 might be modified as follows:

"This law applies to credit transfers as defined in article 2."

In addition, the words "even if located in the same State" might be deleted from articles 7(7), 10(6) and 11(9).

4. The test of internationality in paragraph (1) as it was adopted at the eighteenth session was that the originator's bank and the beneficiary's bank were in different countries. The Working Group decided at its twentieth session to eliminate the result pointed out in A/CN.9/WG.IV/WP.44, article 1, comments 4 to 6 that, since a bank that originated a credit transfer for its own account was an originator and not an originator's bank, a transfer by such a bank to a second bank through a mutual correspondent bank would not fall within the sphere of application of the Model Law even if all three banks were in different States. In order to carry out its decision, the Working Group decided to add the words "or, if the originator is a bank, that bank and its receiving bank are in different countries" (A/CN.9/329, paras. 16 to 23). The formulation was changed by the drafting group, a result that the Working Group disavowed during the adoption of the report of the twentieth session but did not correct for lack of time (A/CN.9/329, para. 194). At the twenty-first session the Working Group began by returning to the original formula (A/CN.9/341, para. 58). After discussion it adopted the current text of paragraph (1) (A/CN.9/341, para. 64), subject to a minor change in wording at the twenty-second session (A/CN.9/344, para. 129).

5. The current formula requires that any one sending bank and its receiving bank in the chain of sending and receiving banks that carry out the credit transfer must be in different States. If any such pair of sending and receiving banks is located in two States, the credit transfer is international and the Model Law applies to every segment in the chain. This is so even though a particular segment is between a sender (originator or sending bank) and a receiving bank in the same State. Except for the originator's bank, the first receiving bank in any given State involved in a particular credit transfer necessarily receives a payment order from a sending bank in another State. However, the originator, the originator's bank as well as the next several receiving banks in the credit transfer chain may be in the same State. All of the payment orders between these parties are subject to the Model Law even though they are prior to the sending of a payment order from a sending bank in that State to a receiving bank in another State.

6. Since paragraph (1) refers only to the location of a sending bank and a receiving bank, the location of a non-bank sender is irrelevant for determining whether the credit transfer is international. Therefore, when a non-bank originator resident in State A issues a payment order to its (the originator's) bank in State B instructing a transfer to the account of the beneficiary at the same or a different bank in State B, the credit transfer would not be international. However, if the originator resident in State A was a bank, its payment order to its bank in State B would be between banks in different States and the credit transfer would be international.

7. In some cases in which a transfer is made from a customer's account in a financial institution in State A to an account in a financial institution in State B, the sending financial institution may not be considered to be a bank under the definition of a bank in article 2*(f)*. Such a situation might arise where the sending financial institution was a broker which would, on instructions of a customer, transfer a credit balance in a customer's brokerage account, but which did not engage in executing payment orders as an ordinary part of its business. See comment 30 to article 2. In that case the sending financial institution would not be a bank. A similar situation arises when the receiving financial institution in State B is not a bank and the payment order issued to it is the only payment order to go from one State to another. In either of those situations the Model Law would not apply. At the twentieth session of the Working Group the definition of a "bank" in article 2*(f)* was modified so as to increase the likelihood that an entity that held accounts of its customers that were subject to payment orders would be considered to be a bank (A/CN.9/329, para. 66; see comment 33 to article 2).

8. A transfer may be international even though the originator's bank and the beneficiary's bank are in the same State. That situation can occur when a transfer between an originator's bank and a beneficiary's bank, both of which are in State A, is denominated in the currency of State B. In such a case the originator's bank would often send a payment order to its correspondent bank in State B instructing it to credit the account of the beneficiary's bank, or instructing it to send a payment order to the correspondent bank of the beneficiary's bank in State B. When the transfer is carried out in that manner, there is a sending bank and a receiving bank in two different States and the credit transfer is subject to the Model Law.

9. There is one situation where the transfer between two banks in State A denominated in the currency of State B would not be international and a second where it is not clear whether it would be international. The transfer would not be international if there was a clearing in State A in the currency of State B and the transfer was executed through that clearing, since no payment order would be sent between State A and State B. This would seem to be so even though the net debits and credits of the participants in the clearing would normally be settled by transfers of those banks through accounts held in State B. Those transfers in settlement of the clearing would be considered to be separate from the individual transfers made through the clearing.

10. It is not clear whether the transfer is international where the originator's bank in State A sends its payment order directly to the beneficiary's bank in State A and pays the beneficiary's bank the amount of that payment order by sending a second payment order to its correspondent bank in State B with instructions to credit, or to cause to be credited, the account of the beneficiary's bank at the correspondent bank. It has been said that in such a case the instruction from the originator's bank to the third (reimbursing) bank to credit the account of the beneficiary's bank is a separate credit transfer from the credit transfer between the originator's bank and the beneficiary's bank. Under that interpretation, the transfer between the originator's bank and the beneficiary's bank in the currency of State B is not an international credit transfer under paragraph (1). However, the credit transfer by which the originator's bank instructs its correspondent bank in State B to reimburse the beneficiary's bank by crediting its account would be an international credit transfer and subject to the Model Law. That interpretation was given at the twenty-first session, but it does not figure in the report of the session. However, that interpretation was specifically rejected at the twentieth session of the Working Group when the concern was whether a reimbursing bank was an "intermediary bank" (A/CN.9/329, paras. 70 and 71; see comment 47 to article 2). The Commission may wish to clarify the issue, which is of some importance for the sphere of application of the Model Law.

11. Opposition to the results described in comments 8 to 10 was expressed at the twenty-first session, as well as at the eighteenth session when a similar proposal was before the Working Group, because of the possibility that the same instruction from the originator might be subject to the Model Law or not depending on the particular means of settlement chosen. It was said that even the originator's bank might not know the routing the credit transfer would take or the settlement procedures to be used where the originator's bank sent its payment order to another bank in the same State that handled international and foreign currency transfers (A/CN.9/318, paras. 25 to 26 and A/CN.9/341, para. 62). At the eighteenth session it was said that that result was not appropriate since the transfer would otherwise be identical from an economic point of view. At the twenty-first session the results described in comments 8 to 10 were accepted since it would always be possible for the originator to specify to its bank the routing of the credit transfer.

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

13. 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 or for the Model Law to be adopted for both domestic and international credit transfers.

Territorial scope of application

14. Since the Model Law is being prepared for international credit transfers, questions of conflict of laws naturally arise. The relevant provisions are contained in article 18. Article 18(1) has the effect of limiting the territorial application of the Model Law.

Consumer transfers

15. 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.

16. At the same time, it was recognized that the special consumer protection legislation that exists in some countries, and that may be adopted in others, could be expected to affect some international credit transfers as well as domestic credit transfers. To accommodate that possibility, the footnote to article 1 was adopted to indicate that the Model Law would be subject to any national legislation dealing with the rights and obligations of consumers, whether the provisions of that legislation supplemented or contradicted the provisions of the Model Law (A/CN.9/318, paras. 30 to 33). The footnote was reconsidered at the twentieth session where no change was made (A/CN.9/329, para. 24).

17. At the twenty-first session the Working Group decided that the footnote should be reworded to state that the Model Law was not intended to deal with issues related to the protection of consumers (A/CN.9/341, para. 65) and that change was incorporated into the text at the twenty-second session (A/CN.9/344, para. 129). It may be noted that consumers who are originators or beneficiaries of credit transfers have the same rights, obligations and protections under the Model Law as do all other originators and beneficiaries.

18. *Comparison with Article 4A.* Article 4A applies to both domestic and international credit transfers that fall within its scope of application based upon the conflict of

laws rules in Article 4A-507. For a discussion, see comments 1 to 10 to article 18. Article 4A-108 excludes from the coverage of Article 4A any transfer that is governed by the Electronic Fund Transfer Act of 1978. While that exclusion covers almost all transfers by or for the benefit of consumers, it does not exclude the relatively rare transfers made for consumer purposes that use the facilities of CHIPS, FEDWIRE or of the Society for Worldwide Interbank Financial Telecommunication (SWIFT).

Article 2. *Definitions*

For the purposes of this law:

(a) "Credit transfer" means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order. [The term does not include a transfer effected through a point-of-sale payment system.]

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

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

(ii) the instruction does not provide that payment is to be made at the request of the beneficiary.

When an instruction is not a payment order because it is issued subject to a condition but the condition is subsequently satisfied and thereafter a bank that has received the instruction executes it, the instruction shall be treated as if it had been unconditional when it was issued.

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

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

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

(f) "Bank" means an entity which, as an ordinary part of its business, engages in executing payment orders. An entity is not to be taken as executing payment orders merely because it transmits them.

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

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

(i) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

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

(k) "Execution date" means the date when the receiving bank should execute the payment order in accordance with article 10.

(l) "Execution" means, with respect to a receiving bank other than the beneficiary's bank, the issue of a payment order intended to carry out the payment order received by the receiving bank.

(m) "Payment date" means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary.

Prior discussion

A/CN.9/297, paras. 24 to 28 (sixteenth session, 1987)
A/CN.9/317, paras. 26 to 47 (seventeenth session, 1988)
A/CN.9/318, paras. 35 to 59, 75, 76, 94 and 106 (eighteenth session, 1988)
A/CN.9/328, paras. 79 and 88 (nineteenth session, 1989)
A/CN.9/329, paras. 26 and 82 (twentieth session, 1989)
A/CN.9/341, paras. 66 to 84 (twenty-first session, 1990)
A/CN.9/344, paras. 130 to 135 (twenty-second session, 1990)

Comments

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

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

Chapeau

3. At the twentieth session the Working Group decided to introduce article 2 with the words "For the purposes of this Law", especially since some of the terms such as "bank" may be defined in other ways in the statutory law of a State that adopts the Model Law (A/CN.9/329, para. 26). Since the *chapeau* to article 2 turns the article into a single paragraph, the individual definitions should be separated by a semi-colon, rather than a full stop as at present.

"Credit transfer"

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

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

6. A credit transfer is defined in terms of the actions taken in regard to payment orders, and not in terms of the movement of funds as in an earlier definition. The types of transfers to be covered by the Model Law are also affected by the definition of "payment order".

7. The definition of "credit transfer" as adopted at the twentieth session included in square brackets a third sentence that stipulated when the credit transfer was deemed completed (A/CN.9/329, para. 33). At the twenty-first session the sentence was deleted in view of the adoption of a provision on completion of a credit transfer in what is now article 17(1) (A/CN.9/341, para. 72).

8. At the twenty-second session the text of that portion of the definition of "payment order" found in article 2(*b*)(iii) as contained in A/CN.9/341, annex was replaced by the text of what is currently article 2(*b*)(i). At that time a concern was expressed that the new wording might not be sufficiently clear as to exclude point-of-sale payment transactions from the application of the Model Law (A/CN.9/344, para. 131; see the earlier expression of that concern in regard to the definition of "bank" in A/CN.9/329, paras. 65 and 67). In order to overcome that concern the drafting group recommended the addition of a new sentence to the definition "credit transfer" specifically excluding point-of-sale payment transactions from the definition, thereby excluding them from the sphere of application of the Model Law. During the adoption of the report of the drafting group the Working Group decided to retain the sentence, but to leave it in square brackets. Although not stated in the report of the meeting, the reasons that can be ascribed to the action of the Working Group were that it had not had the opportunity to consider whether such transactions would fall within the sphere of application of the Model Law absent some specific exclusion, whether such transactions should be excluded from the sphere of application of the Model Law, whether such an exclusion, if any, should be in the form of an exclusion from the definition of "credit transfer" or whether the issues raised by point-of-sale payment schemes should be regulated by national legislation anticipated in the note to article 1.

9. *Comparison with Article 4A.* Except for the sentence in square brackets, the definition of "credit transfer" is almost identical to the definition of "funds transfer" in Article 4A-104. Point-of-sale payment transactions are excluded from the application of Article 4A because they are subject to the Electronic Fund Transfer Act of 1978.

"Payment order"

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

11. At the twentieth session of the Working Group the minimum data elements in a payment order as set out in article 3 were deleted from the draft Model Law (A/CN.9/329, paras. 89 to 93; for the drafting history of former article 3, see A/CN.9/WG.IV/WP.49, article 3, comments). Nevertheless, the existence of an incomplete payment order has consequences in regard to the credit transfer. Those consequences are considered in articles 6 to 9.

12. The basic elements of the current definition of "payment order" were adopted at the twentieth session to accord with the new definition of "credit transfer" adopted at that session (A/CN.9/329, paras. 34 to 58). Several important changes in the definition were made at the twenty-second session (A/CN.9/344, paras. 130 to 132).

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

14. At the twentieth session the Working Group agreed that the Model Law should not govern conditional payment orders that were to be sent from one bank to another, and decided that such orders would not be considered to be "payment orders" (A/CN.9/329, paras. 40 to 42 and 50 to 53). However, a conditional payment order issued by the originator was a "payment order" according to subparagraph (i) if the condition was to be satisfied on or before the issue of a payment order by the originator's bank. Consequential provisions were included to assure that the condition would not affect subsequent receiving banks or the beneficiary. In addition, subparagraph (iv) provided that an instruction to open a letter of credit was not a payment order, a provision that was thought to be necessary in view of the conditional nature of such an instruction.

15. Nevertheless, opposition was expressed at the twentieth session to even such a restricted recognition of

conditional payment orders as falling within the sphere of application of the Model Law. It was noted that article 5(1) did not give the originator's bank any extra time within which to consider whether it wished to be bound by a conditional payment order before the bank was deemed to have accepted the order (A/CN.9/329, para. 52).

16. At the twenty-first session the Working Group decided that a conditional payment order should not be considered to be a payment order under the Model Law (A/CN.9/341, para. 73). That result was achieved by inserting the word "unconditional" in the *chapeau* of the definition and by deleting subparagraph (i). In addition, subparagraph (iv) was deleted as being unnecessary (A/CN.9/341, para. 79).

17. The Working Group recognized that, by saying that a conditional payment order was not a payment order under the Model Law, the sender of that order was not an originator and, consequently, had no rights or obligations under the Model Law. Therefore, if the credit transfer was not carried out properly for reasons unconnected with the original condition, any rights the customer might have would arise from rules of law outside the Model Law. Consequently, the Working Group decided that a provision should be included in the Model Law giving the sender of a conditional payment order the rights of an originator of a credit transfer where the execution of the conditional payment order eventually resulted in an unconditional credit transfer (A/CN.9/341, paras. 74 and 75).

18. At the twenty-second session the Working Group adopted the following text to implement the policy decision made at the twenty-first session:

> "Where an instruction is not a payment order because it is issued subject to a condition, and the condition is subsequently satisfied, the instruction shall be treated as if it had been unconditional when it was issued; but this shall not affect the rights or obligations of any person in respect of the instruction during the period before the condition was satisfied."

In accordance with the expectation of the Working Group, the drafting group reformulated the new provision (A/CN.9/344, para. 132).

19. One of the primary purposes of the last clause of the new sentence is to assure that time limits for the execution of an unconditional payment order as set out in article 10 are not applied to the conditional instruction either prior to the fulfilment of the condition or subsequent to it. The sentence does not come into effect until the bank that has received the conditional instruction executes it. The consequences of any delay on its part in executing the instruction after fulfilment of the condition, or even after its knowledge of the fulfilment of the condition, would be governed by rules outside the Model Law.

20. At the twenty-first session deletion of what is currently subparagraph (i) was suggested on the grounds that the question of reimbursement of the receiving bank should be left for the originator and its bank to agree upon on a contractual basis. However, the subparagraph was retained on the grounds that it was necessary in order to exclude debit transfers from the scope of the Model Law (A/CN.9/341, para. 76).

21. Earlier drafts of the Model Law included another subparagraph that was intended to distinguish between debit and credit transfers. That subparagraph read as follows:

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

22. A proposal at the twenty-first session to delete the subparagraph received no support. Various drafting proposals were made both before the twenty-first session (A/CN.9/WG.IV/WP.46, comment 16 to article 2) and during the session (A/CN.9/341, paras. 77 and 78) intended to make sure that the subparagraph could in fact apply only to a credit transfer. At the twenty-second session the subparagraph was deleted and replaced by a new text that provides

> "the instruction does not provide that payment is to be made at the request of the beneficiary".

23. A concern was expressed that the new subparagraph might not be sufficiently clear as to exclude point-of-sale payment transactions (A/CN.9/344, para. 131). In order to overcome that concern, a new sentence was added to the definition of "credit transfer" in article 2*(a)* but placed in square brackets. (See comment 8.)

24. *Comparison with Article 4A.* Article 4A-103 defines "payment order" in substantially similar terms so that any given instruction should be treated the same way under both texts. However, the changes made at the twenty-second session that are described in comment cause greater textual differences between the two definitions from what had previously been the case and the new sentence added at the twenty-second session leads to a result in respect of a conditional payment order that would not be reached under Article 4A.

"Originator"

25. The definition differs from the wording of the definition in ISO 7982-1, but not from its meaning. It was approved by the Working Group at its seventeenth, eighteenth and twentieth sessions (A/CN.9/317, para. 32; A/CN.9/318, para. 41; A/CN.9/329, para. 59). Under the definition a bank that issues a payment order for its own account is an originator.

26. *Comparison with Article 4A.* Article 4A-104*(c)* defines "originator" in almost identical terms to the current text. "Originator's bank" (which is not defined in the Model Law) is defined in Article 4A-104*(d)* to include "the originator if the originator is a bank". That is inconsistent with the Model Law, though the inconsistency probably does not have any substantive consequences in light of the current sphere of application in article 1 of the Model Law.

"Beneficiary"

27. The definition differs from the wording of ISO 7982-1 in that the beneficiary is the person named as beneficiary in the originator's payment order and a person whose account is credited in error is not a beneficiary (A/CN.9/318, para. 42; A/CN.9/329, para. 69). For the situation where the identity of the beneficiary is expressed both by words and by account number and there is a discrepancy between them, see article 8(5). Similarly to the rule in regard to an originator, a bank may be the beneficiary of a transfer.

28. *Comparison with Article 4A.* Article 4A-103*(a)*(2) defines "beneficiary", as "the person to be paid by the beneficiary's bank". Neither in the definition of beneficiary nor of beneficiary's bank in Article 4A-103*(a)*(3) is it clear whether reference should be made only to the beneficiary indicated in the originator's payment order or to the beneficiary as indicated in some later payment order, if the two should differ as a result of an error.

"Sender"

29. The Working Group decided at its seventeenth and eighteenth sessions that the term should include the originator as well as any sending bank (A/CN.9/317, para. 46; A/CN.9/318, para. 44; see also A/CN.9/329, para. 61). ISO 7982-1 defines "sending bank" as the "bank that inputs a message to a service" but it has no term that includes the originator as a sender. Such a term is not necessary in the context of ISO 7982-1.

30. *Comparison with Article 4A.* Article 4A-103*(a)*(5) defines "sender" consistently with the Model Law. However, 4A-202*(d)* provides that "the term 'sender' in this Article includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection *(a)* [of Article 4A-202], or it is effective as the order of the customer under subsection *(b)*". Subsection *(b)* is the equivalent of article 4(2) of the Model Law. In effect, the term "sender" in Article 4A includes what is referred to as the "purported sender" in article 4(1), (2) and (4).

"Bank"

31. 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; but see comments 37 and 38). 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.

32. The definition in ISO 7982-1 is that a bank is "a depository financial institution". The Working Group at its eighteenth session was of the view that the test as to whether a financial institution should have the rights and obligations of a bank under the Model Law should depend on whether "as an ordinary part of its business it engaged in credit transfers for others", rather than whether it engaged in the totally unrelated activity of taking deposits (A/CN.9/318, para. 50). As a result, some individual financial institutions that would not normally be considered to be banks, such as dealers in securities that engage in credit transfers for their customers as an ordinary part of their business, would have been considered to be banks for the purposes of the Model Law under the definition adopted at the eighteenth session.

33. The Working Group at its twentieth session made three changes in the definition (A/CN.9/329, paras. 62 to 68). First, it replaced the words "financial institution" by the word "entity". It was said that the Model Law was intended to govern a service and not particular systems. The change in the definition was specifically intended to bring under the Model Law those post offices that provide a service for the execution of payment orders, even though they may otherwise be governed by different rules because of their administrative status. That position was reaffirmed at the twenty-first session, despite some continuing opposition (A/CN.9/341, para. 66).

34. A second change made at the twentieth session was to shift the focus of the definition to the execution of payment orders rather than, as it had previously, to whether the entity engages in credit transfers. At the twenty-first session the Working Group decided that the definition of a bank should not be extended to cover entities that only occasionally executed payment orders (A/CN.9/341, para. 69).

35. A third change made at the twentieth session was that the words "and moving funds to other persons" were added, but those words were placed in square brackets by the drafting group. At the twenty-first session it was said that the words should be retained so as to exclude message systems from the definition of a "bank". However, it was decided to delete the words in square brackets and to add a second sentence to state specifically that entities that merely transmitted payment orders were not banks (A/CN.9/341, para. 68). That decision was implemented at the twenty-second session (A/CN.9/344, para. 134).

36. It is clear that the Working Group's decision was intended to exclude the postal authorities from the definition of "bank" when they were exercising their function of operating a public message system such as telex, but not when they were exercising their function of operating a credit transfer system. It is also clear that the policy decision was to extend to all similar message systems, which presumably included clearing-houses.

37. In the working paper submitted to the twenty-second session of the Working Group the Secretariat raised the question whether the then proposed sentence would apply to clearing-houses and other message systems that did more than "merely" transmit payment orders. The concern was expressed that the negative implication of the sentence might suggest that clearing-houses and such other message systems were intended to be included as banks (A/CN.9/WG./WP.49, article 2, comments 34 and 35). However, the Secretariat was unable to suggest any other wording that would accomplish the desired purpose without creating other possibilities of misunderstanding. Therefore, it suggested that the definition in the first

sentence without the second sentence was the most likely to be properly interpreted. Neither the definition of "bank" nor the suggestion of the Secretariat were considered at the twenty-second session.

38. *Comparison with Article 4A.* Article 4A-105(2) defines a "bank" as "a person engaged in the business of banking" and goes on to list several types of institutions that are included.

Whether the term "bank" should be replaced

39. At the twenty-first session the Working Group requested the Secretariat to reconsider the possibility of using a word other than "bank" and to report to the twenty-second session (A/CN.9/341, para. 70). The Working Group recognized that any word chosen would need to be appropriate for use in such compound terms as "receiving bank".

40. In the working paper submitted to the twenty-second session of the Working Group the Secretariat suggested that the best term that it could suggest as a replacement was "credit transfer institution". It was noted that the term combined well with such modifiers used in the Model Law as sending, receiving, originator's, intermediary, and beneficiary's. It was also noted, however, that the term had the disadvantage of being long, especially when compared with the word "bank" (A/CN.9/WG.IV/WP.49, article 2, comments 37 and 38). At the twenty-second session the Working Group decided that the term "bank" should continue to be used (A/CN.9/344, para. 133).

Status of a "branch" of a bank as a separate bank

41. An earlier version of the definition of "bank" provided that "for the purposes of these Rules a branch of a bank is considered to be a separate institution." At the eighteenth session of the Working Group the sentence was deleted and it was decided that consideration would be given in each of the substantive articles whether branches should be treated as banks (A/CN.9/318, para. 54). Paragraphs indicating that branches of a bank are considered as separate banks have been added to articles 1(2), 7(7), 10(6), 11(9) and 18(3) (A/CN.9/318, paras. 53 and 54; A/CN.9/328, paras. 82 and 110; A/CN.9/329, para. 141; A/CN.9/344, para. 140).

42. At the twenty-first session it was suggested that the Model Law should contain a definition of a "branch" of a bank (A/CN.9/341, para. 71). It was said that under some national laws "branches" were defined in a restrictive way that would not cover certain offices or agencies of a bank that might be intended to be treated as separate banks under the Model Law. It was proposed that the significant feature of a "branch" under the Model Law should be that it sent and received payment orders. That proposal was objected to on the ground that the sending and receiving of payment orders were acts that could be carried out by simple message carriers. At the twenty-second session the Working Group decided that the intended purpose could be fulfilled by adding the words "and separate offices" in each of the places where a branch of a bank was referred to (A/CN.9/344, para. 135).

43. The Working Group did not consider whether the five references to "branches and separate offices of a bank" covered all of the situations where the question of their status as banks separate from other branches and offices of the same legal entity might be of significance. It is conceivable that the issue might arise in other provisions, such as articles 12 to 14. Moreover, it is anomalous that the provision is found in article 7, where the duties of a receiving bank that has accepted a payment order are set out, but not in article 6, where the criteria for acceptance of a payment order by the receiving bank are set out. Furthermore, such a provision may have some relevance to articles 8 and 9 in respect of the beneficiary's bank, especially if the beneficiary's bank and its sending bank are branches of the same bank. If the Commission were to decide that branches and separate offices of a bank were always to be considered as separate banks for the purposes of the Model Law, it might be appropriate to express that decision in the definition of "bank", as was the case in the earlier draft referred to above.

44. *Comparison with Article 4A.* Article 4A-105*(a)*(2) provides that "A branch or separate office of a bank is a separate bank for purposes of this Article", i.e. for the purposes of the law governing credit transfers.

"Receiving bank"

45. Although the Working Group at its eighteenth session modified the wording of the definition from that found in ISO 7982-1, the meaning remained the same (A/CN.9/318, paras. 55 to 57). A bank that receives a payment order is a receiving bank even if the payment order was not addressed to it. Such a bank must react to the fact of having received the order. (The problem of a misdirected payment order received by an intermediary bank is addressed in article 7(3)). A bank to which a payment order is addressed but which does not receive it is not a receiving bank. It would not be appropriate to place upon it the obligation of a receiving bank in regard to a payment order that it did not know about.

46. *Comparison with Article 4A.* Article 4A-103*(a)*(4) defines a "receiving bank" as "the bank to which the sender's instruction is addressed", and not the bank that in fact receives the instruction. It is not clear to what extent that distinction is of significance in Article 4A. In most contexts the term "receiving bank" seems to include the beneficiary's bank, but in other contexts a distinction seems to be drawn between the two (e.g., Article 4A-301*(a)*).

"Intermediary bank"

47. The definition was proposed by the Working Group at its seventeenth session and modified at its twentieth session by the drafting group (A/CN.9/317, para. 41; A/CN.9/329, para. 72). It differs from the definition in ISO 7982-1 in three substantial respects: first, it includes all receiving banks other than the originator's bank and the beneficiary's bank, whereas ISO 7982-1 includes only those banks between the given receiving bank and the beneficiary's bank; secondly, ISO 7982-1 includes only those banks between the receiving bank and the

beneficiary's bank "through which the transfer must pass if specified by the sending bank"; and thirdly, reimbursing banks are included in this definition, even though the transfer may be considered not to pass through them and they are not in the chain of payment orders from the originator to the beneficiary's bank (A/CN.9/329, paras. 70 and 71). See also comment 10 to article 1.

48. *Comparison with Article 4A.* Article 4A-104*(b)* defines "intermediary bank" in almost identical terms to that in the Model Law.

"Beneficiary's bank"

49. The term is not defined in the draft Model Law since the definition seemed to be evident. However, certain problems have appeared that may make it advisable to define the term. Those problems are discussed in article 7, comment 8; article 9, comment 8; articles 12 to 15, comment 2 and article 17, comments 4 to 6.

50. *Comparison with Article 4A.* "Beneficiary's bank" is defined in Article 4A-103*(a)*(3) as "the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account". It is not clear whether the payment order referred to is the payment order issued by the originator or the payment order sent to the bank indicated as the beneficiary's bank.

"Funds" or "money"

51. The definition is modelled on the definition of "money" or "currency" contained in article 5(l) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/318, para. 59). However, it specifies that the term includes credit in an account, as is proper in the context of the Model Law. The definition was modified by the drafting group at the nineteenth session in accordance with the suggestion contained in A/CN.9/WG.IV/WP.41, article 2, comment 16. At the twentieth session it was noted that the definition included the ECU (A/CN.9/329, para. 73).

52. This definition differs from all the other definitions in the Model Law in that it is not truly a definition since the terms "funds" and "money" are not limited to credit in an account.

"Authentication"

53. 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".

54. 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.

55. The definition differs from the definition of "message authentication" in ISO 7982-1 in that authentication as here defined does not include the aspect of validating "part or all of the text" of a payment order, even though most authentication techniques that rely upon the use of computers do both. That position was confirmed by the Working Group at its twentieth session because the problems of authentication of a payment order as to its source and verification of the accuracy of its contents were two different legal concepts. In respect of the source of a message, the basic rule in article 4(1) is that the purported sender is not bound by a payment order unless the order had in fact been issued or authorized by the purported sender. The concept of authentication and its use in article 4(2) serve to describe situations in which the purported sender might be bound by a payment order in spite of the fact that the order was not issued or authorized by that person. In respect of errors, the Working Group noted that the general rule was that the sender was bound by what was received by the receiving bank (A/CN.9/329, paras. 77 to 79). The Working Group went on to say that if it was intended that the Model Law should relieve the sender of that responsibility because of the availability of a procedure agreed between the sender and the receiving bank that would detect errors in a payment order or corruption of the contents of a payment order, that intention should be set out separately in the Model Law. At the twenty-first session the Working Group decided that, in its discussion of article 4, it would consider issues having to do with verification that the contents of a payment order as received were the same as the contents of the payment order as sent (A/CN.9/341, para. 81). See comment 21 to article 4.

56. At the twenty-second session the Working Group affirmed the general rule it had stated at its twenty-first session that a sender who was bound by a payment order was bound by the payment order as received. At the same time it adopted a new article 4(5) providing exceptions to that general rule (A/CN.9/344, paras. 121 to 126; see also comments 22 to 25 to article 4).

57. The Working Group was in agreement at its twentieth session that, if what is currently article 11 was retained, the definition of authentication should apply to the revocation of payment orders. However, since there was opposition to the basic scheme of what was then article 10, the words "or a revocation of a payment order" were placed in square brackets (A/CN.9/329, paras. 76 and 184 to 186). At the twenty-second session article 11 was retained in modified form and the square brackets were therefore removed.

58. The definition as adopted by the Working Group at its eighteenth session and modified at its twentieth session includes the provision that the authentication procedure is established by agreement; a procedure applied unilaterally by the receiving bank does not qualify as an authentication (A/CN.9/318, paras. 75, 76 and 94; A/CN.9/329, paras. 74 and 76). That agreement may be embodied in the rules of a clearing-house or message system or it may be in the form of a bilateral agreement between the sender and the receiving bank. Under article 4(2) the authentication procedure must be "commercially reasonable" in order for a

purported sender to be bound by an unauthorized payment order; a sender cannot agree to be bound by a commercially unreasonable procedure (see article 4, comments 7 to 9).

59. *Comparison with Article 4A.* Article 4A-201 defines "security procedure" in terms that are similar to the definition of "authentication", except that it applies as well to a procedure for the purpose of "detecting error in the transmission or the content of the payment order or communication". The provision goes on to give several examples of what the security procedure may require, and specifically states that comparison of a signature is not by itself a security procedure.

"Execution date"

60. There is no equivalent term in ISO 7982-1, except to the extent that the term "value date", i.e., "the date on which the funds are to be at the disposal of the receiving bank", is intended to be used in a payment order to give the basis for determining the date when the receiving bank is to execute the order (see A/CN.9/341, para. 82), for example, the value date itself, or one or two days later depending on whether the credit transfer is domestic or international and whether the credit is in the currency of the receiving bank or in a different currency. It appears, however, that such an interpretation of "value date" is not universally understood.

61. The Working Group at its eighteenth and nineteenth sessions engaged in an extensive effort to define properly the term "execution date", especially in connection with its use in what is currently article 10 (A/CN.9/318, paras. 104 to 106; A/CN.9/328, paras. 76 to 91; see also A/CN.9/WG.II/WP.44, article 2, comments 27 to 31, where the earlier discussion is summarized). The current definition was adopted by the Working Group at its twentieth session (A/CN.9/329, paras. 81 and 182). The execution date is the date when a given payment order is to be executed by the receiving bank and not the date the receiving bank did execute it, if those dates are not the same. See comments 29 and 30 to article 4. Since a credit transfer may require several payment orders, each of those payment orders will have an execution date, and the execution dates may be different. With the Working Group's adoption at its twenty-second session of a definition of "execution" that is limited to receiving banks that are not the beneficiary's bank, the term "execution date" becomes applicable only to the date such receiving banks should execute the payment order (see comments 63 to 65). In regard to the beneficiary's bank, see comments 66 to 70 in respect of "payment date". As to the date when article 10 requires the receiving bank to execute the payment order, see article 10, comments 4 to 10.

62. *Comparison with Article 4A.* Article 4A-301*(b)* defines "execution date" substantively the same as in the current text.

"Execution"

63. Although the term "execution" has been used throughout the drafting history of the Model Law, until the twenty-second session it was not defined. A proposal at the twenty-first session to add such a definition did not receive sufficient support (A/CN.9/341, para. 80). In the working paper submitted to the twenty-second session it was suggested that when the bank was not the beneficiary's bank, an order could be assumed to be executed when the receiving bank issued a payment order intended to carry out the order received (cf. article 6(2)*(d)*). When the receiving bank was the beneficiary's bank, execution was suggested to be best understood as acceptance of the order in any of the ways specified in article 7(1) (A/CN.9/WG.IV/WP.49, article 2, comment 56).

64. The Working Group adopted the current definition at the twenty-second session (A/CN.9/344, paras. 115 and 116). The Working Group noted that the definition did not provide for execution of a payment order by the beneficiary's bank. It was said that, since the credit transfer was completed when the beneficiary's bank accepted the payment order, the bank could not execute the order.

65. Since the Working Group adopted the definition of "execution" late in its twenty-second session, it did not have time to review the entire text to see whether all references to "execution", as well as the references to "acceptance", "execution date" and "payment date" were compatible with the definition. It decided to bring the potentially inconsistent uses of one or all of these terms to the attention of the Commission by placing them in square brackets.

"Payment date"

66. At the twenty-first session the question was raised whether the Model Law should contain any rules covering the use of a payment date and, consequently, whether there was any need for a definition (A/CN.9/341, paras. 82 and 83). It was noted that the payment messages used by SWIFT did not contain a field for such a date and, it was stated, ISO would delete any reference to a pay (or payment) date in its next revision of its standards. It was said that the date commonly used on payment orders between banks was the value date, i.e., the date on which the funds were to be available to the receiving bank. The suggestion that the term "execution date" could be made to serve the intended function of payment date was not adopted on the grounds that, even though payment orders used in interbank practice might not provide for the designation of a payment date, the original payment order sent by the originator to its bank might stipulate that the funds were to be paid to the beneficiary on a particular date. In any case, the decision of the Working Group at its twenty-second session to define "execution" so as to apply only to a receiving bank that is not the beneficiary's bank (see comments 63 to 65) means that a date in a payment order sent to the beneficiary's bank specifying when the beneficiary's bank is to make the funds available to the beneficiary cannot be encompassed within the term "execution date".

67. At the twenty-first session the Working Group changed in the English language version of the Model Law the term "pay date", which it had previously been using to indicate when the funds were to be placed at the

disposal of the beneficiary, to "payment date" (A/CN.9/341, para. 83). With that change the terminology used in the English language version of the Model Law is now in conformity with Article 4A but out of harmony with ISO 7982-1, since the term "pay date" is used by ISO 7982-1 to indicate the date when the funds are to be available to the beneficiary. The English language version of ISO 7982-1 uses the term "payment date" to indicate the date when a payment was executed. In the French language version of the Model Law, the terminology used in ISO 7982-1 has continued to be used, since those words carry an intrinsic meaning, which is not true of the English language terms "pay date" and "payment date". As a result the English and French language versions of the Model Law do not have the same relationship to one another on this point that they have in the two official language versions of ISO 7982-1. It may be thought that such a situation is conducive to confusion in international credit transfers.

68. The definition of "payment date" was included in the text prior to the seventeenth session of the Working Group with the same meaning as in ISO 7982-1 but, since it was not used further, it was deleted in the revision submitted by the Secretariat to the eighteenth session.

69. The definition of "payment date" differs from pay date 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 payment date is the date "when the funds are to be placed at the disposal of the beneficiary". (See A/CN.9/317, para. 43 and A/CN.9/341, para. 83.) The definition leaves open the question when and under what circumstances funds that are placed at the disposal of the beneficiary 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.

70. At the twenty-first session the definition was modified to make it clear that the payment date binding on the receiving bank is the date specified in the payment order received by it. See A/CN.9/WG.IV/WP.46, comment 37 to article 2, and A/CN.9/341, para. 83. If a payment date specified in a payment order received by an intermediary bank or the beneficiary's bank is not in conformity with the payment date specified by the originator, the bank where the change in dates occurred would be responsible for the error. For the significance of a payment date in a payment order prior to the one received by the beneficiary's bank, see article 10, comment 5.

71. *Comparison with Article 4A.* Article 4A-401 defines "payment date" as "the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank". The official comments say that the payment date applies to the payment order issued to the beneficiary's bank, but that a payment order issued to a receiving bank other than the beneficiary's bank may also state a date for payment to the beneficiary. The comments go on to say that the payment date may be expressed to the beneficiary's bank in various ways, including the use of a type of credit transfer system that has a fixed time schedule of a certain number of days to process payment orders.

Article 3. *Variation by agreement*

Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party.

Prior discussion

A/CN.9/318, para. 34 (eighteenth session, 1988)
A/CN.9/WG.IV/WP.47 (submitted to twenty-first session, 1990)
A/CN.9/341, paras. 50 to 52 (twenty-first session, 1990)
A/CN.9/344, para. 141 (twenty-second session, 1990)

Comments

1. At its eighteenth session the Working Group decided that the extent to which the Model Law would be subject to derogation by the agreement of the interested parties would be considered in connection with the individual provisions (A/CN.9/318, para. 34). As a result, a number of the individual articles contained a provision permitting or restricting the parties from derogating from the specific provision. A part of a proposal submitted by the United States prior to the twenty-first session, and distributed as A/CN.9/WG.IV/WP.47, contained two paragraphs in respect of the right to vary the provisions of the Model Law. The first paragraph of the proposal was adopted by the Working Group as article 16 (A/CN.9/341, para. 52). At the twenty-second session article 16 was moved to article 3 (A/CN.9/344, para. 141). The second paragraph, which was not pursued by the United States delegation after a corresponding proposal in respect of *what is currently* article 18 had been rejected (see comment 5 to article 18), provided that a rule adopted by a funds transfer system could be effective between the participating banks "even if the rule conflicts with this law and indirectly affects another party to the funds transfer who does not consent to the rule".

2. Under article 3 the agreement of the affected party need not be with the party to the credit transfer who claims under the agreement. For example, an agreement of the originator with the originator's bank that the beneficiary's bank in another State could execute the payment order it received on the basis of the account number alone would be binding on the originator as against the beneficiary's bank.

3. When the Working Group adopted article 3 it decided to review each of the substantive articles to determine whether the statements in the individual substantive provisions as to the effect of an agreement should be retained or could be deleted (A/CN.9/341, para. 52). In the current draft mention of the effect of contractual rules is made in articles 2*(j)*, 4(3), 4(5), 4(6), 5*(b)*(iv), 6(2)*(b)*, 7(5), 8(1)*(b)*, 9(3), 11(3), 13(2), 16(7) and 18(1). See the comments to those provisions as to the effect of article 3.

4. *Comparison with Article 4A.* Article 4A-501*(a)* is identical to article 3. Article 4A-501*(b)* is a longer version of the provision referred to in comment 1 and set forth in A/CN.9/WG.IV/WP.47 that was rejected by the Working Group at the twenty-first session.

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

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

(2) When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless bound if:

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

(b) the receiving bank complied with the authentication.

(3) The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable.

(4) A purported sender is, however, not bound under paragraph (2) if it proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

(5) A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, if the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates or errors in a payment order, the sender is not bound by the payment order if use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate or the error. If the error that the bank would have detected was that the sender instructed payment of an amount greater than the amount intended by the sender, the sender shall be bound only to the extent of the amount that was intended.

(6) 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 (sixteenth session, 1987)
A/CN.9/317, paras. 57, 69 to 79 and 84 (seventeenth session, 1988)
A/CN.9/318, paras. 70 to 109 (eighteenth session, 1988)
A/CN.9/329, paras. 94 to 111 (twentieth session, 1989)
A/CN.9/341, paras. 86 to 103 (twenty-first session, 1990)
A/CN.9/344, paras. 121 to 126 (twenty-second session, 1990)

Comments

1. Paragraphs (1) to (4) set forth the situations in which a purported sender of a payment order is bound by the order. Paragraph (5) sets forth the extent to which the sender is bound by the terms of the payment order. Paragraph (6) 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. The question whether the actual sender was authorized to bind the purported sender will be determined in accordance with the applicable law and will not be determined by the Model Law. Moreover, at the twenty-first session it was decided that the question as to the law of which jurisdiction would be applicable would not be determined by what is currently article 18 (A/CN.9/341, paras. 46 and 47; see also comment 11 to article 18).

3. Pursuant to the words "or revocation of a payment order" the purported sender is also bound by a properly authorized revocation of a payment order.

4. *Comparison with Article 4A.* Article 4A-202*(a)* provides an essentially identical rule to that in paragraph (1).

Paragraph (2)

5. 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 requirements of paragraph (2) are met (see A/CN.9/341, para. 86).

6. The words "When a payment order is subject to authentication" in the *chapeau* of paragraph (2) were part of a technical amendment made at the twenty-first session to overcome the possible interpretation of paragraph (2), contained in the draft then before the Working Group, that even if the payment order had been authorized under paragraph (1), the sender was bound only if the requirements of paragraph (2) were also met (A/CN.9/341, para. 86; see A/CN.9/WG.IV/WP.46, comment 9 to article 4). Those words also serve the function of pointing out that it is at least technically possible under the Model Law that the payment order is not subject to authentication because of a lack of agreement between the sender and the receiving bank. See the definition of "authentication" in article 2*(j)*. In such a case the receiving bank would always be responsible for any loss that occurred as a result of an unauthorized payment order.

7. The first requirement, set out in subparagraph *(a)*, is that the authentication provided is commercially reasonable. The discussion in the eighteenth session of the Working Group proceeded on the basis that it was the receiving bank that determined the type of authentication it was prepared to receive from the sender (A/CN.9/318, para. 75). Therefore, it was the receiving bank's responsibility to assure that the authentication procedure was at least commercially reasonable. If the receiving bank was willing to accept a payment order even though there was no commercially reasonable authentication, it should accept the risk that the payment order had not been authorized in accordance with paragraph (1) (A/CN.9/341, para. 94).

8. At the eighteenth session the Working Group was in agreement that the sender and the receiving bank could not provide for a lower standard by agreement (A/CN.9/318, para. 75). At the twenty-first session the Working Group noted that at that session it had adopted a new article 16 that stated a general principle of freedom of contract unless otherwise provided in the Model Law, and that it had decided to review each of the substantive articles to determine whether the previous statements as to the effect of an agreement should be retained (A/CN.9/341, para. 93). Consequently it decided to include in paragraph (2) a provision to the effect that parties would not be allowed to agree on the use of an authentication procedure that was not commercially reasonable (A/CN.9/341, para. 96). That decision was implemented at the twenty-second session by the adoption of what is currently paragraph (3) (A/CN.9/344, para. 136).

9. No attempt has been made to set a standard as to what constitutes a commercially reasonable authentication procedure. The standard would be objective, since it would be one from which the parties were not free to vary by agreement. However, since the commercial reasonableness of an authentication procedure 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, the amount of the payment order and the identity of the purported sender, the statement of the parties in their agreement that they chose to use a procedure that was less protective than others available, especially if they explained the reasons why they had made that decision, could be expected to influence a court as to whether the standard chosen was commercially reasonable. It could be expected to be of particular importance that the receiving bank offered the sender at a reasonable price another authentication procedure that clearly was commercially reasonable, but the sender chose to use the less secure procedure for reasons of its own. The standard as to what was commercially reasonable could be expected to change over time with the evolution of technology. At the twentieth session of the Working Group it was suggested that, in view of the imprecision of the term "commercially reasonable" and the unfamiliarity of many legal systems with the concept, any commentary that might be written to accompany the Model Law when it is adopted by the Commission might give a suggestion as to factors to be taken into account (A/CN.9/329, para. 98).

10. A previous requirement, that had been set out in subparagraph *(b)*, was that the amount of the payment order was covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank. That rule was said to afford a protection for originators in some countries. By limiting the amount that could be debited to an account, a customer could limit the amount of potential loss. Such a limitation also furnished to a limited degree an indication that an excessively large payment order might have been in error or fraudulent (A/CN.9/318, paras. 82 and 85 to 87; A/CN.9/329, paras. 100 and 101).

11. At the twentieth session a proposal to delete subparagraph *(b)* was rejected (A/CN.9/329, paras. 100 and 101). At the twenty-first session it was again proposed to delete the subparagraph (A/CN.9/341, paras. 87 to 91). The principal argument against the provision was that it was impractical from an operational point of view since banks could not monitor the accounts of senders on a real-time basis unless all the debits and credits that were chargeable to the account were entered on a real-time basis. It was said that in even the most highly automated banks some types of payment orders were processed in batch with the resulting debits and credits entered to the accounts periodically, and often at the end of the working day. In reply it was said that the rule in subparagraph *(b)* was a risk allocation rule and not an operational rule. The first decision made by the Working Group at the twenty-first session was to limit the application of subparagraph *(b)* to non-bank senders. Subsequently, in connection with its discussion of what is currently paragraph (4), it decided to delete subparagraph *(b)* (see comment 18).

12. What was the third, but is now the second, requirement is that the receiving bank complied with the authentication. If the bank complied with the authentication but the sender had not, the bank would know that the payment order had not been authenticated by the sender and should reject it. However, even if the bank did not comply with the authentication but the payment order was in fact authorized, the purported sender would be bound under paragraph (1). The one occasion when subparagraph *(b)* would be truly dispositive would be in the case envisaged by paragraph (4), i.e., where an unauthorized payment order was properly authenticated by the actual sender but the receiving bank did not comply with the authentication procedure. In that case the sender would not be bound under paragraph (2) and there would be no occasion to turn to paragraph (4).

13. *Comparison with Article 4A.* Article 4A-202*(b)* provides essentially an identical rule with additional detail. Subparagraph *(c)* of Article 4A-202 gives an indication as to what would be "commercially reasonable".

Paragraph (3)

14. In line with a decision taken at the twenty-first session (A/CN.9/341, para. 96), the Working Group decided at its twenty-second session that the parties should not be able to agree that the sender might be bound by an unauthorized payment order if the authentication was not

commercially reasonable (A/CN.9/344, para. 136, see comment 8).

Paragraph (4)

15. The paragraph was prepared in two versions at the eighteenth session of the Working Group (A/CN.9/318, paras. 88 to 90). 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. Placing the major risk on the receiving bank was said to be appropriate because it was the receiving bank that usually designed the authentication procedure (see comment 7). In general, those who were in favour of placing the major risk on the sender favoured variant B. Placing the major risk on the sender 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.

16. The paragraph was discussed again at the twentieth session where several new proposals were made (A/CN.9/329, paras. 103 to 108). However, because of the failure to reach agreement, the Working Group left the text unchanged.

17. The current text was adopted at the twenty-first session (A/CN.9/341, paras. 97 to 101). Paragraph (4) deals with the relatively rare case when there has been an unauthorized payment order that was authenticated in accordance with paragraph (2) but was not authorized in accordance with paragraph (1). In such a case paragraph (4) provides that the purported sender must show that the payment order resulted from the actions of a person other than a present or former employee of the purported sender in order not to bear the loss. In order to meet that burden it would not be necessary to show who had sent the payment order; the fact that it could not have resulted from the actions of a present or former employee might be proved by other means. Once that burden has been met by the purported sender, the receiving bank must show that the authentication was procured by the fault of the purported sender in order to place the loss back on the purported sender.

18. With adoption of the new version of paragraph (4), the Working Group decided to delete the former provision in paragraph (2) that the purported sender would not be bound by an unauthorized payment order unless the amount of the payment order was covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank (see comment 11).

19. After an extensive discussion at the twenty-first session the Working Group decided that it would leave the parties free to vary the provisions of paragraph (4) by agreement, as provided in what is currently article 3. A suggestion was made that it should not be possible to vary the provisions to the detriment of non-bank senders. Another suggestion was that there should be no limitation on the extent to which paragraph (4) could be modified by agreement, but that the agreement could not be in the general conditions of the receiving bank; the agreement would have to be in an individual contract between the purported sender and the receiving bank. The delegations that expressed strong reservations to the decision leaving the parties free to vary the provisions of paragraph (4) by agreement were concerned that the likelihood that the Model Law would be found acceptable by national legislatures would be seriously reduced.

20. *Comparison with Article 4A.* Article 4A-203 is essentially the same as paragraph (4), but slightly more to the advantage of the receiving bank.

Paragraph (5)

21. In the working paper submitted to the twentieth session of the Working Group suggestions were made as to how the authentication defined in article 2 and used in article 4 in respect of identification of the sender might also be used in respect of errors in a payment order or corruption of the contents of a payment order during its transmission (A/CN.9/WG.IV/WP.44, article 2, comment 23, and article 4, comment 10). The Working Group did not accept the suggestion that an authentication as defined should be used for both purposes. It said that, if it was intended that the Model Law should relieve the sender of the responsibility for the content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that would detect the error or corruption, that intention should be set out separately in the Model Law (A/CN.9/329, para. 79). At the twenty-first session the Working Group requested the Secretariat to propose a text that would implement this idea for consideration at its twenty-second session.

22. At the twenty-second session of the Working Group it was recalled that some procedures used to identify the sender depended upon the use of an algorithm that incorporated the contents of the payment order. When such a procedure is used, any error in the content of the payment order would cause the authentication of the sender's identity to fail. The Working Group then decided to adopt the current text on the understanding that its most significant practical application would occur when the authentication procedure used to identify the sender did not depend upon the contents of the payment order (A/CN.9/344, paras. 121 to 126).

23. The first sentence makes it clear that the sender bears the risk that the contents of the payment order as received by the receiving bank are not those intended to be sent, or those actually sent, by the sender. The discrepancy may have occurred as a result of an error by the sender or because the contents of the payment order changed after being sent. The second sentence sets out the occasions when the sender would not be bound to the terms of the payment order as received. A prerequisite is that the sender and the receiving bank had agreed on the use of a procedure that would reveal some or all of the errors in the payment order. In contrast to the authentication procedure, there would be no requirement that the procedure was commercially reasonable, or that it was

designed to reveal all errors. There is also no requirement that the procedure must require the sender to act; the only question is whether use of the procedure by the receiving bank in respect of the particular payment order received revealed the error or, if the receiving bank did not use the procedure, whether its use would have revealed the error (A/CN.9/344, para. 124).

24. It is understood by the Secretariat that the word "error" includes all discrepancies between the payment order as it was intended and the payment order as it was received, whatever be the source of the discrepancy. There was, however, some discussion at the twenty-second session, which is not reflected in the report of the session, that the word "error" in this context might not include discrepancies that were the result of fraud or that were the result of equipment failure. The Commission may wish to consider whether the word "discrepancy" should be used in place of the word "error".

25. To some degree the proposed paragraph implements the same policy as do articles 7(3), (4) and (5) and 9(2), (3), and (4), when the error in the payment order is in relation to the subject matter covered by those provisions. However, the proposed paragraph might most often be applicable to an error in the amount of money to be transferred when the amount was expressed only in figures.

26. *Comparison with Article 4A.* Although the rule that the sender is generally responsible for the contents of the payment order as received by the receiving bank is not specifically stated in Article 4A, that is the overall result under Article 4A-205 and, in a more restricted sense, Article 4A-206. Article 4A-205 gives results in respect of a "payment order . . . transmitted pursuant to a security procedure for the detection of error" that are similar to the results in article 4(5) of the Model Law. If the transfer was made to an incorrect beneficiary or was a duplicate transfer, "the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution", while if the transfer was for too great an amount, the receiving bank could recover from the beneficiary "the excess amount received". To some degree the restitution provision in Article 4A-205 already exists in article 13, though article 13 permits each sender to recover from its receiving bank and not from the beneficiary. This difference in approach is explained in part by the fact that in principle the Model Law does not regulate the rights and obligations of the beneficiary.

Paragraph (6)

27. Paragraph (6) states the basic obligation of the sender, to pay to the receiving bank the amount of the payment order. That obligation does not arise as a result of the sending of the payment order by the sender; it arises as a result of the acceptance of the payment order by the receiving bank. It is at that time that the receiving bank undertakes the obligations towards the sender to act in accordance with article 7 or 9 as the case may be. The sender's obligation to pay the receiving bank is not, therefore, dependent upon the receiving bank having undertaken obligations towards its own credit party, i.e. the next bank in the credit transfer chain when the receiving bank is not the beneficiary's bank or the beneficiary when the receiving bank is the beneficiary's bank.

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

29. At the eighteenth and twentieth sessions the use of the execution date as the date when the sender should be obligated to make the funds available to the receiving bank was questioned on the grounds that the execution date was defined in article 2*(k)* as the date the receiving bank was obligated to act and not the date the receiving bank had performed its obligation (A/CN.9/318, para. 104; A/CN.9/329, para. 109). At the twentieth session it was stated in reply that, while the sender should be obligated to pay on the execution date, the sender should receive interest under what is currently article 16 for the period of any delay by the receiving bank in executing the order. The latter suggestion appears to have been thought to have been the natural consequence of the text of the Model Law as then drafted. However, it is difficult to see what paragraph of article 16, either as then or as currently drafted, would obligate the sender to pay interest to the receiving bank for a delay in fulfilling the payment obligation. The most logical explanation is that the obligation to pay interest may be thought to be a natural consequence of the delay in payment. Nevertheless attention should be paid to article 16(8), which states that the remedies provided in this law are exclusive. See also discussion in article 16, comment 40.

30. It can be doubted whether receiving banks will often accept prior to the execution date payment orders that are intended to be executed at some future date. A more likely event is that a receiving bank might by mistake send its own payment order to the next bank in the credit transfer chain or credit the beneficiary's bank, as the case may be, prior to the execution date on the payment order received. In either case, the receiving bank would have accepted the payment order under article 6(2)*(d)* or 8(1)*(d)*, thereby creating the sender's obligation to pay the receiving bank, albeit an obligation to be discharged only at the execution date. However, at the twenty-second session article 11(1) was modified to permit the sender to revoke a payment order until the later of the actual time of execution or the beginning of the execution date (A/CN.9/344, paras. 91 and 92). Revocation of the payment order by the sender after its acceptance by the receiving bank but before the execution date would eliminate the sender's obligation to pay the receiving bank for the payment order.

31. At the twentieth session it was stated that the sender's obligation to pay should extend only to the amount of the payment order and not to any costs or charges. That issue, however, was not resolved. Reference was made to the treatment of the issue in what was then

article 14(3) (A/CN.9/329, para. 110). Former article 14(3) is currently article 17(3) in a substantially redrafted form. Compare the discussion in regard to article 17(3) in comments 17 to 19 to article 17.

32. Since the sender to the beneficiary's bank is obligated to pay the beneficiary's bank under the same conditions and subject to the same limitation as is the sender to any other receiving bank, the reference to "execution date" is not sufficient. The term "payment date" is also not sufficient since by definition in article 2*(m)* it is the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary. If no such date is specified in the payment order sent to the beneficiary's bank, there is no payment date. It would not be acceptable to change the definition of "payment date" to include the date the beneficiary's bank should make the funds available to the beneficiary even if no such date has been specified in the payment order since, in such a situation, article 9(1) refers "to the applicable law governing the relationship between the bank and the beneficiary". Although the applicable law will provide such a date, the sender in another country cannot be expected to know when it is. Therefore, it may be appropriate to add as a second sentence "When the receiving bank is the beneficiary's bank, payment is due on the payment date or, in the absence of a payment date, on the day the payment order is accepted."

33. *Comparison with Article 4A.* Article 4A-402*(b)* and *(c)* are essentially the same as the Model Law. See comment 71 to article 2 in regard to the payment date in Article 4A. Exceptions are stated to the duty of the sender to pay in case of erroneous payment orders of various types.

Article 5. *Payment to receiving bank*

Payment of the sender's obligation under article 4(6) to pay the receiving bank occurs:

(a) if the receiving bank debits an account of the sender with the receiving bank, when the debit is made; or

(b) if the sender is a bank and subparagraph *(a)* does not apply,

(i) when a credit that the sender causes to be entered to an account of the receiving bank with the sender is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or

(ii) when a credit that the sender causes to be entered to an account of the receiving bank in another bank is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or

(iii) when final settlement is made in favour of the receiving bank at the central bank of the State where the receiving bank is located, or

(iv) when final settlement is made in favour of the receiving bank

a. through a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally and the settlement is made in accordance with applicable law and the rules of the system, or

b. in accordance with a bilateral netting agreement with the sender; or

(c) if neither subparagraph *(a)* nor *(b)* applies, as otherwise provided by law.

Prior discussion

A/CN.9/WG.IV/WP.42, paras. 47 to 57 (submitted to the nineteenth session, 1989)
A/CN.9/328, paras. 61 to 65 (nineteenth session, 1989)
A/CN.9/341, para. 53 (twenty-first session, 1990)
A/CN.9/WG.IV/WP.49, article 4, comments 31 to 45 (submitted to twenty-second session, 1990)
A/CN.9/344, paras. 59 to 85 (twenty-second session, 1990)

Comments

1. Although article 4(6), which states that the sender is obligated to pay the receiving bank the amount of the payment order, had been in the draft Model Law from the first draft, throughout the majority of the preparation of the Model Law there was no provision that indicated how and when a sender might pay the receiving bank. Article 5, which contains such provisions, was adopted at the twenty-second session (A/CN.9/344, paras. 59 to 85). Nevertheless, there had been earlier discussion in the Working Group on aspects of the problem.

2. At the nineteenth session in July 1989 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 (BIS). 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). At the twenty-first session in July 1990 the Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not available soon (A/CN.9/341, para. 53).

3. The report that had been anticipated, entitled the "Report of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries", was published in November 1990 prior to the twenty-second session of the Working Group held 26 November-7 December 1990. The Working Group noted that the report dealt with policy issues in regard to interbank netting schemes, including payment netting schemes, but that it did not attempt to draft any legal text to implement its policy determinations. The conclusions of the report set forth minimum standards for netting schemes. The first of

those minimum standards was that "Netting schemes should have a well-founded legal basis under all relevant jurisdictions". The Working Group noted that for there to be a well-founded legal basis for the netting scheme, it would be necessary that the netting scheme would be valid not only under the civil or commercial law, but that it would also be effective under the law of insolvency. It was also noted that in Part C of the report of the committee on netting schemes it was indicated that the netting scheme would have to function as intended under the law of all relevant States, which included *(a)* the law of each of the parties to the netting scheme, *(b)* the law that governed the individual transactions subject to the netting scheme, and *(c)* the law that governed any contract or agreement necessary to effect the netting (A/CN.9/344, para. 60).

4. The Working Group also decided to recommend to national legislators that domestic laws, especially laws dealing with bankruptcy and insolvency, should be reviewed with the objective of supporting interbank netting of payment obligations (A/CN.9/344, para. 61).

Payment by debiting account of the sender with receiving bank, subparagraph (a)

5. The sender may be either a bank or non-bank originator, the originator's bank or an intermediary bank. The receiving bank may be a commercial bank or the central bank functioning as the originator's bank, an intermediary bank or the beneficiary's bank. The payment order may be denominated in the currency of the sender, in the currency of the receiving bank or of a third country or in a unit of account. The common factor in all these cases is that the sender has an account with the receiving bank that is to be debited as the means of paying the receiving bank even if that account is not maintained in the currency of the payment order.

6. In this situation the receiving bank is certain to receive payment. If the sender does not have a sufficient credit balance in the account or a sufficient line of credit with the receiving bank, the receiving bank need not accept the payment order. If the payment order is not accepted, the sender's obligation to pay does not arise under article 4(6).

7. Under one school of thought the payment should be considered to be made at the time that the receiving bank has a right of set-off of the amount of the payment order against the account of the sender. The debiting of the account should be considered to be merely a bookkeeping entry with no independent legal significance (A/CN.9/344, para. 64).

8. The decision of the Working Group was that payment should be considered to be made only when the account is debited. The act of debiting the account manifests the decision of the receiving bank that it is able and willing to receive payment in that manner. This is of particular importance when the debit results in a debit balance in the account. Even though the payment to the receiving bank in such a case is in the nature of the substitution of one form of a claim against the sender for another, and even though the bank may discover only after the debit has been entered that there had been no withdrawable credit in the account or that credit had not been sufficient, the bank should not be later permitted to assert that its action in debiting the account did not constitute payment to it (A/CN.9/344, para. 67). Even if the account is debited by a computer without human intervention, it would have been programmed to do so only under certain conditions, thereby manifesting the decision of the receiving bank that the debit of the account under those conditions constituted payment to it (A/CN.9/344, para. 65).

9. The Model Law does not give any rule as to what constitutes the act of debiting an account. The question would not have arisen in earlier days when accounts were kept by hand and it could be seen whether the debit or credit entry had been made. Today, with the use of batch mode entry of debits and credits from a magnetic tape at a time convenient to the bank and on-line entry to pro forma accounts that can be merged with the "real" accounts at the end of the day, it may be difficult to determine whether or exactly when a debit or credit was entered from a legal point of view. The very factors that raise the question make it difficult to conceive of how that question might be answered in a legislative formula.

Payment by sending bank by crediting account of receiving bank with sending bank, subparagraph (b)*(i)*

10. Since a receiving bank will never have an account with a non-bank sender, it is possible for the sender to pay the receiving bank by crediting the receiving bank's account only when the sender is a bank. Normally the sending bank will credit the receiving bank's account prior to, or concurrently with, sending the payment order. As a result, in one sense the receiving bank may have received payment even before it received the payment order. However, the amount of the payment order by itself, or in conjunction with other payment orders sent by the sending bank, may be so large that it would create a credit balance larger than that which the receiving bank is willing to have with the sending bank. Therefore, subparagraph *(b)*(i) provides the receiving bank an opportunity to reject the means of payment offered by the sending bank. The effect of rejecting the payment offered is that the receiving bank will not be considered to have accepted the payment order under article 6(2)*(a)* or 8(1)*(a)*, as the case may be, for failure to give notice of rejection of the payment order.

11. Subparagraph *(b)*(i) gives two alternative times when the payment is considered to have been made. The first is that the receiving bank has used the credit. In most cases the credit would not be used in specific terms. Instead, it would be considered to have been used in the normal course of debiting and crediting a continuous series of transactions through the account. This leaves the question of how to determine the moment the credit is used when debits are entered to the account but the credit balance does not fall below the level of any given payment order credited to the account. The Working Group noted that in some legal systems credits to an account are considered to have been withdrawn in the order in which they were made to the account (A/CN.9/344, para. 71).

The Working Group did not consider whether any such provision should be specifically stated in the Model Law.

12. It is possible that the receiving bank will not use the credit for some time, whatever might be the means of determining when a credit is used. In order not to allow finality of payment by the sending bank to the receiving bank to be delayed excessively, the Working Group decided that there should be a deadline after which the receiving bank would be considered to have received payment if it had not rejected the credit. It was stated that the receiving bank would often need additional time when the credit was in a foreign currency that it might need to convert to its own currency before it could use the credit effectively (A/CN.9/344, para. 73). In reply it was stated that international credit transfers to settle foreign exchange contracts were scheduled ahead of time and that the receiving bank would already have made commitments for the use of the funds. However, a large and unexpected credit in a foreign currency could cause such problems.

13. It was finally decided that subparagraph *(b)*(ii) should provide that if the credit is not used, the receiving bank receives payment "on the business day following the day on which the credit is available for use and the receiving bank learns of that fact".

14. While the purpose of the provision is clear, it leaves open several questions. First, grammatically, at least in the English original, "the business day following" refers to the day following the day when the credit was available for use. It would seem that the receiving bank should be considered to receive payment on the business day following the day the receiving bank learned that the credit was available for use. The receiving bank may learn that the credit is available for use on a subsequent day either because of the time necessary for the information to be conveyed to it or because of differences in time zones.

15. Second, the provision does not state when during the business day the payment takes place. In the Working Group it was suggested that the time for payment should be considered to be midnight of the day in question. In reply, it was said that midnight had no relevance to banking operations in many countries, especially where the processing of transactions was completed earlier than midnight. To accommodate that point of view it was suggested that the text should refer to the end of the banking day. It was also stated that the movement to 24 hour banking, including the sending and receiving of international credit transfers, made any point of time arbitrary (A/CN.9/344, para. 74).

16. Third, it is not clear where the point of time when payment takes place should be measured. At the Working Group one view was that it should be measured at the location of the receiving bank. Under another view it should be measured at the location of the sending bank (A/CN.9/344, para. 75).

17. Another point raised at the Working Group, a point which probably had the agreement of all the participants, was that the receiving bank should not be considered to have received payment by the passage of time "unless the credit remained withdrawable throughout the entire period of time" (A/CN.9/344, para. 78). The one difficult case considered by the Working Group was whether a credit would be considered to be withdrawable if the credit could be used within the country where the account was located even though it could not be transferred outside that country. It was stated that, if the currency and the account were otherwise appropriate but the receiving bank did not wish the credit, it should reject the credit (and perhaps the payment order if the payment order had not already been executed) prior to the deadline. It was said that in case of a rejection of the credit prior to the time of payment, the right to the funds would automatically revert to the sender and the receiving bank would continue to have a right to be paid in an appropriate manner.

Payment by sending bank by causing account of receiving bank in third bank to be credited, subparagraph (b)*(ii)*

18. The problems and the solutions given in respect of the crediting of the receiving bank's account in a third bank are essentially the same as when the receiving bank's account with the sending bank is credited. If the third bank is in a third country, the receiving bank may have additional reasons for wishing to reject the credit as a means of payment. However, that does not change the nature of the appropriate legal rules. Therefore, subparagraph *(b)*(ii) is identical to subparagraph *(b)*(i) and comments 10 to 17 apply to subparagraph *(b)*(ii).

19. Since the third bank may be in a different country from either the sending or the receiving bank, or in a different time zone of the same country, the place appropriate for measuring when payment has been made may include the bank where the account is held, in addition to the sending and the receiving bank as mentioned in comment 16 (A/CN.9/344, para. 75).

Payment by sending bank by causing account of receiving bank with central bank to be credited, subparagraph (b)*(iii)*

20. Credit in the receiving bank's account with the central bank of the State where the receiving bank is located is unlike credit with any other third bank. The receiving bank has neither credit risk nor currency risk. Therefore, the credit can be treated immediately as good funds and the receiving bank does not have to be given an opportunity to reject the credit.

21. In some countries the central bank gives provisional credit for the settlement of certain types of transfers. Those transfers may be transfers in which the central bank is itself part of a credit transfer chain. In other cases the transfer is for the purpose of settling net obligations that have been netted subject to a bilateral or multilateral netting agreement. Where the central bank gives provisional settlement for certain types of transfers, the receiving bank would not be paid until the provisional settlement became final settlement. It should be noted that provisional settlement is recognized under the Model Law only when the bank where the account is held is the

central bank. By allowing the central bank to reverse provisional credits even when the central bank is the beneficiary's bank, subparagraph *(b)*(iii) may be in conflict with article 8(1)*(d)* (see article 8, comments 4 to 6).

22. The question was raised in the twenty-second session of the Working Group whether subparagraph *(b)*(iii) should be restricted to the central bank of the State where the receiving bank is located. It was stated that, especially where two or more States have closely linked economic or monetary ties, credit in an account of the central bank of any one of the participating States should be treated the same. However, since the question was raised at the very end of the session when it was not possible to consider the matter thoroughly, the Working Group decided not to consider it at that time (A/CN.9/344, para. 82).

Payment by sending bank through multilateral or bilateral netting agreement, subparagraph (b)*(iv)*

23. Netting is used when it is not possible or desirable for one reason or another to make payment by debiting and crediting the individual transactions to an account as described above. Netting is an arrangement by which a set of two or more transactions creating financial rights and obligations between two or more parties during a defined period of time or coming due at a defined point of time are settled by calculation and payment of the net amount due by the participant or participants who on balance have remaining obligations. Netting may be used as a technique to reduce the number of transaction messages between the participants without changing the legal nature of the individual obligations. This is often referred to as "position netting". Until final settlement is made between the participants by the transfer of a single net amount by the participant with the debit balance between them, each one owes to the other the gross amounts due on each individual transaction.

24. Netting may also be structured in such a way as to merge the individual legal obligations into a single legal obligation for the net amount. Such a transformation of the legal obligations usually depends upon the use of the concept of novation, though the concept of set-off may also be used in some legal systems. It is not clear in some legal systems whether, in case of the insolvency of one of the participants in the netting arrangement prior to settlement of the net amounts, the legal representative of the insolvent person (or of the creditors of the insolvent person) would be bound to recognize the netting arrangement or whether a claim could be made for the gross amounts due to the insolvent while the gross amounts due by the insolvent to the other participant or participants were recoverable only in the liquidation proceedings.

25. While netting may depend on the use of legal concepts such as novation or set-off, netting is always the product of an agreement between the parties to the netting arrangement. Multilateral netting in the payments context is usually associated with a clearing-house.

26. Three principal legal issues in respect of bilateral and multilateral netting agreements might be considered in the Model Law:

(a) Whether, as a matter of law, the debits and credits arising out of the sending of payment orders between the two parties to a bilateral netting agreement, or between the multiple parties to a multilateral netting agreement, can be netted. In the case of a multilateral netting agreement there is a further question whether the netting is to take place on a bilateral basis between each pair of banks or whether it is to take place on a multilateral basis.

(b) Whether some or all of the payment orders that have been sent subject to the netting agreement can be reversed, or are to be reversed, in case one of the participating banks is unable to meet its obligations in the settlement.

(c) The time when payment is considered to have been made to the receiving bank by the sender of any given payment order.

27. The Working Group at its twenty-second session decided that the preparation of a legislative provision on netting for use in the Model Law should be restricted in its scope since the legal issues involved in assuring the existence of a well-founded legal basis for bilateral and multilateral netting schemes had not yet been completely examined. It was said that those issues would be further studied in the work of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries (comments 2 and 3).

28. Consequently, subparagraph *(b)*(iv) does not specifically validate netting agreements, whether bilateral or multilateral. The validity of a netting agreement is to be determined by the applicable law, which, as pointed out in comment 3, may include *(a)* the law of each of the parties to the netting scheme, *(b)* the law that governs the individual transactions subject to the netting scheme, and *(c)* the law that governs any contract or agreement necessary to effect the netting scheme. Nevertheless, the recognition in the Model Law that successful implementation of the netting scheme will have positive legal consequences will give netting schemes a certain efficacy that they may not currently have (see the comment made in A/CN.9/344, para. 107).

29. Subparagraph *(b)*(iv) also does not indicate the consequences for the netting scheme if any participant should be declared insolvent or otherwise become unable to fulfil its obligations prior to settlement of the net or if any participant with a net debit in the netting scheme is unable to settle for that debit. No indication is given whether the debits and credits arising out of the payment orders sent subject to the netting scheme are to be treated as gross amounts owing between the participants or whether only the net amounts of debits and credits are to be considered. Similarly, no indication is given whether payment orders from or to the party that is unable to fulfil its obligations are or can be withdrawn from the net prior to settlement.

30. The only specific rule given in subparagraph *(b)*(iv), and the reason for the rule being in article 5, is that the sender of every individual payment order that was sent subject to the netting scheme pays the receiving bank of that payment order when final settlement in favour of the

receiving bank is made. By the nature of a netting scheme, final settlement is made in favour of those receiving banks that receive the amount of the net credit due to them as well as in favour of those receiving banks that must pay the amount of the net debit that they owe.

Other means for the sender to pay the receiving bank, subparagraph (c)

31. While the situations specifically mentioned in subparagraphs *(a)* and *(b)* cover all the usual means for a sender to pay the receiving bank, other means of payment are possible. The sender might, for example, pay the receiving bank by negotiating to it discounted bills of exchange. For all such cases subparagraph *(c)* simply refers to the otherwise applicable law.

32. *Comparison with Article 4A.* Article 4A-403 is similar to article 5. When the payment is made by crediting the receiving bank's account with the sending bank or with a third bank, payment by passage of time takes place at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact, instead of the next business day as under subparagraph *(b)*(i). The only central bank mentioned is the Federal Reserve Bank. Therefore, payment by credit in an account with any other central bank, including the central bank of the State of the receiving bank, is treated the same as credit in an account with any other third bank. The provisions on bilateral and multilateral netting provide for the same time of payment as does the Model Law. Those provisions are more complete in recognizing the validity of netting schemes and providing particular rules considered necessary to overcome doctrines of the law of set-off in the United States that were thought to call in question the efficacy of a netting scheme in case of insolvency.

Article 6. *Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank*

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

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

(a) when the time for execution under article 10 has elapsed without notice of rejection having been given, provided that: (i) where payment is to be made by debiting an account of the sender with the receiving bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the amount of the payment order; or (ii) where payment is to be made by other means, acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 5*(b)* or *(c)*,

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

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

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

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

Prior discussion

A/CN.9/297, paras. 46 to 51 (sixteenth session, 1987)
A/CN.9/317, paras. 80 to 84 (seventeenth session, 1988)
A/CN.9/318, paras. 110 to 120 and 126 to 134 (eighteenth session, 1988)
A/CN.9/WG.IV/WP.42, paras. 7 to 16 (submitted to the nineteenth session, 1989)
A/CN.9/328, paras. 12 to 16 (nineteenth session, 1989)
A/CN.9/329, paras. 112 to 127 (twentieth session, 1989)
A/CN.9/341, para. 53 (twenty-first session, 1990)
A/CN.9/344, para. 68 (twenty-second session, 1990)

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 6 and 7 deal with a receiving bank that is not the beneficiary's bank while articles 8 and 9 deal with the beneficiary's bank. Since a "receiving bank" is defined in article 2*(g)* in such a way as to include a "beneficiary's bank", it was necessary to include paragraph (1) in this article to make it clear that article 6 does not apply to a beneficiary's bank.

Concept of acceptance

2. In the draft prepared by the Secretariat for the eighteenth session of the Working Group a number of the substantive rules depended on the acceptance of a payment order by the receiving bank. Discussion at that session showed that the Working Group was strongly divided on the desirability of using such a concept (A/CN.9/318, paras. 127 to 130). Its use was advocated as a convenient means to describe in a single word a number of different actions of different receiving banks that should have the same legal consequences, making it possible to use the word in various substantive provisions. In response, it was said that use of the term "acceptance" was not necessary and that it would cause difficulties in many legal systems because it seemed to suggest that a contract was created as a result of the receiving bank's actions.

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

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

Paragraph (2)

5. At the twenty-first session, when it made its decision that the credit transfer was completed when the beneficiary's bank accepted the payment order addressed to it, with the legal consequences that followed, "the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in what are now articles 6 and 8 . . ." (A/CN.9/341, para. 17).

Subparagraph (a)

6. The current text of subparagraph *(a)* was adopted at the twenty-second session (see comment 10), based upon the text previously adopted at the twentieth session (A/CN.9/329, paras. 123 and 175). It is fundamentally a combination of paragraphs (1) and (2)*(a)* of the text as it emerged from the nineteenth session (A/CN.9/328, Annex). Paragraph (1) of that text was in turn composed of elements that had been in articles 5(1) and 7(1) of the text that had emerged from the eighteenth session (A/CN.9/318, annex). Throughout these various forms of presentation the basic policy, first established at the eighteenth session, has remained unchanged.

7. Except for certain obligations of notification of error set out in articles 7 and 9, the receiving bank is normally not required to act upon a payment order it receives unless it accepts the order. Nevertheless, the expectation is that a receiving bank will execute a payment order it has received. Therefore, if the receiving bank does not accept the order, paragraph (3) provides that it is required to notify the sender of the rejection. (See comments 16 to 20.) If the required notice of rejection is not given, paragraph (2)*(a)* provides that the payment order is accepted.

8. One of the most difficult issues has been whether the receiving bank should have an obligation to give a notice of rejection when the reason that it has not accepted the payment order is that it has not as yet received payment for it from the sender. In favour of such an obligation it is pointed out that a notice of rejection informs a good faith sender that there is a problem that needs to be rectified, a problem that otherwise may be unknown. Failure to rectify the problem may have adverse consequences for the sender, for the originator, if the sender is not the originator, and for the beneficiary. Opposed to such an obligation of notification is the fact that in most cases the failure to receive payment is in fact only a technical delay that is automatically rectified. A notification of rejection, or even of non-receipt of payment without specifying that rejection will follow, will merely add to the message flow between banks and will itself lead to additional confusion. In any case, a sender is expected to know whether it has made adequate provision for paying the receiving bank, whether by debit of an account of the sender with the receiving bank or by credit of an account of the receiving bank with the sender or with a third bank.

9. The Working Group decided at the eighteenth session that the receiving bank should have no obligation to give the notice of rejection (the notice now called for by paragraph (3)) if one of its reasons for rejecting the payment order was insufficient funds (A/CN.9/318, para. 119). That led to discussions at the nineteenth and twentieth sessions as to what constituted insufficient funds, and whether any distinctions should be made between the different reasons why the funds were insufficient (A/CN.9/328, para. 15, and A/CN.9/329, paras. 119 to 122). The result was that the reference to insufficient funds was deleted from what is now paragraph (3) (A/CN.9/329, paras. 123 and 175). Paragraph (2)*(a)* was amended to provide that even if a required notice of rejection was not given, the payment order is not accepted "until the receiving bank has received payment from the sender in accordance with article 4(4)". See comments 17 to 19 as to when a notice of rejection is required and article 5 as to when payment has been received.

10. During the discussions at the twenty-second session of the Working Group that led to the preparation of article 5 on when the sender pays the receiving bank, it was noted that one of the ways in which the receiving bank might be paid was by debiting the sender's account with the receiving bank. Since what is now article 6(2)*(a)* provided that the receiving bank was deemed to accept a payment order by failing to give notice of rejection where the receiving bank had been paid for the order, it would be possible for the receiving bank to avoid the effects of its failure to give notice of rejection by simply failing to debit the sender's account and therefore failing to receive payment. That result was thought to be improper (A/CN.9/344, para. 68). Therefore, subparagraph (2)*(a)* was redrafted to provide that acceptance would occur if there were funds available in the account to be debited sufficient to cover the amount of the payment order.

Subparagraph (b)

11. 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 exhibit a volitional element before the beneficiary's bank could be 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.

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

Subparagraph (c)

13. 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.

Subparagraph (d)

14. 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 7(2) are simultaneous. However, a receiving bank accepts a payment order even though the order it has sent is 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.

15. *Comparison with Article 4A.* Article 4A-209 provides that "a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order". Such a receiving bank executes the order, according to Article 4A-301*(a)* "when it issues a payment order intended to carry out the payment order received by the bank." That is the only way in which such a receiving bank can accept a payment order. If a notice of rejection is not given "despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order", Article 4A-210*(b)* provides that the bank is obliged to pay interest to the sender on the amount of the order, but that failure to give notice of rejection does not constitute acceptance of the order. Article 4A-211*(d)* provides that "An unaccepted payment order is cancelled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order." If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, Article 4A-212 provides that it is liable for breach of the agreement.

Paragraph (3)

16. The text of article 7(4) following the eighteenth session of the Working Group provided that "a notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order" (A/CN.9/318, annex). The drafting group at the nineteenth session moved the rule as to when the notice must be given by a receiving bank that is not the beneficiary's bank to article 5(1). In conformity with a decision of the Working Group it deleted the requirement that the notice must be given on the day the decision is made (A/CN.9/328, para. 86). At the twentieth session the requirement that a notice of rejection must be given was moved by the drafting group to article 5(3), i.e. current article 6(3).

17. Paragraph (3) now provides that, if the receiving bank does not accept the payment order under paragraph (2)*(b)*, *(c)* or *(d)*, it must give a notice of rejection and that notice of rejection must be given by the execution date. The provision should be understood to require the notice to be given by an expeditious means, which would normally mean by telecommunications.

18. The need to give notice of rejection exists even if the sender has no account relationship with the receiving bank or has even had no prior dealings with it of any kind (A/CN.9/318, paras. 114 to 116; A/CN.9/329, para. 118). There is no requirement that the notification give any reason for the rejection of the payment order (A/CN.9/297, para. 51). However, no notice of rejection need be given if there is insufficient information to identify the sender (A/CN.9/329, para. 117).

19. It was decided at the twentieth session of the Working Group that paragraph (3) would apply even though the receiving bank had not received payment for the payment order from the sender (A/CN.9/329, para. 123). It should be noted that if the receiving bank has received payment, the failure to give the notice required by paragraph (3) results in acceptance of the payment order by the receiving bank.

20. At the twenty-second session of the Working Group a proposal was made that where a receiving bank did not receive payment from the sender and failed to give a required notice of rejection, the bank would be obliged to compensate for loss of interest for a maximum of 7 days or for the period during which it held the funds, whichever was longer (A/CN.9/344, paras. 23 and 24). The proposal for the payment of interest was consistent with the consequences arising out of other failures to give notice covered by the same proposal. Since by hypothesis there would have been no funds in the possession of the receiving bank, unless they were received after the time when the notice of rejection should have been sent, the proposed sanction was effectively 7 days interest for failure to give the required notice of rejection. The proposed sanction was supported on the grounds that the duty to notify rejection of the payment order should be maintained as a matter of public policy so as to protect the sender, for example in the situation where a bank would unduly delay payment by refusing to make the appropriate entries in an account (A/CN.9/344, para. 31). In response, it was stated that where funds had effectively been sent to the receiving bank, the sender was sufficiently protected by the fact that the receiving bank would be regarded as having accepted

the payment order. As a result, the proposal was not adopted and no consequences are stated in the Model Law for the failure to give the required notice of rejection where the receiving bank has not received payment from the sender. However, the failure to give the required notice of rejection may have consequences for the receiving bank if its good faith or its care in handling the payment order is otherwise in question.

21. The text of article 5(1) (current article 6(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 at the nineteenth session deleted those words from the text, the deletion did not indicate a change in policy on the part of the Working Group. At the twentieth session the Working Group took note of the above statement, which had originally been made in A/CN.9/WG.IV/WP.44, comment 9 to article 5 (A/CN.9/329, para. 124). At the twenty-first session the Working Group adopted what is currently article 3, which gives the parties the power to vary any provision of the Model Law, unless specifically provided otherwise in the provision itself.

22. *Comparison with Article 4A.* As indicated in comment 15, although Article 4A does not require a notice of rejection, Article 4A-210*(b)* requires the receiving bank to pay interest to the sender if the bank fails to execute the order or give notice of rejection "despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order." While the provision applies whether the sender is a bank or not, it seems to be intended to apply primarily when the sender is a non-bank originator. No rule is given when the receiving bank has received payment in some other way but fails either to execute the order or to give notice of rejection.

Article 7. *Obligations of receiving bank that is not the beneficiary's bank*

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

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

(3) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the receiving bank shall give notice to the sender of the misdirection, within the time required by article 10.

(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10.

(5) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 10 if, in the time required by that article, it enquires of the sender as to the further actions it should take in light of the circumstances.

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

Prior discussion

A/CN.9/317, paras. 62 to 67 and 88 (seventeenth session, 1988)
A/CN.9/318, paras. 60 to 69, 121, 122 and 144 to 154 (eighteenth session, 1988)
A/CN.9/328, paras. 17 to 20 and 75 (nineteenth session, 1989)
A/CN.9/329, paras. 128 to 141 (twentieth session, 1989)
A/CN.9/344, paras. 26 to 35 (twenty-second session, 1990)

Comments

Paragraph (2)

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

2. *Comparison with Article 4A.* Article 4A-302*(a)*(1) is essentially the same in substance.

Paragraph (3)

3. Paragraph (3) is based on paragraph (2) as it emerged from the nineteenth session (A/CN.9/328, annex),

which in turn was based on the first sentence of article 5(1 *bis*) as it was adopted at the eighteenth session (A/CN.9/318, annex).

4. 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 to the incorrect bank. (Problems of misidentification of the beneficiary are considered in article 9(4).) The imposition of such a duty will help assure that the funds transfer system will function as intended (A/CN.9/318, para. 122). Although it was argued at the twenty-second session that there was no need for the Model Law to deal with misdirected payment orders since they were so rare in practice, it was replied that however rare misdirected payment orders might be, it was appropriate for the Model Law, as a matter of public policy, to protect the sender against the consequences of a misdirected payment order (A/CN.9/344, para. 26). Furthermore, it was said, misdirected payment orders were not that rare in international credit transfers, particularly when two banks had similar names.

5. The duty to notify the sender of a misdirection 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 and A/CN.9/344, para. 27). The duty to notify of a misdirection is, therefore, an objective duty arising out of the fact of misdirection and that the misdirection could be determined from the payment order.

6. As the result of a concern expressed at the nineteenth session that the bank might not be able to fulfil its obligation even if it wished to, paragraph (3) was modified to provide that the receiving bank is required to notify the sender only if the payment order "contains sufficient information to identify and trace the sender" (A/CN.9/328, para. 20). The words "and trace" were deleted at the twentieth session (A/CN.9/329, annex).

7. Paragraph (3) was retained at the twentieth session in spite of the argument that an excessive burden was being placed on the receiving bank, especially when the error was that of the sender (A/CN.9/329, paras. 129 to 131; see also A/CN.9/344, para. 32). In particular, it was said that when modern means of transmitting payment orders were used, the addressing of the payment order was done primarily by bank identification number and not by name.

8. The draft text of the Model Law prior to the twenty-second session contained a provision on misdirected payment orders received by the beneficiary's bank that was identical to article 7(3), except that the reference was to the beneficiary's bank. At the twenty-second session that provision in what is currently article 9 was deleted (A/CN.9/344, para. 120). It was noted that, although the term "beneficiary's bank" was not defined, it could refer only to the bank of the person designated in the originator's payment order (see definition of "beneficiary" in article 2*(d)*; but see comment 49 to article 2 and comments 4 to 6 to article 17). A bank to which a payment order was sent as the beneficiary's bank but that was not in fact the bank of the beneficiary as defined would have obligations under article 7(3) and not under article 9.

9. *Comparison with Article 4A.* Article 4A-208*(b)*(4) provides that "if the receiving bank knows that the name and number identify different persons", (person here means intermediary or beneficiary's bank) reliance on either one is a breach of the bank's obligations. However, Article 4A is more positive than is the Model Law in authorizing a receiving bank to rely on identification of another bank by number alone.

Paragraph (4)

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

11. *Comparison with Article 4A.* There is no equivalent provision in Article 4A, but the same result might be reached in some instances through Article 4A-208*(b)*.

Paragraph (5)

12. Paragraph (5) as adopted at the twentieth session (A/CN.9/329, annex) is essentially the same as paragraph (3) as adopted at the nineteenth session (A/CN.9/328, annex), which in turn was identical to article 3(1) as it was adopted at the eighteenth session (A/CN.9/318, paras. 60 to 69). If the amount is expressed in both words and figures and there is a discrepancy, the receiving bank is required to notify the sender. The obligation to notify exists whether or not the receiving bank has accepted the payment order. If the receiving bank does not give the required notice and it acts upon the incorrect amount, it is responsible for the consequences, even if it had no knowledge of the discrepancy.

13. At the twentieth session arguments were presented in favour of the rule that, in case of discrepancy, the traditional banking rule should be applied that words controlled over numbers (A/CN.9/329, paras. 133 to 135). Other arguments were presented in favour of the opposite rule that, in regard to modern electronic means of transmitting payment orders where the orders were processed by number, the numbers should control the words. Both arguments were rejected on the grounds that the current rule was a compromise and if a bank did process payment orders by number only, it could contract with its customers to that effect.

14. The rule is expressed in general terms to apply to payment orders between any sender and receiving bank. However, it was the expectation in the Working Group that paragraph (5) would apply in fact only between the originator and the originator's bank, since interbank payment orders in electronic form transmit the amount of the transfer in numbers only (A/CN.9/318, paras. 61 and 63).

15. The view was expressed in the twentieth session that the paragraph was too restricted in that the amount might be represented in clear text by numbers but might also be

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

16. *Comparison with Article 4A.* There is no equivalent provision in Article 4A. In some cases Article 4A-205 governing the security procedure for the detection of error would be applicable.

Paragraph (6)

17. Although a receiving bank is normally bound to follow any instruction in the payment order specifying an intermediary bank, funds transfer system or means of transmission, it may appear to the receiving bank that it is not feasible to follow the instruction 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 10.

18. Several more restrictive provisions were suggested at the twentieth session of the Working Group (A/CN.9/329, para. 139). One suggestion was that a receiving bank that had accepted a payment order that contained instructions should be required to follow those instructions unless it was impossible to do so. Another suggestion was that the receiving bank should be permitted to use a different funds transfer system or communications system under the conditions described in paragraph (6), but should be bound to use any intermediary bank specified by the sender. The reason given was that the sender was more apt to have reasons of its own, unknown to the receiving bank, for specifying an intermediary bank than for specifying a funds transfer system or communications system.

19. *Comparison with Article 4A.* Article 4A-302*(b)* contains essentially the same rule as does paragraph (6), except that a receiving bank may not choose an intermediary bank other than the one specified in the payment order received. The reason given in the Official Comments is that "The sender's designation of that intermediary bank may mean that the beneficiary's bank is expecting to obtain a credit from that intermediary bank and may have relied on that anticipated credit. If the receiving bank uses another intermediary bank, the expectations of the beneficiary's bank may not be realized. The receiving bank could choose to route the transfer to another intermediary bank and then to the designated intermediary bank if there were some reason such as a lack of correspondent bank relationship or a bilateral credit limitation, but the designated intermediary bank cannot be circumvented."

Article 8. *Acceptance or rejection by beneficiary's bank*

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

(a) when the time for [execution] under article 10 has elapsed without notice of rejection having been given, provided that: (i) where payment is to be made by debiting an account of the sender with the beneficiary's bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the amount of the payment order; or (ii) where payment is to be made by other means, acceptance shall not occur until the beneficiary's bank has received payment from the sender in accordance with article 5*(b)* or *(c)*,

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

(c) when it notifies the sender of acceptance,

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

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

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

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

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

Prior discussion

A/CN.9/297, paras. 46 to 51 (sixteenth session, 1987)
A/CN.9/317, paras. 80 to 84 (seventeenth session, 1988)
A/CN.9/318, paras. 110 to 120 and 135 to 143 (eighteenth session, 1988)
A/CN.9/WG.IV/WP.42, paras. 32 to 42 and 59 to 65 (submitted to the nineteenth session, 1989)
A/CN.9/328, 44 to 51, 59 and 60 (nineteenth session, 1989)
A/CN.9/329, paras. 142 to 147 (twentieth session, 1989)
A/CN.9/341, para. 53 (twenty-first session, 1990)
A/CN.9/344, para. 68 (twenty-second session, 1990)

Comments

1. As a result of the restructuring of the draft Model Law by the drafting group at the nineteenth session of the Working Group, the provisions on the acceptance or rejection of a payment order by the beneficiary's bank were placed in an article separate from that containing similar provisions in respect of a receiving bank that is not the beneficiary's bank. The changes made to article 5, currently article 6, at the twentieth session were also introduced into article 7, currently article 8. Consequently, the majority of the provisions are identical, with the exception of the way in which the bank is referred to, and the

comments to article 6 relative to use of the concept of acceptance and to paragraphs (2)*(a)*, *(b)*, *(c)* and (3) are applicable to article 8(1)*(a)*, *(b)*, *(c)* and (2). In particular, at the twenty-first session, when it made its decision that the credit transfer was completed when the beneficiary's bank accepted the payment order addressed to it, with the legal consequences that followed, "the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in [what are now] articles 6 and 8 . . ." (A/CN.9/341, para. 17).

2. Paragraph 1*(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 article 6(2) as adopted at the eighteenth session (A/CN.9/318, annex). At the twentieth session a suggestion was made, but was not acted upon, that subparagraphs *(d)* to *(g)* could be replaced by words to the effect "when the beneficiary's bank placed the funds at the disposal of the beneficiary" (A/CN.9/329, paras. 143 and 147).

3. At the nineteenth session the Working Group deleted from what is currently paragraph (1)*(d)* the words that had been in square brackets "[without reserving a right to reverse the credit if cover is not furnished]" (A/CN.9/328, para. 49). Those words recognized a practice in some countries to allow a receiving bank, including a beneficiary's bank, to give the credit party provisional credit awaiting the receipt of cover from the sending bank. (Compare last sentence of comment 7.)

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 reevaluate 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. At the twenty-second session the Working Group partially reversed its prior decision by which it did not approve of the granting of provisional credit when it recognized that a central bank might reverse a provisional credit (see article 5*(b)*(iii) and comment 21 to article 5). When the central bank is the beneficiary's bank, article 5*(b)*(iii) and article 8(1)*(d)* may be in conflict.

7. *Comparison with Article 4A.* Article 4A-209 makes a larger distinction than does the Model Law between the events leading to acceptance of a payment order by the beneficiary's bank and the events leading to acceptance of an order by any other receiving bank. Article 4A-209*(b)*(1) is substantially equivalent to subparagraphs *(c)* through *(g)* of this article. Article 4A-209*(b)*(2) and (3) base the acceptance of a payment order on when the beneficiary's bank is paid for the order, i.e., when it receives credit in its account at the Federal Reserve Bank, receives final settlement through a funds transfer system (e.g., CHIPS) or "the opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless . . ." The "unless" clause introduces the possibility of rejection of a payment order by the beneficiary's bank. Rejection of a payment order by the beneficiary's bank is not possible when the bank receives the order through FEDWIRE. In the case of CHIPS and as far as Article 4A is concerned, the beneficiary's bank can reject a payment order until it has accepted the order in one of the ways indicated above. Under Article 4A-405*(d)* and *(e)* it is possible for a beneficiary's bank to reverse its acceptance of a payment order under certain circumstances if a net settlement system is unable to complete the settlement.

Article 9. *Obligations of beneficiary's bank*

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

(2) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be [executed] because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 10.

(3) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the beneficiary's bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(4) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank shall give notice, within the time required by article 10, to its sender and to the originator's bank, if they can be identified.

(5) The beneficiary's bank shall on the [execution date] give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for

his benefit, if the bank has sufficient information to give such notice.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 89 to 92 (seventeenth session, 1988)
A/CN.9/318, paras. 64, 66 and 156 to 159 (eighteenth session, 1988)
A/CN.9/328, paras. 17 to 20 (nineteenth session, 1989)
A/CN.9/329, paras. 148 to 167 (twentieth session, 1989)
A/CN.9/344. paras. 26 and 27 (twenty-second session, 1990)

Comments

Paragraph (1)

1. The Working Group discussed at its nineteenth and twentieth sessions the issue of the extent to which the Model Law should be concerned with the relationship between the beneficiary and the beneficiary's bank (A/CN.9/328, paras. 37 to 43; A/CN.9/329, paras. 151 to 159; see A/CN.9/WG.IV/WP.42, paras. 58 to 68). The majority of the discussion at the nineteenth session related to the extent to which the Model Law should contain rules in respect of the civil consequences of the credit transfer as in current article 17, but the discussion was generally relevant to the question as to whether the Model Law should include rules on the obligation of the beneficiary's bank to the beneficiary in respect of the credit transfer. At the conclusion of the discussion at the nineteenth session the Working Group decided to defer any decision on the question until it had discussed the time when acceptance took place. It returned to the question at the twentieth session at which time the current text was adopted.

2. Paragraph (1) provides only that the funds must be placed at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary. The paragraph serves primarily as a reminder that the ultimate purpose of a credit transfer is to make funds available to the beneficiary.

3. A proposal to include a more detailed statement of the obligations of the beneficiary's bank to the beneficiary was rejected at the twentieth session (A/CN.9/329, paras. 151 to 153). The limited approach taken in paragraph (1) conformed to the general policy that the Model Law should set forth the rights and obligations of the parties up to the moment when the beneficiary's bank accepted the payment order. However, the Model Law should not enter into the account relationship between the beneficiary and the beneficiary's bank, including in respect of issues that are closely related to the credit transfer, such as whether the bank must give the beneficiary notice of receipt of the credit (A/CN.9/329, paras. 165 and 166; see comments 13 and 14 for the notice requirement when there is no account relationship and article 17(1), and comment 3 to that article, in respect of the relationship between beneficiary and beneficiary's bank on completion of the credit transfer).

4. Notice by the beneficiary's bank to the beneficiary that it has the right to withdraw the funds or use the credit (or any of the other actions set out in article 8(1)*(c)* to *(g)*) would constitute acceptance of the payment order, if the payment order had not already been accepted in some other manner. To that extent the Model Law gives legal significance to the notice, in addition to any legal significance it may have under other applicable rules of law. However, the Model Law leaves it to those other applicable rules of law to determine the circumstances when notice might be required. (Compare article 9(5) and comments 13 to 15 to that article.)

5. *Comparison with Article 4A.* Article 4A-404 specifies the obligation of the beneficiary's bank to pay to the beneficiary the amount of an order it has accepted. If the United States were to adopt the Model Law, Article 4A-404 would be the applicable law referred to in article 9(1).

Paragraphs (2) and (3)

6. The restructuring of the text by the drafting group at the nineteenth and twentieth sessions of the Working Group led to the duplication in article 9(2), and (3) of the text of article 7(4) and (5) with appropriate changes in the references to the relevant banks. Therefore, the comments to those paragraphs, including the references to Article 4A, are relevant to the corresponding paragraphs of article 9.

7. The word "executed" is placed in square brackets because as defined in article 2(1) it is not applicable to the actions of the beneficiary's bank. In this context the words "acted upon" might be appropriate. Furthermore, as to the time when the notice must be given, see comment 11 below and article 10, comment 15.

Misdirected payment orders

8. The draft text of article 8 (current article 9) prior to the twenty-second session contained a provision on misdirected payment orders that was identical to article 7(3), except that the reference was to the beneficiary's bank. At the twenty-second session the paragraph was deleted (A/CN.9/344, para. 120). It was noted that, although the term "beneficiary's bank" was not defined, it could refer only to the bank of the person designated in the originator's payment order (see definition of "beneficiary" in article 2*(d)*). The view was taken that a bank to which a payment order was sent with an indication that it was the beneficiary's bank even though it was not in fact the bank of the beneficiary as defined in article 2*(d)* would have obligations as a receiving bank to which a payment order had been misdirected under article 7(3) but would have no obligations under article 9. For further discussion of the question whether a definition of beneficiary's bank would be useful, see article 2, comments 49 and 50; article 7, comment 8; articles 12 to 15, comment 2 and article 17, comments 4 to 6.

Paragraph (4)

9. Paragraph (4) 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. There is no equivalent

provision in article 7 since 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.

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

11. 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 10(3), i.e., on or before the payment date. (For the meaning of "payment date" in this context, see article 10, comment 15.) 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.

12. *Comparison with Article 4A.* Article 4A-207 governs the problems covered in article 9(4). The provision is too complex to be summarized adequately here, but in general the beneficiary's bank is permitted to rely upon the number alone.

Paragraph (5)

13. Any duty to notify a beneficiary that had an account with the beneficiary's bank that a credit had been entered to its account could be left to their agreement or to the law applicable to the account relationship (comment 4). Although the originator or the sender may have an interest that the beneficiary's bank notify the beneficiary of the credit, that interest is not recognized in the Model Law (A/CN.9/329, para. 165).

14. However, there is unlikely to be a rule in the law applicable to the account relationship as to the obligation of the beneficiary's bank to notify a beneficiary who had no account relationship with the bank that the funds were available. Such a duty is set out in paragraph (5). The duty is owed to the sender and not to the beneficiary, since the Model Law does not in general enter into the relationship between the sender and the beneficiary (A/CN.9/329, paras. 165 and 166). Although paragraph (5) does not say so explicitly, the duty applies only if the beneficiary's bank has accepted the payment order. Furthermore, the duty applies only if the bank has sufficient information to give such notice. Contrary to the rule in article 10(3) in respect of the time when other required notices must be given, the notice specified in this paragraph must be given on the execution date (A/CN.9/329, para. 172). However, the words "execution date" are in square brackets since that date does not apply to a beneficiary's bank (A/CN.9/344, para. 116).

15. *Comparison with Article 4A.* Article 4A-404*(b)* provides that notice of receipt of a payment order instructing payment to an account of the beneficiary must be given by midnight of the next day but that "If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order." In both cases the obligation to give notice can be varied by agreement of the beneficiary or by a rule of a funds transfer system that is used in the transfer.

Beneficiary's right to reject credit transfer

16. At the twentieth session the Working Group decided that in principle the Model Law should provide that the beneficiary would have a right to reject the credit transfer (A/CN.9/329, para. 164). One of the participants was requested to prepare a text, which would deal with the time within which the beneficiary would be permitted to act and the costs of any credit transfer returning the funds. Although the participant did not submit a proposal, the Secretariat prepared the following provision for the consideration of the Working Group on the basis of an informal draft supplied by him. This proposal was not considered by the Working Group at either its twenty-first or twenty-second session. It is submitted for the possible consideration of the Commission.

"The beneficiary has the right to reject a credit transfer [even though the beneficiary's bank has accepted the payment order and even though the transfer was made to an appropriate account of the beneficiary] by notice to the beneficiary's bank before the close of the banking day following the day when the bank accepted the payment order, if

(a) the beneficiary's bank has not applied the credit in conformity with article 8(1)*(f)* or *(g)*,

(b) the beneficiary's bank has not applied the credit to an obligation owed by the beneficiary to the bank,

(c) when the beneficiary rejects the transfer, there is a credit balance in the account of an amount at least as much as the amount of the transfer, and

(d) the beneficiary's bank is not precluded by reason of insolvency or otherwise from repaying the amount of the transfer to its sender."

17. The rejection of the credit by the beneficiary should take place as soon as is feasible so as to reduce the risk to the originator. The beginning of the period during which the beneficiary might be permitted to reject the credit could be when the beneficiary's bank accepts the payment order, when the beneficiary's bank credits the beneficiary's account or otherwise applies the credit, or when the beneficiary receives notice of the transfer. Although the most logical time from the point of view of the beneficiary would be when notice of the transfer is received, the Model Law does not require that notice be given and banking law and practice vary greatly as to when notice might be given, or even whether notice of credit to an account is given. The proposal suggests that the rejection should have to be given by the end of the banking day following the day the beneficiary bank accepts the payment order. That is a very long period of time for high-speed, high-value credit transfers, but it is difficult to decide what might be an appropriate shorter time.

18. The proposal places several limitations on the beneficiary's right to reject the credit. The credit must not already have been specifically applied. The credit must still be available in the sense that there is a sufficient credit balance in the account. There might be a sufficient credit balance in the account when the payment order is rejected even though there had earlier not been a sufficient balance because in the meantime other credits have been made to the account. Unless the credit has been specifically applied, the proposal does not attempt to trace the credit on a first-in, first-out or other such basis. The credit must still be available only in the sense that the beneficiary's bank is in a position to repay the amount of the transfer to the sender. (Compare article 5, comment 11 in respect of the use of first-in first-out.) The beneficiary should not be able to place on the originator the risk that the beneficiary's bank became insolvent after it accepted a payment order for the beneficiary's benefit or that the outbreak of war or similar event reduced the value of the credit to the beneficiary's account.

19. Under article 13 the beneficiary's bank, like all receiving banks in the chain of the failed credit transfer, will have to refund to its sender the funds received from its sender.

20. *Comparison with Article 4A.* Article 4A has no provision allowing the beneficiary to reject a payment order by notifying the beneficiary's bank. Compare Article 4A-406*(b)* on the right of the beneficiary to refuse payment from the originator when the payment was made by a means prohibited by the contract of the beneficiary with respect to the obligation.

Obligation to make funds available on payment date

21. At the twentieth session the Working Group considered, but did not decide, the issue of whether the beneficiary's bank should have a duty either to its sender or to the originator to make funds available on a payment date specified in the payment order (A/CN.9/329, para. 167). Such a provision might be appropriate in spite of the general position taken in the Model Law that it does not concern itself with the relationship between the beneficiary and the beneficiary's bank. The duty to place the funds at the disposal of the beneficiary on a payment date specified in the payment order would seem to be owed to the sender of the payment order rather than, or in addition to any duty owed, to the beneficiary. Compare the duty owed to the sender to give notice to a beneficiary that does not have an account at the beneficiary's bank that funds have arrived (article 9(5) and comment 14).

Article 10. *Time for receiving bank to [execute] payment order and give notices*

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

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

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

(2) A notice required to be given under article 7(3), (4) or (5) shall be given on or before the day the payment order is required to be executed.

(3) A notice required to be given under article 9(2), (3) or (4) shall be given on or before the [payment date].

(4) 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.

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

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

Prior discussion

A/CN.9/297, paras. 65 to 68 (sixteenth session, 1987)
A/CN.9/317, paras. 94 to 107 (seventeenth session, 1988)
A/CN.9/328, paras. 76 to 91 (nineteenth session, 1989)
A/CN.9/329, paras. 168 to 183 (twentieth session, 1989)
A/CN.9/344, paras. 117 to 119 (twenty-second session, 1990)

Comments

1. Following the discussion at the nineteenth session of the Working Group of the draft of prior article 7, which had been prepared by the Secretariat for the eighteenth session, a new draft was prepared by a small group (A/CN.9/328, para. 88). Following discussion of the draft late in the nineteenth session, the small group further revised the draft article for discussion at the twentieth session, taking into account the restructuring of the draft Model Law being undertaken by the drafting group (A/CN.9/328, paras. 89 to 91). Article 9 was further revised at the twentieth session (A/CN.9/329, paras. 168 to 183) and at the twenty-second session (A/CN.9/344, paras. 117 to 119).

Title of article

2. The word "execute" has been placed in square brackets because the article may refer to the actions to be taken by the beneficiary's bank to implement the payment order received (see comment 3).

Purpose of paragraph (1)

3. The purpose of paragraph (1) is to state the time within which a receiving bank must execute a payment order; it is not intended to state an obligation to execute the order. By use of the word "execute", paragraph (1) is restricted to stating a time limit for action by all receiving banks other than the beneficiary's bank. That may be

appropriate in view of article 9(1), which provides that the extent to which the beneficiary's bank has an obligation to place the funds at the disposal of the beneficiary is determined by the applicable law governing the relationship between the bank and the beneficiary. However, if the Commission were to decide that the Model Law should have a provision stating a duty of the beneficiary's bank to the sender to place the funds at the disposal of the beneficiary on a payment date specified on the payment order, as suggested in comment 21 to article 9, it might be appropriate for article 10 to have a provision in respect of the time limit within which the beneficiary's bank would have to act.

Same day execution

4. The general rule stated in the *chapeau* to paragraph (1) is that a payment order is to be executed on the day the payment order is received. The Working Group has at all times accepted the appropriateness of the general rule. Such a rule might not have been appropriate when credit transfers, including international credit transfers, were paper based. However, the vast majority of international credit transfers are currently transmitted by electronic means, and especially by on-line data transfer. In such an environment rapid execution by the receiving bank should normally be expected (A/CN.9/329, paras. 176 and 177). The appropriateness of this short period of time for execution of a payment order was again questioned at the twenty-second session where it was said that such a general rule would put an excessive burden on the banks. It was also stated that there might be good reasons why payment orders would not be executed on the day when they had been received, particularly in the case of paper-based payment orders. However, the general rule of same-day execution was maintained (A/CN.9/344, para. 117).

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

6. The second is the general rule that a receiving bank is not required to execute any payment order it receives simply by virtue of its reception (article 6, comment 7). Therefore, the obligation to execute the payment order by a certain time arises only if the receiving bank has accepted the order pursuant to article 6(2) or, if a requirement to make the funds available on a payment date specified in the payment order received by the beneficiary's bank is included in the Model Law, pursuant to article 9(1). A particularly important application of this rule is that, since a bank does not accept a payment order for failure to give notice of rejection under article 6(2)*(a)* or 8(1)*(a)* until the bank has received payment from the sender (even though article 4(6) does not require the sender to pay the receiving bank for the payment order until the receiving bank accepts it), 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 10(1). It would be in breach of those obligations if it had agreed with the sender that it would execute payment orders from the sender upon receipt, since in such situations the receiving bank would have accepted the payment order when the order was received (articles 6(2)*(b)* and 8(1)*(b)*).

7. The third mitigating rule, which is found in paragraph (4), recognizes that banks establish cut-off times for the processing of payment orders for same-day execution. There may be different cut-off times for different types of payment orders, and a bank might establish its cut-off time for certain types of payment orders by adhering to the rules of a funds transfer system. Any order received after the cut-off time is treated as having been received the following day the bank executes that type of payment order. There is no limit on the discretion of a bank (or funds transfer system) in establishing a cut-off time, and it is not unusual for cut-off times to be as early as noon (A/CN.9/329, para. 178), and it might be as early as the opening of the funds transfer day. Such an early cut-off time might be reasonable where the bank's computer, or that of a funds transfer system, had been open all night to receive payment orders.

8. The fourth mitigating rule, which is found in paragraph (6), is that a branch or separate office of a bank, even if in the same State, is treated as being a separate bank for the purposes of article 10. 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 might require 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. Although the general rule requires the receiving bank to execute the payment order on the day it was received, subject to the mitigating rules mentioned above, there are two special cases in which the receiving bank is required to or permitted to execute the payment order on a different date. In the first case mentioned in paragraph (1)*(a)*, the payment order specifies a later date as the execution date. It should be noted that the provision is quite clear in saying that the payment order is to be executed on the date specified and not before that date, since the sender may have strong reasons for not wishing earlier execution (A/CN.9/328, para. 78). If the word "executed" continues to be used, the provision applies only to a receiving bank that is not the beneficiary's bank. However, it would seem that the rule in paragraph (1)*(a)* should also apply to the beneficiary's bank.

10. The second special case set forth in subparagraph (1)*(b)* is when a receiving bank that is not the beneficiary's bank receives a payment order specifying a payment date. That payment date tells the receiving bank how much time it has to be sure that the beneficiary's bank will receive the payment order in time to accept it and place the funds at the disposal of the beneficiary on the payment date. In some cases, the payment date may be so soon that it requires the receiving bank to take special care that the means of transmission of the payment order to the beneficiary's bank is such that the payment date can

be respected. In other cases the payment date will be far enough in the future that the receiving bank need not execute the order on the day it was received.

Derogation by contract

11. In response to a suggestion made at the twentieth session that the sender and the receiving bank should be able to derogate from the provisions of paragraph (1) by agreement, it was stated that such a possibility would make it impossible for orginator's banks to predict how long international credit transfers would take when they had to go through several intermediary banks (A/CN.9/329, para. 180). However, with the adoption of what is currently article 3 at the twenty-first session, the parties are free to derogate from any provision of article 10. Consequently, at the twenty-second session the same concern that the originator's bank could not know what agreements there might be between subsequent banks in the credit transfer chain derogating from the general rules stated in current article 10(1) led to a suggestion that the provisions of article 10(1) should be mandatory (A/CN.9/344, para. 119). Another suggestion was that derogation from the provisions of article 10(1) should be possible only between the originator and the originator's bank. Finally, however, no change was made in the general policy of freedom of contract as applied to article 10(1).

Paragraphs (2) and (3)

12. Prior to the twenty-second session, article 9(2) provided the general rule as to when all receiving banks, including the beneficiary's bank, had to give required notices; the notice had to be given the day the payment order was received.

13. Former article 9(2), as well as current article 10(2) and (3), made an exception for two cases: (i) the notice of rejection of a payment order required by current articles 6(3) and 8(2), and (ii) the notice by the beneficiary's bank to a beneficiary that does not maintain an account at the bank that the bank is holding funds for its benefit required by current article 9(5). Those provisions contain their own time limits.

14. At the twenty-second session the drafting group separated the former paragraph (2) into two provisions. The current paragraph (2) applies only to a receiving bank that is not the beneficiary's bank. The drafting group, implementing a decision of the Working Group, also changed the date when notices had to be given by such a receiving bank to "on or before the day the payment order is required to be executed". This change is particularly applicable when the payment order contains an execution date that is in the future, since the receiving bank should have no obligation to examine or process payment orders for the purpose of giving timely notice under the Model Law earlier than the bank would be obliged to examine or process those payment orders for the purpose of executing them (A/CN.9/344, para. 118).

15. In respect of the beneficiary's bank in paragraph (3), the same reasoning led the drafting group to make the deadline the "payment date". However, it is clear that the payment date as defined in article 2*(m)* is not the correct term to be used. Therefore, the Working Group left the term in square brackets.

Paragraph (4)

16. As noted in comment 7, banks often establish a cut-off time after which a payment order received is considered to have been received on the following day. The cut-off time may differ for different types of payment orders. They may be established by unilateral action by the bank or by interbank agreements, and especially by the rules of a clearing-house or other funds transfer system. Paragraph (4) places no limitation on how early in the day the cut-off time can be.

17. Since paragraph (4) is intended to apply to beneficiary's banks as well as to other receiving banks, the word "executes" is not appropriate. One possibility would be to substitute the words "acts upon".

Paragraph (5)

18. The use of the word "executes" is also not completely appropriate in paragraph (5), which is also intended to apply to beneficiary's banks. As in paragraph (4), it would be possible to use the correct grammatical form of the words "acts upon".

19. *Comparison with Article 4A.* Articles 4A-301*(b)* and 4A-302*(a)* in combination are substantially the same as paragraph (1). Since there are no notice requirements that are the equivalent of the ones referred to in paragraphs (2) and (3), there are no time limits equivalent to paragraphs (2) and (3). Article 4A-106 is substantially the same as paragraphs (4) and (5).

Article 11. *Revocation*

(1) A payment order may not be revoked by the sender unless the revocation order is received by a receiving bank other than the beneficiary's bank at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act before the later of the actual time of execution and the beginning of the execution date.

(2) A payment order may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner sufficient to afford the bank a reasonable opportunity to act before the later of the time it accepts the payment order or the beginning of the payment date.

(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) A revocation order must be authenticated.

(5) A receiving bank other than the beneficiary's bank that executes or a beneficiary's bank that accepts a payment order that has been revoked is not entitled to payment for that payment order and, if the credit

transfer is completed in accordance with article 17(1), shall refund any payment received by it.

(6) If the recipient of a refund under paragraph (5) is not the originator of the transfer, it shall pass on the refund to the previous sender.

(7) If the credit transfer is completed in accordance with article 17(1) but a receiving bank [executed] a revoked payment order, the receiving bank has such rights to recover from the beneficiary the amount of the credit transfer as are otherwise provided by law.

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

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

Prior discussion

A/CN.9/297, paras. 79 and 92 to 95 (sixteenth session, 1987)
A/CN.9/317, paras. 68 and 120 to 133 (seventeenth session, 1988)
A/CN.9/328, paras. 92 to 116 (nineteenth session, 1989)
A/CN.9/329, paras. 184 to 186 (twentieth session, 1989)
A/CN.9/344, paras. 86 to 101 (twenty-second session, 1990)

Comments

1. Article 11 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. A further discussion took place at the twenty-second session as to whether, as a matter of principle, payment orders should be revocable or irrevocable (A/CN.9/344, paras. 86 and 87). Besides the arguments based on the ease or difficulty of operating a modern credit transfer system when payment orders were revocable, the Working Group considered certain legal effects of adopting one principle or the other. It noted that in either case a number of exceptions to the general principle would be necessary, rendering the practical results similar in the two cases. However, under several legal systems, exceptions to a general rule are construed restrictively by the courts. Furthermore, the general rule might determine, in the case of litigation, whether the sender of a revocation order or the receiving bank would bear the burden of proof as regards, for example, the time when the revocation order was received. At the end of the discussion the Working Group decided to adopt the principle of irrevocability, which is expressed by paragraphs (1) and (2) (A/CN.9/344, para. 89). At the end of its discussion of the entire article it noted that a new text of article 11 would be necessary in the light of the numerous decisions it had taken and referred the matter to the drafting group, which prepared the current text (A/CN.9/344, para. 99).

3. 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 11 refers only to the revocation of payment orders and no provision is made for their amendment. The Working Group did not consider a suggestion made in the working paper submitted to the twenty-second session that the text was not clear that revocation of a part of a payment order would not be effective (A/CN.9/WG.IV/WP.49, article 10, comment 3).

4. At the twentieth session the Working Group took note of a proposal that would terminate the right to revoke a payment order once it had been received by the receiving bank, but which would also have permitted a receiving bank that was not the beneficiary's bank to cooperate with the request of the sender, regardless of whether or not the payment order had been accepted, and would have permitted a beneficiary's bank to so cooperate if it had not already accepted the payment order (A/CN.9/329, paras. 184 to 186). No action was taken at the twentieth session, since it had been agreed that the discussion of what is currently article 11 at that session was to be only exploratory. The proposal was resubmitted to the twenty-second session, but was rejected because it would have stated the principle of irrevocability of payment orders in a more radical manner than was desired (A/CN.9/344, para. 88).

Paragraphs (1) and (2)

5. 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 in question; 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.

6. 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. While sending its own order would also constitute acceptance of the order received, other forms of acceptance under article 6(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 8(1) (A/CN.9/344, para. 89).

7. The receiving bank is given a certain period of time to act upon the revocation received. This period must "afford the receiving bank a reasonable opportunity to act" before the cut-off event (A/CN.9/328, paras. 96 and 116; A/CN.9/344, para. 90). The length of the period as so defined is by its nature indefinite, since it depends on the ability of the receiving bank to act. 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.

8. A concern that had been expressed at the nineteenth and twentieth sessions, and that was repeated at the twenty-second session, was that a sender of a payment order with a future execution date should not lose any right of revocation that it might have by the premature execution of the payment order (A/CN.9/328, para. 78; A/CN.9/329, paras. 168 and 169; A/CN.9/344, para. 91). Therefore, in the revision of the article at the twenty-second session the cut-off event became the "later of the actual time of execution and the beginning of the execution date" in the case of a receiving bank that is not the beneficiary's bank and the "later of the time [the bank] accepts the payment order or the beginning of the payment date" in the case of the beneficiary's bank. In this case the term "payment order" is used as defined in article 2*(m)*.

Paragraph (3)

9. 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) would apply to the rules of a clearing-house that prohibited revocation of a payment order once sent to the clearing-house if, under the applicable law, the rules of the clearing-house were considered to be an agreement between the sender and the receiving bank. Paragraph (3) does not apply to a restriction in a telecommunications message system, such as SWIFT, 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).

10. When paragraph (3) was introduced at the nineteenth session of the Working Group, what is currently article 11 contained a paragraph (4) that allowed a sender whose revocation had arrived too late to require its receiving bank to attempt to revoke the receiving bank's payment order sent in execution of the payment order received. The introduction of paragraph (3) caused concern 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. Although former paragraph (4) was deleted at the twenty-second session, a receiving bank that received a late revocation could still endeavor to revoke its own payment order if it wished (A/CN.9/344, para. 94). Since an originator no longer has the right to have the different receiving banks in the credit transfer chain attempt to revoke their own payment orders until either a relevant payment order is revoked or until the beneficiary's bank accepts an order completing the credit transfer, the concern expressed at the nineteenth session in regard to paragraph (3) is currently of less importance.

11. At the twenty-first session the Working Group adopted what is currently article 3, which provides for a general freedom of contract "except as otherwise provided in this law". Although article 3 would seem to render paragraph (3) redundant, it was retained by the Working Group at the twenty-second session (A/CN.9/344, para. 93).

12. *Comparison with Article 4A.* Article 4A-211 permits cancellation of a payment order, as well as its amendment, until the order has been accepted. A receiving bank that is not the beneficiary's bank can agree to cancel or amend an order it has received even after it has accepted the order, or can be bound to do so by a funds transfer system rule, but the bank must be able to cancel any order it has issued in execution of the order it received. A beneficiary's bank can agree, or be required by a funds transfer system rule, to cancel or amend an order that was issued in execution of an unauthorized payment order or was issued as a result of one of several types of error by the sender. Article 4A-211*(h)* places a minor restriction on the general right to vary by agreement all rights and obligations, which is otherwise available under Article 4A-501. Article 4A-209*(d)* provides that a payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or until the execution date if the bank is not the beneficiary's bank; therefore, until the payment date or execution date, the payment order can be cancelled. Those provisions in Article 4A cover essentially the problems covered in paragraphs (1) to (3) of article 11.

Paragraph (4)

13. Prior to the twenty-second session paragraphs (1)*(c)* and 2*(c)* provided that the revocation had to be authenticated in the same manner as the payment order. That implied that the revocation had to be sent by the same means of communication as was the payment order. When that 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).

14. At the twenty-second session the paragraph was changed to indicate simply that the revocation must be authenticated (A/CN.9/344, para. 95).

Paragraph (5)

15. Paragraph (5) provides 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 it would otherwise be under article 4(6), 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; see article 13, comment 16 and article 17, comments 17 to 19). It may be thought that a sender who has a right to a refund under paragraph (5) 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, as it would for a refund under article 13 (see article 13, comment 15).

16. At the twenty-second session a question was raised whether paragraph (5) was necessary since the sender would be refunded any payment it had already made to the receiving bank under article 13 (A/CN.9/344, para. 96). Although no reason was given in the report of the session for the retention of the paragraph, it may be noted that article 13(1) applies only if the credit transfer is not completed under article 17(1). The Working Group was of the view that the credit transfer is completed when the conditions of article 17(1) are met, even though an instruction to revoke one of the payment orders in the credit transfer chain was received in time but was not acted upon by the receiving bank (see paragraph (7)). Paragraph (5) was, therefore, necessary.

Paragraph (6)

17. Once it is decided that the refund arising out of a revocation under article 11 is not to be governed by article 13, it is also necessary to provide a mechanism to pass the benefit of the refund received under paragraph (5) to the previous sender and ultimately to the originator in those cases when the revoking sender of the payment order in question is not the originator.

18. The provisions of paragraph (6) cannot be applied where the sender revoked its payment order because it realized that it had made a mistake by sending the order to the incorrect bank or for the credit of an incorrect beneficiary. Assuming that the bank sent a second and correct payment order, it would be authorized to keep the refund it received under paragraph (5).

Paragraph (7)

19. In the normal case when a credit transfer is completed but a receiving bank has to make a refund to its sender under paragraph (5), the amount of the credit transfer should be recoverable from the beneficiary (A/CN.9/344, para. 97). The rightful claimant would be the bank that failed to act on the revocation order. That bank might be the beneficiary's bank or any prior receiving bank, including the originator's bank. However, there may be valid reasons why the beneficiary should be able to retain the funds received. One such reason might be that the originator owed the beneficiary an amount of money that the credit transfer was originally intended to discharge. Since the subject raises difficult questions that go beyond the law of credit transfers, and those questions are solved quite differently in various legal systems, paragraph (7) simply refers the receiving bank to "such rights to recover from the beneficiary the amount of the credit transfer as are otherwise provided by law" (compare articles 12 to 15, comment 27).

20. A receiving bank that has had to refund the amount of the credit transfer to its sender under paragraph (5) but is not able to recover the amount of the transfer from the beneficiary, may have a claim against its sender or the originator for reimbursement of the refund. That might especially be the case where the beneficiary was able to retain the credit in discharge of an obligation owed to it by the originator. However, the Model Law leaves any such questions to the rules of law outside the Model Law itself.

21. The word "executed" has been placed in square brackets because, in the light of paragraph (5), it seems clear that paragraph (7) is meant to apply to the beneficiary's bank as well. Paragraph (7) might be amended to be parallel to paragraph (5), i.e. "If the credit transfer is completed in accordance with article 17(1) but a receiving bank other than the beneficiary's bank executed or the beneficiary's bank accepted a payment order that had been revoked, the bank has such rights . . ."

22. To some degree paragraph (7) is a replacement for article 8(7) as it was adopted at the eighteenth session (A/CN.9/318, annex), which was subsequently deleted by the Working Group at its nineteenth session (A/CN.9/328, para. 106). That provision would have given the beneficiary's bank a right to reverse a credit entered to the beneficiary's account that met certain objective criteria of being the result of an error or fraud. For the origin of prior article 8 see A/CN.9/297, para. 79 and A/CN.9/317, para. 68. The current text of paragraph (7) is severely restricted in its field of application compared to the earlier provision.

23. *Comparison with Article 4A.* If the revocation is acted upon so that the credit transfer is not completed, Article 4A-402*(c)* and *(d)* (the equivalent of article 13 of the Model Law) requires the refund to the sender of any payment received. Article 4A-211*(c)*(2) provides that a beneficiary's bank that accepts a cancelled payment order is authorized "to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution", that is, the same reference to the law outside the statute governing the credit transfer is made in Article 4A as is made in the Model Law. No similar right seems to accrue to a receiving bank other than the beneficiary's bank if the credit transfer is

completed, although such a right may be available anyway under the "law governing mistake and restitution".

Paragraph (8)

24. In order to make the provision clearer and to assure that the word "bankruptcy" is not understood in a restricted sense (as in English law where it is restricted to personal insolvency), the second sentence was added at the twenty-second session. See the proposal of the United Kingdom in the working paper submitted to the twenty-second session, A/CN.9/WG.IV/WP.49, article 10, comments 28 and 29.

25. *Comparison with Article 4A.* Article 4A-211*(g)* provides as follows:

"A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order."

Rejected proposal

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

27. Such a proposal was originally presented to the nineteenth session but was considered and rejected only at the twenty-second session (A/CN.9/344, paras. 100 and 101). The proposal was as follows:

"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."

28. In support of the proposal, it was stated that considerable disruption of the banking system might result from the execution of court orders that attempted to affect a credit transfer in process. Therefore, it was considered important to restrict the possibility of executing a court order to the two ends of the credit transfer and to state that no action would be available against an intermediary bank. In reply it was stated that it would be improper for the Model Law to include rules governing judicial procedure. It was also stated that there was no reason why the sender of an unsuccessful revocation order should be prevented from using any means that might be available under the applicable law to stop the execution of the credit transfer.

29. *Comparison with Article 4A.* The proposal is identical to Article 4A-503, except for the last clause which is not found in article 4A.

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

Article 12. *Duty to assist*

If the credit transfer is not completed in accordance with article 17(1), each receiving bank is obligated to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the credit transfer.

Article 13. *Duty to refund*

(1) If the credit transfer is not completed in accordance with article 17(1), the originator's bank is obligated to refund to the originator any payment received from it, with interest from the day of payment to the day of refund. The originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund.

(2) The provisions of paragraph (1) may not be varied by agreement. However, a receiving bank shall not be required to make a refund under paragraph (1) if it is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund. The sender that first specified the use of that intermediary bank shall have the right to obtain the refund from the intermediary bank.

Article 14. *Correction of underpayment*

If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted, it is obligated to issue a payment order for the difference between the amounts of the payment orders.

Article 15. *Restitution of overpayment*

If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is greater than the amount of the payment order it accepted, it has such rights to recover from the beneficiary the difference between the amounts of the payment orders as are otherwise provided by law.

Prior discussion

A/CN.9/318, paras. 151 to 154 (eighteenth session, 1988)

A/CN.9/328, paras. 54 to 58 (nineteenth session, 1989)

A/CN.9/341, para. 56 (twenty-first session, 1990)
A/CN.9/344, paras. 44, 45 and 102 to 111 (twenty-second session, 1990)

Comments

1. Articles 12 to 15 set forth the basic obligations of a receiving bank to rectify the situation if problems arise in the implementation of a credit transfer. The original formulation of the obligations was set out in article 5(3)*(b)* and *(c)* as it was drafted during the eighteenth session (A/CN.9/318, para. 154). At the nineteenth session the text was transferred to article 11 (A/CN.9/328, annex). At the twenty-second session the original two paragraphs of article 11 were divided by the drafting group into four separate articles (A/CN.9/344, annex).

2. Articles 14 and 15 are applicable only if the credit transfer is completed in accordance with article 17(1) while articles 12 and 13 are applicable only if the credit transfer is not completed in accordance with article 17(1). Article 17(1) gives a clear rule as to when a credit transfer is completed in the normal case, i.e. when the beneficiary's bank accepts the payment order. Therefore article 17(1) also gives a clear rule in the normal case as to whether a credit transfer has not been completed. However, there are certain types of errors that can be committed by the originator or by one of the banks in the credit transfer chain that raise a question as to whether the payment order has been accepted by the "beneficiary's bank" (see article 17, comments 4 to 6) and, therefore, whether the credit transfer has been completed.

Article 12

3. The context of article 12 makes it clear that the duty to assist arises when the credit transfer has not yet been completed, although it should have been, and the originator still expects the transfer to be carried out.

4. 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 article 12 by taking the necessary actions itself, although in such a case resort to article 12 might not be necessary. For example, if a receiving bank had misdirected its own payment order, it would continue to be obligated under article 7(2) to send a payment order consistent with the order it had received (A/CN.9/344, para. 103). The receiving bank would fulfil that duty only by sending a new payment order. Article 12 on the other hand is primarily directed to the situation where the credit transfer has been delayed or an error has been made at another bank in the credit transfer chain and the originator or the sender have requested the assistance of the receiving bank. Article 12 might, for example, require the receiving bank to find out where the problem had occurred or to send new instructions to the subsequent bank.

5. An objection was raised at the twenty-second session that the duty the article sought to create was unclear in content and of uncertain utility since no remedy had been proposed by which the breach of the duty might be appropriately redressed (A/CN.9/344, para. 104). In reply it was said that even if the duty was not specifically enforceable by a clear sanction, it would establish a norm for conduct and might, in egregious cases, be enforced by a court's application of general principles of law concerning the breach of a statutory duty. (See, however, article 16(8), which provides that the remedies in article 16 are exclusive, with an exception that would not normally apply to the failure to act in accordance with article 12.)

6. *Comparison with Article 4A.* There is no equivalent provision in Article 4A.

Article 13

7. Article 13 sets forth one of the most important rules in the draft Model Law; if the credit transfer is not completed in accordance with article 17(1), the originator has a right to a refund of any payment it has made to the originator's bank under article 4(6). A consequential rule is that the originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank.

8. The context of article 13 makes it clear that the duty to refund arises only when it is evident that the credit transfer will never be completed.

9. The most typical reason a credit transfer is not completed is that one of the senders in the credit transfer chain has revoked the payment order under article 11 (A/CN.9/344, para. 96). Other reasons why a credit transfer is not completed successfully are (1) that the identification of the beneficiary or of the beneficiary's bank is incorrect on one of the payment orders in the credit transfer chain by reason of error or fraud, (2) that the imposition of currency restrictions prevents the transfer from being made, (3) that for some reason a transfer cannot be made to the beneficiary's bank or to the country where the beneficiary's bank is located, (4) that the beneficiary's bank refuses to accept the payment order addressed to it or (5) that 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.

10. The obligation of the originator's bank to the originator and the obligation of each receiving bank to its sender to return the payment received if the credit transfer is not completed is absolute. 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 credit transfer chain and to bear the risk that the reimbursement could not be fully recovered. As it is, under article 13 if a credit transfer is not completed and any receiving bank is not able to reimburse its sending bank promptly, perhaps because of the

insolvency of the receiving bank or because of the cessation of payments between the two States concerned, the sending bank to that non-reimbursing receiving bank would bear the loss or suffer the delay in reimbursement. Such a non-reimbursing receiving bank would normally be an intermediary bank, and that is the case envisaged in article 13. It would be the beneficiary's bank only if the bank had received payment for the order from its sender but had not accepted the payment order, a situation that would rarely arise.

11. The policy that lies behind article 13 was reaffirmed at the twenty-second session after long discussion (A/CN.9/344, paras. 105 to 108). In opposition to the policy it was said that the risk that was placed on the originator's bank and on each intermediary bank in the credit transfer chain that it might have to reimburse its sender even though it could not get reimbursement from its receiving bank was a new risk for banks, since in certain countries it had been borne in the past by the customers. It was said that the new risk would not be overly burdensome to large banks with foreign branches; those banks would route most international credit transfers through their branches. The banks that would most often have to run the risk would be small and middle-sized banks that had to route international credit transfers through correspondent banks in foreign countries. It was said that this would be of particular concern for banks in developing countries.

12. It was also stated that the increased risk for an originator's bank might give rise to new concerns by banking regulators who were increasingly aware of, and interested in, reducing systemic risk. Examples given raised the possibility that deposit insurance or reserve requirements might be changed to address risks such as that which article 13 placed upon banks. It was also questioned whether banks might be required to provide capital support for that risk under the Basle Accord. In response, it was stated that at least one country that operated large value credit transfer systems had implemented a rule equivalent to article 13 without serious repercussions. The analysis carried out in that country by the bank supervisory authorities had led to the conclusion that the duty to refund to the originator did not raise issues under the Basle Accord, or serious risks of new contingent liabilities threatening the banks.

13. As a further argument in support of article 13, it was pointed out that the adoption of the provisions in article 5*(b)*(iv) recognizing bilateral and multilateral netting agreements, an action that had been taken earlier in the twenty-second session, would lead to a significant reduction in the credit risk that otherwise would exist in respect of those transactions (A/CN.9/344, para. 107). It was said that the reduction in risk that would result from the implementation of such agreements had been estimated to be between 50 and 80 per cent. As a result, even with the increased risk for banks that might arise out of article 13, the general effect of the Model Law would be to decrease risks to banks rather than to increase them.

14. At the close of the discussion, when the decision to maintain article 13 was taken, the Secretariat was requested to send a copy of the report of the twenty-second session of the Working Group to the Bank for International Settlements (BIS) for its information (A/CN.9/344, para. 108). The Secretariat has sent a copy of the report as requested.

15. Article 13 as adopted at the twenty-second session provides that the refund from the originator's bank to the originator and from a receiving bank to its sender shall be "with interest from the day of payment to the day of refund". The day of payment is the day the sender, whether originator or sending bank, paid its receiving bank. Similarly, the day of refund is the day the receiving bank, whether the originator's bank, an intermediary bank or the beneficiary's bank, refunded to its receiving bank. As a result, the interest received by a bank from its receiving bank will almost always be less than the interest it is obligated to refund to its sender. The difference between the two is the interest on the funds for the amount of time the funds were in the possession of that bank. This accords with the theory of the provisions in article 16 on the payment of interest for late payment, i.e. that neither the banking system as a whole nor any individual bank in the credit transfer chain should profit from the use of customer's funds arising from inefficiencies or from errors in that or in any other bank (A/CN.9/341, para. 118; A/CN.9/344, paras. 44 and 45).

16. 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). At the twenty-first session it was decided that current article 17 should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20; see article 17, comments 17 to 19). The issue as to whether the costs of the transfer and of the refund should be borne by the originator were not discussed at the twenty-second session when article 13 was adopted in its current form. However, the fact that the issue was before the twenty-second session of the Working Group in the working paper submitted by the Secretariat (A/CN.9/WG.IV/WP.49, article 11, comment 11) would suggest that the failure to discuss the question of costs was done knowingly.

Paragraph (2)

17. It was decided at the twenty-second session that the provisions of article 13 should be mandatory (A/CN.9/344, paras. 109 and 110). During the discussion leading to that decision the concerns that had previously been expressed about the very principle of article 13 were reiterated. In particular, it was pointed out that the originator might specify that the credit transfer was to be carried out through a particularly unreliable intermediary bank or a particularly unstable country. One suggestion was that, since the refund mechanism set forth in article 13 could be compared to insurance or a guarantee that the credit transfer would be completed, it would create a cost for the bank for which the bank should be able to charge. An originator might then wish to choose a less expensive method of transfer in which the risk that the credit transfer could not be completed and the principal amount of the transfer

could not be recovered would be knowingly borne by the originator. That suggestion, which would have been contrary to the principle that article 13 should be mandatory, was not implemented.

18. Another suggestion was that, where the originator specified that the credit transfer was to be carried out through a particularly unreliable intermediary bank or a particularly unstable country, the originator's bank should have the possibility to conclude a special agreement shifting the responsibility of the transfer to the originator (A/CN.9/344, para. 109). In reply it was stated that the Model Law should not allow easy derogation of the refund obligation, especially by means of a bank's standard terms of dealing.

19. Paragraph (2) as formulated by the drafting group at the twenty-second session, implementing the decision of the Working Group (A/CN.9/344, para. 110), states that the refund provided in paragraph (1) need not be made if the bank "is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund". The use of the word "directed" seems to cover every case in which the payment order received by the bank specified use of the intermediary bank in question.

20. Such an interpretation would seem to lead to the result that no refund need be given in some cases beyond those that had been envisaged in the Working Group. One such case would be where the choice of the intermediary bank that failed was contained in the originator's payment order but that bank had originally been chosen by the beneficiary's bank, which had informed the beneficiary of the bank to be used. The beneficiary's bank might have indicated the intermediary bank in question because it wished to receive all payment orders of a particular type through that bank or because it wished to receive credit at that bank (see article 7(6) and comments 19 and 20 to article 7). As far as article 13 would be concerned, no refund would be due to the originator, since the originator would have specified to the originator's bank the intermediary bank to be used. The originator would have to claim against the beneficiary, who in turn would have to claim against the beneficiary's bank as the original source of the decision to use the intermediary bank that failed.

21. The duty to make a refund might also be excluded in a case where an originator's bank systematically caused all or the majority of its customers to "direct" the bank as to the routing to be used to effect the credit transfer. There are a number of ways in which an originator's bank might act to cause its customers to give it directions systematically. Such a practice would seem to be against the policy expressed in the Working Group that a derogation from the obligation to make a refund should not be easy, especially by means of a bank's standard terms of dealing (A/CN.9/344, para. 109).

22. If the Commission is in agreement, it might wish to consider adding a new sentence between the second and third sentences of paragraph (2) as follows:

"A receiving bank is not considered to have been directed to use the intermediary bank unless the receiving bank proves that it does not systematically cause the type of senders or payment orders involved in the transfer to instruct it as to the intermediary bank or banks to be used."

23. If relatively few of the payment orders that the bank receives from its customers designate an intermediary bank, the receiving bank would normally have carried its burden of proof. However, the bank may cause only certain customers, such as originators, to name the intermediary bank to be used or it may cause its senders to name the intermediary bank to be used only in respect of certain types of payment orders, such as those over a certain amount. If the sender claimed that the receiving bank systematically did so, under the proposed sentence the receiving bank would have to prove that it did not.

24. *Comparison with Article 4A.* Article 4A-402*(c)*, *(d)* and *(e)* are essentially equivalent to article 13.

Article 14

25. Articles 14 and 15 make it clear that at least in some cases a credit transfer can be completed under article 17(1) when a payment order is accepted by the beneficiary's bank even though the payment order is inconsistent with the originator's order in some respect. Article 14 deals with the situation where the payment order is for too small an amount. In such a case, the receiving bank where the error occurred is obligated to issue a payment order for the difference between the amounts of the two orders.

26. Article 14 does not provide that the bank is to pay interest to its receiving bank or to the beneficiary on the underpayment. Article 16(5) does provide for such interest, but only to the extent that the late payment "is caused by the receiving bank's improper action" (see article 16, comment 32).

Article 15

27. In most cases where the amount of the payment order accepted by the beneficiary's bank is greater than the amount of the originator's payment order, the beneficiary's bank will be authorized by the beneficiary to debit its account for the overpayment and to return the funds to the bank that made the error. Where the beneficiary does not authorize the debit to its account, article 15 gives the bank that made the error the right to recover from the beneficiary the difference between the amounts of the two payment orders. However, since the beneficiary may have valid reasons to keep the entire amount that was credited to its account, article 15 gives the bank the right to recover only as "otherwise provided by law" (compare article 11, comments 19 and 20).

Article 16. *Liability and damages*

(1) A receiving bank other than the beneficiary's bank is liable to the beneficiary for its failure to execute its sender's payment order in the time required by article 10(1), if the credit transfer is completed under article 17(1). The liability of the receiving bank shall

be to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure. Such liability may be discharged by payment to its receiving bank or by direct payment to the beneficiary.

(2) If a receiving bank that is the recipient of interest under paragraph (1) is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to the next receiving bank or, if it is the beneficiary's bank, to the beneficiary.

(3) A receiving bank other than the beneficiary's bank that does not give a notice required under article 7(3), (4) or (5) shall pay interest to the sender on any payment that it has received from the sender under article 4(6) for the period during which it retains the payment.

(4) A beneficiary's bank that does not give a notice required under article 9(2) or (3) shall pay interest to the sender on any payment that it has received from the sender under article 4(6), from the day of payment until the day that it provides the required notice.

(5) A receiving bank that issues a payment order in an amount less than the amount of the payment order it accepted shall, if the credit transfer is completed under article 17(1), be liable to the beneficiary for interest on any part of the difference that is not placed at the disposal of the beneficiary on the payment date, for the period of time after the payment date until the full amount is placed at the disposal of the beneficiary. This liability applies only to the extent that the late payment is caused by the receiving bank's improper action.

(6) The beneficiary's bank is liable to the beneficiary to the extent provided by the law governing the relationship between the beneficiary and the bank for its failure to perform one of the obligations under article 9(1) or (5).

(7) The provisions of this article may be varied by agreement to the extent that the liability of one bank to another bank is increased or reduced. Such an agreement to reduce liability may be contained in a bank's standard terms of dealing. A bank may agree to increase its liability to an originator or beneficiary that is not a bank, but may not reduce its liability to such an originator or beneficiary.

(8) The remedies provided in this law do not depend on 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 except any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order *(a)* with the intent to cause loss, or *(b)* recklessly and with knowledge that loss might result.

Prior discussion

A/CN.9/297, paras. 55 to 63 and 70 to 72 (sixteenth session, 1987)
A/CN.9/317, paras. 137 to 150 (seventeenth session, 1988)
A/CN.9/328, paras. 66 to 74 and 117 to 144 (nineteenth session, 1989)
A/CN.9/329, paras. 187 and 188 (twentieth session, 1989)
A/CN.9/341, paras. 105 to 131 (twenty-first session, 1990)
A/CN.9/344, paras. 11 to 57 (twenty-second session, 1990)

Comments

1. Article 16 was completely redrafted at the twenty-second session on the basis of prior article 12 (A/CN.9/344, paras. 11 to 57). Prior article 12 was essentially the text as prepared by the Secretariat for the eighteenth session in A/CN.9/WG.IV/WP.39 on the basis of the discussion at the seventeenth session (A/CN.9/317). Certain amendments to the Secretariat's draft were introduced at the nineteenth session (A/CN.9/328). At the twentieth session a small group consisting of four delegations was asked to consider the liability provisions in general and to attempt to formulate an agreed position that might be considered by the Working Group, but they were unable to reach such an agreed position. Instead they identified four major issues and each of the delegations submitted their separate views for the consideration of the Working Group (A/CN.9/329, paras. 187 and 188).

2. At the twenty-first session the Working Group had before it a complete redraft of the article that had been proposed by the delegation of the United Kingdom in a communication to the Secretariat (A/CN.9/WG.IV/WP.46, comment 28 to article 12). However, "the Working Group decided that it would be a more appropriate procedure to discuss the original text of article 12, including paragraph (2), and to use the suggested redraft as a source of ideas for improving the text" (A/CN.9/341, para. 106). Certain changes were made in the text at the twenty-first session, and the consideration of the problem of liability continued at the twenty-second session, when the current text was adopted. While the current text is the result of the entire series of discussions, the extent of the redrafting at the twenty-second session makes it more difficult to follow the development of the ideas represented by the current text than it is for the majority of the other articles in the draft Model Law.

3. The general system of liability in the draft Model Law prior to the twenty-second session was that the originator could hold the originator's bank liable for the proper performance of the credit transfer. That meant that the bank would be responsible to the originator for loss wherever the loss occurred. The types and extent of the losses for which the originator's bank would be liable were those set forth in paragraph (5) of former article 12. In order to avoid liability, the originator's bank would have had to show that one of the exempting conditions in former article 13 was relevant, an article that was deleted at the twenty-second session as no longer necessary in the light of the changes in the general regime of liability at that session (A/CN.9/344, para. 58; comments 47 and 48, below). If the loss for which the originator's bank was liable to the originator had been caused by events that had occurred at a subsequent bank in the credit transfer chain,

the originator's bank would have been able to recover the loss from its receiving bank and each bank in turn would have been able to recover from its receiving bank until, under paragraph (3), a bank would have shown that the payment order received by the beneficiary's bank was consistent with the payment order received by the bank in question.

4. That system of liability was based on the idea that the originator's bank provided a service to the originator that depended on it having established correspondent relations with other banks. It is a system of liability that is well known in other similar types of economic activity, such as the international transport of goods, where it is common for the carriage to be effected by several different carriers. Under some, though not all, conventions on international carriage of goods the claim might be made either against the original contracting carrier or against the carrier where the damage occurred. The procedure envisaged by former paragraph (2), similar to the procedure used in those conventions, would have eased the procedural problems for the originator since he would not have had to claim against a bank in a foreign country with which he had no business relationship. At the same time, it would have allowed the originator's bank to have recourse against its receiving bank, a bank with which it normally had a continuing business relationship (A/CN.9/341, para. 111).

5. Against that system of liability was the concept that no one should be responsible for the errors of third parties. The originator's bank is not always in a position to know, much less to control, the route that an international credit transfer will take on its way to the beneficiary's bank. In some cases the originator specifies some or all of the intermediary banks to be used. In any case, when the originator requests its bank to transfer funds to a foreign country, it should know that its bank is likely to use independent intermediary banks (A/CN.9/341, para. 108).

6. At the twenty-first session there were contradictory statements as to the standard of care for which the originator's bank would be held liable when the loss occurred because of the acts of an intermediary bank in a foreign country. Under one view the originator's bank would be responsible if the intermediary bank did not act in accord with the performance standards of the Model Law. The example given was that the intermediary bank did not execute the payment order on the day it was received because the standard in that country was next day execution. Under another view, under what is currently article 18(1) the actions of the receiving bank, i.e. of the intermediary bank, and therefore the standard of care of the originator's bank, would be measured by the rules in force in the State of the receiving bank (A/CN.9/341, paras. 109 and 110). Therefore, the applicable standard of care would be that prescribed by the Model Law only if the State where the receiving bank was located had adopted the Model Law.

7. The types of damages that could be recovered under paragraph (5) of former article 12 were gradually reduced during the preparation of the Model Law (see A/CN.9/WG.IV/WP.49, comments 8 to 10). In particular, any recovery for indirect (consequential) damages was all but eliminated (see comments 41 to 46 below). By the time current article 16 was considered at the twenty-second session, the originator's bank was liable to the originator only for loss of interest and for expenses incurred for a new payment order, expenses that were considered to be of minor importance. Furthermore, it had already been decided that interest for delay should be passed to the beneficiary (see comments 13 to 21). Therefore, it was concluded that there was little justification left for holding the originator's bank liable to the originator for the proper completion of the credit transfer and the original system of liability was deleted from the Model Law (A/CN.9/344, para. 43).

Relation of article 16 to other remedial provisions

8. Article 16 is only one of several provisions that afford relief to a party when the credit transfer is not carried out as it should be. In particular, article 16 must be read in the light of articles 13 to 15, which provide a form of monetary relief, but which the Model Law does not treat as liability or damages provisions. Articles 12, 6(2)*(a)* and 8(1)*(a)* also specify certain consequences when the credit transfer has not been carried out properly or when certain obligations under the Model Law have not been fulfilled.

Paragraphs (1) and (2)

9. Paragraph (1), contains the core concept in respect of the liability of a receiving bank when there is a failure to execute its sender's payment order in the time required by article 10(1), i.e. "to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure". The payment of interest is also required in several other provisions (i.e. articles 11(5), 12(1), 16(3), (4) and (5)) where the circumstances are not considered to fall under paragraph (1). With the exception of the unlikely availability of consequential damages under paragraph (8), the extent of a bank's liability under the Model Law is limited to payment of the applicable amount of interest.

10. 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 a loss of interest but no subsequent party, including the beneficiary, suffers any loss. 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.

11. If the beneficiary (as creditor of the underlying obligation) could recover loss of interest from the originator (as debtor of the underlying obligation) because of late payment of the underlying obligation, the originator might claim for the interest it had paid to the beneficiary from the bank where the delay occurred or from the originator's

bank. In many cases the amount of interest the beneficiary could claim from the originator because of late payment of the underlying obligation would be more than the amount of interest due from the bank because of delayed performance of the credit transfer. At the twenty-first session, when it was suggested that the bank that had caused the delay should have to pay to the beneficiary or to the originator (if the originator had reimbursed the beneficiary) an additional amount equal to the interest due as a result of the late payment of the underlying obligation, less the amount already paid for the delay in the credit transfer, it was stated that such an additional amount was in the nature of indirect (consequential) damages and should be treated as such under the Model Law (A/CN.9/341, para. 120). Under the current text of article 16(8), the originator would almost assuredly be unable to pursue any such claim.

12. At the twenty-second session there was a discussion as to whether interest should be due merely because of a delay in the execution of a payment order or whether it should arise only if there was a delay in the completion of the credit transfer (A/CN.9/344, para. 54). A delay in the execution of a payment order, it was stated, should give no claim to the beneficiary if the delay was made up at a later point in the credit transfer chain and the credit transfer was completed by the payment date that had been stipulated. In reply it was said that a rule that relied on a delay in the completion of the credit transfer would be difficult to administer. Such a rule would mean that the intermediary bank would not know whether it was liable to pay interest until it had notice as to whether the credit transfer had been completed on time or not. It may also be said that it would be possible to complete a credit transfer by the payment date only when a payment date had been stipulated in the originator's payment order. Where no payment date has been stipulated, in all but the rarest of cases a delay in execution by any of the banks in the credit transfer chain will necessarily delay the completion of the credit transfer from the time when it would otherwise have been completed. Consequently, under paragraph (1) interest is due from a receiving bank by virtue of its delay in executing the payment order it has received without regard to whether that delay caused a delay in the completion of the credit transfer itself.

13. The most controversial question that arose during the preparation of what is currently article 16(1) was whether the originator or the beneficiary should receive the interest due for the delay. The original text of paragraph (1) provided that the originator was the party who had the right to damages when the credit transfer was not completed as required, including that it was completed late. Such a rule seemed to be logical, since it was the originator who gave the instructions that resulted in the credit transfer. Furthermore, whether or not the originator is seen to be in privity of contract with subsequent receiving banks, a question that the Working Group avoided because of the different doctrinal solutions to that question in various legal systems, it is evident that there is a contractual chain reaching from the originator to the receiving bank that caused the delay. No such contractual chain reaches back from the beneficiary to any bank prior to the beneficiary's bank. Finally, in the original draft of article 12, the predecessor to the current article 16, significant damages beyond the payment of interest were available. In most cases it was the originator that would have suffered the losses for which those damages could be claimed.

14. The question as to whether the originator or the beneficiary should receive the interest for delayed completion of a credit transfer was discussed by the Working Group at its nineteenth, twenty-first and twenty-second sessions (A/CN.9/328, paras. 122 to 131; A/CN.9/341, paras. 118 to 123; A/CN.9/344, paras. 44 to 57). The Working Group 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 (A/CN.9/328, 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 bank that received the transfer late would automatically receive the interest. 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 (A/CN.9/328, para. 126).

15. At the conclusion of the discussion at the nineteenth session 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 required consultation, the Working Group requested the Secretariat to prepare a draft of a provision for its consideration at a later session (A/CN.9/328, para. 131).

16. At the twenty-first session it was stated that where the credit transfer was not completed and the originator had the right to get its funds back under what is currently article 13, the originator should also be entitled to receive the interest (A/CN.9/341, para. 118; see article 13 and comments thereto). The relationship between the right of the originator to receive interest on the amount refunded under article 13 and the right of the beneficiary to receive interest on the amount of the credit transfer as damages for the period of any delay was noted at the twenty-second session (A/CN.9/344, paras. 44 and 45).

17. The Working Group also noted at the twenty-first session that the typical way in which banks compensated one another for interest due was to adjust the date of the credit to the account so that it showed "as of" the date on which the credit should have been entered (A/CN.9/341, para. 119; A/CN.9/344, para. 53). By changing the date of the credit, appropriate interest would normally be given automatically to the bank receiving the credit. It was stated that, in practice, delay in executing a payment order was almost always because the payment order had been executed improperly. As soon as the error was brought to the attention of the bank, it would immediately execute

the order correctly for the original amount. Interest adjustments would be made later, usually by way of an "as of" adjustment, although that method was less often used where the person receiving the adjustment did not maintain an account with the bank.

18. An interest rate adjustment between banks would automatically be at the interbank rate in the currency concerned when it was effected by means of an "as of" adjustment of the date on which the account was credited. An "as of" adjustment of the date of crediting a non-bank beneficiary's account would not have the same automatic effect. The effective amount of interest a non-bank beneficiary would receive would depend on whether the account was in debit or in credit during that period of time, since the rate charged on a debit balance is always higher than the rate the beneficiary would receive if the account was in credit.

19. As a result, even though it was suggested that the Model Law should indicate the appropriate rate of interest to be paid, and that the interest should be calculated at the interbank rate in the currency in which the payment order was expressed, the Working Group decided at its twenty-first session that it would provide only that interest was payable without indicating how that interest should be calculated (A/CN.9/341, paras. 121 and 123).

20. At the twenty-second session the question was raised whether the Model Law should specifically state that one way for a sending bank to pay interest to its receiving bank was to make an appropriate adjustment in the date of the credit (A/CN.9/344, para. 53). An objection was raised that the date of the credit might be adjusted in an account that did not bear interest, thereby being of no benefit to the receiving bank. As a consequence, paragraph (1) indicates only that interest is to be paid; an "as of" adjustment may be one way to pay the interest, but any other method that achieves the desired result is acceptable.

21. At the twenty-second session it was decided that the beneficiary should have a direct right to recover the interest against the receiving bank that had delayed the credit transfer even though there was no contractual relationship between the beneficiary and the bank where the delay occurred (A/CN.9/344, paras. 49 and 50). Furthermore, it was decided that the beneficiary's right should be only against the bank where the delay occurred. That decision, reflected in the language of paragraph (1), was in line with the general decision taken at the twenty-second session that a bank should be liable only for the consequences of its own acts (see comment 7).

22. In the light of the discussion as to how banks often reimbursed one another for a delay, it was decided to provide in paragraph (1) that the receiving bank could discharge its obligation to the beneficiary by payment of the amount of the interest to its receiving bank. In order to ensure that the benefit of the interest is passed on to the beneficiary, paragraph (2) requires the receiving bank that receives the interest to pass it on to the next receiving bank. The last receiving bank in the credit transfer chain, which is the beneficiary's bank, is then required to pass it on to the beneficiary. This is one of the few occasions in the Model Law where the relationship between the beneficiary and the beneficiary's bank is regulated. The result of paragraphs (1) and (2) taken together is that the beneficiary is expected to receive the interest for delay in the credit transfer from the beneficiary's bank, even though the beneficiary's only right to recover arising out of the delay itself is against the bank where the delay occurred. Naturally, the beneficiary would also have a right against a bank that did not pass on the interest it received from a prior bank; that right is implicit in paragraph (2), which speaks of the obligation of the receiving bank to pass on the interest, but does not state to whom that duty is owed.

23. It should be pointed out that paragraphs (1) and (2) govern only the situation where a receiving bank has delayed executing the payment order received. According to article 2(l), "'Execution' means . . . the issue of a payment order intended to carry out the payment order received by the receiving bank." At the twenty-second session it was suggested that it should be clear in the Model Law that the failure of a sending bank to furnish cover to its receiving bank, as a result of which the receiving bank delayed its execution of the payment order, was one failure for which the sending bank should be liable for interest (A/CN.9/344, para. 48). In reply it was said that the duties of the sending bank, in its capacity as receiving bank of the order it had received, should be set forth in article 7 and not in article 16. In any case, its obligation as a sending bank under article 4(6) was to pay its receiving bank for the payment order when that receiving bank accepted it. It was agreed that further study of the question was needed.

24. In most cases a receiving bank will accept and execute a payment order received from another bank (or if it is the beneficiary's bank, it will accept the payment order received and credit the beneficiary's account) without verifying that it has received payment. Where that occurs, there is no delay in the credit transfer arising out of the fact that payment has not yet been made, and paragraph (1) does not apply. Where a sending bank does delay making the payment called for by article 4(6), the sending bank will pay interest to the receiving bank for the delay in payment, either directly or in the form of an "as of" adjustment as described in comments 17 and 18. Such interest for delay in payment is not covered by any provision in article 16, and paragraph (8) might be considered to preclude the application of any doctrine outside of the Model Law to enforce the obligations of article 4(6) (see comment 39). Banks could, however, agree under paragraph (7) to make such payments of interest to one another. Since the delay in paying for the payment order as required by article 4(6) is not a delay in executing a payment order, the bank that receives the interest would not be obligated by paragraph (2) to pass it on to the next receiving bank.

25. The suggestion was made at the twenty-second session that, even if the beneficiary would have the primary right to receive interest for a delayed transfer, the originator should have a residual right to recover the interest (A/CN.9/344, para. 47). The example was given of a beneficiary that did not receive the interest due from the delay in the transfer and that, as a result, recovered

interest from the originator because of a delay in payment of the underlying obligation. The reply was given that, although the originator should undoubtedly be able to recover the interest in such a case, such a right should not be available under the Model Law. Instead, it was said, the originator's right to exercise the claim of the beneficiary should be left to the otherwise applicable law of subrogation or other appropriate doctrine. It should be noted again, however, that article 16(8) says that the remedies in this law are "exclusive, and no other remedy arising out of other doctrines of law shall be available . . ."

26. Another suggestion made at the twenty-second session was that where a bank was obligated to pay interest to its sender or to its receiving bank for which the bank had a right of reimbursement from a third party, but the bank could not recover the reimbursement because the third party had become insolvent, the bank should be entitled to recover the reimbursement from any other party that itself had an obligation to reimburse the insolvent bank (A/CN.9/344, paras. 56 and 57; see A/CN.9/WG.IV/WP.49, article 12, comment 49). The suggestion was rejected on the grounds that, although such a rule appeared on first analysis to be a fair rule, a thorough economic analysis would show that it was incompatible with a bilateral or multilateral netting scheme such as that recognized by article 5*(b)*(iv). The Working Group did not consider the question as to whether it would be appropriate to have such a rule for those credit transfers that were carried out completely by correspondent banking relations or whether the importance for international credit transfers of such netting schemes as CHAPS in London and CHIPS in New York would render inappropriate any such a rule for correspondent banking alone.

Paragraphs (3) and (4)

27. When the Working Group adopted the provision requiring a receiving bank to notify its sender of a misdirected payment order, current article 7(3), 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; A/CN.9/344, paras. 26 to 29). Therefore, from the eighteenth to the twenty-first sessions draft article 12(6) provided that if a receiving bank failed to notify of a misdirected payment order, and the credit transfer was delayed, the bank was 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."

28. At the twenty-second session the sanctions under what are currently paragraphs (3) and (4) were extended to a failure to give any of the notices required by the Model Law, except for the failure to give notice of rejection (A/CN.9/344, paras. 30 to 32). The reason for the exclusion of the failure to give a required notice of rejection from the operation of article 16(3) and (4) is that the consequence of such a failure, when payment has been made to the receiving bank, is that the payment order is accepted under article 6(2)*(a)* or 8(1)*(a)* (A/CN.9/344, para. 31). At the same time that it was decided to extend the liability for interest to a failure to give any of the other required notices, it was decided that the duty to pay interest would arise only if the receiving bank that failed to give the notice had been paid for the payment order (A/CN.9/344, paras. 30, 32 and 33).

29. Paragraphs (3) and (4) both provide that the interest is to be paid to the sender. In effect, the payment of interest by the receiving bank to the sender because of the failure to give notice reimburses the sender a portion of the interest it owes to the beneficiary for the delay in the credit transfer caused by the sender's (i) misdirection of the payment order, (ii) sending of a payment order that cannot be executed or (iii) sending of a payment order that contains an inconsistency between the words and figures that describe the amount of money to be paid. It was noted at the twenty-second session that where the receiving bank had received funds with the misdirected payment order, article 13 would require it to return the funds with interest (A/CN.9/344, para. 29). However the Working Group decided that article 16 should contain a provision in respect of misdirected payment orders so as to prevent unjustified enrichment of the receiving bank.

Paragraph (5)

30. Paragraph (5), requiring interest on the amount of an underpayment, was added to the text of the Model Law by the drafting group at the twenty-second session (A/CN.9/344). There was no discussion in the Working Group as a whole in regard to this issue.

31. Paragraph (5) should be read in conjunction with article 14, which requires a receiving bank that has executed the payment order it received by issuing its own payment order, but for a smaller amount, "to issue a payment order for the difference between the amounts of the payment orders". Article 14 does not require the payment of any interest on the amount of the underpayment; that is left to article 16(5).

32. Paragraph (5) requires the payment of interest "only to the extent that the late payment [of the deficiency] is caused by the receiving bank's improper action". (The Commission may wish to add the words "of the deficiency" to make the provision clearer.) It is unclear why this limitation was added to paragraph (5), since it does not appear in either paragraph (1) or in articles 13 or 15. In all those provisions the receiving bank that had funds for a period of time because the credit transfer had not been completed correctly is required to pay interest on those funds whether or not the bank had acted improperly.

Paragraph (6)

33. The beneficiary's bank might cause loss to the beneficiary by such actions as failing to fulfil its obligations under article 9(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.

34. 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 (6) 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 relationship between the beneficiary and the bank.

35. For the drafting history of paragraph (6) prior to the twenty-second session, see A/CN.9/WG.IV/WP.49, article 12, comments 16 to 22. There was no discussion of the problem by the Working Group at the twenty-second session and the current draft was prepared by the drafting group in its general revision of article 16.

Paragraph (7)

36. 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. The provision was contained in article 9(6) of the draft of the Model Law prepared by the Secretariat for the eighteenth session of the Working Group (A/CN.9/WG.IV/WP.39). It was not discussed by the Working Group until the twenty-second session (A/CN.9/344, paras. 36 to 39). Between the drafting of the original provision and the discussion at the twenty-second session, the Working Group at its twenty-first session had adopted what is currently article 3, giving a general freedom to the parties to vary their rights and obligations by agreement (A/CN.9/341, para. 52).

37. Paragraph (7) constitutes a limitation on the general right of the parties under article 3 to vary their rights and obligations by contract. Deletion of paragraph (7) was proposed at the twenty-second session on the grounds that the Model Law should not attempt to give special protection to bank customers, since their bargaining power might well be equal or superior to that of the banks. The Working Group was of the view that there existed a need to set a minimum standard in regard to the liability of a bank for the protection of bank customers. Therefore, paragraph (7) provides that, while two banks can agree to any modification of the liability regime between themselves and a bank can agree to a greater measure of liability to a non-bank customer than is provided in the Model Law, a bank cannot reduce its liability to a non-bank customer by agreement.

38. Since paragraph (7) permits an agreement of non-responsibility of one bank to another, it was decided at the twenty-second session that it should be stated clearly that any such agreement could be contained in a bank's standard terms (A/CN.9/344, para. 39). This was considered necessary because in certain States it is not possible to modify the legal regime of responsibility except by an express contract and clauses of non-responsibility found in standard form contracts are not enforceable. The location of the sentence makes it clear that the Model Law contains no rule as to whether a bank can undertake a higher level of liability to non-bank customers by means of its general conditions or whether such an undertaking would have to be in a special contract.

Paragraph (8)

39. Paragraph (8), making the liability provisions of this law 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.

40. In several comments throughout this report mention has been made of arguments raised in the Working Group that would either call for additional remedies to be added to the text of article 16 or that would call for the application of remedies generally available in the legal system (see article 4, comment 29; article 12, comment 5 and article 16, comments 24 and 25). The Commission may wish to consider how those issues might best be solved.

41. The last clause of the second sentence of paragraph (8) makes an exception to the exclusivity of the liability provisions of this law "when a bank has improperly executed a payment order or failed to execute a payment order *(a)* with the intent to cause loss, or *(b)* recklessly and with knowledge that loss might result". When such a situation exists, any remedy arising out of doctrines of law other than the Model Law may be applied, if any such remedy exists in the legal system. This clause was introduced at the twenty-second session (A/CN.9/344, paras. 11 to 22). It was the result of a long discussion lasting several sessions of the Working Group as to whether the Model Law should provide that a receiving bank might be liable for indirect (consequential) damages.

42. 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 article 12(5)*(d)* from the eighteenth to the twenty-second session provided that the claimant would have to prove the intent or the reckless behaviour of the bank.

43. At the nineteenth session retention of the essence of the provision was again reaffirmed (A/CN.9/328, paras. 140 to 143). However, the formulation of the subparagraph was criticized as being imprecise. It was said that the subparagraph was not clear as to the types of losses that were to be covered or that those losses should have been the direct consequence of the failure on the part of the bank. The formula used for limiting the right to

recover, which had been taken from article 8 of the Hamburg Rules, was said not to reflect properly the problems of making credit transfers (A/CN.9/328, 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 to redraft the provision.

44. At the twentieth session three of the four delegations that were asked to formulate an agreed position on the general liability regime of the Model Law (see comment 1) were in favour of retaining the provision in one form or another, while one delegation was in favour of deleting it (A/CN.9/329, para. 188, question 3).

45. At the twenty-first session the Working Group decided to limit the application of the provision so that only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender (A/CN.9/341, para. 114 and 126). Following that decision the Working Group considered at length whether the provision should be retained at all (A/CN.9/341, paras. 127 to 131). At the end of the discussion a suggestion was made to delete both any provision on indirect (consequential) damages and paragraph (8). Under that proposal the Model Law would not provide for consequential damages under any circumstances, but a party would not be precluded from relying on other doctrines of law that might be available in the relevant legal system to claim such damages. A similar suggestion was that the two provisions might be combined so that banks would be subject to other relevant doctrines of law when they acted in the ways described in the then current text of article 12(5)*(d)*. The Working Group decided that it would need more time to study the implications of the suggestions that had been made.

46. At the twenty-second session the Working Group considered three possibilities:

(a) The Model Law should state that indirect (consequential) damages should be available and set the conditions under which they would be awarded. That was the system proposed in the original draft of article 12(5)*(d)*.

(b) The Model Law should state that indirect (consequential) damages should never be available (A/CN.9/344, para. 14). In support of that suggestion it was said at the twenty-second session that any provision allowing for such damages would imply that in case of litigation an attempt would be made to determine whether the bank intended the harm that occurred. It was also said that in some legal systems a party was deemed to have intended the consequences of its acts. In those systems it would be at least a question for the trier of fact, which might be a jury of ordinary citizens, whether the bank intended the harm when harm resulted from a failure by a bank to act with due care. It was said that an attempt to determine the intent of the bank would not be compatible with the operation of automated high-value, high-speed funds transfer systems.

(c) The Model Law should leave the matter to national law outside the Model Law. It was noted that this last policy could be implemented either by deleting both article 12(5)*(d)* as it then existed and paragraph (8) from the Model Law or by deleting article 12(5)*(d)* and rewording paragraph (8) in the manner finally adopted. Retention of some possibility to recover from a bank that acted so willfully was said to be appropriate because under many national laws parties to a contract could not validly agree to exclude liability for their own intentional misconduct (A/CN.9/344, paras. 13 and 18). The choice between those two alternatives, which were recognized to be technically all but identical in respect of the right to recover indirect (consequential) damages, lay between the desire to have no mention of such a possibility in the Model Law and the desire to have the possibility mentioned. The latter solution also preserved the general rule of exclusivity for all other cases.

Finally, the Working Group decided to adopt the last of those alternatives (A/CN./344, para. 21).

Exemptions from liability

47. The first draft of the Model Law prepared by the Secretariat for the seventeenth session contained a provision exempting the bank that was otherwise liable for damages from paying those damages under certain circumstances. See A/CN.9/297, para. 60 for the policy decision and A/CN.9/WG.IV/WP.37, article 15 for the first draft. That provision was an integral part of the scheme that made the originator's bank liable to the originator for the consequences arising out of the non-completion of the credit transfer as originally instructed, including the indirect (consequential) damages that might have been suffered. The Secretariat draft was considered at the seventeenth session (A/CN.9/317, paras. 151 to 156) and a revised draft was prepared for the eighteenth session (A/CN.9/WG.IV/WP.39, article 10). While the provision was subsequently renumbered as article 13 in the continuing preparation of the Model Law, it was not considered again until the twenty-second session. At the twenty-second session the Working Group deleted the provision on the ground that there was no need to maintain a rule on exemptions in the light of the prior decisions limiting liability to the payment of interest (A/CN.9/344, para. 58).

48. *Comparison with Article 4A.* Article 4A-305 provides that a receiving bank is liable for its late or improper execution or failure to execute a payment order. In the case of late completion the bank "is obliged to pay interest to either the originator or the beneficiary . . .". In the case of other types of improper or non-execution, the bank "is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses . . . resulting from the improper execution." "If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute." In all cases additional "damages, including consequential damages, are recoverable [only] to the extent provided in an express written agreement of the receiving bank".

CHAPTER IV. COMPLETION OF CREDIT TRANSFER AND DISCHARGE OF OBLIGATION

Article 17. *Completion of credit transfer and discharge of obligation*

(1) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

(2) 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.

(3) A credit transfer shall be considered complete notwithstanding that the amount of the payment order accepted by the beneficiary's bank is less than the amount of the originator's payment order because one or more receiving banks have deducted charges. The completion of the credit transfer shall not prejudice any right of the beneficiary under the applicable law to recover the amount of those charges from the originator.

Prior discussion

A/CN.9/317, paras. 157 to 164 (seventeenth session, 1988)
A/CN.9/328, paras. 37 to 43 (nineteenth session, 1989)
A/CN.9/329, paras. 189 to 192 (twentieth session, 1989)
A/CN.9/341, paras. 11 to 23 (twenty-first session, 1990)
A/CN.9/344, paras. 138 and 139 (twenty-second session, 1990)

Comments

Paragraph (1)

1. Although earlier versions of the draft Model Law had implied that the credit transfer was completed when the beneficiary's bank accepted the payment order, a specific rule as to when the credit transfer was completed was first introduced into the draft Model Law at the twentieth session when it was placed in the definition of "credit transfer" in article 2*(a)* (A/CN.9/329, paras. 31 to 33). At the twenty-first session it was moved to article 14(2 *bis*)—(A/CN.9/341, para. 17). At the twenty-second session at the same time the name of the article was changed the provision was moved again, this time to article 17(1) (A/CN.9/344, paras. 138 and 139). As had previously been the case, the credit transfer is completed when the beneficiary's bank accepts the payment order.

2. At the twenty-first session the Working Group noted that by its adoption of what are currently paragraphs (1) and (2), it had decided that the point of time when the credit transfer was completed with the legal consequences that followed was when the beneficiary's bank accepted the payment order addressed to it. Consequently, the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in current articles 6 and 8 (A/CN.9/341, para. 17). Although a proposal for amending paragraph (1) was contained in the working paper submitted to the twenty-second session (A/CN.9/WG.IV/WP.49, article 14, comment 14), it was not considered at that session.

3. Among the consequences arising out of the completion of the credit transfer are that its completion can no longer be stopped by revocation of a payment order (article 11(2)) and that the risk for any bank in the credit transfer chain that it may have to refund the amount of payment to its sender comes to an end (article 13). Another consequence arises out of the fact that, although the general policy of the Model Law is not to enter into the relationship between the beneficiary and the beneficiary's bank (comment 3 to article 9), paragraph (1) also provides that when the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it. However, the provision does not state when or how the beneficiary's bank must make the funds available to the beneficiary or the extent to which the beneficiary's bank can charge the beneficiary a fee for receiving and processing the transfer. Those are questions to be settled by the law applicable to the account relationship. Finally, if the credit transfer was for the purpose of discharging an obligation, article 17(2) provides that the beneficiary's claim against the originator/debtor is discharged at the same moment and to the same extent that the beneficiary's claim arises against the beneficiary's bank.

4. Paragraph (1) gives a clear rule as to the time when a credit transfer is completed in the normal case; it is completed upon acceptance of a payment order by the "beneficiary's bank". Although the term "beneficiary's bank" is not defined in article 2, it has always been assumed to be the bank of the beneficiary as indicated in the originator's payment order (article 9, comment 8 and A/CN.9/344, para. 120). Therefore, acceptance of a payment order by a bank named as the beneficiary's bank because of a mistake by one of the banks in the credit transfer chain would not be acceptance by the beneficiary's bank. Instead, the bank would be obligated under article 7(3) to give notice to the sender that the payment order had been misdirected.

5. The Model Law may not give the same result if it was the originator that designated the incorrect beneficiary's bank, even though the bank would be equally unable to credit the beneficiary's account. It would seem that in this case as well the bank should have the obligations of article 7(3) to give notice to its sender that the payment order was misdirected.

6. A variant of the problem arises if the beneficiary's bank has been properly indicated but the beneficiary has been improperly indicated, either by the originator or by an error of one of the banks in the credit transfer chain. While article 17(1) would suggest that the credit transfer was completed, it would still seem appropriate that the bank should be obligated to notify the sender of the problem under article 7(3), since all that the bank knows

is that it cannot identify the beneficiary. As far as the bank can tell, the payment order has been misdirected. Compare comment 13 in regard to paragraph (2).

7. The Model Law recognizes that acceptance of the payment order by the beneficiary's bank is completion of the credit transfer even if the payment order is for an amount larger or smaller than the amount in the payment order from the originator to the originator's bank. That result is specifically stated in paragraph (3) for cases in which the reason for the deficiency in amount is that one or more banks in the credit transfer chain deducted its fees from the amount of the transfer. It is also recognized for the general case by article 14, which obligates the bank that has sent its own payment order for an amount less than the amount of the payment order received by it to issue a payment order for the difference between the amounts of the payment orders, and by article 15, which provides that the overpayment can be recovered from the beneficiary "as . . . otherwise provided by law".

8. *Comparison with Article 4A.* Article 4A-104*(a)* provides that "A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order." The acts of acceptance of a payment order by the beneficiary's bank are somewhat different in Article 4A-209*(b)* from those in article 8.

Paragraph (2)

9. The first draft of the Model Law prepared by the Secretariat for the seventeenth session contained a provision that authorized payment of an obligation by a credit transfer (A/CN.9/WG.IV/WP.37, article 16(1). The provision was redrafted for the eighteenth session (A/CN.9/WG.IV/WP.39, article 11(1)) following the decision of the Working Group at the seventeenth session that it would be appropriate to have such a provision (A/CN.9/317, para. 158). The paragraph was deleted at the twenty-first session (A/CN.9/341, para. 12). The reasons given were that, while many legal systems already recognized credit transfers as an acceptable method of making payment, it was a matter of the policy of each State to decide whether a monetary obligation could be discharged by a credit transfer and that it might be contrary to the monetary policy of some States to consider credit in an account in a bank as having the same legal significance as money issued by a central bank.

10. Prior to the twenty-first session paragraph (2) provided that the obligation of the debtor was discharged when the beneficiary's bank accepted the payment order. The beneficiary's bank became indebted to the beneficiary at the same time. The drafting history of that prior provision is set forth in A/CN.9/WG.IV/WP.46, comments 5 to 9 to article 14. The current text was adopted at the twenty-first session (A/CN.9/341, paras. 13 to 17).

11. Although there was a widespread feeling in the Working Group that the Model Law should neither provide that a debtor had a right to discharge an obligation by transferring funds to the credit of the creditor in his bank account nor provide that if such a transfer was made the obligation would be discharged to the extent of the payment order received, there was a recognition that it would be useful to provide a rule that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, it was thought to be useful for the Model Law to indicate the time when such a discharge took place.

12. Paragraph (2) applies only if the transfer was for the purpose of discharging an obligation of the originator/debtor to the beneficiary/creditor and if that obligation could be discharged by credit transfer to the account indicated by the originator. Although it is unlikely that any State has a general prohibition against credit transfers, and especially international credit transfers, it is possible that certain obligations can be discharged only by payment in cash or by some other specified means. What is more likely is that in a given State an obligation is discharged by credit transfer to an account of the beneficiary only if the transfer is done with his consent. It may be that the consent need not be specific, that it could be implied from the very fact of having a particular type of account, from the indication of the bank account numbers on an invoice or from other similar circumstances.

13. Paragraph (2) provides that the obligation is discharged when the beneficiary bank accepts the payment order. Although not specifically so stated in paragraph (2), the payment order accepted by the beneficiary's bank must have directed credit to the proper account (see comment 6 in regard to paragraph 1). If the payment order was addressed to the proper account but the beneficiary's bank failed to credit the account or credited the wrong account, the obligation from the originator to the beneficiary is discharged and if the beneficiary suffered loss as a result of the misapplication of the credit, he must look to his bank for reparation under the law applicable to the account relationship.

14. Paragraph (2) provides that the obligation is discharged to the extent that it would be discharged by payment of the same amount in cash. The amount in question is the amount of the payment order accepted by the beneficiary's bank. If the beneficiary's bank charges a fee for receiving and processing the payment order, the fee is at the cost of the beneficiary. However, if the payment order accepted by the beneficiary's bank is for an amount less than the amount in the payment order sent by the originator's bank as a result of fees charged by intermediary banks, the originator is not discharged of his obligation to the beneficiary to the extent of those fees. Compare paragraph (3) and comment 18.

15. In most cases when less than the full amount of the obligation is paid, the obligation is discharged to the extent of the payment. However, in some cases the obligation is indivisible and payment of less than the full amount does not operate as a discharge of any of the obligation (A/CN.9/328, para. 39). Those are questions that are settled by doctrines outside the law of credit transfers. However, in order to know the effect of a transfer of a sum that is less than the entire obligation, paragraph (2) provides that the obligation is discharged to the

extent that it would be discharged by payment of the same amount in cash.

16. *Comparison with Article 4A.* Article 4A-406 has substantially the same rule in respect of time of discharge, subject to the qualification that the acts of acceptance of a payment order by a beneficiary's bank are slightly different in Article 4A-209*(b)* from those in article 8. Article 4A-406*(c)* provides that the extent of the discharge is the amount of the originator's payment order "unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges".

Paragraph (3)

17. Paragraph (3) is concerned with a problem that is difficult when credit transfers pass through several banks, even though the problem does not involve a significant amount of money. It could be expected that the originator would be 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.

18. At the twenty-first session the Working Group decided that paragraph (3) should be redrafted to state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20). That decision was implemented at the twenty-second session by the current text of paragraph (3) (A/CN.9/344, paras. 139).

19. The last sentence in article 17(3) has the effect of countering a possible interpretation of article 14 that banks are prohibited from deducting their charges. Such an interpretation would arise out of the fact that article 14 provides that every receiving bank that executes a payment order for less than the amount of the payment order it accepted is obligated to issue a payment order for the difference between the amounts of the two payment orders.

20. A provision that the originator's bank has fulfilled its obligations to the originator when the credit transfer is completed has not been included in paragraph (3), since it would seem to be a natural consequence of completion of the transfer.

21. *Comparison with Article 4A.* Article 4A-302*(d)* contains a prohibition on the collection of charges "by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges . . ." unless instructed by the sender to do so. Such a quasi regulatory provision could not be included in the text of the Model Law, but it could be included by any State when enacting the Model Law if that seemed desirable. Article 4A-406*(c)* provides that if charges of one or more receiving bank have been deducted (perhaps by a foreign bank) "payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charge".

CHAPTER V. CONFLICT OF LAWS

Article 18. *Conflict of laws*

(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.

(2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender for the purposes of article 4(1).

(3) For the purposes of this article,

(a) where a State comprises several territorial units having different rules of law, each territorial unit shall be considered to be a separate State, and

(b) branches and separate offices of a bank in different States are separate banks.

Prior discussion

A/CN.9/297, paras. 34 to 36 (sixteenth session, 1987)
A/CN.9/317, para. 165 (seventeenth session, 1988)
A/CN.9/WG.IV/WP.42, paras. 69 to 80 (nineteenth session)
A/CN.9/341, paras. 24 to 49 (twenty-first session, 1990)
A/CN.9/344, paras. 112 to 114 and 140 (twenty-second session, 1990)

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 was prepared for the eighteenth session of the Working Group (A/CN.9/WG.IV/WP.39, article 12). The problem of conflict of laws was 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 considered 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. At the twenty-first session the Working Group made a number of policy decisions

(A/CN.9/341, paras. 24 to 49) that were incorporated into the text at the twenty-second session (A/CN.9/344, para. 140).

Inclusion of conflict of laws provisions in the Model Law

2. At the twenty-first session there was a long discussion as to whether the Model Law should retain any provision on conflict of laws (A/CN.9/341, paras. 33 to 37). One objection to retaining any provision was that a certain number of States were already parties to bilateral or multilateral conventions on conflict of laws, and in particular to the Rome Convention on the Law applicable to Contractual Obligations between the member States of the European Communities, and that it would be difficult for those States to adopt any conflict of laws provisions that might be in the Model Law. A second objection was that no single conflicts rule would be appropriate for both high speed electronic transfers and paper-based transfers. A third objection was that, considering the complexity of the issues involved, the text before the twenty-first session did not have the degree of refinement that would make it acceptable to most States.

3. The Working Group decided to retain a provision on conflict of laws, primarily on the grounds that it could not be anticipated that the law governing international credit transfers would be uniform in the entire world by virtue of all States having adopted the Model Law in its entirety. Therefore, it was necessary for parties in States that had adopted the Model Law to know what law would govern the various relationships in an international credit transfer. Although it was possible that some States that would adopt the Model Law might have difficulties in adopting the conflict of laws provisions because of bilateral or multilateral conventions to which they might be a party, that was considered to be no more of a reason not to include such provisions in the Model Law than the existence of national provisions on the substance of the law governing credit transfers would be a reason not to include equivalent substantive provisions in the Model Law (see also A/CN.9/344, para. 114).

Paragraph (1)

4. One of the primary difficulties that the Working Group faced in preparing a legal regime for international credit transfers is the dichotomy between the point of view of the originator and beneficiary of the credit transfer (particularly when neither of those parties is a bank) and that of the implementing banks. From the point of view of the originator and the beneficiary, the transfer is a single operation in which their rights and obligations in respect of the transfer itself should be governed by a single law. From the viewpoint of the banks an international credit transfer is effectuated by a series of individual payment orders giving rise to rights and obligations of the sender and the receiving bank. From that point of view, each bilateral relationship in the credit transfer chain is a separate banking transaction. Being a separate banking transaction, the law applicable to that relationship might be different from the law applicable to the other bilateral relationships that taken together constitute the credit transfer chain. That, however, is unsatisfactory in that the smooth implementation of international credit transfers requires that the rights and obligations of all parties are consistent with one another.

5. The following proposal was made at the twenty-first session to overcome those difficulties:

> "A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail."

6. In support of the proposal it was stated that it was particularly important that one set of rules govern the rights and obligations of all the parties when the transfer was a high-speed transfer (A/CN.9/341, paras. 24 to 32). It was said that, unless there was a means for the parties to elect the application of a single law as was here proposed, the general rules of choice of law reflected in what was then article 15(1) would lead to the result that the law of different States would apply to the different segments of the credit transfer and that there would be no single law that would govern the entire credit transfer. It was pointed out that the technique suggested had already been implemented by CHIPS in its new rule 3 and the law of the state of New York had been chosen to govern the entire transfer if any part of it passed through CHIPS. (The CHIPS rule is set out in A/CN.9/WG.IV/WP.47.)

7. The proposal was rejected by the Working Group on the grounds that, even if it might be reasonable when restricted to the relationships between the banks, the proposal was excessive when it attempted to impose a law upon non-bank originators and beneficiaries that was different from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen (A/CN.9/341, para. 29). The proposal would have given the funds transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds transfer system might choose a law that was particularly favourable to the banks and unfavourable to the non-bank originators and beneficiaries.

8. At the twenty-first session the Working Group tried to find other rules that would also have led to the application of a single law to the entire transaction. One suggestion was that the substantive provisions of the Model Law applicable to the relations between the originator and the originator's bank should be governed by the law of the originator's bank but that the rest of the credit transfer should be governed by the law of the beneficiary's bank (A/CN.9/341, para. 38). Finally, it was decided that the only way to ensure that the Model Law might become applicable to the entire credit transfer was by its adoption by the several States concerned (A/CN.9/341, para. 39).

9. While the Working Group had not been willing to allow any group of banks to decide that the Model Law

or any other law would apply to parties to the transfer that were not parties to the choice-of-law agreement, the Working Group was in favour of permitting the parties to choose any law they wished to govern their relationship (A/CN.9/341, paras. 44 and 45).

10. The Working Group decided that, in the absence of a choice of law by the parties, the law of the receiving bank should apply to that segment of the transfer (A/CN.9/341, paras. 46 and 47). The only exception was that it should be made clear that the Model Law did not purport to determine what law would determine the authority of the actual sender to bind the purported sender under article 4(1). This decision was implemented at the twenty-second session without debate in the Working Group by the current text of paragraph (1) (A/CN.9/344, para. 140).

Paragraph (2)

11. The Working Group noted at its twenty-first session that the question as to whether an actual sender had the authority to bind the purported sender under article 4(1) raised complicated questions of conflict of laws that were not unique to credit transfers. It decided, therefore, that the Model Law should not attempt to solve the question as to which law should apply (A/CN.9/341, para. 46).

12. *Comparison with Article 4A.* Article 4A-507 is generally consistent with paragraphs (1) and (2), except that Article 4A would apparently apply the law of the receiving bank to the question whether an actual sender was authorized to send a payment order. Article 4A-507*(c)* is a slightly more complicated version of the provision set out in comment 5 that was rejected by the Working Group at the twenty-first session.

B. Model Law on International Credit Transfers: compilation of comments by Governments and international organizations (A/CN.9/347 and Add.1)

[Original: English/French/Spanish]

CONTENTS

[A/CN.9/347]

INTRODUCTION

1. The Commission, at its twenty-third sesion in 1990, requested the Working Group on International Payments to present to it at its twenty-fourth session in 1991 a draft of the Model Law on International Credit Transfers.[1] The Working Group, at its twenty-second session (Vienna, 26 November—7 December 1990) adopted a text of the draft Model Law and presented it to the Commission for its consideration (A/CN.9/344, para. 142).

2. The text of the draft Model Law as adopted by the Working Group was sent to all Governments and to interested international organizations for comment. The comments received as of 26 April 1991 from 15 Governments and three international organizations are reproduced below.

ANNEX

Compilation of comments

States

BANGLADESH

[Original: English]

The Government of Bangladesh expressed its agreement with the draft Model Law.

CANADA

[Original: English/French]

Canada expresses general satisfaction with the improvements to the draft effected by the work of the Working Group on International Payments at its twenty-second session. Canada considers the basic structure and scope of the draft to be satisfactory. Our proposals for change are largely of an editorial nature, offered in the spirit of supporting the draft and in the hopes of improving it on a technical level. Some of our proposals are merely to move existing text to more logical positions within the draft Model Law. One possibly more significant change seeks to clarify the terminology of the Model Law in dealing with the responsibilities of banks. Canada proposes a new term "to act" with reference to the duty of a receiving bank upon receiving a payment order, and a new term, "to pay", with reference to the duty of the beneficiary's bank. In the new usage a receiving bank that receives a payment order must *act* on it. It may either *accept* or *reject*. If it is an intermediary bank, and it *accepts*, then it must *execute* within the required time. If it is the beneficiary's bank, and it *accepts*, then it must *pay*, except that if the beneficiary does not have an account with the beneficiary's bank, its duty is to notify the beneficiary and to place the funds at his or her disposal.

We have organized our comments in the order that the points arise in the draft approved on 7 December, 1990 (A/CN.9/344, annex).

I. In paragraph (2)*(a)*, the definition of "credit transfer" expresses the purpose of a credit transfer as being the "placing [of] funds at the disposal of a beneficiary". Canada objects to this on both practical and technical grounds. As a practical matter, it appears to us that most credit transfers are made for the purpose of making a payment to the beneficiary. On a technical level, it appears to us that if article 5 is generally acceptable in stipulating what may be payment to a receiving bank, then the Model Law ought to be able to prescribe a similar rule providing that the deposit by the beneficiary's bank of the sum payable under the payment order to the account of the beneficiary is payment to the beneficiary. In fact, where the credit transfer was completed in ECU or SDR (as contemplated, by the definition of *money)* some such provision would probably be required to supplement national legal tender statutes. Some qualifications of that general proposition may be necessary in order to accommodate local law. We address those subsequently. For the purposes of this comment on the definition of "credit transfer", it is sufficient to note that if the words "placing funds at the disposal of a" were deleted and replaced by the words "making a payment to", the definition would be improved.

At paragraph 15 *infra*, Canada gives its reasons for suggesting a significant simplification of article 7, paragraph (2). Part of that proposal is that the words "that contains the instructions necessary to implement the credit transfer in an appropriate manner" be deleted from article 7, paragraph (2) and added to the definition of "credit transfer". Canada also proposes to use the term "executed" so that the definition would conclude with the sentence.

> "The term includes any payment order executed by the originator's bank or any intermediary bank that is intended to implement the originator's payment order."

Canada proposes the deletion from the Model Law of the verb "to issue" when used in connection with payment orders, and the substitution therefor of the verb "to send". The proposed usage is illustrated in the foregoing proposed amendment to article 2, paragraph *(a)*.

[1]Report of the United Nations Commission on International Trade Law on the work of its twenty-third session, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17* (A/45/17), para. 25.

In the law of negotiable instruments in many common law countries, the term "issue" has been given a technical meaning that may prove to be inconvenient if transferred by the courts to its usage in the Model Law. That technical meaning includes an element of mental volition to transfer as well as a physical element of transfer of possession or delivery. It may also require a completed communication to the receiving bank in order to constitute a completed "issue". Canada believes that the policy promoted by the common law usage of the verb "to issue" would not be properly applied to the use of that verb in the Model Law. Canada proposes the substitution of a neutral term for that potentially misleading technical term. The verb "to send" would raise no risk that the unwanted technical meanings of "to issue" might be applied in the context of the Model Law. The use of "send" also would clarify the intention of the Model Law text that the sender fulfils its obligation at the moment it dispatches a message containing a payment order. There would be no need to consider what other steps might be necessary to comprise an "issue" of a payment order nor any implied requirement that the payment order must be received by the receiving bank in order to be properly "issued".

Canada supports the deletion of the square brackets and the retention of the text now contained in square brackets as the last sentence of article 2, paragraph *(a)*, the definition of "credit transfer".

II. In article 2, paragraph *(b)*, Canada proposes the deletion of the words "by a sender" from the first line of the definition of "payment order". The definition of "sender" in article 2, paragraph *(e)* leaves no doubt as to the designation of the person who sends a payment order. The inclusion of the words "by a sender" in the present definition of "payment order" gives rise to interpretational difficulties in those portions of articles 7 and 9 dealing with unauthorized, misdirected and incomplete payment orders.

III. In article 2, paragraph *(c)*, Canada proposes to substitute the word "sender" for the word "issuer" in the definition of "originator".

IV. In article 2, paragraph *(e)*, Canada proposes to substitute the word "sends" for the word "issues" in the definition of "sender".

V. In article 2, paragraph *(f)*, Canada proposes to narrow the definition of "bank" and, to relate it more closely to the functions that the Model Law text now contemplates being performed by the entities it designates as banks. The Model Law now contains frequent references to accounts of various parties with receiving banks and of the beneficiary with the beneficiary's bank. On a plain reading of the text of the Model Law, it is now apparent that the account-holding function of the entities described as "banks" is at least as important as the "payment order executing" functions emphasized in the definition to the exclusion of all other considerations. Canada believes that the definition now places its emphasis on the wrong function. Canada suggests that the important function should be that an institution designated as a bank for the purposes of the Model Law should,

> "as an ordinary part of its business, receive money from the public that is repayable by it on demand and make payments therefrom in accordance with instructions received from its customers."

Canada would prefer to substitute the quoted text for the words "in executing payment orders". If that solution is accepted by the Commission, it will not be necessary to retain the second sentence of the definition. If that solution is not acceptable, as a compromise, Canada would propose to *add* its quoted text to the existing text as an additional element of the definition, so that an entity would have to satisfy both the existing and the proposed test in order to qualify as a bank.

VI. In article 2, paragraph *(j)*, Canada proposes to enlarge the definition of "authentication" by re-expressing the existing requirement that the procedure be able to confirm the identity of the sender, and adding words to extend the meaning of the term to include procedures to detect error, omission or alteration in the text of the payment order, and erroneous duplication of a payment order, now addressed separately in paragraph (5) of article 4. Canada also proposes to add words to the definition to indicate that the agreement must be between a bank and its customer. The definition proposed also avoids the use of the word "issued" and substitutes the word "sent" therefor. Canada's proposals would produce a draft in the following terms:

> "'Authentication' means a procedure established by agreement between a bank and its customer for one or both of the following purposes:
>
> *(a)* to determine whether a payment order or a revocation of a payment order is sent by the person indicated as its sender;
>
> *(b)* to detect error, omission or alteration in the content of a payment order or revocation of a payment order, or erroneous duplication thereof."

VII. In article 2, paragraph *(k)*, Canada proposes to delete the word "when" and to substitute therefor the words "on which".

VIII. In article 2, paragraph *(l)*, Canada proposes to use the new term "act on" instead of "carry out" for reasons given in paragraph XX and to add to the definition of "execution" the words in the final clause of article 7, paragraph (2) (which Canada proposes to delete) so that the definition would read

> "'Execution' means, with respect to a receiving bank other than the beneficiary's bank, the sending of a payment order intended to act on the payment order received by it and containing instructions necessary to implement the credit transfer in an appropriate manner."

IX. In article 2, paragraph *(m)*, Canada proposes to delete the words "placed at the disposal of" and to substitute therefor the words "paid to" in the definition of "payment date".

X. In article 4, paragraph (1), Canada proposes to delete the word "purported" as a modifier of sender. On our analysis, it appears that the application of the rule in this paragraph constitutes the identified person as the sender of the payment order both as a matter of fact and of law. There is, therefore, no need to describe that person as merely "purported sender". The use of the modifier "purported" in paragraph (4) of article 4 is, however, appropriate, and should be retained.

In the same paragraph Canada also proposes to change the word "issued" in the second line to the word "sent".

Canada notes the incongruity of providing that "a sender is *bound*" by a payment order upon the conditions described in the paragraph when it is clear from paragraph (5) of article 4 that the sender will not be bound if the receiving bank rejects the payment order. A more appropriate concept would appear to be that the sender is *potentially* bound or *committed* by the payment order *if* it subsequently becomes a binding obligation as a result of the acceptance by the receiving bank. Alternatively, the concept might be expressed as the sender being "responsible for" the payment order in the sense that it is his communication.

XI. Canada proposes to delete the word "provided" in the first line of subparagraph *(a)* of paragraph (2) of article 4 as superfluous.

XII. Canada proposes to re-express paragraph (3) of article 4 so as to clarify its presumed intent: that is, the parties may not, by their agreement, preclude a court from reaching its own conclusion as to whether an authentication is a commercially reasonable method of security. If it is agreed that is the policy intent of the paragraph, Canada proposes that it be expressed

"(3) The parties may not, by their agreement, preclude a court from determining whether an authentication is commercially reasonable."

XIII. Canada proposes that, in the English language version of the Model Law, the masculine pronoun ("he") be used uniformly throughout the Model Law to refer to parties designated as *originator, sender* or *beneficiary;* and that the impersonal pronoun ("it") be used to designate banks. The current usage is divided between "he" and "it" for the former.

Canada suggests that the references to "present or former *employee* of the purported sender" in paragraph (4) of article 4 is undesirably narrow since it might exclude a director, officer or other person whose relations with the purported sender might have enabled him or her to obtain improper access to the authentication or other operations of the purported sender, or are such that the purported sender is legally responsible for his or her actions. Canada proposes that the existing section be reviewed from the perspective of the policy reflected in its scope. Canada does not propose any specific language extending that scope until there is agreement in principle to do so.

XIV. The scope of paragraph (5) of article 4 should be expanded to include a revocation of a payment order.

If Canada's suggestion in paragraph 6 of this memorandum is adopted, Canada sees no reason to have a separate rule for erroneous duplication and errors in payment orders. The rule dealing with authentication generally appears to operate satisfactorily, and the definition may easily be expanded to include erroneous duplication and error. Canada's proposal would also include erroneous data omission within the scope of the rule. At present, erroneous data omission appears not to be covered.

XV. Canada proposes to move the first paragraph of article 10 so that it becomes a new article 4 *bis,* following article 4. Article 4, paragraph (6) refers to the acceptance of the payment order by the receiving bank. Article 5 refers to what flows from that. It seems logical to defer dealing with the time for acceptance to article 10. That treatment requires complicated forward references in provisions such as article 6, paragraph (2)*(a)* and article 8, paragraph (1)*(a)*. A person reading the Model Law provisions in numerical order would, we submit, expect to find the provisions on time of execution dealt with before the consequences of execution.

XVI. Canada proposes that the present article 5 be relocated after article 9 and before article 10 as a new article 9 *bis.* It seems illogical to deal with the sender's obligation to the receiving bank following acceptance until after the provisions defining acceptance have been introduced.

XVII. Canada proposes to amend clause (i) of subparagraph *(b)* of article 5 to substitute the words "deposit of funds" for the words "enter a credit". In practice, only funds are entered into accounts. There is a risk of confusion if the word *credit* is used to mean both the act of depositing funds and in the sense of *available credit.*

Canada also proposes to add words to the clause to emphasize that the funds must be used by the receiving bank in order to attract the application of the rule.

The two changes proposed by Canada would result in the clause reading as follows:

"(i) when funds that the sender causes to be deposited to an account of the receiving bank with the sender are used by the receiving bank, or if not used, on the business day following the day on which the funds are available for use and the receiving bank learns of that fact; or"

Canada proposes conforming changes to clause (ii) in the same subparagraph so that it would read:

"(ii) when funds that the sender causes to be deposited in an account of the receiving bank in another bank are used by the receiving bank or, if not used, on the business day following the day on which the funds are available for use and the receiving bank learns of that fact; or"

XVIII. Canada proposes to add a provision to old article 5 (new article 9 *bis*) to make it clear that for the purposes of applying clause (iii) of subparagraph *(b)* of the article, separate branches or offices of a bank, even if located in the same State, are separate banks.

XIX. Canada proposes to delete from the last line of subclause *(a)* in clause (iv) of subparagraph *(b)* of old article 5 (new article 9 *bis*) the words "applicable law and". The Model Law can safely assume that the rules of any funds transfer system that would be acceptable to banks as a means of making final settlement would be operated in accordance with the law of the State in which the funds transfer system is located and operating. Any additional reference to applicable law, particularly where the reference is conjunctive, merely serves to introduce an undesirable element of uncertainty concerning the enforceability of the rule set out in the subclause. It might be thought, for example, that the final settlement had to be in accordance with some law applicable to the participants (by reason of their state of incorporation or location of the receiving branch) *as well as* the law in accordance with which the rules of the funds transfer system operated.

XX. Canada proposes to separate the first paragraph of article 10 and to make it into a new article 4 *bis* and to amend the text: (i) to create a new term "to act" which comprises both *execution* and *acceptance;* and (ii) to clarify the exceptions to the duties to execute and to accept promptly.

The draft proposed by Canada is as follows:

["4 *bis* (1) A receiving bank shall act on each payment order on the day it receives it.

(2) If the receiving bank is not the beneficiary's bank, such action shall be to execute the payment order unless

(a) it rejects the payment order in accordance with paragraph (3) of article 6; or

(b) a later date is specified in the payment order, in which case the receiving bank shall execute the payment order on that date; or

(c) the payment order specifies a payment date and that date indicates that later execution is appropriate in order for the beneficiary's bank to be able to accept a payment order and to pay the beneficiary on the payment date, in which case the receiving bank shall execute the payment order on such later appropriate date.

(3) If the receiving bank is the beneficiary's bank, such action shall be to accept the payment order unless

(a) it rejects the payment order in accordance with paragraph (2) of article 8; or

> *(b)* the payment order specifies a payment date, in which case the beneficiary's bank shall either reject the payment order in accordance with article 8(2) before the payment date or accept the payment order on the payment date.]

XXI. In accordance with Canada's recommendation to move the text of paragraph (1) of article 10 to become a new article 4 *bis,* Canada recommends a conforming change to amend all references to article 10.

XXII. In subparagraph *(d)* of paragraph (2) of article 6, Canada recommends substituting the words "executes it" for the words "issues a payment order intended to carry out the payment order received".

XXIII. In paragraph (3) of article 6, Canada recommends deleting the word "sender" from the first line and amending the words "that sender" in the second and third lines to read "the sender".

XXIV. Canada recommends deleting most of paragraph (2) of article 7 so that it shall read:

> "A receiving bank that accepts a payment order is obligated to execute it."

This change has been made possible by changes recommended by Canada to the definitions of "credit transfer" and "execution" in article 2, paragraphs *(a)* and *(l)* respectively.

XXV. In the last sentence of paragraph (5) of article 7, Canada proposes to change the words "would rely" to "may rely".

XXVI. Canada proposes to delete from subparagraph *(a)* of paragraph (1) of article 8 the term "execution" and the words "under article 10" and to substitute therefor the words "action under article 4 *bis*" and to re-express the remainder so that the first two lines of the subparagraph would read:

> "When the time for action under article 4 *bis* has elapsed without action having been taken, provided that . . ."

XXVII. In subparagraph *(b)* of paragraph (1) of article 8, Canada proposes to delete the square bracketed word "execute" and to substitute therefor the word "accept".

XXVIII. In subparagraph *(d)* of paragraph (1) of article 8, Canada proposes to delete the words "places the funds at the disposal of" and to substitute therefor the word "pays".

XXIX. In paragraph (2) of article 8, Canada proposes to delete the square brackets and to retain the reference to the execution date.

XXX. In paragraph (1) of article 9, Canada proposes to delete the words "place the funds at the disposal of" and to substitute therefor the word "pay".

XXXI. In paragraph (2) of article 9, Canada proposes to delete the word "executed" in square brackets and to substitute therefor the word "accepted" and to change the reference to article 10 to "article 4 *bis*".

XXXII. In paragraph (4) of article 9, the last sentence, Canada proposes to delete the verb "would" and to substitute therefor the word "may", and to change the reference to article 10 to "article 4 *bis*".

XXXIII. In paragraph (4) of article 9, Canada proposes to change the reference to article 10 to "article 4 *bis*".

XXXIV. In paragraph (5) of article 9, Canada proposes to delete the words "execution date" in the square brackets and to substitute therefor the words "acceptance date".

XXXV. Canada proposes to move the text of paragraph (1) of article 10 to form a new article 4 *bis*. See paragraph 20 of this memorandum.

XXXVI. In paragraph (3) of article 10, Canada proposes to delete the square brackets around the term "payment date" and to retain that term.

XXXVII. In paragraph (4) of article 10, Canada proposes to delete the word "following" and to substitute therefor the word "next"; to delete the square-bracketed word "executes" and to substitute therefor the words "deals with"; and to add to the end of the sentence the words "in the ordinary course of its business", so that the predicate of the paragraph would read:

> "is entitled to treat the order as having been received on the next day the bank deals with that type of payment order in the ordinary course of its business."

XXXVIII. In paragraph (5) of article 10, Canada proposes to delete the word "execution" in square brackets and the preposition following it, and to substitute therefor a reference to "that type of business"; to delete the word "following" and to substitute therefor the word "next"; to delete the word "executes" and the square brackets and to substitute therefor the words "deals with"; to add to the end of the sentence the words "in the ordinary course of its business", so that the paragraph (with conforming grammatical changes) would read:

> "If a receiving bank is required to take action on a day when it is not open for that type of business, it must take the required action on the next day it deals with such matters in the ordinary course of its business."

XXXIX. In paragraph (1) of article 11, Canada proposes to clarify the meaning by moving the reference to "the receiving bank" so that it immediately follows the reference to the payment order at the beginning of the sentence and reads:

> "A payment order sent to a receiving bank other than the beneficiary's bank may not be revoked by the sender unless the revocation order is received at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act . . ."

XL. In paragraph (2) of article 11, an editorial change similar to that suggested by Canada for paragraph (1) appears to be desirable to clarify the meaning so that the sentence would begin:

> "A payment order sent to a beneficiary's bank may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner . . ."

Canada also proposes to change the word "or" in the last line of paragraph (2) to "and". This is merely a grammatical change.

XLI. In paragraph (4) of article 11, the requirement that a revocation order always be authenticated is more strict than the requirement of paragraph (2) of article 4 with respect to payment orders themselves. If authentication is optional in the case of a payment order, it should be optional in the case of a revocation order as well. Canada proposes to amend the paragraph so that it reads:

> "A revocation order must be authenticated if the payment order was subject to authentication."

XLII. In paragraph (5) of article 11, it should not be necessary to retain the words "other than the beneficiary's bank" in the first line, since the reference to a receiving bank *"executing"* a payment order is sufficient to exclude the beneficiary's bank.

XLIII. In paragraph (6) of article 11, the provision for refunds does not clearly appear to operate repeatedly with respect to each recipient in order to ensure that the refund will be returned to the originator. That intended meaning would be clarified if the reference to a refund under paragraph (5) were expanded to include a reference to a refund under paragraph (6) as well. In addition, Canada proposes to add the word "credit" before transfer to conform to the usage in other parts of the Model Law.

XLIV. In paragraph (8) of article 11, it appears to be desirable to expand upon the saving effect of the text so that all receiving banks that act to complete the credit transfer retain their authority notwithstanding the loss of the originator's capacity or the capacity of any intermediate sender. Canada proposes to amend the first sentence so that it reads:

> "The death, bankruptcy or incapacity of the sender or the originator does not of itself operate to revoke a payment order or to terminate the authority of the sender or the originator or of any receiving bank to act to complete the credit transfers."

XLV. In article 12, Canada proposes to delete the words "the next" and to substitute therefor "its".

XLVI. In addition, Canada proposes to add a provision protecting the text of article 12 from variation by agreement between the parties in terms such as "The provisions of this article may not be varied by agreement".

XLVII. In paragraph (2) of article 13, Canada proposes to add, immediately following each reference to the intermediary bank, the words "or funds transfer system". The policy that shifts to the sender the risk of the failure of an intermediary bank should extend to cover as well the risk of failure of a designated funds transfer system.

XLVIII. In article 14, Canada proposes to conform the verb to the usage of the Model Law by deleting the words "is obligated to" and substituting therefor the word "shall".

XLIX. In article 15, the policy ought to extend to a payment order accepted by the beneficiary's bank. Canada proposes to add, after the reference to the payment order executed by a receiving bank in the second line, the words "or accepted by the beneficiary's bank".

L. In paragraph (3) of article 16, there should be a reference to a specific payment order in order to give a clear meaning to the term "sender". Canada proposes to add the words "with respect to a payment order" immediately following the reference to paragraph (5) of article 7 in the second line of paragraph (3). Canada proposes a similar amendment to the second line of paragraph (4) of article 16.

LI. In paragraph (5) of article 16, Canada proposes changes to implement its proposal that the verb "issues" be replaced throughout the Model Law by the verb "sends" and that references to "placing funds at the disposal of" the beneficiary be replaced by the words "paid to".

In the same paragraph, Canada proposes to modify the term "improper action" so that it reads "improper execution". This change should make it clear that any discrepancy between the payment order received and the implementing payment order executed may be a source of interest liability for the receiving bank when the circumstances of paragraph (5) are satisfied.

LII. In paragraph (8) of article 16, Canada proposes to delete the verb "to execute" in the fifth line and to substitute therefor the verb "to act upon", applying the new terminology suggested by Canada in proposed new article 4 *bis*.

LIII. In paragraph (2) of article 17, it appears to be an error to purport to discharge the obligation as soon as the beneficiary's bank *accepts* the payment order. Acceptance may occur at a time significantly before the time that the beneficiary actually receives payment from the beneficiary's bank. This could occur, for example, if the conditions of subparagraph (1)*(a)* of article 8 applied. Similarly, the conditions in subparagraphs (1)*(c)*, *(d)* and *(e)* of the same article appear to be inappropriate events to create a discharge. Canada proposes to delete the verb "accepts" and to substitute therefor the words "pays the amount of the payment order to the beneficiary". Expressing the condition of discharge in terms of traditional *payment* emphasizes the bilateral nature of the necessary action (i.e. the funds must be both given and received with the intention of discharging the obligation) and protects the beneficiary from unwanted payments or having his contractual rights against the originator affected without his consent.

LIV. In paragraph (2) of article 18, Canada proposes a conforming amendment to delete reference to the purported sender, if its proposal to amend paragraph (1) of article 4 has been accepted. The provision should read:

> ". . . shall not affect the determination of which law governs the question whether the sender is bound by the payment order for the purposes of article 4(1)."

CZECHOSLOVAKIA

[Original: English]

Article 7(5)

In essence, we have no objections to the contents of this paragraph. We, however, submit to your consideration whether the answer to the problem of a possible difference between the verbal and numerical expression of data in a payment order corresponds with the banking practice developed over many years. Moreover, the Geneva Conventions on Bills of Exchange and Promissory Notes unambiguously endorse the conclusion that, in the event of a difference between the numerical and the verbal expression, the verbal expression has priority.

Article 9(3)—see comments above.

Article 10(4)

We assume that the receiving bank's cut-off time will be an individual matter of the individual banks, because the "same date execution" might cause practical problems in a number of countries, viz. with regard to the fact that not only banks but also clients possess sophisticated computer technology.

Article 11(8)

It is our opinion that the specification of the respective facts should not be understood to be enumerative. This is why we would suggest to include in the text an expression like "similar circumstance" or a like expression to make it more explicit that an enumerative specification is not meant.

Article 13

In our opinion this is one of the most complicated questions in the draft of the Model Law. Duty to refund conceived as money back guarantee seems too severe to us, viz. in spite of a certain limitation of this duty, which ensues from paragraph 2 of this article. We explain that, by virtue of the duty thus conceived, the behaviour of the banking system could be affected adversely, and payment orders might possibly be refused, which so far is not happening, on the part of the individual banks. Not only does the payment order enter in the bank's balance sheet but, in a number of countries, it would burden also the "risk asset ratio" of the banks, which is usually a binding indicator set by central banks. As opposed to the issuance of the banking guarantee, opening of a letter of credit etc., there would often be involved an unintentional, involuntary conduct with which the question of "contingent liabilities" would be connected.

Article 16

We submit to your consideration whether it would be appropriate to state in the text words to the effect ". . . to pay interest on the amount of the payment order in the currency involved . . .", not in order that the rate be set directly, but to make it unambiguous that the interest rate should be related to the pertinent currency.

Article 16(8)

We take into consideration that the present document has the form of a Model Law, viz. that it would be embodied by means of domestic regulations. We agree to the variant that the Model Law itself does not specify "consequential damages" but, to this effect, only defines the pre-conditions under which these damages would be compensated, if the applicable law recognizes such damage.

The question remains, however, what pre-conditions the Model Law itself should set.

Maybe it is usual and in the practice of the individual countries it will cause no problems to define the expression "intention" as a form of "culpa". A major problem would in our opinion cause the interpretation of the Anglo-American term "recklessness" dealt with in the continental law, without this expression being defined for the purpose of the Model Law. According to our information the term "recklessness" has more meanings and is not interpreted uniformly even in the common law itself. This expression would namely cover both the "dolus eventualis" "indirect intention"/ as well as "gross negligence", which would obviously cause big problems in the continental practice in the application of these rules. This is why we suggest deletion of the expression "recklessness" from the draft of the Model Law, or to try and express the objective in another more customary manner.

EL SALVADOR

[Original: Spanish]

We have examined the approach contained in the draft in question and it appears to be consistent in several respects with our legislation. Nevertheless, we can suggest that other concepts should be taken into account, such as the following:

(a) the credit transfer must be made in favour of a definite person;

(b) each operation must be for a fixed quantity;

(c) the transfer document must not be negotiable.

In addition, we can suggest in Chapter I of the draft a different wording for article 1, as follows:

"The present law has as its purpose the legal regulation applicable to credit transfers between customers of banks located in different States."

For the purposes of this law, branches and offices of a bank that are separate from their central office are considered to be separate banks, if they are to be found in different States, that is, in territories that do not have the same legal order.

FINLAND

[Original: English]

1. *General comments*

The Government of Finland welcomes the effort by UNCITRAL towards a harmonization of the law governing international credit transfers. The task undertaken by UNCITRAL is a difficult one, both because it raises a large number of policy issues and because the subject matter is very complicated. A Model Law must, in order to be acceptable, strike a reasonable balance between the interests of all the parties. It is necessary to take into account the conditions under which payment services are operated and must be operated in order to cope with large volumes of transactions, in terms of both number and value, and in order to meet the requirements and expectations of speedy processing. It is obvious that a Model Law on international credit transfers will largely deal with interbank relationships. At the same time, it is of special importance that the position of originators and beneficiaries that are not banks is adequately safeguarded. These parties depend and rely on the banking system for efficient and professional payment services, and even if the present project is focused on commercial payments and not on consumer protection, an essential function of the law in this field must be to provide bank customers with adequate rights and remedies in case their reasonable expectations on the professional payment services of the banking system are not fulfilled. The adoption of a law governing international credit transfers could hardly be justified unless the interests of bank customers were adequately taken care of.

While the draft Model Law provides a good basis for consideration, it is suggested that a number of improvements could be made, with regard to both substance and drafting and in order to achieve better coordination and clarity in the relationship between different parts of the text.

The draft Model Law also raises the question as to what the status of the text should be. It is subject to doubt whether the rules could work properly irrespective of whether all or only some of the banks involved in the transfer are subject to the same rules. Thus, the question arises whether it is appropriate to present the rules as a Model Law, applicable to all international credit transfers, rather than as a convention. Especially the liability rules envisaged in the draft would seem better fit for a convention than a Model Law.

2. *Specific comments*

Article 2. *Definitions*

(a) "Credit transfer"

In principle, there does not seem to be any particular reason to exclude transfers effected through point-of-sale payment systems from the scope of the Model Law, even though it is disputable whether they should be classified as credit transfers or debit transfers. Consumer transactions and consumer oriented payment systems are not generally excluded, even if the footnote under article 1 makes it clear that the Model Law has been drafted without special consideration to consumer protection and is not intended to thwart separate legislation in that field. Thus, the last sentence should either be deleted or modified to state the opposite.

(e) "Sender"

The definition might be modified as follows: "Sender" means the person who issues a payment order or who is bound by a payment order under article 4, paragraphs (1) to (4). The term includes the originator and any sending bank.

(f) "Bank"

Taking into account the definition of the term "execution" in paragraph (1) the second sentence of paragraph *(f)* seems superfluous.

(j) "Authentication"

The term authentication is used in article 4, paragraphs (2) to (4). The problem is that the definition is broad enough to encompass even comparison of a signature with a specimen; this can also be described as 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". Comparison of a signature with a specimen is, however, not intended to be covered by the provisions of article 4, paragraphs (2) to (4). The cases where a payment order is authenticated by signature should be governed by article 4, paragraph (1) only. Thus, for the purpose of the Model Law, the definition of authentication needs to be modified accordingly. The following addition to paragraph *(j)* is suggested: "The term does not include comparison of a signature with a specimen." Another possibility would be to indicate this limitation in article 4, paragraph (2).

(l) "Execution"

The definition needs to be completed as regards execution by the beneficiary's bank. The following might be considered: "With respect to the beneficiary's bank, 'execution' means the action necessary in order to place the funds at the disposal of the beneficiary."

Article 4. *Obligations of sender*

Paragraph (2), subparagraph (a)

Taking into account the definition of authentication as an agreed procedure, a more appropriate expression than "authentication provided" would seem to be "authentication used".

The basic standard of commercial reasonableness is vague. Some guidelines concerning the factors to be taken into account in assessing whether an authentication procedure meets the standard should be given. The following formulation is suggested:

> "the authentication used is a commercially reasonable method of security against unauthorized payment orders, taking into account the amounts and the frequency of payment orders normally issued by the sender to the receiving bank, the method of transmission used between them as well as other circumstances".

Paragraph (2), subparagraph (b)

This provision does not seem to provide a clear answer to the allocation of risk in cases where the authentication result is incorrect due to a technical malfunction. It is uncertain how the words "complied with" should be interpreted in this context. The problem arises if, due to a technical malfunction in the authentication mechanism, a payment order passes as authenticated even if it shouldn't have passed (the computer "accepts" a false authentication code, for instance). If the words "comply with" are taken to mean that it is enough that the receiving bank has taken the steps required in order to comply with the authentication procedure, this would mean that the sender would bear the risk of falsely positive authentication results that are due to technical malfunctions. That would not be fair in cases where the technical problem arose in the computer system of the receiving bank; in such cases the loss should be borne by the receiving bank and not by the sender. The provision should be worded so that a proper risk allocation is ensured. The following amendment is suggested:

> "*(b)* the receiving bank performed properly with respect to the authentication."

Paragraph (5)

The following wording of the first sentence of this paragraph would seem to be appropriate:

> "Subject to the preceding paragraphs, a sender is bound by the terms of a payment order as received by the receiving bank. . . ."

Article 5. *Payment to receiving bank*

This article, which was introduced at the final session of the Working Group, raises a number of problems. The very purpose of the article is rather obscure. It is not clear what the provisions are intended to achieve and what their scope is intended to be. In the Model Law, the time of payment is of direct relevance in the context of deemed acceptance only, and some of the provisions in article 5 have been formulated with a view to that specific purpose. However, the solutions provided in article 5 do not seem to be satisfactory from the point of view of article 6. Moreover, the wording of article 5 does not indicate that the function of its provisions was limited to such a narrow purpose only. Rather, the wording suggests that the article is intended to pinpoint the time of payment for more general purposes. Some of the provisions included are, however, not appropriate for such a broader function, while others merely refer the issue to applicable law (and funds transfer system rules).

The following comments focus first on *subparagraphs* (b)*(i) and* (b)*(ii)*, because they highlight the problems involved.

With respect to the duties of the receiving bank, the two basic questions relating to time are (1) when does acceptance occur and (2) when is the receiving bank required to execute the payment order. One of the main concerns in the drafting of the rules on acceptance has been to make sure that so-called deemed acceptance does not occur until the receiving bank has received good cover for the payment order. The drafting of subparagraphs *(b)*(i) and *(b)*(ii) of article 5 was determined by some of the problems that arise in the context of deemed acceptance, particularly by the need to afford the receiving bank an adequate possibility to make a credit judgment with respect to the credit provided by the sender. Thus, the draft seems to confuse the question of when payment occurs with the question of when the receiving bank is in a position to determine whether the credit provided constitutes acceptable cover. For the purpose of a regulation of the duties of the receiving bank, the question of when payment occurs is, as such, not necessary to deal with at all; the important issues relate to the time of acceptance and the time of execution, and should be dealt with under those headings.

Subparagraph (b)*(i)* deals with the situation where the receiving bank has an account with the sender. It states that payment is deemed to occur when the credit is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact. Article 6(2)*(a)*, as well as 8(1)*(a)*, deals with deemed acceptance. That provision states that acceptance occurs when the time for execution has elapsed without notice of rejection having been given, i.e. at the end of the day on which the payment order was received, assuming that no other execution date and no payment date was indicated. However, acceptance does not occur until payment has been received, i.e. not until the credit is used or "on the business day following the day on which the credit is available for use and the receiving bank learns of that fact". The latter rule is not very precise, and it is not clear why the time of deemed acceptance must be deferred to the day following the day on which the credit became available. With respect to the time of execution in the latter case, the draft Model Law fails to provide an explicit answer. The present text indicates that deemed acceptance in some cases takes place after the time for execution under article 10 has lapsed, which means that execution following deemed acceptance would always be late.

In contexts outside articles 6(2) and 8(1), it may cause problems to state generally that where the sender credits an account of the receiving bank with the sender, "payment" by the sender to the receiving bank "occurs" on the day following the day on which the credit became available. Even the credit in the account basically amounts to a claim against the sender.

Subparagraph (b)*(ii)* raises similar objections: the time of deemed acceptance can better be dealt with in articles 6 and 8 exclusively, and the rules proposed are not appropriate for the purpose of determining the time of payment for other purposes.

If, as the wording suggests, article 5 purports not only to relate to the time of deemed acceptance under articles 6(2)*(a)* and 8(1)*(a)* but to lay down a general rule on the time of payment, the situation becomes very peculiar. Let us assume that a sending bank (A) issued a payment order to the receiving bank (B) on day 1 and that the order was received and executed on day 1. Let us further assume that on day 1 the third bank (C) credited the account of bank (B) with the amount required to cover the payment order from (A) to (B), and that at the end of day 1 the receiving bank files for bankruptcy. The question then arises whether the amount already credited to B's account at bank (C) belongs to the assets of the sending bank (A) or to the assets of the receiving bank (B). Normally, it would be deemed to belong to the receiving bank (B). Under the principle in article 5*(b)*(ii), payment would not be deemed to occur until the following day, day 2, which means that the amount already credited would not have been part of the receiving bank's assets at the time of the bankruptcy. Instead, there would only be a claim against the sending bank. Such a result would be odd.

The reasons that have been advanced for the "following day" rule have no bearing on the question of when payment should be deemed to occur for purposes other than those arising in articles 6, 8 and 10, and there is no reason to introduce such a deviation from general principles to govern the time of payment in interbank relationships.

The subparagraph is strange also because it is inconsistent with the principles contained in article 17. Subparagraph *(b)*(ii) deals with a situation where the sender pays the receiving bank through a third bank: the sender (bank A) issues a payment order to the receiving bank (bank B) and a covering payment order to the third bank (bank C) for the benefit of bank (B). Such a cover transfer is also governed by the draft Model Law (nothing indicates the opposite). The beneficiary of the covering payment order is bank (B), and bank (C) is both the originator's bank and the beneficiary's bank. Under article 17, the covering transfer is completed when bank (C) accepts the covering payment order issued by bank (A), and this is the time when payment from (A) to (B) would be deemed to occur under the principle contained in article 17(2). There seems to be no valid reason for deviating from that principle in cases where the purpose of the transfer is to discharge (A) from an obligation to provide cover for a payment order issued by (A) to (B).

Articles 6 and 8 can be drafted without resorting to a construction now found in article 5. Therefore, article 5 should be deleted and necessary elements from it should be incorporated into articles 6 and 8. A suggested redrafting of article 6 is presented below.

Other comments:

The *chapeau* of the article refers to "payment of the sender's obligation under article 4(6)". According to article 4(6), that obligation does not arise until the payment order has been accepted by the receiving bank. However, in article 6(2)*(a)* and 8(1)*(a)* the time at which payment occurs is used as a criterion for defining when acceptance occurs. Thus, the wording of the *chapeau* introduces an unnecessary circularity in the text.

Subparagraph (iv) is very ambiguous. It is unclear what its effect would be if adopted in a particular legal system. Especially the reference to applicable law in (iv)a. is very obscure. It is not clear whether the reference to applicable law means the law applicable to the payment obligation or the law applicable to the funds transfer system. In the first case the provision does not seem to say more than that payment occurs when final settlement takes place in accordance with the rules of the system, provided that the law applicable to the payment obligation in question recognizes that time as conclusive. Such a provision is hardly very useful. In the second case the provision is also of questionable value since it seems quite unclear what the law applicable to the funds transfer system might be. If it is not possible to elaborate and reach consensus on rules that would really ensure the legal effect of settlements made through netting arrangements, it is doubtful whether the Model Law could address these issues in some less controversial manner that would still be useful.

Article 6. *Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank*

The following restructuring and redrafting of article 6 is suggested:

"(1) This article applies to a receiving bank other than the beneficiary's bank.

"(2) If a receiving bank does not accept a sender's payment order, it shall give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date. Failure to give notice of rejection results in acceptance under the conditions and at the time laid down in subparagraph (3)*(b)*. A payment order which has been accepted by the receiving bank can no longer be rejected by the bank.

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

(a) when it executes the payment order received;

(b) when it gives notice to the sender of acceptance;

(c) when the bank receives the payment order, provided that the sender and the receiving bank have agreed that the

bank will execute payment orders from the sender upon receipt;

(d) when the receiving bank makes a debit to an account of the sender with the receiving bank in order to cover the payment order;

(e) at the end of the day on which the payment order was received or at the end of the execution date indicated in the payment order, if later, provided that:

(i) where payment is to be made by debiting an account of the sender with the receiving bank, acceptance shall not occur until there are funds available in the account sufficient to cover the amount of the payment order; or

(ii) where payment is to be made by crediting an account of the receiving bank with the sender, acceptance shall not occur until the earlier of the following:

— when the credit is used, or

— at the end of the day on which the credit became available for use and the receiving bank learned of that fact; or

(iii) where payment is to be made by credit to an account of the receiving bank in another bank, acceptance shall not occur until the earlier of the following:

— when the credit is used, or

— at the end of the day on which the credit was made and the receiving bank learned of that fact; or

(iv) where payment is to be made through the central bank of the State where the receiving bank is located, acceptance shall not occur until final settlement is made in favour of the receiving bank; or

(v) where payment is to be made through a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally, acceptance shall not occur until

— final settlement is made in favour of the receiving bank in accordance with [applicable law and] the rules of the system; or

— final settlement is made in favour of the receiving bank in accordance with a bilateral netting agreement with the sender; or

(vi) where none of the subparagraphs (i)-(v) apply, acceptance shall not occur until the receiving bank receives payment for the payment order as provided by applicable law."

Article 7. *Obligations of receiving bank that is not the beneficiary's bank*

Paragraph (2)

Under this provision, the obligation of the receiving bank that has accepted a payment order is only to issue an appropriate payment order of its own to the beneficiary's bank or to an intermediary bank. Nothing is said about an obligation to provide cover for the payment order. However, the provision of cover is equally important in order to make the credit transfer work. The obligation of a bank as sender to pay for the payment order arises when the payment order is accepted. Such a provision, which only takes account of the relationship between a sender and its receiving bank, is not enough with a view to the credit transfer as a whole, because without cover acceptance will often not take place: failure by a bank to make covering funds available is likely either to result in a rejection of its payment order by the next receiving bank or to defer acceptance by the next bank so that completion of the credit transfer is delayed. A Model Law on credit transfers which could be properly complied with merely by transmitting payment orders, without a timely provision of funds, would be odd. Under the present draft, however, neither the originator nor the beneficiary would have any remedy available in cases where the completion of the credit transfer was delayed because of a delay by one or more receiving banks in making cover available to the next receiving bank. That is not acceptable. The following amendment is suggested:

"(2) A receiving bank that accepts a payment order is obligated under that payment order

(a) to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner, and

(b) to take the appropriate steps in order to provide or make available sufficient cover for the payment order issued under subparagraph *(a)*."

Paragraph (3)

The paragraph should be deleted. The problem of misdirected payment orders does not merit regulation in the Model Law. It appears from article 16(3) that a failure to give notice of a misdirection will have consequences only when payment was received also. Firstly, it is probably an unlikely occurrence that both a payment order and covering funds are mistakenly delivered to the wrong bank. Secondly, should this happen, it is possible and perhaps most likely that the misdirection is not detected and the payment order will be executed. In that case, it seems that from the point of view of the draft Model Law there is no problem; no liability of any kind arises. Thirdly, if the misdirection is in fact detected, it is unlikely that the bank would not notify the sender. Fourthly, the draft does not provide that the rules concerning deemed acceptance would not apply in cases where a payment order comes in but is misdirected. This means that the receiving bank would be required to give a notice of rejection, provided that cover was received also.

Paragraph (5)

It is not clear how this provision relates to the provisions of articles 6 and 16. If a bank has failed to notify the sender of an inconsistency between the words and figures that describe the amount of the payment order, this may be due to the fact that the inconsistency was not detected and the payment order was executed in either amount. The liability provided for in article 16(3)—the payment of interest to the sender—does not seem to make sense in cases where execution has taken place. Paragraph (5) of article 7 is, however, not limited to situations where the inconsistency was in fact detected and the payment order was not executed.

For example: The amount in words was a hundred thousand and the amount in figures 10000. The bank executed by sending a payment order for 10000. The draft does not make it clear how such a situation is to be assessed. Has there—through execution—been acceptance and if so, in what amount? In other words, can the receiving bank be liable under article 16(5)?

It seems that the problem of inconsistency in words and figures describing the amount of the payment order can be properly solved only by establishing a rule as to which description shall govern.

Paragraph (6)

This paragraph is directly related to paragraph (2) and should be placed after it; in other words, paragraph (6) should become paragraph (3).

Article 8

This article should be restructured in the same manner as article 6.

Article 9

Paragraph (3)

See comments to article 7(5).

Paragraph (4)

This paragraph also lays down a duty of notification. It is not clear what the implications of a failure to give the required notice would be and how the provision relates to situations where the beneficiary's bank has executed the payment order on the basis of either the words or the figures. If the name and the account number identify different persons and the beneficiary's bank pays one of them, who turns out not to be the intended beneficiary, the Model Law does not seem to provide an answer as to what the consequences are. Presumably, the duty to refund (article 13) would apply, provided that the inconsistency did not originate from the originator's payment order. The bank that caused the error would also be entitled to a refund, and the beneficiary's bank would be the one to recover the funds from the person who received them. Paragraph (4) does not seem to affect this situation in any way. If, on the other hand, the inconsistency originated from the originator's payment order, i.e. from an error of the originator himself, the question arises whether paragraph (4) would be of some significance for determining the allocation of loss between the originator and the beneficiary's bank.

Article 10. *Time for receiving bank to execute payment order and give notices*

The provisions on deemed acceptance give rise to problems in the context of article 10. If a payment order is received on day 1 but payment is not received until day 2, deemed acceptance would, under articles 6 and 8, take place once the payment is received. Thus, it seems necessary to introduce a special provision on the time of execution for such cases. The following is suggested:

"(1) A receiving bank is required to execute the payment order on the day it is received or, in cases referred to in article 6(3)*(e)* and 8(2)*(g)*, on the day following acceptance, unless . . ."

Article 11. *Revocation*

This article is based on the principle that a revocation of a payment order is effective only if received by the receiving bank so early that execution of the order can still be prevented. A receiving bank that has received a revocation at a later point of time is under no obligation to revoke its own payment order. Thus, the article limits the possibility for an originator to interrupt a credit transfer. Such a possibility can be of great importance to the originator (for instance in cases of fraud or the beneficiary's breach of contract or insolvency), while a requirement that the receiving bank would have to revoke a payment order already issued would not always be unreasonable. If, at the same time, it is recognized that it should be possible for payment systems to be based on the principle of irrevocability and that adequate provision must be made for such a possibility, a more balanced solution could be found. The draft in the UNCITRAL Working Group's Working Paper A/CN.9/WG.IV/WP.49 p. 54-55 represents a better basis for a regulation of revocation than does the present draft.

Articles 12-15 and 17(1); general remarks

Articles 12-15 all start with a reference to the completion of the credit transfer "in accordance with article 17(1)"; Article 17(1) states that a credit transfer is completed when the beneficiary's bank accepts "the payment order". This leaves open at least one important question: if the payment order accepted by the beneficiary's bank was not consistent with the originator's payment order with respect to the identification of the beneficiary, it is not clear whether the Model Law treats the transfer as completed or not completed and which of the provisions in Chapter III would apply. It seems obvious that article 17(1) needs to be qualified so that a credit transfer is deemed to be completed "when the beneficiary's bank accepts a payment order to the benefit of the beneficiary designated in the originator's payment order".

Article 12. *Duty to assist*

The logic on which the provisions of this chapter are based does not seem quite unequivocal. On the one hand, the draft Model Law could be understood so that as long as the credit transfer is not completed, it follows from article 7(2)—which lays down the obligations of a receiving bank that has accepted a payment order—that the bank must, if necessary, make several attempts at execution (unless the refund provisions in article 13 are invoked). If a problem arises—the next receiving bank rejects the payment order or the execution was erroneous with respect to the identification of the beneficiary or with respect to the amount (it was too small)—the receiving bank's basic obligation is that it has a duty to try again by issuing a new payment order, possibly to another bank (in the case of rejection). On the basis of such a reasoning, the duty to assist provided for in article 12 could be understood to impose "new" obligations only on receiving banks other than the one where the execution problem actually arose. However, it is not clear whether this is the correct interpretation. Thus, the question arises—for example—whether the duty of a receiving bank to issue a new payment order in cases where it has made an error in the identification of the beneficiary would be derived from article 7(2) or from article 12.

The point is that a Model Law could reasonably be expected to be more specific with respect to the duty of a receiving bank to correct an erroneous execution—without additional cost to the sender or the originator. It should also be made clear that the assistance referred to in article 12 may not involve additional cost to the sender or the originator.

Article 14 deals with correction of overpayment. That provision could be incorporated into article 12, which could be amended as follows:

Article 12. *Duty to correct erroneous execution and duty to assist*

"(1) If the credit transfer has not been completed in accordance with article 17(1) because a receiving bank has issued a payment order in which the identification of the beneficiary did not correspond to the payment order it accepted, the receiving bank is obligated to issue, without additional charge, a new payment order containing the correct identification.

"(2) If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order issued by a receiving bank is less than the amount of the payment order it accepted, the receiving bank is obligated to issue, without additional charge, a payment order for the difference between the amounts of the payment orders.

"(3) If the credit transfer is not completed in accordance with article 17(1) or if it has been completed in an amount less than the amount of the originator's payment order, each receiving bank is obligated to assist, at its own cost, the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the credit transfer in accordance with the originator's payment order."

Article 13. *Duty to refund*

The principle contained in this article is of fundamental importance, even if the situations in which it would need to be invoked will probably, and hopefully, not be very frequent. The policy that the sender of a payment order does not risk losing the principal sum even if, due to later events, the credit transfer is not properly completed, represents a basic safeguard of the sender's and especially the originator's legal position.

The amendment suggested above for article 17(1) would make it clear that the duty to refund would apply also in cases where the payment order accepted by the beneficiary's bank was—because of fraud or error—to the benefit of a person other than that designated by the originator. However, in such a case the right to the return of funds from the next receiving bank should not extend to the receiving bank that had issued a payment order that was inconsistent with the payment order accepted by it. Therefore, an amendment of paragraph (1) to that effect seems necessary. The following redraft of article 13(1), second sentence, is suggested:

"The originator's bank and each subsequent receiving bank, with the exception of a receiving bank that has issued a payment order inconsistent with the payment order accepted by it, is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund."

An alternative would be to add the following sentence at the end of the paragraph: "However, a receiving bank that has issued a payment order inconsistent with the payment order accepted by it is not entitled to a return of funds from its receiving bank."

Article 14. *Correction of underpayment*

It has been suggested above that this provision should be placed in article 12.

Article 15. *Restitution of overpayment*

This provision deals with a situation where the beneficiary has received more money than he should have. The article does not attempt to regulate the right of a bank to recover such overpayment from the beneficiary but contains only a reference to relevant rules of law. Since there are other situations in which a need for restitution of payment may arise in connection with credit transfers—for instance where an error by some bank has resulted in payment to the wrong person—it is not easy to see a justification for including an express provision on one particular case while others are not dealt with.

Article 16. *Liability and damages*

This article involves a number of problems.

1. The article is based on the principle that if a delay by one receiving bank results in delayed completion of the credit transfer, the receiving bank that caused the delay is liable to the beneficiary for interest. The bank can discharge its liability by paying the interest to the next receiving bank, which in turn is obligated to pass the interest forward.

The principle that the beneficiary should be entitled to interest compensation in the case of delayed completion of the credit transfer is, as such, a good principle. However, the liability rules set out in the draft Model Law contain a major flaw because they can function properly only on the condition that all the receiving banks involved in the credit transfer are subject to the Model Law (or rules similar to it). Yet, the Model Law would be recommended to States as a statute that they are expected to make applicable to all international credit transfers, regardless of whether all the receiving banks involved are governed by the same rules. The kind of liability system that the draft contains would seem to require that the rules are given the form of a convention instead of a Model Law.

The problem can be illustrated by the following example: The originator and his bank are located in State A, which has adopted the Model Law, and the beneficiary and his bank in State B. The transfer goes through two intermediary banks in States C and D. If the intermediary bank in State D causes a delay, but State D has not adopted the Model Law, the beneficiary may have no claim against the intermediary bank under the applicable law, or there may be a great deal of legal uncertainty and practical problems involved in trying to pursue such a claim. Even if the beneficiary might have a claim under the law of State D, it is unlikely that the intermediary bank would on its own initiative forward any interest to the next receiving bank that is not the holder of the claim, unless the applicable law clearly recognizes such a procedure. Thus, if the credit transfer passes through a legal system not based on the Model Law, the beneficiary is not likely to receive interest as envisaged in article 16(1) and 16(2). In that case, the beneficiary is likely to claim against the originator (provided that there has been a delay with respect to the terms of the underlying obligations also). Given that State A has adopted the Model Law, the originator would have no possibility of recovering from the banking system any interest paid to the beneficiary.

It would not be a justifiable policy to recommend to States the adoption of liability rules which in many cases would either leave the beneficiary without compensation or let the originator bear the ultimate loss for delays that arise in the banking system.

If the draft is to be presented as a Model Law and not as a convention applicable when each receiving bank involved is subject to its provisions, the liability rules require modification in order to ensure a fair allocation of losses. The Model Law must provide a right of recourse for the originator in order to safeguard the originator against situations where the basic liability scheme does not work due to the fact that the system presupposes that every receiving bank is governed by uniform rules without making sure that this is the case.

2. Under article 16(1), the liability of a receiving bank arises if it fails to execute its sender's payment order in the time required by article 10(1). This language is all too narrow. According to article 2(1), execution means the issue of a payment order "intended to carry out the payment order received by the receiving bank". Thus, it seems that no liability would arise if the receiving bank causes a delay by issuing a payment order that is not consistent with the payment order accepted by it; it would be enough that the receiving bank managed to issue, within the time required by article 10, a payment order "intended" to carry

out the order it accepted. Obviously, the receiving bank must be liable if it causes a delay by erroneous execution and not only for failure to execute at all. If, for example, the payment order issued by the receiving bank erroneously instructed payment to the wrong beneficiary and this resulted in a delay in the completion of the credit transfer, article 16(1) must apply. The provision needs to be formulated by reference to a failure of a receiving bank to fulfil its obligations under article 7(2).

3. It has been pointed out in connection with article 7(2) that a receiving bank must also be liable for delays caused by the bank's failure to make cover available to the next bank so that the latter is put in a position to accept the payment order. If article 16(1) is amended so that reference is made to article 7(2) and article 7(2) is amended as suggested, this problem would be solved.

4. Paragraph (5) of article 16 contains a puzzling special provision on the liability of a receiving bank in the case of underpayment. According to this paragraph, interest would be payable only in case a payment date had been specified and there has been a delay in relation to that date.

The provision introduces a peculiar distinction between situations where the whole amount to be transferred has been delayed and situations where there has been a partial delay. Under article 16(1), the beneficiary is entitled to interest if the credit transfer has been completed later than it should have in the normal course of events. It is not required that a payment date has been specified and passed. This has been one of the basic considerations behind article 16(1). It seems odd and quite unjustified to deviate from that policy in the case of underpayment. The paragraph also contains a second sentence in which reference is made to "improper action" by a receiving bank. It is very unclear what that means and why liability should arise only on such a condition.

Paragraph (5) should be deleted. Instead, it should be made clear in article 16(1) that it applies regardless of whether there has been a delay with respect to the whole or to only part of the amount specified in the payment order accepted by the receiving bank in question.

5. According to article 16(1), a receiving bank may discharge its liability to the beneficiary by payment to the next receiving bank or by direct payment to the beneficiary. While it is important to encourage procedures that would make the interest compensation flow to the beneficiary automatically, this may not always happen in practice (even if the receiving banks in question were subject to the Model Law). If this is the case, it may often be difficult for the beneficiary to find out which bank is liable or, if that bank has discharged itself by payment to the next bank, which of the subsequent banks has failed to pass on the interest. Therefore, a duty for the receiving banks to assist the beneficiary in the necessary fact finding should be considered.

The following amendments to article 16 are suggested:

Article 16. *Liability for interest and other loss*

"(1) If the completion of a credit transfer in accordance with article 17(1) has been delayed due to the failure of a receiving bank other than the beneficiary's bank to fulfil its obligations under article 7(2), the receiving bank is liable to the beneficiary. The liability of the receiving bank shall be to pay interest on the amount of the payment order accepted by it for the period of the delay caused by the receiving bank's failure. If the delay concerns only part of the amount of the payment order accepted by the receiving bank, the liability shall be to pay interest on the amount that has been delayed.

"(2) The liability of a receiving bank under paragraph (1) may be discharged by payment to its receiving bank or by direct payment to the beneficiary. If a receiving bank receives such payment but is not the beneficiary of the transfer, the bank shall pass on the benefit of the interest to the next receiving bank or to the beneficiary.

"(3) Each receiving bank is, upon request, obligated to give the beneficiary reasonable assistance in ascertaining the facts necessary for pursuing his claim for interest under paragraphs (1) and (2).

"(4) If the originator has paid interest to the beneficiary on account of a delay in the completion of the credit transfer, the originator may recover such amount, to the extent that the beneficiary would have been entitled to but did not receive interest in accordance with paragraphs (1) and (2), from the originator's bank or the bank liable under paragraph (1). The originator's bank and each subsequent receiving bank that is not the bank liable under paragraph (1) may recover interest paid to its sender from its receiving bank or the bank liable under paragraph (1)."

(5) [Liability of a receiving bank for failure to give notices (if needed).]

(6)-(8) As in the draft Model Law.

GERMANY

[Original: English]

1. A Working Group of UNCITRAL has been dealing for some time with the drawing up of a Model Law on international credit transfers.

2. We feel that the work done so far deserves great praise, particularly the efforts to reappraise the problems involved in international transfers and the endeavour to solve these problems in a draft Model Law. Exercising the required caution *vis-à-vis* the undoubtedly carefully drafted proposals, however, we have a few reservations relating to their underlying concept, which we shall explain in the following comments.

3. At the same time, our comments are made in the belief that the General Assembly is the right place to discuss the draft in detail. In this light, we have taken up some fundamental reservations, of which we wish to mention already here the misgivings against article 10—principle of same-day execution—and against article 13—money-back guarantee.

I. *Necessity*

4. In our experience, international credit transfers are currently handled relatively smoothly in practice. In fact, the banking industry has proven that it is able, through the creation of complex systems, to efficiently handle international payments, taking into account satisfactory contractual bases as well; let us recall the SWIFT system.

5. The German delegation therefore initially felt that there was no need for a Model Law on international credit transfers. However, if the international community holds the view that legislation on international credit transfers requires harmonizing, we shall not close our eyes to this undertaking. Nevertheless, a Model Law makes sense only

— if it is based on the fundamental principles of international commercial law;

— if it takes account of actual practice in international credit transfer payments;

— if it promotes harmonization, i.e. if the Model Law really has a chance of being adopted internationally.

6. When any harmonization of legislation is undertaken, it may of course be necessary, for the common good, to abandon established concepts of national law. In this event, however, the regulatory concept adopted must be convincing. We believe that this is not the case with regard to some points:

— the restriction on freedom of contract is unsatisfactory;

— the sphere of application of the provisions also meets with misgivings on our part, and we wonder whether the draft Model Law really serves to promote harmonization or is not more likely to encourage a further fragmentation of legislation;

— a number of dogmatic breaks are unsatisfactory;

— also unsatisfactory are a number of provisions on the distribution of risk between the contracting parties;

— a number of provisions in the draft are unrealistic in the light of current actual practice;

— the regulations dealing with the effects on the "underlying obligations" do not appear convincing;

— in addition to this, we have a number of reservations about individual provisions contained in the draft.

II. *Restriction on freedom of contract*

7. Article 3 of the Model Law does state that the principle of freedom of contract applies. The rights and obligations of the parties listed in the Model Law may be varied by agreement.

8. This principle is, however, breached in key places, particularly article 11, paragraph (3), article 13, paragraph (2) and article 16, paragraph (7). There is no reason for the mandatory nature of these provisions and the resulting restriction of freedom of contract. Mandatory provisions are justified whenever these are required to ensure the due orderliness of payment transactions or to protect certain interests, e.g. of consumers. Neither is the case here. Neither the due orderliness of payment transactions is in question nor are there any recognizable interests in need of mandatory protection. The Model Law applies not only to credit transfers by firms but also to those made by consumers. Yet it is definitely not a law dealing with the protection of consumers (see footnote to article 1). UNCITRAL's task is in fact the harmonization of international commercial law. In trade and commerce, however, there is no reason to deprive the contracting parties of the opportunity to arrange their contractual relations at their own discretion. Neither the due orderliness of payments transactions nor the protection of a contracting party thus justify deviation from this fundamental principle of contract law:

— The idea that the mandatory provisions establish the characteristic obligations and risks of banks is incorrect, since banks can be both originator and receiving bank in a credit transfer transaction.

— Incorrect is the idea that an orderly return of faulty credit transfers requires more extensive liability on the part of a receiving bank, e.g. the "money-back guarantee" stipulated in article 13, since it is possible to find alternative arrangements that take into account the interests of the contracting parties in the same way. The shape of such arrangements should, however, be left to the contracting parties.

— Incorrect is also the idea that retail payments must be organized on a uniform legal basis, since it is precisely in the case of large-scale payments, on which the Model Law also focuses, that individual arrangements may be appropriate.

9. Restricting freedom of contract also limits competition. On the one hand, this puts small and medium-sized banks at a disadvantage (see VI *(c)* below) and, on the other, deprives banks of the opportunity to develop different offers for payments and to fix prices for handling payments in accordance with the different types of agreement available.

10. The unrestricted importance of freedom of contract can, moreover, not be overestimated, since during a possible "adaptation phase" of the Model Law this law will exist in international payments only as a particular additional legislation, such as all other national laws (which have not yet been modified). Moreover, future, especially technical, developments will force an adaptability, as extensive as possible, of international payments to the needs of the parties involved, which is not to be impeded but rather enhanced by international efforts to harmonize legislation.

11. Particularly problematic is, finally, the fact that restricting freedom of contract may lead to banks no longer accepting certain payment orders because the risk involved is out of all proportion to the price. Take, for example, payment transfers to countries where, as a result of acts of war or similar circumstances, there is no guarantee that the amount will actually be credited to the beneficiary's account.

12. It is therefore proposed that all provisions entailing a restriction of freedom of contract be deleted.

III. *Sphere of application*

13. The Model Law defines payment orders as unconditional orders. A point of doubt is thus, firstly, what legal consequences arise when the payment order is issued subject to a condition. Although such cases are untypical in practice, they cannot be ruled out. It must in particular also be borne in mind that new forms of payment transactions will be developed in the future involving a conditional payment order.

14. It could be assumed that payment orders issued subject to a condition are to be treated in the same way as unconditional payment orders. The Model Law does not seem to have adopted this approach in our view. However, this would have to be stressed more clearly.

15. If it is assumed, secondly, that conditional payment orders are not, as a rule, covered by the Model Law, these payment orders thus remain subject to the current legal arrangements. For the future, this could mean that a state of "new disorder" will be created.

— In the case of cross-border transfers between countries that have adopted the Model Law, legislation on payments will be harmonized.

— This will not, however, apply to payments by consumers, since in this respect the national consumer protection legislation will take effect.

— The Model Law is not to apply to conditional payment orders either, so that the old legal arrangements will remain in force.

— Furthermore, the old legal arrangements will also remain in force, and will apply to all payment orders, if the Model Law is not adopted by a country.

— The system is further complicated by the fact that the Model Law is to apply when the payment order is issued subject to a condition and the condition subsequently comes into play (article 2*(b)*, paragraph 2).

IV. *Dogmatic breaks*

16. If there is default in the execution of a credit transfer, e.g. if payment orders are not forwarded in due time by a correspondent bank, certain methods may well have developed in practice to deal with the resulting loss. However, it is not the task of the legislator to merely incorporate standard practice in a law drafted along the lines of a manual of operational rules. His task is in fact to take the contractual arrangements as the starting point. What is required is a reasonable balance of interests. This does not rule out a legal basis for claims also being embodied in a Model Law on international credit transfers. However, such a legally defined basis for claims then requires special justification.

17. This careful distinction between a contractual basis and a legal basis for claims is disregarded in several places. The following provisions of the draft Model Law appear to us to pose particular problems in this respect:

(a) Under article 16, paragraph (1), a receiving bank is liable to the beneficiary of a credit transfer if it has failed to execute the payment order within the period stipulated in article 10 and provided that the credit transfer was accepted by the beneficiary's bank in accordance with article 17. Article 16 therefore justifies claims by the beneficiary on intermediary banks although no contractual relationship exists between these parties.

What remains unclear is, *firstly*, whether such a claim only exists when the bank is responsible for the delay, i.e. when it is, in particular, guilty of wilful negligence. The present proposal implies that such claims exist irrespective of fault. This provision appears all the more problematic as the principle of an execution on the day the order is received (article 10) cannot be ensured; detailed comments on this point will be made under VI.

Secondly, article 16, paragraph (8) makes clear that a legal basis for claims is envisaged. Such an arrangement is justified by arguing that this is in conformity with banking practice in many countries and that existing practice—which is also economic in terms of costs—should thus be incorporated in a legal provision. This reasoning fails to convince. It blends a contractual basis and a legal basis for claims and produces inconsistent results. It is, for example, unclear how the beneficiary's claim stands in relation to the claim by the contracting party who issues the payment order to the bank which is responsible for the delay in forwarding the payment order. Are the types of claims implied under article 16, paragraph (8) to be ruled out, or are such claims to continue to exist, and how is a balance of interests to be achieved, if necessary, between the parties? In this light, this "interest-forward guarantee" appears unconvincing to us. Our proposal is that, when the execution of a payment order is delayed as a result of negligence, only the sending contracting party of the bank which forwards the payment order with a delay due to negligence on its part . . .

(b) The draft contains dogmatic breaks also in article 17. As a fundamental problem is involved this will be dealt with in more detail under VIII.

V. *Unrealistic obligations*

18. The Model Law must make allowance for the different types of payment systems. Credit transfers are partly electronic, partly paper-based, some are routine cases, some are transfers to beneficiaries involving special preliminary work to determine the transfer route. However, as the provisions of the Model Law are broad in scope and intended to cover all types of transfers, these special cases must also be taken into account. The banks must also be able to depict the discharge of obligations in practice. In this light, article 10 with its periods for the execution of payment orders cannot be depicted in practice. At least with regard to orders in foreign currency, it has to be pointed out that the bank can transmit amounts in foreign currency only if the corresponding amount has been put at its disposal abroad. However, in accordance with the present execution procedures in foreign exchange transactions, this is the case only one or two days after the bank has received the order. This two-days-rule is also acknowledged in the EC Commissions's recommendation of February 14, 1990 on the transparency of banking conditions relating to cross-border transactions (see no. 4).

VI. *Reservations regarding individual provisions*

19. Notwithstanding the general reservations regarding the underlying concept of the provisions, specific arrangements also meet with misgivings.

20. Article 6, paragraph (2)*(a)* in conjunction with paragraph 3 of the Model Law could be understood to mean that a receiving bank is to be treated, even if no cover is available, as if it has accepted the payment order on condition that it does not reject the order on the execution date. If it fails to give notice of the rejection in time, i.e. in an extremely short period, the receiving bank is consequently forced into a contractual relationship, even if it does not wish to be. This "sanction" would be undue and inappropriate, since a claim for damages (especially a claim for interest as of receipt of cover) would, in doubt, exist under general provisions of private law.

21. Such claims for damage result from article 7, paragraphs (3), (4) or (5) in conjunction with article 16, paragraph (3) and article 9, paragraphs (2) or (3) in conjunction with article 16, paragraph (4) if, in practice, extremely short periods are not observed by the receiving bank or beneficiary's bank with regard to interest to be paid on amounts received, although the respective cause for not executing the order was given by the relevant sending bank. The reduction of damages is made more difficult for the receiving bank on account of the fact that the handling of payment orders and account management are dealt with by two separate bank departments and the obligation to pay interest is to exist until the amount is returned.

GREECE

[Original: English]

The views of the Greek authorities concerning the "Draft UNCITRAL Model Law on International Credit Transfers" are reflected in the comments submitted by the Commission of the European Communities.

ISLAMIC REPUBLIC OF IRAN

[Original: English]

On the basis of our examination of the matter, we wish to inform you as follows:

Article 16 stipulates that in case of any delay in the payment of the transferred sum, the incurred interest shall belong to the beneficiary. But, since the transfer of the sum takes place in accordance with a contract existing between the applicant and the beneficiary, and since such a contract has its own terms and conditions, e.g. price validity, duration, etc., a delay in the payment of the transferred sum may invalidate the contract, in which case the payment of compensation for an invalid contract does not seem to be logical. Besides, so long as the sum is not given to the beneficiary, it in fact belongs to the applicant. It, therefore, seems to be more appropriate that the compensation for the delayed payment be paid to the applicant and not the beneficiary.

JAPAN

[Original: English]

The Government of Japan sincerely appreciates the long and assiduous efforts of the Working Group on International Payments of UNCITRAL towards the completion of the Draft Model Law on International Credit Transfers and considers that the Draft Model Law will serve as a sound basis for the discussion at the 24th plenary session of UNCITRAL. In order to further improve the Draft Model Law, however, it seems appropriate to make the following comments.

The following comments are submitted without prejudice to any final position to be taken by the Japanese Government at the plenary session.

1. *Article 2*(a)

According to the records of deliberations at the Working Group on the definition of the terms "Credit transfer" and "Intermediary bank", there seems to be an understanding at the Working Group that a reimbursing bank shall also be considered to an intermediary bank and a payment order issued for the purpose of reimbursement of an original payment order shall constitute a part of the original credit transfer chain (A/CN.9/WG.IV/WP.49, p. 8, para. 10, p. 18, para. 44). But this understanding not only gives rise to results contrary to an anticipation of a party as pointed out in the Secretariat Commentary (supra p. 8, para. 10), but also contradicts the common usage in banking practice and may bring about unnecessary confusion in the Model Law. Reimbursement relationships should be considered to be, not a part of the original credit transfer, but separate from the original credit transfer.

We propose, therefore, to delete the second sentence of article 2*(a)* and to insert a phrase *"that receives and issues payment orders"* at the end of article 2*(h)*, which defines "intermediary bank".

2. The third sentence of article 2*(a)* in square brackets refers to a point-of-sale payment system. This reference to a specific payment system or specific technology seems to be inappropriate in view of the rapid development of technology in this field. It would be sufficient if we make a clarification on this point at the plenary session.

The third sentence of article 2*(a)*, therefore, should be deleted.

3. *Article 2(1)*

This provision, which defines "Execution" only with respect to a receiving bank other than the beneficiary's bank, seems to imply that there is no such concept for the beneficiary's bank. This definition results in unexpected and unacceptable interpretations that the same-day requirement of article 10(1) shall not be applied to the beneficiary's bank and that the beneficiary's bank shall not be considered as a "Bank" in the definition of article 2*(f)*.

We propose, therefore, to insert at the end of article 2(1) a phrase *", and with respect to the beneficiary's bank, receiving a payment order and placing funds at the disposal of beneficiary"* in order to avoid the above-mentioned problem.

4. *Article 3*

We think that the phrase "agreement of the affected party" is an inappropriate expression which is rarely used and should be replaced by a common expression *"agreement of the parties"*.

5. *Article 4(1) and (5)*

The provisions of article 4 need some clarification with respect to a question whether they should be applied to a case where the terms of an authorized payment order are altered by an unauthorized person. Although it can be interpreted that the provisions of article 4 covers the case of unauthorized alteration, express reference might be helpful.

We propose to delete the first sentence of article 4(5) and to make the following amendments to article 4(1):

> "A purported sender is bound by *the term* of a payment order or a revocation of a payment order *if it was* issued by him or by another person who had the authority to bind the purported sender."

6. *Article 4(3)*

There is no restriction for the parties to alter the provisions of article 4(4) by agreement. But it would unfairly prejudice the position of the sender to allow the receiving bank to be exempted from its liability by agreement even in a case where the actual sender of a payment order is a present or former employee of the receiving bank who might have gained access to customers' information while he was working in the bank.

We, therefore, propose to amend article 4(3) as follows:

> "The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable, *nor are they permitted to agree that the same paragraph shall apply if it is proved that the payment order as received by the receiving bank resulted from the actions of a present or former employee of the receiving bank."*

7. *Article 5* chapeau

Although a practical purpose of article 5 is to determine the point of time when the deemed acceptance set out in article 6(2) and article 8(1)*(a)* shall occur, the present wording of the provisions may allow an interpretation that it also determines the time when a payment occurs in a case where the bank has suspended payment. We consider that this interpretation should be expressly avoided since careful consideration is required in that case.

We therefore propose to insert a phrase *"For the purpose of Article 6(2)*(a) *and Article 8(1)*(a)*,"* at the beginning of article 5.

8. *Article 5*(b)*(i) and (ii)*

The provisions of article 5*(b)*(i) and (ii) provide that the payment by a sending bank occurs when a credit in an account of the receiving bank is used. The determination of the time of payment in these provisions, with which the deemed acceptance would take effect in the context of article 6(2)*(a)* and article 8(1)*(a)*, is inappropriate in view of the fact that, in banking practice, the receiving bank might use a credit in its account without any knowledge of its origin or purpose.

We, therefore, propose to insert a phrase *"with the knowledge that the credit is paid as the payment of the payment* *order*" after the word "used" in each provision of article 5*(b)*(i) and (ii).

9. *Article 5*(b)*(iv)*

We consider that this provision, which deals with settlement through bilateral or multilateral netting schemes, actually contains little substance, and that the provisions of article 5*(b)*(i) through (iii) would provide sufficient substitutes.

The provisions of article 5*(b)*(iv), therefore, should be deleted.

10. *Article 7(5) and article 9(3)*

The second sentences of article 7(5) and article 9(3) have become self-evident and unnecessary in light of article 3.

We propose to delete these sentences.

11. *Article 10(1)*

The provision of article 10(1) provides two exceptions to the same-day requirement of execution of a payment order. This requirement should not be imposed in a case where a sender does not make necessary payment.

The following new subparagraph *(c)* should be added to article 10(1).

"(c) *the sender does not make payment in accordance with the provisions of Article 5. In this case the order shall be executed on the day the payment is made.*"

12. *Article 12*

If the credit transfer is not completed, it is indispensable to collect information such as whereabouts of the funds or the cause of the failure. This information is also helpful for a prompt refund in accordance with article 13. It would be appropriate, therefore, to add the duty to gather necessary information in the article.

We propose to insert the phrase *"in particular by offering and gathering necessary information such as the whereabouts of the funds,"* before the terms "in completing the credit transfer" of article 12.

13. *Article 13(2)*

The thrust of this provision is that, although the duty to refund should be basically a mandatory obligation, there is a case where the originator's bank should not be held liable, in particular, when its customer has designated an intermediary bank and thereby assumed the risk.

There must be other cases where this mandatory obligation is inappropriate in view of varied legal frameworks and practices of each State, and a State would have some discretion in dealing with these cases when it adopts the Model Law. Necessary amendments to this provision or clarification to this effect in records of the plenary session should be made in order to reflect this consideration.

14. *Article 14 and article 16(5)*

The provisions of article 14 and article 16(5) seem to contradict the provisions of article 17(3) by assuming that a credit transfer may be completed even though the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted. Article 14 and article 16(5) should be aligned with the provisions of article 17(3), since there is no need to permit partial completion of a payment order except in the case of article 17(3).

Therefore, the clause "the credit transfer is completed in accordance with article 17(1), but" in article 14 and the clause in article 16(5) "if the credit transfer is completed under article 17(1)" should be deleted.

15. *Article 16*

Although the liability of a receiving bank is limited to paying interest in the current provisions of article 16, there was no such understanding in the consideration of the twenty-second session of the Working Group that the provisions on compensation for expenses incurred for a new payment order and for reasonable costs of legal representation should be deleted. As there is substantial ground to provide for such compensation, liability of a receiving bank should be extended to cover those expenses and costs.

16. *Article 16(4)*

While the provisions of article 16(4) refer to a notice requirement under article 9(2) and (3), they do not refer to the requirement under article 9(4). Since there is no reason to exclude article 9(4) in the application of article 16(4), reference to article 9(4) should be added to article 16(4).

17. *Article 17(1)*

Since there is no need to permit partial completion of a payment order except in the case of article 17(3), as we have already mentioned in the comment 14, this article should clearly prescribe that a credit transfer is completed when the beneficiary's bank accepts the payment order whose amount is equivalent to that of the originator's payment order except in the case of article 17(3).

18. *Article 17(2)*

These provisions clearly interfere with transactions between the originator and beneficiary, and this interference is not acceptable for us. The relationship between the originator and beneficiary should be governed by the applicable law designated by rules of conflict of laws and should be excluded from the scope of this Model Law. Not only have the provisions little merit, but they also cause serious confusion, especially in the case where a payment order accepted before the payment date is revoked.

These provisions should therefore be deleted.

19. *Article 18*

This article should be deleted as we can see no need to include in this uniform law these sorts of conflict of laws provisions.

MALAYSIA

[Original: English]

Article 2. Definition

"Credit Transfer"

It is suggested that the words "and of which the beneficiary has a claim against the beneficiary bank" be added after the words "disposal of a beneficiary" at line 3.

In our view, the word "funds" gives a very wide meaning to credit transfer and it is suggested that the word "credit" be used instead.

"Beneficiary"

As in the definition of "credit transfer" above, the definition of beneficiary should be a person who has a claim against a bank as a result of a funds transfer.

"Bank"

The words "not to be taken as" should be amended to read "not deemed to be engaged in" so as to make the sentence more comprehensible.

"Authentication"

It is possible in such high volume electronic system to authenticate part of a payment order.

A payment order is either authentic or not authentic.

Paragraph (1)

The phrase "carry out the payment order . . . receiving bank" on lines 2 and 3 should be substituted for the phrase "be carried out by the receiving bank which received the payment order".

"Payment date"

Again, it is suggested that the payment date should be the day when the beneficiary has a claim for payment from the beneficiary bank. See 1 and 2 above.

Article 4(1)

The purported sender is bound only if the agent of the purported sender is expressly authorized to bind the purported sender. The agency rule of ostensible or apparent authority is clearly not applicable under this provision.

Is this the intention of the Model Law? If this is not so, then we suggest that in place of the words "had the authority to bind the purported sender" on line 3 should be substituted the phrase "has been expressly or impliedly authorized by the purported sender to do so".

Article 4(4)

This paragraph relates to the burden of proof. The purported sender merely has to prove that the payment order received by the receiving bank arose from actions of a person (the third party) other than a present or former employee of the purported sender and it would not be bound under paragraph (2). The burden of proof then shifts to the receiving bank to prove that:

(a) the actions of the third party are the actions of the present or former employee of the purported sender, especially in the situation where it was the employee of the purported sender who disclosed the authenticated procedure to the third party; or

(b) the third party had gained access to the authentication procedure due to the fault of the purported sender.

As can be seen, the burden of proof is more burdensome on the receiving bank. Is this the intention of the Model Law?

Article 6(2)(d)

It is suggested that the phrase "carry out the payment order received" on lines 1 and 2 should be amended to read "be carried out by it on receipt of such payment order", to render the subparagraph more comprehensible.

Article 7(5)

It is our opinion that it may be difficult to implement paragraph (5). In an environment where payment orders are being executed in a millisecond by machines that read numeric data in the order and make appropriate entries, having such a provision would force the receiving banks to abandon their high speed electronic operation and review each payment for inconsistency between the numeric amount and the alphabetic amount.

It will make more sense if only numeric information is applied.

Article 8(2)

The notice of rejection should be authenticated.

Article 9(3)

Again as in article 7(5) above, it is suggested that the numerical description should be accepted as the amount on the payment order in the event of any inconsistency in a payment order between the words and figures. In effect it would mean only the numerical figure would be applied.

Article 9(5)

It is necessary for notice to be given to a beneficiary who does not maintain an account at the bank.

It is suggested that the beneficiary should receive a cheque rather than a notice as this would cut down the costs of administration and record keeping.

Article 11(1), (2), (5) and (7)

It is suggested that clarifications should be obtained for the above four paragraphs.

Article 16(5)

The word late payment should be "payment of less than the amount of the payment order" since in effect it is not a late payment.

Also, what is meant by "improper action"? The meaning can be very wide.

MEXICO

[Original: Spanish]

The Government of Mexico considers that the draft UNCITRAL Model Law on international credit transfers, prepared by the Working Group on International Payments, fills a gap in legislation on the subject in question. It is also of the opinion that the draft offers a comprehensive regulation of credit transfers, which balances the needs of institutions engaged in providing transfer services and those of their users. The Government of Mexico hopes that UNCITRAL will adopt the draft in its next session and ask the General Assembly to recommend its adoption to Member States.

The following suggestions are offered with the aim of contributing to improving the Model Law.

Chapter I. General provisions

Article 2. *Definitions*

(b) Definition of "payment order"

Conditional payment orders are excluded from the sphere of application of the Model Law.

When the point was discussed during the twenty-first session, consideration was given to the hypothesis of a bank receiving a conditional instruction and executing it as if it were a straightforward payment. Such a transfer would not fall within the sphere of application of the Model Law. Consequently, if the transfer was not correctly executed, the parties would not have the rights or obligations derived from the Model Law, even though the cause of the error had nothing to do with whether the condition was or was not satisfied.

It was decided that such an effect was not desirable and that, without ceasing to exclude conditional payment orders from the sphere of application of the Model Law, provision should be made that in the hypothesis contemplated the effects of the condition between the bank in question and the sender would not be governed by the Model Law; the payment order would be treated as if it were straightforward (A/CN.9/341, paras. 73-75).

With the final section of subparagraph *(b)* as it stands, this result is achieved only if the condition is satisfied, and not in the opposite case. Furthermore, the hypothesis will as a rule only arise in respect of the originator's bank, for which reason an alternative text is proposed in square brackets. The following text is suggested:

"When an instruction is not a payment order because it is issued subject to a condition, if the receiving bank [originator's bank] executes it, for the purposes of this law the condition will be deemed not to have been made."

Additional article

Taking account of the international character of the operations to be regulated by the Model Law, and of the conclusion reached by the Working Group at its sixteenth session (A/CN.9/297, para. 33), we propose the addition of an article concerning uniform interpretation. What is proposed is the typical formulation which appears in the most recent conventions drafted by UNCITRAL and there is nothing to prevent its inclusion in a law. This text will be of particular importance in interpreting the final sentence of paragraph (8) of article 16.

The proposed text reads:

Article X. Interpretation

"In the interpretation of this law, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

Article 4. *Obligations of sender*

Paragraphs (2) and (3)

Paragraphs (2) and (3) require that the authentication procedure agreed between the parties should be "a commercially reasonable method of security". In the interests of uniformity of interpretation, the word "commercially" should be deleted.

The criterion of "reasonable", which has become established in international trade law documents, has been criticized somewhat by those who maintain that there is no international jurisprudence which gives it meaning. It is a term of Anglo-Saxon origin. The word "commercially", included by the Working Group, adds little: if the criterion of reasonableness is invoked in an international trade instrument, "reasonable" must be "commercially reasonable" in the context of the branch of trade in question. Besides, if it is kept it will mean that international jurisprudence must define not only what is "reasonable" but also what is "commercially reasonable".

The deletion of the word "commercially" in paragraphs (2) and (3) is suggested.

Chapter III. Consequences of failed, erroneous or delayed credit transfers

Article 16. *Liability and damages*

The obligation to pay interest, provided for in paragraph (1) of article 13 and in article 16, leaves two problems unresolved:

1. The rate of interest. During the session of the Working Group when this subject was discussed, delegations were not yet aware of the publication of the *Guidelines on International Interbank Funds Transfer and Compensation* of the International Chamber of Commerce, whose article 18 is the basis of the paragraph (2) proposed below.

2. When a bank corrects an error by crediting an account of the sender on the correct date. In this second hypothesis it may happen that the bank chooses to credit an account of the sender which does not give rise to interest or gives rise to lower interest. Differences in interest rates may be due to several causes; the most common are: the currency in which the different accounts are maintained or the different situation arising when there are debit or credit balances. The receiving bank must make the credit to the correct account and not the one which best suits it.

The addition of the following article is proposed:

Article X. Calculation of interest

"1. By interest is understood the time value of the transaction amount in the country of the currency involved. Interest shall be calculated at the rate and on the basis customarily accepted by the local banking community of such country.

"2. When a receiving bank fulfils the obligation to pay interest under paragraph (1) of article 13 and paragraphs (1), (3), (4) and (5) of article 16, crediting an account of the sender on the date on which it should have executed the act whose omission rendered it liable, it must make the credit to the account in which it received the payment [in accordance with article 7].

"3. The period for which interest shall be payable shall start on the [date of execution] and end with the day before the day on which correction is made, that day being included."

Chapter IV. Preclusion and prescription

It is proposed to add a chapter with an article on preclusion (estoppel) on grounds of acquiescence, of the right to claim any amount, and another article on prescription (limitation of actions). It is not appropriate that the legal certainty of the debits, payments and liabilities arising from operations regulated by the Model Law should be suspended during the normal term of general rules on obligations and contracts. A shorter time limit is desirable. Nevertheless, to establish a short limitation period is inappropriate when international operations are involved, thus a short time limit is proposed for giving notice of disagreement and, when notice has been given, a longer time limit before actions are time-barred.

Article X. Obligation to notify disagreement with debits and payments. Preclusion of actions

"(1) When one of the parties to a transfer has an action derived from this law, he must notify the party against whom he has the action of the matter which is the grounds for his action within a period not exceeding two months from the date when the transfer was completed or should have been completed according to the payment order of the originator.

"(2) If a party receives a notice from which it arises that his sender or receiving bank may be bound or liable, he has the obligation to inform that bank within two days of receiving the notice.

"(3) If a party does not give the notice mentioned in paragraphs (1) and (2) of this article, he may not subsequently initiate any action against any of the parties to the transfer."

Article Y. Limitation of actions

"(1) Any action under this law is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

"(2) The limitation period commences on the day when the transfer was completed or should have been completed according to the payment order of the originator.

"(3) The day on which the limitation period commences is not included in the period.

"(4) The party bound or liable may at any time during the running of the limitation period extend the period by a declaration in writing to the claimant. The period may be further extended by another declaration or other declarations.

"(5) A recourse action by one party against his sender, receiving bank or any other party may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the party who is going to institute the action has been held liable in an action against himself, or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim, against the party who is going to institute the action, that may result in a recourse action, notice of the filing of such a claim has been given to such sender, receiving bank or other party."

THE NETHERLANDS

[Original: English]

Add in article 9, paragraph 4 the sentence: "This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be".

Add in article 16 between paragraph (2) and paragraph (3) a new paragraph:

"(2 *bis*) Paragraphs (1) and (2) apply *mutatis mutandis* if a delay is caused by the failure of a sending bank

(i) where payment is to be made by debiting its account with its receiving bank, to put funds available in the account to be debited sufficient to cover the amount of the payment order, or

(ii) where payment is to be made by other means, to pay its receiving bank in accordance with article 5*(b)* or *(c)*."

SWEDEN

[Original: English]

Article 4. *Obligations of sender*

Paragraph (2), Subparagraph (a)

The text should contain a demand for a safe method of authentication—not only the vague standard "commercially reasonable". For example:

"*(a)* the authentication provided is a safe and commercially reasonable method of security against unauthorized payment orders, and".

Article 5. *Payment to receiving bank*

This article was introduced at the final session of the Working Group. However, it is rather unclear what is the purpose of the rules contained in this article. The reasons for having the rules of this article have to be more clarified at the session of UNCITRAL. Unless this is done, the article should be left out.

Article 6. *Acceptance or rejection of a payment order by a receiving bank that is not the beneficiary's bank*

Paragraph (3)

According to this paragraph the receiving bank has to give notice of its rejection of a payment order - not later than on the execution date. The paragraph should state that the notice should be given as soon as possible but not later than on the execution date:

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

Article 7. *Obligations of receiving bank that is not the beneficiary bank*

Paragraph (2)

According to the present draft, a receiving bank that accepts a payment order is obligated only to issue its own payment order but there is no obligation on the receiving bank under this provision to provide cover for the payment order it has issued. The obligation under article 4 paragraph (6) to pay the receiving bank for the payment order when the receiving bank accepts it only refers to the relationship between the sender and the receiving bank. It's therefore important that article 7 contains a provision on cover for the payment order, because without cover, the payment order will probably often be rejected by the receiving bank. The following amendment might be appropriate:

(2) A receiving bank that accepts a payment order is obligated under that payment order,

(a) to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an

appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner, and

(b) to take the appropriate steps in order to provide or make available sufficient cover for the payment order issued under subparagraph (a).

Paragraph (5)

This provision is not restricted to situations where the inconsistency between the words and figures in fact was detected and the payment order therefore was not executed. Hence, it is not clear how this provision relates to articles 6 and 16. The liability under article 16, paragraph (3)—to pay interest to the sender— does not make sense in cases when the inconsistency was not detected and the payment order was executed. The problem of inconsistency between words and figures describing the amount of the payment order can probably be properly solved only by establishing a rule as to which description shall govern.

If UNCITRAL decides to keep the rule as it stands, we interpret the words "if the sender and the bank have agreed" in the last sentence of the paragraph to mean both a standard agreement and a contractual agreement.

Article 8. *Acceptance or rejection by beneficiary's bank*

Paragraph (1), subparagraph (g)

According to the draft the beneficiary's bank is entitled to accept the payment order by applying the credit to a debt of the beneficiary owed to it. This is not acceptable. When the beneficiary's bank accepts a payment order it has an obligation to transmit the credit for the disposal of the beneficiary. The bank cannot, without the beneficiary's permission, be entitled to use the funds to settle its differences with the beneficiary. Therefore this paragraph should be amended as follows. But there is also a need for another amendment. Legal demands for the credit can be given not only by a court. This should be reflected in the wording. The paragraph should read:

"*(g)* when the bank applies the credit in conformity with an order of a court *or another competent legal authority.*"

Paragraph (2)

In the last sentence of paragraph 2 there should be the same amendments as in article 6, paragraph (3):

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

Article 11. *Revocation*

The current drafting lays down the general principle of irrevocability. If a revocation order is given too late to be effective under paragraph (1), the originator has no prospect of interrupting the credit transfer. That possibility can be of such a great importance to the originator that a requirement on the receiving bank to revoke its own payment order already issued, would be legitimate. The provision under paragraph (4) of article 10 in the Working Group's previous draft should therefore be adopted (A/CN.9/341, annex).

Article 16. *Liability and damages*

This article is based on the principle that if a delay by one receiving bank results in delayed completion of the credit transfer, the receiving bank that caused the delay is liable to the beneficiary for interest. The bank can discharge its liability by paying the interest to the next receiving bank, which in turn is obligated to pass on the interest. However, this liability rule functions properly only when all the receiving banks involved are subject to the same or similar rules. If the credit transfer passes a legal system that does not recognize a similar procedure, the beneficiary is not likely to receive interest according to the liability rules of the Model Law. If the originator must compensate the beneficiary for the loss of interest as a result of the delay, the beneficiary would have no possibility under the Model Law to recover the expenses from the banking system. It is not acceptable if the result of the rules on liability in some cases would be that the beneficiary is left without compensation or the originator has to bear in the end losses for delays in the banking system. The following amendments to article 16 might solve the problem:

"(3) Each receiving bank is, upon request, obligated to give the beneficiary reasonable assistance in ascertaining the facts necessary for pursuing his claim for interest under paragraphs (1) and (2)."

"(4) If the originator has paid interest to the beneficiary on account of a delay in the completion of the credit transfer, the originator may recover such amount, to the extent that the beneficiary would have been entitled to but did not receive interest in accordance with paragraphs (1) and (2), from the originator's bank or the bank liable under paragraph (1). The originator's bank and each subsequent receiving bank that is not the bank liable under paragraph (1) may recover interest paid to its sender from its receiving bank or the bank liable under paragraph (1)."

Paragraph (5)

Under article 16 paragraph (1), the beneficiary is entitled to interest when the credit transfer has been delayed. In case of underpayment however, paragraph (5) introduces a contradictory rule, saying that interest would be payable only if a payment date has been specified and there is a delay in relation to that date. The provision in paragraph (1) should apply regardless of whether there has been a delay with respect to the whole or only part of the amount specified in the payment order accepted by the receiving bank. Furthermore, it is unclear why the bank's liability should apply only in case of "improper action" by the receiving bank. Paragraph (5) should be deleted.

Paragraph (7)

In accordance with the general rule on freedom of contract in article 3, the wording of paragraph (7) should be:

"(7) The provisions of this article may not be varied to reduce the liability to an originator or a beneficiary that is not a bank."

Article 17. *Completion of credit transfer and discharge of obligation*

Paragraph (2)

Paragraph (2) contains a rule which seems to deal with the legal relationship between the originator and the beneficiary. According to the rule an obligation of the originator to the beneficiary is discharged when the beneficiary's bank accepts the payment order. In cases where the beneficiary has had no influence on the choice of bank to be the beneficiary's bank this rule seems improper. It should be deleted.

SWITZERLAND

[Original: French]

A. *Preliminary remarks*

The present draft Model Law on international credit transfers reflects an in-depth approach to and analysis of international payments processes and the legal problems that arise therefrom. The Working Group has undoubtedly succeeded in presenting a draft whose structure and order are convincing. It also proposes in many provisions satisfactory solutions which take into consideration in an appropriate manner the interests of the parties involved in an international credit transfer. However, not all the rules have our unreserved agreement. Indeed, our delegation, during the sessions of the Working Group which have taken place up to the present, has expressed its doubts and reservations of principle on the subject of various rules contained in the Model Law. We shall return to these in detail in due course (cf. C).

B. *Need for and appropriateness of a model law*

Concerning the question whether it is necessary or desirable to draft a Model Law on international credit transfers, there is in principle, in the view of Switzerland, no need to establish uniform rules at international level. The business of foreign payments generally proceeds without any particular problems. Firstly, existing payments systems have proved efficient and, secondly, current legislation is adequate to ensure that payments are made smoothly both nationally and internationally. However, various factors justify a re-examination today of this position in respect of certain issues. The very rapid evolution of cross-border payments techniques should be taken into account. The new methods and services in the telecommunications area or "high speed/low cost" transactions illustrate this phenomenon. This gives rise to problems of liability on the juridical plane, and also problems in regard to identifying and authenticating originators of orders in electronic transfer systems. Technical errors in the course of significant payments can lead to complicated and endless discussions at both national and international level. In the above-mentioned areas, international provisions would permit the standardization of legal relations and thus increase legal certainty.

A Model Law of the kind presented here is thus justified, to this limited extent, and the drafting of international norms can be approved from this angle. It should, however, be pointed out that such regulation only makes sense and can only lead to the desired harmonization at international level to the extent that it is accepted by the majority of States concerned and incorporated in national law. This objective can be achieved only if solutions that are theoretically convincing and can be put into practice are proposed for discussion. This does not seem to us to be the case in various provisions of the Model Law, particularly as regards the assigning of risk in the event of error or omission in the transfer, the right to claim damages and interest, the restriction of freedom of contract and the consequences of the payment order for the legal act underlying the transfer.

C. *Comments on the various articles of the model law*

Article 1 *(sphere of application)*

There are grounds for approving in principle the proposal that the draft Model Law should also encompass interbank payments in its article 1. This will avoid a proliferation of standards. However, conflict of laws is inevitable when a banking operation involving several States leads to payments effected through the intermediary of banking establishments in different countries. Such difficulties can be considerably reduced if the parties agree on the applicable law, but they cannot be completely eliminated.

The extension of the law to interbank payments may thus lead to complications due to the fact that the rules of national systems relating to payments (e.g. SIC, CHIPS, FEDWIRE) are in partial contradiction to the solutions envisaged in the Model Law.

The rule contained in paragraph (2) of article 1, under which the foreign branches of a bank must be considered as separate banks, will cause problems; in reality, one and the same legal entity is involved and it is difficult to see how, in the case of internal transfers, the matter of mutual rights and obligations is to be regulated and under what conditions it will be possible to make these prevail.

Article 2. *Definitions*

The definition of the concept of "payment order" contained in subparagraph *(b)* of this article expressly applies only to unconditional orders; consequently, a payment order made subject to a condition does not constitute a payment order in the meaning of the Model Law. Given that in practice one comes across conditional payments orders—even if they are not very common—which are admissible in the eyes of a large number of States, we consider it, to say the least, surprising that they cannot be treated here as payment orders. The legal consequences of this provision appear even graver when the second sentence of subparagraph *(b)* is examined; the Model Law applies to a conditional payment order only if the condition is subsequently satisfied. In certain circumstances, the condition will be satisfied only in the context of the execution of the payment order; thus one is inevitably confronted with two different legal orders, contrary to the original objective of the draft—to harmonize the payment process. Furthermore, a party can easily avoid the application of the Model Law by issuing a conditional payment order. We therefore recommend that this provision should be re-examined in the light of the foregoing considerations.

We also consider that the condition contained in subparagraph *(b)*(i), under which the receiving bank is to be reimbursed by the originator of the order, does not form part of the concept of a payment order; it is rather the logical consequence of executing the payment order, as is clear, moreover, from article 4, paragraph (6), of the Model Law.

Article 3. *Variation by agreement*

The fact that the principle of freedom of contract is expressly provided for in the Model Law must be approved. It is desirable that the parties should be able, within determined limits, to depart contractually from the Model Law. The scope allowed for freedom of contract is, however, too restricted—unnecessarily so. This comment is particularly relevant in respect of article 13, paragraph (2), and article 16, paragraph (7).

Freedom of contract may legitimately be subject to restriction when interests deserving protection—that is, those of the public and of the economy—so demand. In the present context, it would more be a question of ensuring the smooth functioning of the payments process or the protection of consumers' interests. As has already been indicated, the legal rules at present in force, which contain few restrictions on freedom of contract, are adequate to regulate the flow of payments. As for the protection of consumers, it should be borne in mind that not only banks and companies but also consumers may be party to international transfers. However, the Model Law has not been conceived to protect the rights of consumers (as expressly indicated in the footnote to article 1), but rather to harmonize trade law at world level, in accordance with its basic objective. The Model Law should therefore not contain restrictions on individual freedom based on the protection of consumers' rights.

For the reasons expressed, we are in favour of the broadest possible guarantee of freedom of contract. We are nevertheless conscious of the need to have rules reflecting the greatest possible uniformity for the payments process in general. However, such rules should not impair basic legal principles, as they do here in the case of freedom of contract.

Article 4. *Obligations of sender*

The Working Group addressed the question of regulating payments by compensation, or netting, in the context of this article. As this problem is not specific to payments and the subject is not sufficiently "ripe" for codification, it should not, in our view, be regulated in the Model Law. A reference to netting contracts and to the rules of certain netting systems would tend to be a source of uncertainty.

Article 7. *Obligations of receiving bank that is not the beneficiary's bank*

According to paragraph 2 of this provision, the receiving bank is obliged to execute the payment order within one day. This time limit is very short and hardly leaves the bank time for processing or, where applicable, transmitting the order with care. It should be borne in mind that banks are not in a position to process and transmit automatically and without delay all the payment orders which come to them. It often happens, particularly in international payments, that complementary information and verification is necessary. It therefore seems justified to extend by one banking day the time limit within which the payment order must be processed, the more so as the Model Law regulates all types of transfers and not only those affected through electronic systems. A solution aimed at treating different transactions (electronic and other transactions) separately would scarcely facilitate the application of the Model Law; it might even lead to additional difficulties of interpretation.

Article 11. *Revocation*

In order to strengthen the security of transactions and the smooth functioning of the international payment process, the principle of irrevocability of transfer orders should be established and, in particular, exceptions to this principle should be defined expressly and restrictively. However, Swiss law does not recognize the principle of absolute irrevocability, and the transfer order is considered in principle to be revocable; the assignor may revoke the assignment to the assignee, provided that the assignee has not notified his acceptance to the beneficiary (cf. article 470, paragraph 2, Code of Obligations). Since in practice acceptance is not notified before payment, the notifice of credit should be considered as acceptance. The customer, as assignor, may revoke the credit transfer order given to the assignee bank provided that a credit advice has not been effected to the bank of the final beneficiary.

The Model Law does not state where the sender may revoke the transfer order, in the event that revocation is admissible. In Swiss law, the sender can revoke the transfer order only through his bank—that is, the receiving bank. He cannot take similar action in respect of the other banks involved in the execution of the transfer order (indeed, such banks could not even identify him, since as a rule they do not know him). For reasons of practicality and on the basis of a certain legal logic, the revocation should take place in cascade—i.e., it must be transmitted by each receiving bank to the next bank in line. A right of direct revocation, bypassing one or more links in the transmission chain, could not be admitted.

Under Swiss law, an assignment which has not yet been accepted is deemed to be revoked in the event of bankruptcy of the assignor (article 460, paragraph 3, Code of Obligations). Paragraph (8) of article 11 seems to run counter to this principle, in that bankruptcy does not automatically cancel a transfer order. We therefore request that this paragraph (8) should be re-examined in the light of the foregoing comments, at least taking account of international insolvency law.

Article 13. *Duty to refund*

We have very serious reservations concerning the duty to refund envisaged in this article, for the following reasons. Firstly, this guarantee of refund is contrary to certain fundamental principles of Swiss contract law. Swiss law authorizes the originator's bank to debit the customer's account provided that the credit transfer order has been correctly executed in accordance with the instructions of the parties. The bank is in no way bound to guarantee the success of the transaction as a whole. If the intermediary banks have diligently fulfilled their obligations, the originator must bear the consequences of any incidents. The originator's bank thus answers for the good execution of the credit transfer order, a responsibility which to some extent includes a judicious choice of intermediary banks. For legal reasons and reasons of principle, we categorically reject the idea of a broader responsibility, *a fortiori* one of an objective or causal nature.

Such a guarantee of refund would correspond to a kind of insurance, resulting in an obligation for the bank to collect the charges related to such operations with a view to adequate financial cover. In extreme cases, some banks might even refuse to effect payments in countries where there are high risks attached to transfers and commission.

Finally, it should also be noted that such risk regulation, which is, all in all, highly problematic for the banking sector, could, as a kind of "*pièce de résistance*", prevent broad acceptance of the Model Law.

If the guarantee of refund is retained, it should be a matter of enabling law. The parties to an international transfer would thus be able, on a contractual basis, to avoid the rule provided in the Model Law in respect of duty to refund. As a result of such flexibility, banks would have the choice of proposing payments with or without guarantee of refund. We therefore propose that article 13 should be formulated as a rule of enabling law.

Article 16. *Liability and damages*

The Model Law starts out here from the idea that the originator's bank is liable to the originator for the good execution of the transfer order and thus assumes liability for the transaction as a whole. Such a concept, which is very close to the objective liability attached to company contracts, is contrary to Swiss doctrine and jurisprudence, under which transfer orders are governed by the law of agency and assignments. Under these provisions, the agent is liable only for the good and faithful execution of the mandate and not for the result of the operation itself. Thus, when a bank carries out a transfer order with all the diligence that can be expected of it (good and faithful execution), it can in no case be made liable for any damage which might ensue. Any liability in respect of errors committed by intermediary banks should therefore be rejected. Otherwise the bank would run the risk of having to answer for significant damages which it had not itself caused. Firstly, such risk regulation is contrary to the *ratio legis* of a Model Law which is intended to be balanced; secondly, it would simply oblige banks to insure themselves against such risks or set aside the necessary funds. This would inevitably result in higher transaction costs without being particularly useful to the banking systems of States.

The Model Law should provide for liability only in the context of a direct contractual relationship, meaning only between the various parties involved in executing a transfer order. To this end, we recommend that paragraph (8), which moreover relates more to the area of illicit acts and therefore has no place in a Model Law of the type proposed, should be quite simply deleted. This question should, if necessary, be regulated by national law.

According to article 16, paragraph (7), a bank can restrict its liability to the originator of an order or the beneficiary only to a very limited degree. This provision should be rejected, if only on the grounds of freedom of contract. Such a restriction also places an obstacle in the way of flexible regulations for certain types of payment ("high speed/low cost" transactions). We therefore take the view that it is for the parties to settle the question of risk by contractual means; a referral to national law may perhaps be possible.

Article 17. *Completion of credit transfer and discharge of obligation*

We are convinced that the Model Law must not intervene in the basic relationship between the originator of the order and the beneficiary. The transfer is independent of the relationship with the basic transaction and all provisions of the Model Law which directly or indirectly refer to that transaction should be eliminated. For the sake of clarity, it could even be stated in the Model Law that the transfer is abstract and independent of the legal relationship underlying it.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

1. *Article 2*(a): *"Credit transfer"*

We are not yet convinced that the words in square brackets should be retained. Transfers effected through point-of-sale systems may be either debit or credit transfers. If they are debit transfers the words in square brackets are unnecessary because debit transfers should be excluded by paragraph (ii) of the definition of "payment order". If they are credit transfers we are not certain why they should be excluded. We are concerned that if the words are retained to overcome a problem with card based payment systems, this might cause difficulty in the future if facilities are developed for processing ordinary credit transfers through terminals primarily intended for card based payment systems. However, we are willing to look at this further if the potential problem remains a concern, provided the meaning of "point-of-sale payment systems" can be made clear.

2. *Article 2*(b): *"Payment order"*

Requirement (ii) of the definition specifies that the instruction must not provide that payment is to be made at the request of the beneficiary. This is intended to exclude debit transfers, but may have the effect of excluding credit transfers made to a beneficiary who does not have an account where the beneficiary's bank is instructed to "pay on application". Any solution to this problem is not without difficulty but it might help to add the following paragraph between (ii) and the paragraph about conditional order—

"Subparagraph (ii) shall not prevent an instruction from being a payment order merely because it directs the beneficiary's bank to hold funds for a beneficiary that does not maintain an account with it until the beneficiary requests payment."

3. *Article 2*(k): *"Execution date"*

The Working Group has noted that the provisions of the Model Law relating to payment, execution and acceptance are circular in that under article 4(6) a sender is not obliged to pay for a payment order until the execution date, but it is implicit in article 10 that a payment order does not have to be executed until it has been accepted and under articles 6(2)*(a)* and 8(1)*(a)* acceptance does not take place (assuming no other action on the part of the receiving bank) until payment is received. We propose amendments to articles 4(6) and 10 which we hope may overcome the problem. The problem is also relevant in relation to the definition of execution date. We comment below on those articles which refer to the "execution date" in a sense which we believe differs from the expression as currently defined.

4. *Article 2*(l): *"Execution"*

The draft report of the last session of the Working Group noted that the definition of "execution" adopted at that session did not cover the beneficiary's bank. Although it would be possible to devise another term for that purpose, we believe it would be better to adapt the present definition. The present definition (which relates to a receiving bank other than the beneficiary's bank) corresponds to "the doing of an act described by article 6(2)*(d)*". We believe therefore that it would be appropriate to add the following wording in order to cover the beneficiary's bank—

". . . and with respect to the beneficiary's bank, the doing of any act described by article 8(1)*(d)*, *(e)*, *(f)*, or *(g)*."

The words referred to by cross reference could be written out in full if that were thought to be clearer or more consistent with the first part of the definition, but that would make it much longer.

We have reviewed the terms "execute" and "execution" in the places where they occur in square brackets and believe that they work correctly if the definition of "execution" is amended as we suggest.

5. *Article 2*(m): *"Payment date"*

The term "payment date" is used in articles 10(1), 10(3), 11(2) and 16(5). We propose below that in articles 10(3), 11(2) and 16(5) it would be more appropriate to refer to the "execution date". If those amendments are accepted, there would be little point in keeping the defined term for use only in article 10(1): it would be sufficient there to refer to "a date when the funds are to be placed at the disposal of the beneficiary". The Working Group has also noted that SWIFT payment messages do not contain a field for a payment date and ISO has proposed to delete any reference to a pay (or payment) date in its next revision of standards, so the use of the term in the Model Law is somewhat unsatisfactory.

6. *Article 3*

The Working Group at its last meeting affirmed that the Model Law should be subject to freedom of contract. It recognized that there should be limits to this and that certain provisions should be mandatory, but apart from one or two cases (such as article 13) did not decide which. A problem with permitting variation by contract is that not all the parties to a credit transfer will be in contractual relationships with each other. It is not always easy to see how an agreement between two parties to vary the operation of a rule in the law might effect other parties to the same transfer.

A further difficulty is that it is not clear which parts of the law are capable of variation by agreement. Article 1 for example, which defines the scope of the law, is presumably not capable of variation. Similarly, the definitions in article 2 determine the meaning of other provisions and should not be capable of amendment; if it is desired to change a definition in order to change the operation of certain of the substantive provisions, the substantive provisions themselves should be varied by agreement. This difficulty extends to other provisions of the law which are interdependent: it is hard to assess the effect of variation on the dependent provisions. The rules on deemed acceptance in article 6(2)*(a)* and 8(1)*(a)*, for example, depend on when payment takes place, which is set out in article 5. Other provisions, although logically capable of amendment, are essential to the structure of the law, such as article 7(2) (the obligation of a receiving bank which has accepted a payment order to issue a payment order to implement it) or article 9(1) (the obligation of the beneficiary's bank to place the funds at the disposal of the beneficiary in accordance with the applicable law). We have taken the view that the following provisions are either not logically capable of being varied or are in a necessary part of the structure of the Model Law and as such should not be capable of variation:

article 1
article 2
article 3
article 4(3)
article 5
article 6(1) and (2)
article 7(1), (2) and (7)
article 8(1)
article 9(1)
article 10(6)
article 11(3), (5), (6), (7), (8) and (9)
article 13(2)
article 15
article 16(6), (7) and (8)
article 17
article 18

In some cases it is difficult to decide whether a provision is truly a necessary part of the structure of the law. If it is argued that certain of the above provisions are not truly essential to the structure of the law, we would reply that we nevertheless believe that it is essential for them to be mandatory.

We believe that the following provisions of the law, although not a necessary part of its structure, should be mandatory:

article 4(6) (obligation mandatory, time of payment variable)
article 6(3)
article 7(3) and (4)
article 8(2)
article 9(2) and (5)
article 10(1), (2), (3), (4) and (5)
article 11(1) and (2) (except as permitted by (3))
article 11(4)
article 12
article 13(1) (as stated in (2)).

A table setting out our analysis with a brief summary of our reasoning is contained in an annex to this note.

In view of the large number of provisions which we believe should not be varied, we wonder whether it would not be better from a drafting point of view to return to the position where contracting-out was not permitted except where stated.

7. *Article 4(6)*

As stated above the Working Group has noted that the provisions of the Model Law relating to payment, execution and acceptance are circular. The Group has also noted that a bank's failure to pay for a payment order is not treated as failure to execute and does not attract any liability under article 16. There is thus no incentive for a bank to break the circle. We believe that a bank should be required to pay for payment orders that have not been rejected and that late payment should attract an interest penalty. We suggest that article 4(5) be reworded as follows:

"(6) A sender becomes obligated to pay the receiving bank for the payment order when it is issued, but unless otherwise agreed payment is not due until the day when the receiving bank is required to execute the order under article 10, or would be required if the order had been accepted."

In order to ensure that a bank which pays late incurs an interest penalty for the delay caused, we propose below that a reference to a bank's failure to pay be inserted in article 16(1). We make other proposals to overcome the circular problem in relation to articles 6(2)*(a)*, 8(1)*(a)* and 10(1).

8. *Article 6(2)*(a)

We noted above the circular problem relating to payment and acceptance. Acceptance under article 6(2)*(a)* cannot be dependent on execution if execution depends on acceptance. We propose below that article 10 should say explicitly that a payment order does not have to be executed until after it has been accepted, but that in determining the time for execution for the purpose of article 6(2)*(a)* that rule should be disregarded. This should have the effect of breaking the circle.

A further problem with "deemed acceptance" is that even when the payment order is received before the bank's cut-off time, the bank may be unable to execute it on the same day if "deemed acceptance" under paragraph (2)*(a)* occurs too late in the day. For example an order may be received first thing in the morning, but payment may not be received until shortly before close of business. Unless the bank rejects the order it will be deemed to have been accepted and the bank will be liable if it does not execute it that day (assuming neither 10(1)*(a)* nor *(b)* apply). This is not of course a problem with other forms of acceptance as they all involve a conscious act, or agreement, on the part of the bank. Nor is this a problem when payment is in accordance with article 5*(b)*(i) or (ii) as that involves either a conscious act (use of the credit) or a further day. We therefore suggest the addition of the following paragraph after paragraph (2):

"(2 *bis*) A receiving bank may set a time after which acceptance occurring under paragraph (2)*(a)* (except by virtue of payment under article 5*(b)*(i) or (ii)) may be treated as occurring on the following day the bank executes payment orders of the type concerned. Any such time must be set before the payment order has been accepted."

It should not be possible to vary this provision by agreement.

We have also given consideration to the concept of "deemed acceptance" in article 6(2)*(a)* in the light of the concern that a bank which was deemed to have accepted a payment order without action on its part might find itself obliged to deal with a bank with which it would not normally deal. In practice we believe a bank in this position would refuse to complete the transfer and would refund the money. It might of course have to pay interest for failure to execute in accordance with article 7(2), but that would be the extent of its exposure under the law.

9. *Article 6(3)*

Paragraph (3) provides that a notice of rejection must be given not later than on the execution date. As we state elsewhere it is implicit that execution will not, indeed cannot, take place before acceptance. It is therefore not clear how the definition of "execution date" should be interpreted in relation to a payment order that is not to be accepted but is to be rejected. We suggest that the end of the paragraph be reworded as set out below. We also remain concerned that the words "otherwise than by virtue of subparagraph (2)*(a)*" are not entirely clear. It has been suggested that they mean that it is not necessary to notify rejection if funds are not received; whereas the words are intended to mean only that it is not necessary to notify the fact that the proviso has operated to prevent deemed acceptance taking place. We suggest the paragraph be reworded as follows:

"(3) A receiving bank that, otherwise than by virtue of the proviso to subparagraph (2)*(a)*, does not accept a sender's payment order is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than the date when, if it were accepted, the receiving bank would be required to execute it under article 10."

10. *Article 7(3)*

At the twentieth session of the Working Group it was stated that the Model Law should not set forth a duty to detect misdirection but that it was appropriate to require notification once the misdirection had been detected. The present wording of article 7(3) does not reflect this and we believe it is important that it should. We suggest it be reworded as follows:

"(3) A receiving bank that detects that a payment order contains information which indicates that it has been misdirected shall give notice to the sender of the misdirection, if the payment order contains sufficient information to identify the sender, within the time required by article 10."

11. *Article 7(4)*

Instructions which are not payment orders are strictly outside the scope of the Model Law but we nevertheless think that a provision of this kind is useful. However we are concerned that the provision as currently drafted is too widely drawn. It covers instructions regardless of whether the receiving bank appreciates that the provision applies. If the provision is to be retained the following might be more appropriate:

"(4) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order or being a payment order cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10."

12. *Article 7(5)*

The view was expressed at the twentieth session of the Working Group that this provision was too restrictive. We agree: the amount might for example be expressed in some form of code. The following wording is suggested:

"(5) If there is an inconsistency in the information relating to the amount of money to be transferred, the receiving bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified."

The last sentence of the present draft is unnecessary if article 3 is retained.

13. *Article 7(6)*

This paragraph is not entirely clear. Is a receiving bank able to choose another route without reference to the sender if it acts in good faith, or is it merely to enquire of the sender what action it should take (in which case unilateral action would be at its own risk)? The present draft says that the bank is "not bound" to follow the relevant instruction and "acts within the time required by article 10" if it enquires of the sender what it should do; it does not therefore appear to permit unilateral action. We suggest it read as follows:

"(6) If a receiving bank determines that it is not feasible 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, or that following such an instruction would cause excessive costs or delay in completing the credit transfer, the receiving bank shall be taken to have complied with paragraph (2) if it enquires of the sender what further actions it should take in the light of the circumstances, within the time required by article 10."

In any event article 10(2) should be amended to refer to the making of an enquiry under article 7(6).

14. *Article 8(1)*(a)

We would make the same comments as we made on article 6(2)*(a)*. Our proposed amendment to article 10 addresses the circular problem. We propose that the following paragraph be added after paragraph (1) to deal with the problem of deemed acceptance occurring too late in the day for execution to take place:

"(1 *bis*) The beneficiary's bank may set a time after which acceptance occurring under paragraph (1)*(a)* (except by virtue of payment under article 5*(b)*(i) or (ii)) may be treated as occurring on the following day the bank executes payment orders of the type concerned. Any such time must be set before the payment order has been accepted."

It should not be possible to vary this provision by agreement.

15. *Article 8(2)*

We would make the same comment as we made on article 6(3). We suggest that paragraph (2) be reworded as follows:

"(2) A beneficiary's bank that, otherwise than by virtue of the proviso to subparagraph (1)*(a)*, does not accept a sender's payment order is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than the date when, if it were accepted, the beneficiary's bank would be required to execute it under article 10."

16. *Article 9(2)*

We would make the same comment as we made on article 7(4). The following is suggested as more appropriate:

"(2) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order, or being a payment order cannot be executed because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 10."

17. *Article 9(3)*

We would make the same comment as we made on article 7(5). The following wording is suggested:

"(3) If there is an inconsistency in the information relating to the amount of money to be transferred, the beneficiary's bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified."

The last sentence of the present draft is unnecessary if article 3 is retained.

18. *Article 9(4)*

This paragraph requires the beneficiary's bank to give notice to the originator's bank, if it can be identified, as well as to its sender. We understand that the reference to the originator's bank may have been added to this paragraph, but not to paragraphs 9(2) and (3), partly because a discrepancy in the manner of identifying the beneficiary was indicative of fraud. After further consideration we believe that only a minority of such discrepancies arise because of concerns about fraud; in our view this requirement would place an unnecessary burden on banks and should be deleted. This will not prevent banks from continuing to notify others in the chain if they suspect fraud, but the Model Law will require them to notify only their senders. We understand that this is the normal practice in the absence of suspicious circumstances.

19. *Article 9(5)*

Where the beneficiary's bank is directed to pay on application, notification is not required. We believe that this could be achieved by amending the beginning of paragraph (5) to read:

"(5) Unless the payment order states otherwise, the beneficiary's bank shall . . ."

20. *Article 10*

It is perhaps implicit that a bank does not have to execute a payment order it has not accepted but this is not clear from the wording of article 10(1). The difficulty with stating this expressly is that, as we have noted elsewhere, acceptance is itself linked to the time for execution. We believe that this difficulty could be overcome if articles 4(6) and 10(1) are amended in the way we suggest. We propose the insertion of the following paragraph after paragraph (1):

"(1 *bis*) Nothing in paragraph (1) shall be taken to require a bank to execute a payment order before it is accepted, but for the purposes of articles 6(2)*(a)* and 8(1)*(a)* this provision shall be disregarded in determining the time for execution."

It should not be possible to vary this provision by agreement.

21. *Article 10(1)*

Article 10(1)*(b)* uses the term "payment date". We propose that in the other places where the term is used it should be replaced by "execution date". If those amendments are agreed, it would be unnecessary to retain the definition for use in 10(1)*(b)*, which would read:

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

22. *Article 10(2)*

As noted above this provision should be amended to refer to the making of an enquiry under article 7(6). We suggest:

"(2) A notice under article 7(3), (4) or (5) shall be given, and an enquiry under article 7(6) shall be made, on or before the day the payment order is required to be executed."

23. *Article 10(3)*

We believe that if the definition of "execution" is amended to include the beneficiary's bank in the way we suggest, the reference to "payment date" in article 10(3) (which is in any event unsatisfactory as the payment order may not specify a payment date) should be amended to read:

". . . the day the payment order is required to be executed".

It would also be possible to use the defined term "execution date" here and in article 10(2).

24. *Article 11*

At the last meeting of the Working Group it was suggested in the context of what was then article 12 that the law should address the case where a bank that was obliged to pay interest to another bank could not recover that interest from an insolvent bank. We proposed wording for this but it was not adopted because, although on first analysis it seemed fair, it was feared it might be incompatible with bilateral or multilateral netting schemes. It was pointed out that the rule would be of greater significance in the context of an obligation to refund the principal sum. We have therefore reconsidered it in relation to articles 11 and 13. In our view a rule of the kind proposed would be incompatible with netting schemes only if it purported to alter the obligations arising under those schemes. If it did not do so, a bank which had come under a separate obligation pursuant to such a netting scheme (or having given irrevocable instructions might do so when final settlement occurred) would not seek to take advantage of the rule. We propose the following paragraph to follow paragraph (6):

"(6 *bis*) Without prejudice to its obligations under any agreement that nets obligations bilaterally or multilaterally, a bank that is obliged to make a refund to its sender under paragraph (5) is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent."

It should not be possible to vary this provision by agreement.

25. *Article 11(2)*

This paragraph refers to "the payment date". As we point out in relation to article 10(3) a payment order may not specify a payment date. We believe that if the definition of "execution" is amended to include the beneficiary's bank as we suggest, the reference to "payment date" can be changed to "execution date".

26. *Article 11(5)*

At the last meeting of the Working Group it was agreed that execution of a payment order by a bank before the execution date (or payment date in the case of the beneficiary's bank) should not relieve the bank from the consequences of failing to act on a revocation order that was otherwise in time. Paragraph (5) refers to the execution or acceptance of a payment order "that has been revoked". However, if the revocation order is received before the execution date (or payment date), a sender should not have to pay for an order executed (or accepted) before the revocation order was received. We propose that the words "that has been revoked" are replaced by the words:

"in respect of which a revocation order that is effective under this article has been or is subsequently received".

27. *Article 12*

Articles 12 and 13 both begin "If the credit transfer is not completed in accordance with article 17(1) . . .". However, the duty to refund arises only where it is clear the transfer will not be completed, whereas we believe that the duty to assist should continue until the credit transfer is completed. We suggest that article 12 begins:

"Until the credit transfer is completed in accordance with article 17(1), . . . ".

28. *Article 13*

We referred above to the need for a rule permitting a bank obliged to make a refund to make it to a prior sender. We propose the following addition to paragraph 13(1):

"Without prejudice to its obligations under any agreement that nets obligations bilaterally or multilaterally, a bank subsequent to the originator's bank which is obliged to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent."

The originator's bank and intermediary banks between it and the refunding bank will still be liable for their share of the interest, which will have to be passed up the chain or foregone. The exposure of a bank above an insolvent bank will however be greatly reduced where the rule operates.

29. *Article 16(1)*

As we mentioned above we believe that article 16(1) should be amended so as to require a bank which delays in paying for a payment order to pay interest. We suggest the insertion after the words "article 10(1)" the following:

", or its failure to pay for a payment order in the time required by article 4(6),".

30. *Article 16(5)*

This paragraph refers to "the payment date". As we point out elsewhere a payment order may not specify a payment date. We believe that if the definition of "execution" is amended to include the beneficiary's bank as we suggest, the reference to "payment date" can be changed to "execution date".

Annex

The table below shows our analysis of the extent to which it should be possible to vary provisions of the Model Law by agreement. We have described as "structural" those provisions which are logically incapable of amendment or which we believe are a necessary part of the structure of the law. Other provisions are described as "mandatory" or "variable".

Provision	*Structural*	*Mandatory*	*Variable*	*Notes or Explanation*
1(1)	×			Scope of the law.
(2)	×			Definition.
2	×			Definitions.
3	×			Provision about variation.
4(1)			×	Variable in principle, but scope for variation probably limited.
(2)			×	Variation subject to (3).
(3)	×			Provision about variation.
(4)			×	Could be varied by contract.
(5)			×	First sentence a basic proposition. Remainder could be valid by agreement, e.g. no liability if sender fails to comply with procedure.
(6)		×		The obligation must be mandatory. The time of payment may be varied by agreement: we believe its useful to state this.
5	×			Effectively a definition.
6(1)	×			
(2)	×			Effectively a definition.
(3)		×		It is implicit that the first sentence is mandatory; we believe the second sentence should also be.
7(1)	×			

Provision	*Structural*	*Mandatory*	*Variable*	*Notes or Explanation*
(2)	×			This provision is essential to the operation of the law.
(3)		×		We believe the law will be more effective if this is mandatory.
(4)		×		We believe the law will be more effective if this is mandatory.
(5)			×	The existing draft provides for contracting out; we agree with this.
(6)			×	Senders may wish to agree that banks should not delay but always act on their instructions.
(7)	×			
8(1)	×			
(2)		×		See our comment on 6(3).
9(1)	×			See our comment on 7(2).
(2)		×		See our comment on 7(4).
(3)			×	See our comment on 7(5).
(4)			×	Banks may in practice agree to rely on words or figures; we believe such agreements should be permitted.
(5)		×		If this provision is amended as we suggest it should be mandatory.
10(1)		×		The originator could agree with its bank a later payment date, e.g. for a lower fee. The rule must otherwise be mandatory if transfers are not to be delayed.
(2)		×		This provision is supplemental to 7(3), (4) and (5) (and (6) if 10(2) is amended as we suggest) and should be variable only to the extent that they are variable.
(3)		×		This provision is supplemental to 9(2), (3) and (4) and should be variable only to the extent that they are variable.
10(4)		×		There could be no reason to vary this rule.
(5)		×		There could be no reason to vary this rule.
(6)	×			
11(1)		×		This and paragraph (2) can be varied only to the extent specified in paragraph (3).
(2)		×		
(3)	×			Provision about variation.
(4)		×		We believe this is important.
(5)	×			This and paragraph (6) are necessary for the operation of the law.
(6)	×			
(7)	×			This proposition is the minimum that can be said.
(8)	×			This is quasi-definitional.
(9)	×			
12		×		We believe that the law will be more effective if this is mandatory.
13(1)		×		See 13(2).
(2)	×			Provision about variation.
14			×	A bank might agree with its sender or the beneficiary that it did not need to trouble itself with small discrepancies. However, in the absence of an agreement with the beneficiary, a bank should be able to contract out only as between itself and its sender: it must issue a payment order for the difference even where it has agreed its sender need not do so.

Provision	*Structural*	*Mandatory*	*Variable*	*Notes or Explanation*
15	×			This is the minimum that can be said.
16(1)			×	Paragraphs (1) to (5) are variable only to the extent stated in (7).
(2)			×	
(3)			×	
(4)			×	
(5)			×	
(6)	×			This provision is supplemental to 9(1) and (5).
(7)	×			Provision about variation.
(8)	×			This provision is supplemental to the rest of article 16.
17(1)	×			Article 17 contains fundamental propositions about the nature of the law and should not be capable of amendment.
(2)	×			
(3)	×			
18(1)	×			Provisions about conflict of laws are not capable of amendment.
(2)	×			
(3)	×			

Intergovernmental international organizations

BANKING FEDERATION OF THE EUROPEAN COMMUNITY

[Original: English/French]

I. *General observations*

As the problems inherent in international credit transfers are currently settled by banks through agreements, as widely accepted international standards do exist (e.g. SWIFT) and as the contentious issues in this area are of little importance, the Banking Federation considers that a Model Law on international credit transfers is unnecessary and indeed of no use.

This aside, the draft Model Law should respect the principle of contractual freedom which allows the parties to agree on the solution best adapted to their needs. The Federation considers that the restrictions placed on this principle by the draft Model Law should be deleted.

II. *Detailed observations*

Article 2. *Definitions*

(a) Credit transfer

The Federation considers that the notion of credit transfer would benefit from being defined as follows:

"Credit transfer means the movement of funds from an originator to a beneficiary, in accordance with a payment order from the originator received by his bank."

Should this proposal not be adopted, the present definition of credit transfer should at least be amended to specify that the credit transfer begins with a payment order that the originator gives to his own bank. The words "to his bank" should thus be inserted in the first sentence of *(a)* of article 2, after the words ". . . of the originator's payment order".

The square brackets around the sentence relating to payments made through a point-of-sale payment system should be deleted, leaving no doubt that these payments do not come within the sphere of application.

Article 3. *Variation by agreement*

In the concern to allow practice to develop in line with needs, the Banking Federation would like the Model Law to establish more widely the principle of freedom of agreements, contrary to the provisions of this text.

It suggested that the restrictions laid down in the following provisions should be deleted:

— paragraph 3 of article 4,
— the first sentence of paragraph 2 of article 13,
— the last sentence of paragraph 7 of article 16.

Article 5. *Payment to receiving bank*

The Banking Federation expresses its satisfaction that the Model Law mentions the settlement of obligations among participants either bilaterally or multilaterally, and the application of bilateral netting agreements.

Article 8. *Acceptance or rejection by beneficiary's bank*

To avoid any ambiguity the Banking Federation suggests wording the title as follows: "Acceptance or rejection of a payment order by beneficiary's bank".

Article 9. *Obligations of beneficiary's bank*

With regard to the fourth paragraph the Federation proposes that the rule be amended so that in the event of discrepancy between the description of the beneficiary in words and any reference number, it is the latter description which prevails.

Article 10. *Time for receiving bank to [execute] payment order and give notices*

The Banking Federation points out that in practice it will not always be possible to comply with the requirements of the time limit laid down in the first paragraph of article 10. It thus considers that the rule, whereby a receiving bank is required to execute the payment order on the day it is received, is too strict. The rule is all the more severe as article 16 provides tough rules relating to liability. The rule differs moreover from the principle stated by the European Recommendation of 14 February 1990 on the transparency of banking conditions relating to cross-border transactions, under which a cross-border credit transfer should be executed within two working days. Banks in European Community countries risk facing problems in applying the requirement, due to the practical impossibility of sorting out credit transfers into those for EEC countries and those for non-EEC countries.

It is therefore proposed that the first sentence of paragraph 1 of article 10 be amended as follows:

"A receiving bank is required to execute the payment order as soon as possible, and at the latest on the day after it is received."

In any case, agreements contrary to the rule of paragraph 1 of article 10 should certainly be allowed.

Article 11. *Revocation*

The Banking Federation is in favour of the principles of this article.

It is suggested however that the text be clarified by adding to the fifth and seventh paragraphs that the revoked payment order in question is an order revoked under the rules of paragraphs 1 and 2.

Article 13. *Duty to refund*

The Banking Federation is opposed to the rule of the first paragraph of article 13 and considers as unacceptable the rule of paragraph 2 under which agreements contrary to the rule of the first paragraph are not allowed (see article 3 above).

It considers that the principle of liability of the originator's bank is too strict, and that this liability should depend on the nature of the negligence. In particular, the Federation cannot accept that the originator's bank, obliged to return the funds if the credit transfer is not executed, must also pay interest when failure to execute the credit transfer is a result of non-acceptance of the credit transfer by an intermediary bank or the beneficiary's bank, who have refused to execute the credit transfer.[1]

Furthermore, comparison of paragraphs 1 and 2 of article 13 reveals that the second sentence of the former refers to "the originator's bank and each subsequent bank", whereas the second sentence of the latter refers only to "a receiving bank". The question therefore arises of whether the originator's bank, although a receiving bank according to the definition given in article 2, profits by the exception provided by the second sentence of paragraph 2 of article 13. To remove any ambiguity in this respect the second sentence of paragraph 2 should expressly refer to the originator's bank.

This same second sentence of paragraph 2 of article 13 only considers the case where suspension of payment or prevention from making the refund relates to an intermediary bank, whereas such suspension or prevention may be due to the beneficiary's bank. The beneficiary's bank should thus be referred to as well as an intermediary bank through which it was directed to effect the credit transfer.

Article 14. *Correction of underpayment*

The rule should be completed as follows "(. . .) without prejudicing the right to recover the amount of the charges as laid down in article 17(3)".

Article 16. *Liability and damages*

These rules would be too severe if the requirement stipulated in article 10 for the execution of the payment order by the receiving bank were to be maintained.

Paragraphs 3 and 4: these paragraphs can be deleted since the originator does not incur any financial loss in the cases mentioned.

Paragraph 7: the Banking Federation is not at all satisfied with the rule under which a bank cannot reduce its liability to an originator or a beneficiary that is not a bank. It considers that agreements contrary to the provisions of article 16 must be allowed without reservation. In any event, the originator's bank should not be liable to the originator in the event of executing a formal order from the latter.

Paragraph 8: the Federation understands the reference to reckless behaviour on the part of a bank to correspond to inexcusable or gross negligence (for example, a credit transfer made to a country where it seems almost certain, and well-known, that it will not be executed). The paragraph, which can be approved in principle, would benefit from being worded more clearly.

Article 17. *Completion of credit transfer and discharge of obligation*

The Banking Federation considers that a credit transfer is completed only when the funds are placed at the disposal of the beneficiary by the latter's bank, and it expresses the wish that article 17 be amended in this sense.

Furthermore, it would perhaps be more logical to place this chapter after chapter I.

COMMISSION OF THE EUROPEAN COMMUNITIES

[Original: English]

Article 5. *Payment to receiving bank*

We would suggest to reformulate article 5(*d*)(iii) as follows:

"When final settlement is made in favour of the receiving bank at a central bank in which the receiving bank maintains an account."

[1]The Dutch Banking Association considers it is not unreasonable that the originator's bank guarantees the execution of a payment order. The originator's bank should however have the right to refuse a payment order if the risks are too high. In this case the parties should be able to agree that acceptance of a payment order is subordinated to the condition that the originator bears the entire risk for a payment order not properly executed. Furthermore, an originator's bank accepting a payment order with special risks must have the right to charge the additional costs for covering the risk to the originator.

We consider that situations may arise, especially within the European Community, in which banks participate in payment systems, and have accounts with Central Banks of other countries without being located (established) in those countries. The proposed amendment clarifies that this possibility is not precluded by the specifications laid down in article 5. The amendment does not intend to modify the provisions of this article with regard to the timing of a payment ("following day" in sections (i) and (ii) as opposed to "final settlement" in sections (iii) and (iv)).

Article 10. *Time for receiving bank to execute payment orders and give notice*

We assume that the opening clause of article 10, stipulating that a receiving bank is required to execute a payment order on the day it is received, will be discussed again during the twenty-fourth session of the Commission to be held at Vienna from 10 to 28 June 1991.

The Commission of the European Communities is presently developing plans to increase the efficiency and in particular the speed, of cross-border transfers in the Community. Endeavours to induce banks to execute payment orders on the day they are received are, therefore, in principle to be welcomed.

The Commission has the impression, however, that banking systems of some countries might experience difficulties in this respect at the present stage. Without making a formal proposal to this effect, we would like to suggest that a possible compromise in this discussion, if it arises, may be reached in stipulating that the execution of a payment order must take place no later than the following day.

Article 18. *Conflict of laws*

The relation between this article and the "Convention on the law applicable to contractual obligations" (opened for signature in Rome on 19 June 1980, doc. 80/934/EEC, *Official Journal of the European Communities* No. L 266 of 9/10/1980, page 1) requires further studies. It might be useful to include certain principles, in particular those enshrined in article 9 of the said Convention, in article 18 of the Draft Model Law. However, this raises very complex problems of international law. We have not been able to retain the possibility of making further comments in this respect.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

[Original: French]

Article 2. *Subparagraph* (a): *Definition of credit transfer*

It is proposed that the second sentence of the definition of "credit transfer" be deleted, saying that the term "includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order". Not only does this sentence seem unnecessary, since the hypothesis it envisages is already covered by the first sentence of the definition, but it even presents a danger, to the extent that a court might interpret the sphere of application of the Model Law as defined in its article 1 in a restrictive manner, applying the Model Law only to the element of the transfer effected between the sending bank and the receiving bank situated in different States.

Article 5. *Payment to receiving bank*

Subparagraph (b)*(iv) a:* The Permanent Bureau wishes firstly to point out that there is a typographical error in the draft Model Law submitted for appraisal by Governments: the reference to "applicable law" should be placed in square brackets, as is clear from the the last sentence of paragraph 83 of the report of the Working Group (A/CN.9/344 of 10 January 1991).

The Permanent Bureau proposes that this reference to applicable law should be deleted. It will be recalled in this connection that the hypothesis envisaged in this subparagraph relates to settlements effected by an interbank "netting" system. Netting is a relatively new system which has been the subject of study, notably by a Group of Experts on Payments Schemes of the Central Banks of the Group of Ten Countries, which met under the auspices of the Bank for International Settlements (BIS). As the report of the UNCITRAL Working Group quite correctly notes in paragraphs 60-62 (document A/CN.9/344), the Group of Ten was faced with an extremely complex legal problem, notably with regard to determining the law applicable to netting. Indeed, it is clear from their work and the statements made during the twenty-second session of the Working Group by the observer for BIS that the system of netting is only instituted with the agreement of all the parties and this agreement is reflected in internal rules, not depending on or regulated by the law of a given State. The only consensus which has been achieved within the Group of Ten is that the internal rules creating the netting must not be in conflict with the laws of *any* of the States parties to the system.

In other words, the monetary settlement that takes place between a sending bank and a receiving bank linked by a netting system can be in accordance only with the rules of the system: the reference to applicable law has no meaning because, once the netting is established, monetary settlement can take place only in accordance with the system established and not with a national law. The end of the article therefore only needs to read: "the settlement is made in accordance with the rules of the system".

Subparagraph (c): While a provision such as that contained in subparagraph *(c)* of article 5 can perhaps be justified in the context of an international convention, it does not seem to have any meaning in a Model Law. The fact is, and this is a classic legislative technique, that any reference in a Model Law to "the law" can refer only to that Model Law, which will become the national law of a State which decides to incorporate it in its system of law. It is precisely this Model Law, having become national law, which lists the means of settlement by which the sender's obligation to pay the receiving bank is discharged: that is the subject of article 5. One cannot see to which other law subparagraph *(c)* refers, unless there is an intention to allow the national legislator to add other means of paying the obligation to article 5; if that is the case, it would suffice simply to give such authorization either in the report or by a footnote. In the view of the Permanent Bureau, subparagraph *(c)* of article 5 should be deleted.

Article 17. *Paragraph 3*

The Permanent Bureau takes as its starting point the idea that the reference to the applicable law, in the last sentence of this paragraph, refers to the law applicable to the underlying liability linking the originator of the transfer with the beneficiary. It is suggested, for clarification purposes, that this should be specifically stated in the text of the provision.

Article 18. *Conflict of laws*

The problems raised by the conflict of laws in relation to international credit transfers, particularly because of the various modalities of such transfers, are extremely complex in nature and would have deserved serious study before regulatory provisions of the kind contained in article 18 could be adopted. Not only has no such study been undertaken during the deliberations of the Working Group on International Payments, but article 18 as it stands, with the additions adopted during the last session of the Working Group following a proposal by the United Kingdom delegation, was not even discussed in open session. In the view of the Permanent Bureau of the Hague Conference, this article 18 raises too many delicate issues to be adopted as it is and, since it is not possible to amend it without serious study, the Permanent Bureau suggests that article 18 of the Model Law should simply be deleted.

Without going into all the problems raised by article 18, the Permanent Bureau would like to draw attention to the following points:

(a) Article 18, paragraph (1), as submitted by the UNCITRAL Secretariat (document WP.42 of 27 April 1989—it was then article 15), contains an ambiguity because of an apparent confusion of two problems: on the one hand the conditions for the application of the Model Law, and on the other the conflict-of-laws rules whose object is precisely to determine the application of this Model Law. The report of the Secretariat suggested that one could envisage a provision regulating conflict of laws only when the dispute arose in a State which had adopted the Model Law, and the other interested State or States had not done so. Hence the ambiguity: is article 18 intended only to determine the applicable law when the banking relationship involves States which have not adopted the Model Law—which would imply that, for application in a State of the uniform rule itself, another conflict rule should apply—or is article 18 also intended to designate the law of the State which has adopted the Model Law? If that should be the case, and the Permanent Bureau cannot see how article 18 can be interpreted in any other way, one is faced with a clear technical inadequacy, consisting of adopting in a substantive law a conflict rule whose aim is specifically to determine the application of that law. This technique is, admittedly, used in some legal systems (notably in the United States—cf. the conflict rule in article 4A of the Uniform Commercial Code (UCC), section 507—but in this context it can be justified as an American interstate rule), but it is quite alien to the civil law system and the Permanent Bureau knows of no examples of conventions or Model Laws adopting such a solution.

(b) A much more serious objection, in the eyes of the Permanent Bureau, to the solution in article 18 concerns the very nature of the Model Law and its very broad substantive sphere of application. The Permanent Bureau does not think that it is possible for one and the same conflict rule to be included in the Model Law to cover two fundamentally very different cases: that of paper-based transfers and that of electronic transfers. In the case of paper-based transfers, the segmentation of a global international credit transfer into a series of distinct bilateral operations, to each of which a different law would apply, may be conceivable (although it does not seem desirable), but it would seem quite impracticable in the case of an electronic credit transfer. The extreme speed of such transfers makes it in practice impossible to split them into different bilateral operations within the overall transfer, and for this new method of transfer a system should be devised in which a *single law* regulates the transfer as a whole.

Moreover, it seems that in the United States, where electronic credit transfers are most advanced, such a conception of the single law does indeed exist, despite the conflict rule of article 4 of UCC, section 507: credit transfers through the Federal Reserve Bank system, that is transfers through FEDWIRE, are subject to a new Regulation J which came into force on 1 January 1991 (see Federal Register, vol. 55, No. 194, of Friday, 5 October 1990) and which mandatorily sets aside article 4A of UCC for all transfers by FEDWIRE and imposes Regulation J on all parties to such transfers. The same goes for the system introduced by the Clearing-House Interbank Payments System (CHIPS), which in its rule 3 imposes the law of New York for all transfers made through that system (see document A/CN.9/341 of 13 August 1990, paragraph 27).

These considerations probably explain why the United States delegation at one time proposed a special rule for article 18 (which was then article 15) to resolve the specific problem raised by an electronic funds transfer system (see document A/CN.9/341 of 13 August 1990, paragraphs 24 *et seq.*), a proposal which was not taken up by the Working Group.

The Permanent Bureau wishes to recall here that the Hague Conference has placed on its agenda of future work a study of specific problems of private international law which, in regard to trade law, may arise from the use of electronic procedures (see the final act of the sixteenth session, B, paragraphs 4*a* and *b*), and has in particular invited the Permanent Bureau to establish links in this area with those international organizations concerned, "taking specially into account, as regards electronic funds transfers, the work undertaken within the United Nations Commission on International Trade Law (UNCITRAL)". It is likely that, if article 18 were to be deleted from the Model Law, the Hague Conference would then undertake work on the subject, making the necessary studies of specific problems of conflict of laws relating to international transfers, in collaboration with interested banks, in order to achieve complete regulation of conflict of laws for all transfer systems.

[A/CN.9/347/Add.1]

FRANCE

[Original: French]

The Draft Model Law on International Credit Transfers, adopted by the Working Group on International Payments at the conclusion of its twenty-second session, held in Vienna from 26 November to 7 December 1990, calls for the following observations.

1. *On the principle of a model law*

A model law seems preferable to the drafting of an intergovernmental convention.

2. *Sphere of application* (article 1)

The sphere of application as defined in article 1 is satisfactory.

3. *Definitions* (article 2)

Definition of "credit transfer"

The phrase in square brackets ["The term does not include a transfer effected through a point-of-sale payment system"] should be deleted since the question of knowing whether the payments effected through a point-of-sale system are credit orders or debit orders is not clear.

4. *Payment to receiving bank* (article 5)

Paragraph (b)*(iii)*

The wording adopted by the Working Group is based on the idea that a bank can only obtain "central bank settlement" at the central bank of the country in which it is located.

Thus, assuming that the sending bank and the receiving bank are located in different countries and that both have an account at the central bank of the country in which the sending bank is located, the obligation to pay could be discharged only under the terms of paragraph *(b)*(ii) ("when a credit . . . is used" or "on the business day following the day on which the credit is available for use") and not under the terms of paragraph *(b)*(iii) (that is, when final settlement is made at the central bank).

If the basis of the rule laid down in paragraph *(b)*(iii) is that a settlement through an account at a central bank is equivalent to a settlement in cash, all cash settlements at central banks should be treated in the same way, with no distinction made as to whether it is the central bank of the country in which the receiving bank is located or another central bank.

This point is all the more important since within the European Economic Community some central banks are unclear as to the possibility of accepting in the settlement systems they manage banks that are not established in their country but that operate out of another Community country.

For these reasons, it is proposed that paragraph *(b)*(iii) should be amended as follows:

"when final settlement is made in favour of the receiving bank at the central bank at which it has an account, or".

Paragraph (b)*(iv)*

The Working Group has wished to recognize the existence of interbank settlement systems, on the one hand, and bilateral netting agreements, on the other.

According to the present wording of subparagraphs *(a)* and *(b)* of paragraph *(b)*(iv), the obligation to pay the receiving bank would be discharged when final settlement was made through any interbank settlement system or in accordance with any bilateral netting agreement even if these systems or agreements were operating under conditions that were insufficiently secure in legal terms to allow these systems or agreements to be recognized as valid according to the criteria laid down in the Report of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries (report published by the Bank for International Settlements in November 1990).

It would be advisable, therefore, at least to add a reservation to subparagraphs *(a)* and *(b)* of paragraph *(b)* (iv). This reservation might consist in adding the following phrase to each of these subparagraphs:

"provided that the rules governing this system (this agreement, in the case of subparagraph *(b)*) are compatible with this law."

5. *Obligations of receiving bank that is not the beneficiary's bank* (article 7)

It is desirable that the following sentence should be added to article 7(2):

". . . to implement the credit transfer in an appropriate manner. It must, specifically, effect the operation in the currency or unit of account stipulated by the sender."

The purpose of this addition is to remind the banks that they are not, when implementing payment orders, to take the initiative of converting the funds received into a currency other than that in which the order has been made out by the sender.

The automatic conversion of currencies by receiving banks is the main source of disputes between French and United States banks in connection with the implementation of credit transfers.

6. *Obligations of beneficiary's bank* (article 9)

An addition similar to the one recommended for article 7(2) and inspired by the same concern is also desirable in the case of article 9(1):

". . . relationship between the bank and the beneficiary. It must, specifically, place the funds at the disposal of the beneficiary in the currency stipulated by the sender, unless otherwise instructed by the beneficiary."

7. *Time for receiving bank to [execute] payment order and give notices* (article 10)

The principle of execution on the same day is too restrictive since the purpose of the model law is to govern not only electronic credit transfers but also paper credit transfers.

It is proposed that the chapeau of article 10(1) should be amended as follows:

"A receiving bank is required to [execute] the payment order no later than the day after it is received, unless . . .".

8. *Revocation* (article 11)

Article 11(4) requires the authentication of a revocation order, whereas article 4 suggests that the authentication of payment orders is optional. This difference in treatment hardly appears justified.

Moreover, the current wording of article 11(4) has resulted, it would seem, from the fact that at one time it was envisaged that a revocation order was to be authenticated "in the same manner as the payment order" that it revoked, and that the Working Group had rightly taken the position that this formal parallelism was not necessary.

Once the words "in the same manner as the payment order" had been deleted, all that remained of the original provision was the phrase "A revocation order must be authenticated", with no further specification.

This being the case, article 11(4) would gain by being redrafted in the following way:

"When a revocation order must be authenticated, this need not necessarily be done by the same method as the payment order."

9. *Duty to refund* (article 13)

The drafting of article 13(2) is not satisfactory.

It is very important that the principle of the obligation to refund the funds received when a credit transfer cannot be completed should be maintained. Under French law, in fact, a bank that has received funds for the purpose of carrying out a credit transfer is regarded as bound to the party that has remitted these funds to it by a bailment contract, it being considered that the obligation on the part of the bailee to return the funds to the bailor is the very essence of a bailment contract.

Nevertheless, it should be admitted that, *in certain circumstances,* a bank can only agree to carry out a credit transfer at the risk of the originating party.

In the current drafting, the second sentence of article 13(2) does not convey this idea that only exceptional circumstances can justify the stipulation in a credit transfer order that it is "at the risk" of the originating party.

In addition, it also seems reasonable to suppose that, assuming that the originating party has instructed that the transaction should involve one (or several) particular correspondent (or correspondents), he will make it his business to recover the funds directly from the correspondent (correspondents) in question as soon as it (they) has (have) received the funds.

Article 13(2) at best very indirectly reflects this idea, which is only conveyed by the words "through which it was directed to effect the credit transfer" (French: "conformément aux instructions reçues", line 5 of the French text).

For these reasons, article 13(2) should be discussed anew.

ITALY

[Original: English]

The draft Model Law refers to credit transfers, i.e. to shifts of amounts carried out under the initiative of the debtor at an international level, i.e. implying an ordering bank and a receiving bank sited in two different States.

The regulation of the different phases and multiple aspects of these payments has been dealt with by a draft Model Law, and it is not excluded that the latter can be transformed into a Convention. To this regard we esteem that the second solution would be more advisable, as it would not leave to adherent States any space for possible departure from the official procedure, therefore enabling to pursue the aim of a standardized regulation.

On the other hand, the necessary flexibility in some particular situations would in fact be guaranteed, within some limits, by article 3, which allows parties to depart from the law, unless the latter formally provides for non-derogation.

Operations regulated by the draft Model Law are characterized as international transfers. To this regard in Community circles, it has been debated on the opportunity to extend the implementation of the law also to national transfers, keeping into account the possibility that the EEC itself incorporates UNCITRAL dispositions in a measure of its own (directive or other).

To this regard we point out that there would not be any hindrance to an extension of this legislation within our country, such legislation being consistent with inter-bank systems in force.

The Model Law, furthermore, excludes from its field of implementation the transfers originated by means of a point-of-sale terminal, i.e. those specifically defined under the banking terminology, but also covers all other transfers, of any amount. This exclusion seems consistent with the choice not to take into account matters which may pertain to the consumers' protection.

This line of activity moreover can seem satisfactory for the United States which already avail themselves of an adequate legislation as far as the relationship between consumers and financial institutions is concerned, but leaves the matter unsolved for the European nations who, like ours, do not have such regulation.

Referring to provisions concerning the intervention of intermediary banks, the article 6(2)*(a)* establishes the rule that the order has effectively been accepted, if the term provided for by article 10 has elapsed without notice of rejection having been given, but such acceptance is subordinated to an availability of funds in the account to be debited, or to the fact that the payment has been executed.

On the other hand we deem it would be preferable, keeping in mind a clear need of security, that the rule could be valid in every case, i.e. that the bank which receives the order should always be bound to make its rejection known, even if such rejection is due to lack of funds, because otherwise the person who issues the order, faultlessly unaware of such circumstance, could rely on the execution of the order and be kept liable for failure of execution. A possible modification, as we have suggested it, would entail the necessity to modify accordingly the following paragraph (3).

Article 7 regulates the obligations of the receiving bank which is not the bank of the beneficiary. In paragraph (5) of this article, it would be better to establish that in case there should be not time to ask instructions to the sender, the order should stand for the lesser amount or for the amount written into letters, and the sender should be notified thereof. In paragraph (6) of the same article it is advisable to delete the sentence contained between "or that following the instruction" and "the credit transfer", as the execution of an order is not impossible in this case, but it might be more expensive.

The same consideration can be made, with reference to the above-mentioned comment relating to article 6(2)*(a)* and article 8(1)*(a)* when regulating the case of acceptance by the beneficiary bank. If this modification is accepted, paragraph (2) should also be adjusted, in cases of rejection of a transfer order.

As for article 9(3), we hold that what is said in paragraph (5) of article 7 is valid, as the former seems to be a repetition of the latter.

In the Model Law the principle of the irrevocability of the transfer is established, in view to give security to the use of such means of payment. In fact this principle lives together with a whole set of possibilities of exception which would repeal its validity. As on the other hand the same article 11 allows parties to establish the total irrevocability of the order which has been given, it would be better to reverse the matter, and establish the irrevocability from an absolute point of view, providing for a possible waiver by means of an agreement between the debtor and the beneficiary. If article 11 were to be maintained in its original wording, the possibility to shorten the terms of the revocation of a payment, provided for at article 3, should not be allowed, as it could be a source of insecurity. In paragraph (4) of this article, one should then regulate the hypothesis of the paper money order, for which there is the problem of the signature (and authentication of the signature) of the person who can legitimately undertake obligations on behalf of the sender.

Lastly, we must remember the principle contained in article 17, under which the acceptance by the beneficiary's bank is the last phase of the payment order, and it extinguishes the obligation existing between the parties just like a payment in cash. The principle is taken from the recent United States law on the matter of funds transfers, but it is opposite to the solution sustained by the best Italian doctrine, under which the paying off of the obligation coincides with the crediting of the beneficiary's account, or in any case with the moment when funds are placed at the disposal of the beneficiary.

MOROCCO

[Original: French]

1. *Article 2*

(a) The last, bracketed sentence in the definition of "credit transfer" should be deleted since a payment order issued by a point-of-sale payment system also implies an authentication or validation procedure agreed upon by the originating party and his bank.

(i) The definition of the term "funds" or "money" is overly restrictive since it is limited to credits on account and excludes cash payments.

(j) If the authentication procedure is correctly applied, the payment order in its entirety will be regarded as having been issued by the purported sender, so that the words "all or part of" should be deleted.

(m) The "payment date", more commonly known as the "validity date", is not always indicated on the initial payment order. In this case, it generally corresponds to the date on which the payment order is accepted by the beneficiary's bank. Accordingly, it would be useful to provide for this case.

2. *Article 4*

The provisions of paragraphs 1 to 4 have not been drafted with sufficient clarity to facilitate their understanding and interpretation, all the more since the term "purported sender" is nowhere defined.

What is more, the provisions of paragraph 4 are subject to criticism in that, in actual practice, all payment orders that have been duly authenticated in accordance with the authentication procedure agreed must bind the sender *vis-à-vis* his bank or its foreign correspondent. The purported sender must logically enter a claim against the party that originated the fraudulent instruments and not against his bank or its foreign correspondent. The purported sender remains bound by these instruments so long as he has not revoked them before the completion of the credit transfer.

3. *Article 5*

Paragraph *(c)* refers to the "law" without specifying whether it is the law of the country of the sender (originating party, primary receiving bank or intermediary bank) that is intended.

Moreover, it might be supposed that this paragraph refers, *inter alia*, to payment by drawing on an authorized overdraft or cash facility. If this is not the case, which would imply the prior existence of sufficient funds on account, explicit provisions should be made for this case. Subparagraph *(a)*(ii) of paragraph 2 of article 6 and subparagraph *(a)*(ii) of paragraph 1 of article 8 should be brought into conformity with this observation.

4. *Article 10*

Since certain national regulations provide for execution dates different from those covered by paragraph 1 of article 10, a subparagraph (1)*(c)* should be added to this article with the following wording:

"The regulations in effect in the country of the receiving bank provide for an entirely different execution date."

5. *Article 13*

In the case of the non-completion of the credit transfer in accordance with article 17(1), the principle of the refund of the funds paid at the different stages of the operation is incontestable. With regard to the interest running from the day of payment to the day of refund, the payment of such interest does not have to be justified except when the receiving bank has failed to honour the sender's instructions. This idea should be reflected in paragraph 1 of article 13.

6. *Article 16*

(a) Paragraphs 1 and 2

The provisions of paragraph 1 do not appear to be in keeping with actual practice. In fact, when there is a delay in the receipt of the funds by the beneficiary, the latter enters a claim for damages (delay interest) against the originating party and not against a receiving bank other than his own. However, for its part, the beneficiary's bank that fails to place the funds at the beneficiary's disposal within the period specified remains directly responsible and thus liable to the beneficiary for delay interest.

Accordingly, paragraphs 1 and 2 of article 16 should be redrafted.

(b) Paragraph 5

The last sentence of this paragraph should have referred to the receiving bank's liability for the shortfall between the amount of the payment order received and accepted and the order issued for execution. As drafted, this sentence should be deleted.

UNITED STATES OF AMERICA

[Original: English]

I. *Background*

The seventh session on international credit transfers of the United Nations Commission on International Trade Law (UNCITRAL) Working Group on International Payments ("Working Group") was held in Vienna, Austria, from November 26 to December 7, 1990 ("Vienna session"). A revised text of a draft model law on international credit transfers ("draft model law") was produced. This text of the model law will be presented to the plenary meeting of UNCITRAL, to be held in Vienna from June 10-28, 1991 ("plenary meeting"). The United States has urged that the draft model law be designed to be compatible with new computer banking and clearing systems and thus facilitate international commerce and trade.

II. *Organization*

This paper is a list of the continuing concerns of the United States regarding the draft model law.

Some of the continuing concerns are accompanied by a proposed change in the draft model law. Each proposal is specifically denoted as such by separating it from the preceding and subsequent text.

Other concerns, however, are not accompanied by a specific draft for a proposed change. The United States hopes that such discussion will lead to an appropriate change in the draft model law. The absence of a specific draft for a proposed change below should not be interpreted as an indication that the concern listed is of diminished importance.

III. *General comments*

The delegation is heartened by the significant progress made at the Vienna session. But, it cannot fail to express its continuing concerns regarding certain provisions in the draft model law. What must be considered are potential adverse effects of these provisions on: (1) existing high-speed, high-volume electronic credit transfer systems; and (2) facilitating the development of such systems.

The position of the United States is dependent upon there not being introduced and adopted new provisions which would undercut the ability of the Model Law to support existing and future high-speed, high-volume electronic credit transfer systems.

IV. *List of continuing concerns and proposed changes*

A. *Article 1: Sphere of application*

1. Article 1(1): Test for internationality

A credit transfer should not be divided into an "international" part and a "domestic" part. Such a distinction poses conceptual problems. The test for internationality contained in article 1(1) ("a sending bank and its receiving bank are in different States") is formalistic and therefore potentially under- and/or over-inclusive. For example, suppose a sending and receiving bank are located in State A, but the originator is in State B and the beneficiary is in State C. This transfer is treated as outside the scope of the draft model law, and accordingly the draft model law may be viewed as under-inclusive.

The test for internationality also may pose operational problems. It presumes that a receiving bank is cognizant of the geographic location of its sending banks. In many instances, this may be so. But the draft model law purports to govern all segments of an international credit transfer, and not all receiving banks in a funds transfer chain may be aware that a sending bank earlier in the chain was located in a different State. For instance, suppose a sending bank is located in State A and receiving bank No. 1 is located in State B, so the Model Law is triggered under article 1(1). Suppose further that subsequent intermediary banks, e.g., receiving banks Nos. 2 and 3, are located in State B too. The draft model law purports to govern the credit transfer segments between receiving banks Nos. 1 and 2 and Nos. 2 and 3. It is not clear that receiving banks Nos. 2 and 3 know that sending bank No. 1 was in State A. This is relevant in so far as the draft model law imposes obligation on them that are different from those under domestic law.

Finally, as a legal matter, dividing credit transfers into "international" and "domestic" does not necessarily result in greater harmony among domestic payments system laws, contrary to the goal of the Working Group. Rather, it may result in the creation of a public international law document (the draft model law) which tolerates disharmony among domestic laws. Stated differently, to the extent the draft model law seeks to create a "level playing field" in the area of payments system law, then the drafters should be wary of artificial distinctions.

2. Footnote: Consumer law

The footnote to this article states that the draft model law does not deal with consumer-protection issues. It is unclear whether this means that the draft model law applies to consumers unless the internal laws of a particular State otherwise govern the transaction. What if consumer protection laws of a State conflict with provisions in the draft model law only in some respects? Would the draft model law apply to parts of a credit transfer, and that State's consumer protection laws apply to other parts of the transaction?

Proposed change:

To clarify such issues, the footnote as currently drafted should be replaced by the following footnote:

"The consumer protection laws of a particular State may further govern the relationship between the originator and the originator's bank, or between the beneficiary and the beneficiary's bank, within the State, but may not impair the rights of other parties to a credit transfer located in a different State, as provided in this law."

B. *Article 2: Definitions*

1. "Credit transfer" (article 2*(a)*)

There appears to be opposition on the part of certain delegations to the bracketed language in the definition of "credit transfer". The draft model law should not cover point-of-sale transactions ("POS"), because these are more properly regarded as debit transfers. Furthermore, regardless of the conceptual issue, the legal implications of POS transactions have not been reviewed *vis-à-vis* all the other provisions of the draft model law. Finally, POS transactions are primarily consumer transactions, and the complications of including them seems at odds with the purpose of the draft mode law.

Proposed change:

The square brackets should be removed and the text should remain as currently drafted.

In addition, a "credit transfer" is more precisely viewed as a series of "payment orders," not a series of "operations".

Proposed change:

Accordingly, the word "operations" in the first sentence of article 2*(a)* should be replaced with the word "payment orders".

Finally, the ending point of a "credit transfer" is currently set forth in the first sentence of article 17(1). To avoid any misunderstanding, it would be more appropriate to include this in the definition of "credit transfer" in article 2*(a)*.

Proposed change:

The first sentence of article 17(1) should be included in article 2*(a)* as the last sentence of article 2*(a)*.

2. "Beneficiary" (article 2*(d)*)

This definition is not sufficiently restrictive so as to eliminate the possibility that a "beneficiary" could be a party receiving funds from a non-bank.

3. "Bank" (article 2*(f)*)

This definition is too broad because it includes telecommunications carriers, possibly certain securities firms, and other entities which do not maintain the same standards as banks and are not subject to similar regulatory regimes.

Proposed change:

The current definition should be eliminated and replaced by the following definition:

"A bank is defined as an institution that:

(i) engages in the business of banking;

(ii) is recognized as a bank by the bank supervisory or monetary authorities of the country of its organization or principal banking operations;

(iii) receives deposits to a substantial extent in the regular course of business; and

(iv) has the power to accept demand deposits."

4. "Authentication" (article 2*(j)*)

A payment order is authenticated in its entirety, but this definition refers to the authentication of "part" of a payment order. In addition, authentication can refer to amendments of a payment order.

Proposed change:

The definition of "authentication" should be amended by deleting the words "all or part of". In addition, the words, "an amendment of a payment order" should be inserted after the words "payment order". Thus, article 2*(j)* should read:

" 'Authentication' means a procedure established by agreement to determine whether a payment order, an amendment of a payment order, or a revocation of a payment order, was issued by the purported sender."

5. Additional definitions

Even though the term "Credit Transfer System" (or "Funds Transfer System") is used in articles 5 and 7, it is not defined. (See article 5*(b)*(iv).) This is also the case with respect to "Interest" and "Revocation" of a payment order.

Proposed changes:

"Credit transfer system":

" 'Credit Transfer System' means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed."

"Interest"

"Unless otherwise agreed between the relevant parties, 'interest' refers to the inter-bank rate of interest in the currency of the State in which the receiving bank is located."

"Revocation"

"A 'Revocation' of a payment order is an instruction to a receiving bank from a sender intended to rescind a payment order previously issued by the sender."

C. *Article 3: Variation by agreement*

Article 3 does not provide for variation by a credit transfer system rule. How will this affect a credit transfer sent through existing and future systems? For example, how will it affect a credit transfer involving the Society for Worldwide International Financial Telecommunications ("SWIFT"), or a credit transfer through the Clearing House Interbank Payments System ("CHIPS"), which is destined for a foreign beneficiary's bank on the books of a US bank? How will this affect a credit transfer which in part is sent through Fedwire but which has an international aspect to it (e.g., the beneficiary's bank and the beneficiary are located in a foreign country)?

The draft model law should provide for the possibility of varying the effect of a rule of a credit transfer system by agreement, if rules of a credit transfer system provide for such variance, and therefore, this should be made clear in article 3.

D. *Article 4: Obligations of sender*

1. Article 4(3): Authentication

Article 4(3) is a problem because, if authentication is not commercially reasonable, then article 4(2) does not apply by its own terms. It would seem that the intent behind article 4(3) is to prohibit variation by agreement of the effect of article 4(2). Yet, because article 4(2) deals only with payment orders subject to authentication, is it possible to vary the terms of the draft model law as they relate to an unauthenticated payment order? That is, may the parties vary the effects of article 4(1) by having the purported sender of an unauthorized order be bound by the order none the less because the receiving bank and the sender choose not to authenticate?

2. Article 4(2): Variation

An additional and perhaps more important concern is as follows. Under article 4(2), a purported sender of a payment order is bound by that order if the order is authenticated by a commercially reasonable security procedure with which the receiving bank complied. Suppose the authentication procedure is not commercially reasonable. Can a sender agree with its receiving bank that the sender nevertheless will be bound by the payment order? Under article 4(3), the answer is no.

This answer is imprudent. Each sender should be allowed to perform its own cost-benefit analysis and agree with its receiving bank on the security procedure that is less than commercially reasonable. In turn, the receiving bank should be allowed to disclaim liability if such a procedure is adopted. Currently, major banking systems do allow such variation. A law which purports to prohibit such an accepted commercial practice poses difficulties that are not matched by any benefits.

Proposed change:

Article 4(3) should be deleted in its entirety.

E. *Article 6: Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank*

Article 6(2)*(a)* is objectionable because it allows for "passive" acceptance on the part of the originator's bank or the intermediary bank. That is, not rejecting within the time for execution prescribed by article 10, acceptance is deemed to have occurred. A court may view culpability for failure to execute an accepted payment as a very serious matter, and "the door remains open" to consequential damages. (See article 16(8).)

F. *Articles 7 and 9: Obligations of banks*

1. General concerns

(a) The obligations are neither appropriate nor feasible

Notification duties are imposed on receiving banks that are well beyond the scope of duties normally viewed as reasonable and are incompatible with the development of high-speed, high-volume electronic credit transfer systems. In particular, a receiving bank may be required to give notice of a misdirection, an insufficiency in data, or an inconsistency between words and figures (article 7(3)-(5) and article 9(2)-(4)).

Receiving banks in an electronic environment must have the ability to rely on figures, not words. Electronic transmission in large volumes cannot be stopped on receipt of each payment order and checked for discrepancies. An electronic credit transfer is akin to an express train that, unlike a local train, bypasses most stations. Forcing a delayed system because of pauses at each receiving bank will increase costs, slow volume, and not work with high-speed banking.

Hence, for example, the obligation imposed on a receiving bank to give notice of an inconsistency between words and figures describing the amount (article 7(5)), and the obligation to give notice of an inconsistency between words and figures describing the beneficiary (article 9(4)), are too severe. A receiving bank should be entitled to rely solely on figures, and so long as prior parties in the credit transfer chain are aware of this practice, the receiving bank should bear no liability for mismatches or misdescriptions.

There is no clear indication in the draft model law that a receiving bank is allowed to rely on a figure, as opposed to a word, in the event of an inconsistency. For high-speed, high-volume systems, in which processing of payment orders is automated, the ability to rely on numbers is crucial. Presumably, banks want to comply with laws. Yet, as an operational matter, compliance with the draft model law would be difficult or impossible.

If a receiving bank is permitted to rely on numbers with respect to domestic credit transfers, but not with respect to international credit transfers under the draft model law, then it would be forced to divide the payment orders it receives between those that come from domestic and from foreign senders. Yet, this would pose serious operational difficulties and increased costs, and would be unlikely to be implemented.

(b) The penalties are not properly specified

The remedy for failure to perform these duties is interest on the funds that are held (article 16(3)-(4)). While this might simply prevent unjust enrichment, there is no definition of "interest" so this is not certain to be the result.

2. Specific concerns

(a) Article 7(2)

The reference to "appropriate" intermediate bank is ambiguous. Receiving banks that are instructed should not be authorized to change those instructions unilaterally. (See the discussion of article 7(6).)

Proposed change:

The word "appropriate" should be deleted.

(b) Article 7(5)

This subparagraph concerns an inconsistency in a payment order between words and figures. In the case of "straight-through" processing (i.e., automated processing without manual intervention), the inconsistency may not be discovered by a receiving bank. Or, the receiving bank may not be notified of a problem occurring elsewhere in the credit transfer.

Proposed change:

An appropriate correction in the text of the draft model law should be made.

(c) Article 7(6)

This subparagraph allows a receiving bank to disregard the instructions of a sender regarding the use of an intermediary bank. Suppose the beneficiary's bank (or the beneficiary) relied upon the receipt of funds at a designated intermediary bank, and consequently drew down on its account with the intermediary bank in reliance upon this expected receipt. Then, an overdraft might be created, and overdraft interest charges and other damages might result. Accordingly, a receiving bank should not be allowed unilaterally to disregard instructions on the designation of an intermediary bank.

(d) Article 9(3)

This is a serious problem for the reasons previously discussed, namely, with automated processing, a beneficiary's bank should not be expected to discern a discrepancy between words and figures.

(e) Article 9(4)

This provision poses serious difficulties and would have deleterious effects on the payments system. Because a beneficiary's bank is likely to receive payment orders from a myriad of sources, and because it is not possible to have contracts with all bank senders and remote parties varying this provision, how can reliance ever be placed by a beneficiary's bank on account number? Suppose the account number matches the beneficiary with reasonable certainty, but does not match the name of the intended beneficiary. Will the beneficiary's bank be liable for the amount of the credit transfer if it credits the party identified by number? Banks which are not able to distinguish domestic from international credit transfers will have to match all orders by name and account number. Processing payment orders will be slowed down immeasurably, and the cost of such processing will vastly increase. This is all the more likely because article 9(4) would require a beneficiary's bank to give notice both "to its sender and to the originator's bank".

G. *Article 8: Acceptance or rejection by beneficiary's bank*

Article 8(1)*(a)*(i) refers to "passive" acceptance occurring upon receipt of sufficient available funds in the account of the sender to be debited. There is a lack of precision as to when acceptance occurs, because deposit accounts are dynamic. That is, funds are incoming and outgoing continually throughout the day. Few banks in the United States (and we believe in other countries as well) have on-line, real-time accounting systems; only at the close of the banking day will there be a static balance.

Proposed change:

It is essential to have a rule that allows for rejection within a specific time from the opening of the next banking day.

H. *Article 10: Time for receiving bank to [execute] payment order and give notices*

Apparently, this applies to all types of receiving banks—originator's banks, intermediary banks, and beneficiary's banks. Article 10(1) requires execution unless certain enumerated events (i.e., (1)*(a)* or *(b)*) occur. However, the relationship between this provision and articles 6 and 8, which do not require execution (i.e., which allow for a payment order to be rejected), is unclear and must be addressed.

In addition, the times within which required notices must be provided are unrealistically brief. If a notice must be provided (see the discussion of articles 7 and 9), it may well be operationally impossible to provide it on or before the day the payment order in question is required to be executed (article 10(2)), or on or before the payment date (article 10(3)).

Suppose a payment order is received late in the day, and that day is the execution date or the payment date. If a notification duty is triggered, it may be too late in the day to fulfil this duty. Instead, the earliest time at which notification can be provided may be after the beginning of the next banking day.

Proposed change:

Article 10(2)-(3) should be changed to allow for the provision of notice on the banking day after the payment order in question is received.

I. *Article 11: Revocation*

The conjunctive "and" on the fourth line of article 11(1) should read "or". (See, e.g., the style in article 11(2).)

Proposed change:

Replace "and" with "or" on the fourth line of article 11(1).

J. *Article 12: Duty to assist*

A receiving bank is obligated to assist each prior party in a credit transfer, and to seek the assistance of each subsequent party in a credit transfer, in the event the transfer is not completed. The vagueness of this duty is a serious problem.

With respect to this objectionable "duty to assist", there is no explicit statutory penalty for a failure to abide by the "duty", which itself is not defined. Does it mean telephone calls? Does it mean filing lawsuits in three countries? While the provision could be viewed as unimportant for this reason, a court may reason that a right without a significant remedy is not right at all, and, accordingly, it may read an implied remedy into the draft model law. Such an implied remedy could be severe.

K. *Article 13: Duty to refund*

1. Article 13(1)

Article 13(1) requires a refund with *interest* if the credit transfer is not completed in accordance with article 17(1). "Interest", however, is not currently defined. The definition of "interest" here proposed for article 2 will correct the ambiguity.

2. Article 13(2)

This subparagraph indicates that subparagraph (1) may not be varied by agreement. That is, the purpose of article 13(2) is that the general rule of article 13(1), the "money-back guarantee", may not be varied by agreement. In so far as this is accomplished by article 13(2), this is entirely correct—it should not be possible to vary the money-back guarantee by agreement.

The money-back guarantee is a fundamental aspect of the overall synthesis of interests of parties to credit transfers under the draft model law. It works to the advantage of senders of payment orders in view of the necessary compromises on other issues made because of the high-speed, high-volume nature of electronic credit transfers.

However, as a separate matter, there is a potential ambiguity in article 13(2). Does it, for example, mean that the parties cannot agree as to an appropriate interest rate? This should be clarified.

L. *Article 14: Correction of underpayment*

An ambiguity needs to be resolved in view of existing commercial practices. Suppose the receiving bank does not issue a payment order for the difference between the amounts of the payment orders. This might occur because the originator has undertaken to remit the shortage or other arrangement may have been concluded to resolve underpayment (e.g., set-offs, etc.). What happens then? The draft model law should not be worded so as to preclude commercial practices.

M. *Article 16: Liability and damages*

1. Article 16(1), (5)

These subparagraphs are troubling in that they could create rights in a would-be beneficiary of a non-existent credit transfer against some bank. Specifically, the legal theory, and the conception of the relationships of the parties upon which this liability would exist, are seriously at variance with existing commercial legal principles and practices.

2. Article 16(3)-(5)

The "interest" which must be paid is unclear. The definition of "interest" proposed above will correct the ambiguity.

3. Article 16(4)

As currently drafted, this provision is applicable only to the obligations imposed on a beneficiary's bank that are specified in article 9(2) and (3). The draft model law does not specify the penalty for failure to perform the obligation specified in article 9(4) or 9(5). We have recommended that these obligations be deleted because of their impracticality. In any event, the penalty for violation of these obligations should have been limited to that specified in article 16(4).

4. Article 16(8)

This provision remains a very serious problem. The draft model law proposes penalties that have not been accepted in any other major electronic or telecommunications commercial field, and are unlikely to be accepted if included here.

A general "exclusivity clause" exists which states that the remedies set forth in the draft model law are exclusive. An express exception exists for "any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order *(a)* with the *intent* to cause loss, or *(b) recklessly* and with *knowledge* that loss *might* result". (article 16(8), emphasis supplied).

This exception is dangerous and unnecessary for several reasons, and is incompatible with high-volume, computerized banking and clearing systems.

First, the highlighted words may be interpreted differently in different jurisdictions, and may be seen as an invitation to award catastrophic damages. That is, terms like "intent", "recklessly", "knowledge", and "might" are imprecise without further qualification and have different meanings in different legal cultures.

Second, the words "any remedy" could be taken to include consequential damages. More generally, if "any" is meant literally, then this word is most troubling. Does this include consequential and punitive damages? Criminal sanctions?

Third, the words "reckless" and "might" are so broad as to open participating banks to liabilities that could preclude modern high-speed, high-volume systems.

Fourth, just as the language above is imprecise and vague, so too are the "trigger mechanisms". What constitutes a "failure" to execute or "improper" execution? These terms are not clearly defined. Yet, these are critical terms because these events trigger the imposition of an article 16(8) remedy.

Finally, article 16(8) is commercially unacceptable because it could apply to an originator's bank or intermediary bank that "passively" accepts a payment order.

N. *Article 18: Conflict of laws*

The general choice of law rule is that in the absence of an agreement, the law of the receiving bank applies (article 18(1)). This appears to be the proper result in the absence of a conflicts law which results in one law as applicable to all segments of a credit transfer.

However, this rule is inapplicable in the event of interloper fraud and in the event of a disputed agency relationship (article 18(2)). In such cases, there are two senders, the innocent customer and the alleged wrongdoer. If these parties are in different jurisdictions, then there are two additional potentially applicable laws to determine the issue of authority—that of the innocent customer and that of the alleged wrongdoer. This would present problems.

Proposal:

Article 18(2) should be eliminated in its entirety.

Comment:

A credit transfer system should be allowed to freely choose the law applicable to its system. The failure to include such a provision is likely to result in considerable difficulties in applying the draft model law. This is because international banking is increasingly moving toward new high-speed, high-volume means of transferring credit.

Proposal:

The Working Group should reconsider its earlier decision rejecting this concept.

BANK FOR INTERNATIONAL SETTLEMENTS

[Original: English]

A number of comments that address specific international aspects of the draft Model Law, in particular from the point of view of cooperation between central banks, have been transmitted to [BIS] by several central banks.

In the Bank's capacity as an observer at the sessions of UNCITRAL's Working Group on International Payments, I feel that it would be helpful if we were to pass on to you, in summary form, the comments which have been received by the BIS. I therefore have pleasure in enclosing that summary, which complements, in specific areas, the observations which may already have been transmitted to you directly by the national delegations.

Summary of the comments received by the BIS from several central banks with regard to the UNCITRAL Model Law on International Credit Transfers

A. *General observations*

(1) Attention was generally drawn to the risk of possible conflict arising between different rules governing "national" and "international" credit transfers if the Model Law were adopted by legislation in any given country. In general it was felt that banks had sufficient capacity to distinguish between national and international credit transfers (e.g. usage of the SWIFT system).

However, the view was expressed that it was desirable for the rules which govern purely domestic credit transfers to be harmonized with those which deal with international credit transfers in order that the risks which arise in a credit transfer can be easily foreseen by the parties involved. In one country a special advisory committee is working on both the rules for purely domestic credit transfers and those for international credit transfers so that those rules become compatible.

(2) The point was raised that the application of the Model Law to interbank payments would lead to problems whenever the rules of the respective funds transfer system contradicted the rules of the Model Law. It seemed unlikely that national funds transfer systems would adapt their rules to the Model Law; in order to accomplish international funds transfers via the existing systems, the operating agency of such funds transfer systems, e.g. the central bank, would have to exclude the applicability of the Model Law as much as necessary and feasible.

(3) It was suggested that some of the problems indicated above could be overcome if the rules of the Model Law were not incorporated in a "model law" intended to be incorporated into different national legal systems but rather in a "convention". The "model law" approach could lead to a situation where, for instance, an intermediary is located in a country that had not adopted the rules of the Model Law. If, in such a case, the credit transfer was not completed, the originator's bank would have to refund the originator (article 13.1), without being able to get its money back from its receiving bank. On the other hand, a "convention" could be drafted in such a way that the rules would apply only if all banks involved were domiciled in contracting States (see, for example, the UN Convention on International Sale of Goods).

(4) A number of central banks feared that too great a divergence of the Model Law from existing national practice and domestic legal rules would cause participants in a credit transfer to make the widest use possible of "variation by agreement" (article 3), thereby invoking the danger of the Model Law being "art for art's sake".

B. *Comments on specific articles*

Article 5(*b*)(iv). *Payment to receiving bank/netting*

On the question whether there might be a conflict between the rules of netting schemes (or of a bilateral netting agreement) and the rules of the Model Law, various views were expressed.

(1) One view was that this clause should be maintained since it did not pose a major problem. The clause left the actual time of payment to be determined by the netting scheme's rules and applicable law; there was no attempt to validate or harmonize national laws governing netting.

Although these references to netting were narrow and limited, it was felt that they may be helpful in highlighting for national legislators the issue of the legal validity of netting, albeit only in the context of credit transfers.

(2) Other views expressed were in favour of deletion of the clause. It was stated that with regard to interbank netting schemes, there seemed to be a consensus that the time at which an obligation under a payment order is discharged should be determined by the terms and conditions of each netting scheme. Accordingly, it was suggested that article 5*(b)*(iv) was neither appropriate nor necessary.

The concern was voiced that the problems relating to "netting" had not yet been solved in a sufficient manner to be included in the Model Law with a view to defining the time of payment between sending and receiving bank.

(3) According to an intermediate view the clause required further study and refinement. It was thought that a mere reference to a netting agreement or to rules of a netting scheme would tend to create rather than to reduce uncertainties in this respect. For instance, it was pointed out that it was uncertain whether choice-of-law clauses in netting scheme rules would be upheld by a national court; rules relating to bankruptcy might be upheld in one, but not in the other country; bankruptcy law was mostly "national" law, and there did not exist generally accepted conflict-of-law rules regarding bankruptcy; netting involved problems like assignment of future obligations and novation of future debt that are not known or equally accepted in all legal systems. (For instance, it was stated that a rule like article 11.8 was contrary to certain national bankruptcy rules according to which a payment order is deemed to be revoked by the sender if it has not yet been accepted by the recipient.)

It was also pointed out that subparagraphs *(a)* and *(b)* open the possibility for an obligation to be settled in a "netting scheme" that did not function with all required legal security and that, in particular, did not comply with the minimum standards put forward in the Report of the Committee on Interbank Netting Schemes of the central banks of the Group of Ten Countries.

In addition, even though this clause did not seem to have a direct influence on the way participants in a "netting scheme" regulated their contractual relations, it was felt that this question should be studied more thoroughly, especially by those countries having wide experience in that domain. In addition, the references to netting in the Model Law did not address the problems which may arise from differing national law; it was suggested that this issue could be addressed by UNCITRAL in the future.

Article 10. *Time to execute payment order*

Concern was voiced that the rule according to which a receiving bank is required to execute the payment order on the day it was received created a problem whenever payment orders issued on paper and concerning small amounts were involved. In the light of the fact that the Working Group had opted not to make any reference to the form in which the payment order might exist and therefore not to limit the Model Law to electronic credit transfers, it was suggested that article 10 should more realistically reflect banking practice by obliging the receiving bank to execute a payment order no later than one banking day after the day it was received. Another solution would be to make a distinction between electronic and paper based credit transfers.

Article 13. *Duty to refund*

(1) With reference to the "money-back guarantee" and the concern that this clause—which deviates greatly from banking practice in a large number of countries—might have a bearing on the applicable capital ratio, we refer to the letter from the Secretariat of the Basle Committee on Banking Supervision of 22 May 1991 (copy enclosed).

(2) With regard to article 13.2 it was suggested in comments received by the Legal Service that the exceptions listed should be more explicit. The French version, for instance, speaks of "impossibilité de payer". Does that include bankruptcy of the bank concerned? If so, the guarantee and security which is meant to be achieved in article 13 would be greatly weakened. In addition, under certain circumstances, a bank might not wish to perform a credit transfer unless it was agreed that the originator would assume all risks.

Article 17. *Completion of credit transfer and discharge of underlying obligation*

(1) Some answers appear to be in favour of the proposed rule: they stated that it was not unreasonable to relate the completion of a credit transfer to the point at which the beneficiary's bank accepts the payment order. However, under existing law, this approach remains a minority view in some countries.

Even though this rule might be considered an encroachment upon the underlying relationship, the rule nevertheless had the advantage that the beneficiary's bank would be considered as his "agent", so that the beneficiary would bear the risk of his own bank's bankruptcy.

In this connection, it was suggested that while the principle contained in article 17.1 correctly stated the time when a credit transfer is completed, this provision should rather be moved to the definition of "credit transfer" in article 2*(a)*.

(2) Other answers were more critical with respect to the proposed rule. Taking into consideration the fact that credit transfers were often initiated for the purpose of discharging underlying obligations, it was observed that article 17.1 could complicate the situation because there may be some discrepancy between the time at which the credit transfer is completed pursuant to article 17.1 and the time at which the underlying obligation is discharged under relevant domestic rules.

Several answers commented that substantial differences existed with regard to time and place of "cash-less" payments. These problems were not solved by linking the completion of a credit transfer to "acceptance" by the beneficiary's bank. It was suggested that it would be preferable for international initiatives to achieve harmonization of domestic rules among major countries with regard to the time and place of payment to be revived. Such efforts should be given sufficient time to resolve possible conflicts with civil and commercial laws in those countries.

(3) With regard to article 17.2 several comments were made.

It was suggested that the question of time of payment could be dissociated from that of revocation of payment, so that the latest possible moment for revocation would be, for example, the debiting of the originator's account, while the payment itself would only be completed when the beneficiary's account was credited. This would have the advantage of reducing risks linked to credit transfers (especially that of insolvency of the originator) while at the same time being in conformity with civil law rules on the time of payment.

It was also pointed out that the impact of article 17.2 on conflicting domestic rules has yet to be thoroughly analysed and that, pending such analysis, it might be preferable to delete this provision.

However, it was felt that the rule linking the discharge of a payment obligation to the "crediting of a beneficiary's account or otherwise placing the funds at the disposal of the beneficiary" (article 8.1*(d)*) conformed with precedent and legal doctrine. This rule was also in conformity with the International Law Association's Model Rules on the Time of Payment of Monetary Obligations.

Article 18. *Conflict of laws*

(1) The Model Law seems to take the position that it accepted multiple applicable laws at various stages of a credit transfer, on the assumption that participating countries would enact domestic laws compatible with the Model Law, and that it would be difficult to single out one law which would govern all States of a credit transfer. It was pointed out that a single applicable law governing an entire international transfer might be a preferable outcome, and that article 18 might help to achieve this outcome.

(2) It was suggested that while refining the rules to settle conflicts of law was realistic and meaningful at this stage, harmonization of the laws governing credit transfers was a more important goal.

It was felt that the question of conflict of laws would be less prominent if a large number of countries interested in international credit transfers were to enact the Model Law. The same would be valid if, in a given contract, the Model Law was made applicable by reference; it could even be envisaged that the Model Law should develop into a "usage", similar to the ICC's rules on letters of credit.

(3) However, it could not be expected that all countries will take legislative action to implement the provisions of the Model Law as a whole. It would thus be necessary to have a simple and decisive rule to settle the conflict of laws issue so that the Model Law provides foreseeability to the parties. Article 18 of the Model Law is ambiguous, however, regarding the extent to which the governing law chosen by the parties would be applied and the liability for damages incurred by a third party who is not in a sender-receiver relationship. It was therefore suggested that article 18 should be deleted unless the present text of the draft undergoes considerable amendment.

It was believed that in any event the parties to credit transfers ought to remain free to choose the legal regime applicable to their transactions.

(4) It was suggested that the expression "law chosen by the parties" could be misleading. Even if this was meant to cover the whole transfer procedure, there could be a difference between the rules governing, say, the calculation of interest when a transfer is not completed (article 13) and the technical rules regarding the payment (modalités de paiement). The former rules should be governed by the chosen law but the technical rules might remain governed by the domestic law of the country where the intermediary bank is domiciled. Further discussion and clarifying amendments thus seemed necessary.

(a) *Basle Committee on Banking Supervision*

22 May 1991

Dear Mr. Bergsten,

I refer to your letter to M. Lamfalussy of 8 February 1991 on the UNCITRAL draft Model Law on International Credit Transfers (A/CN.9/344). As M. Lamfalussy indicated in his letter of 13 March 1991, as Secretary of the Basle Committee on Banking Supervision I have drawn the attention of the member institutions to article 13 and specifically to the question whether intermediary banks might be required to hold capital against the risk of having to return funds to the initiator of a transaction, without being able to receive the corresponding funds due to them.

Members do not feel that the 1988 capital accord would require banks placed in this position to include this risk as a contingent liability with a capital weight. Notwithstanding this view of the Model Law, I should add that the 1988 agreement acknowledges that there are a number of risks with which it does not deal, and some countries have additional requirements of their own. Banking practice in some member countries clearly differs from the practice envisaged in article 13 so that a further review might be necessary both by individual supervisors and perhaps by the Committee should the risks become material.

I hope that this letter helps to answer the question raised by the working group, but if I can be of any further help please let me know.

(P. C. Hayward, Secretary)

C. Report of the Working Group on International Payments on the work of its twenty-first session

(New York, 9-20 July 1990) (A/CN.9/341) [Original: English]

CONTENTS

INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to begin the preparation of model rules on electronic funds transfers and to entrust that task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments.[1]

2. The Working Group undertook the task at its sixteenth session, at which it considered a number of legal issues set forth in a note by the Secretariat (A/CN.9/WG.IV/WP.35). The Group requested the Secretariat to prepare draft provisions based on the discussions during its sixteenth session for consideration at its seventeenth session (A/CN.9/297, para. 98). At its seventeenth session the Working Group considered the draft provisions prepared by the Secretariat. At the close of its discussions the Working Group requested the Secretariat to prepare a revised draft of the model rules (A/CN.9/317, para. 10). At its eighteenth session the Working Group began its consideration of the redraft of the model rules, which it renamed the draft Model Law on International Credit Transfers (A/CN.9/318, paras. 10-19). At its nineteenth and twentieth sessions it continued its consideration of the draft Model Law (see A/CN.9/328 and 329).

3. The Working Group held its twenty-first session in New York from 9 to 20 July 1990. The Group was composed of all States members of the Commission. The session was attended by representatives of the following States members: Bulgaria, Cameroon, Canada, Chile, China, Costa Rica, Czechoslovakia, Denmark, Egypt, France, Germany, Federal Republic of, India, Iraq, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

4. The session was also attended by observers from the following States: Australia, Burkina Faso, Colombia, Ecuador, Finland, Indonesia, Israel, Jordan, Liberia, Pakistan, Philippines, Poland, Republic of Korea, Rwanda, Saudi Arabia, Sweden, Switzerland, Thailand, Uganda, United Republic of Tanzania, Vanuatu, Venezuela and Yemen.

5. The session was attended by observers from the following international organizations: International Monetary Fund, Bank for International Settlements, Hague Conference on Private International Law, Banking Federation of the European Community, International Chamber of Commerce, Latin American Federation of Banks and Society for Worldwide Interbank Financial Telecommunication.

6. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora (Mexico)

Rapporteur: Mr. Bradley Crawford (Canada)

7. The following documents were placed before the Working Group:

(*a*) Provisional agenda (A/CN.9/WG.IV/WP.45);

(*b*) International credit transfers: comments on the draft Model Law on International Credit Transfers (A/CN.9/WG.IV/WP.46 and Corr.1);

(*c*) International credit transfers: proposal of the United States of America (A/CN.9/WG.IV/WP.47).

8. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of Model Law on International Credit Transfers.
4. Other business.
5. Adoption of the report.

9. The following documents were made available at the session:

(*a*) Report of the Working Group on International Payments on the work of its sixteenth session (A/CN.9/297);

(*b*) Report of the Working Group on International Payments on the work of its seventeenth session (A/CN.9/317);

[1]*Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 230.

(c) Report of the Working Group on International Payments on the work of its eighteenth session (A/CN.9/318);

(d) Report of the Working Group on International Payments on the work of its nineteenth session (A/CN.9/328);

(e) Report of the Working Group on International Payments on the work of its twentieth session (A/CN.9/329);

(f) International credit transfers: major issues in the Model Law on International Credit Transfers (A/CN.9/WG.IV/WP.42).

I. CONSIDERATION OF DRAFT PROVISIONS FOR MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

10. The text of the draft Model Law before the Working Group was that set out in the report of the twentieth session of the Working Group (A/CN.9/329, annex) and reproduced with comments in A/CN.9/WG.IV/WP.46 and Corr.1.

Article 14

11. The Working Group recalled that at its twentieth session there had been a short general discussion of article 14 so as to lay a foundation for a more thorough discussion of the article at the current session (A/CN.9/329, paras. 189-192).

Paragraph (1)

12. Although opposition was expressed, the Working Group decided to delete paragraph (1). It was stated that, while many legal systems already recognized credit transfers as an acceptable method of making payment, it was a matter of the policy of each State to decide whether a monetary obligation could be discharged by a credit transfer. It was also noted that it might be contrary to the monetary policy of some countries to consider credit in an account in a bank as having the same legal significance as money issued by a central bank.

Paragraph (2)

13. Under one view paragraph (2) should be deleted. In support of that view it was said that the current text assumed that the function of a credit transfer was to discharge an obligation even though a credit transfer could, in fact, have many other functions such as shifting funds between accounts of the same person. It was also stated that discharge should not result from a credit transfer if payment through another means had been stipulated between the parties or if the transfer had been credited to the wrong account.

14. It was stated that the Model Law should treat a credit transfer as an abstract operation, without regard to the purpose for which the transfer had been made or the legal effect of the transfer on the underlying transaction. Under that view the Model Law should contain a provision stating when a credit transfer was completed. If the transfer was for the purpose of discharging an obligation, other rules of the law applicable to the obligation would determine whether, when and to what extent the obligation had been discharged by the transfer. The proponents of that view also suggested that, in order to be consistent with the definition of a "credit transfer" in article 2, completion of the transfer should result from the placing of the funds at the disposal of the beneficiary and not from the acceptance of the transfer by the beneficiary's bank.

15. Under another view, even though the Model Law would not have a provision providing that a credit transfer would constitute discharge of an obligation, the Model Law might include a provision that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, the Model Law might indicate the time when such a discharge took place. However, it was stated, such a provision should indicate that the extent of the discharge arising out of the credit transfer would not be greater than if the payment had been in cash. The following text was suggested in implementation of that view:

> "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."

16. It was also stated that the two views were not fundamentally incompatible and that the Model Law might include both the provision set out above and a provision on the time of completion of the credit transfer that might read as follows:

> "A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it."

17. The Working Group decided to adopt the two provisions in the form in which they had been suggested. It noted that its decision comprised both a decision as to the matters that should be included in the Model Law and a decision that the point of time when the credit transfer was completed, with the legal consequences that followed, was when the beneficiary's bank accepted the payment order addressed to it. The Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in articles 5 and 7 in light of the fact that acceptance entailed completion of the credit transfer.

Paragraph (3)

18. The Working Group noted that the sums of money involved in paragraph (3) were relatively small, but that the legal questions that it raised were significant. It was noted that few people could anticipate the extent of the fees that might be charged for the making of an

international credit transfer and that there was a general lack of agreement or understanding as to who should bear those fees or how they should be collected.

19. Although a suggestion that the paragraph should be deleted was not adopted, there was general agreement that the paragraph should not deal with the effect on the underlying transaction resulting from the deduction of fees by the bank from the amount of the transfer.

20. The Working Group decided that paragraph (3) should state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer. The Working Group requested a drafting group to be created at the next session of the Working Group to prepare a provision implementing that decision.

Paragraph (4)

21. The view was expressed that the paragraph was too detailed for a model law. It was also stated that the paragraph as drafted was inconsistent with provisions of paragraph (4) of article 4 in that paragraph (4) of article 14 would give the bank a right to debit the account of the sender when the bank received the payment order, whereas paragraph (4) of article 4 stated that, although the sender's obligation to pay the receiving bank was created upon acceptance of the payment order, actual payment was not due until the execution date of the payment order.

22. The Working Group decided to delete the paragraph.

Title of article

23. The Working Group noted that the title of the article should be changed to reflect the current content of the article.

Article 15

Proposed paragraph (3)

24. The Working Group discussed a proposal of the United States of America contained in A/CN.9/WG.IV/WP.47 that would add a new paragraph (3) as follows:

> "(3) A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail."

25. In support of the proposal it was stated that, since the rights and obligations of one party to a credit transfer might be affected by the actions of a party to the transfer located in another State, it was important that one set of rules govern the rights and obligations of all the parties to the transfer. It was stated that the concern was particularly important in respect of high-speed electronic transfers (a term that was defined in another portion of the written proposal). Unless there was a means for the parties to elect the application of a single law as was here proposed, the general rules of choice of law reflected in article 15(1) would lead to the result that the law of different States would apply to the different segments of the credit transfer and that there would be no single law that would govern the entire credit transfer.

26. In addition, it was stated, the Model Law should better accommodate the needs of high-speed electronic transfers than it currently did. It was stated that the current draft reflected the law appropriate to slower means of making credit transfers and that in its current form it would impede high-speed transfers rather than facilitate them. There were two means by which high speed transfers could be facilitated by the Model Law. One was to reconsider all of the substantive provisions and to amend them to reflect the needs of high-speed electronic transfers, or to add special rules reflecting those needs. The other, as proposed here, was to allow a funds transfer system to choose the law of a State that had rules more appropriate to such transfers as the law to govern the entire transfer if any portion of the transfer passed through the system.

27. It was pointed out that the technique suggested had already been implemented by the Clearinghouse Interbank Payments System (CHIPS) in its new rule 3 and the law of New York had been chosen to govern the entire transfer if any part of it passed through CHIPS. (The CHIPS rule was set out in A/CN.9/WG.IV/WP.47.)

28. There was general agreement in the Working Group that the Model Law should meet the operating needs of high-speed electronic credit transfers. It was stated that one of the very purposes of preparing the Model Law was to meet those needs, and that the individual substantive provisions should be reviewed with those concerns in mind. It was suggested that there might be scope for different rules governing paper and electronic transfers to be included in individual articles of the Model Law.

29. A view was expressed that the proposal might be a reasonable means for the banks that engaged in making international credit transfers to agree upon a single law to govern their relations. It was stated, however, that, even if the proposal might be reasonable if it was restricted to the relationships between the banks, it was excessive when it attempted to impose a law upon non-bank originators and beneficiaries that was different from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen. The proposal would give the funds transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds transfer system might choose a law that was particularly favourable to the banks and

unfavourable to the non-bank originators and beneficiaries.

30. A suggestion was made that the Model Law might be drafted so that, while it would apply to the entire transfer, it would recognize that the rules of a funds transfer system would govern the participants in that system to the exclusion of the Model Law to the extent that the rules and the Model Law were inconsistent.

31. Under another view the proposal would lead to the disunification of the laws governing international credit transfers rather than to their unification. It was pointed out that a transfer might go through two funds transfer systems and that the two systems might have chosen different laws to apply to the entire transfer.

32. The Working Group did not adopt the proposal but decided that it would review the draft provisions of the Model Law to be sure that they were compatible with the needs of high-speed credit transfers.

Paragraph (1)

33. The suggestion was made that article 15(1) should be deleted since it would be preferable for the Model Law not to contain any provision on conflicts of law in international credit transfers. It was stated that, considering the variety of national laws on means of payment and the complexity of the issues involved, the draft provisions of article 15(1) did not have the degree of refinement that would make them acceptable to most States. It was noted, for example, that no provision had been made as to the means by which the parties would have to express their choice of the applicable law. In this regard attention was drawn to article 3 of the Rome Convention on the Law Applicable to Contractual Obligations, which states that:

> "The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case."

It was also stated that it would be difficult for States that were parties to the Rome Convention or to other bilateral or multilateral conventions on conflicts of law of contractual obligations to adopt any conflicts of law provisions of the Model Law.

34. Furthermore, it was suggested, no single conflicts rule would be appropriate for both high-speed electronic transfers and paper-based credit transfers. If a need was felt for specific conflicts rules in the area of international credit transfers, the preparation of a convention on the topic should be considered. That would be particularly appropriate since the Working Group contained expertise on the substantive aspects of international credit transfers but not on the complex questions of conflicts of law.

35. In opposition to the suggestion to delete the provision on conflicts of law from the Model Law, it was stated that in an ideal world in which all States would adopt the Model Law no rules on conflicts of law applicable to international credit transfers would be necessary. However, that could not be anticipated and parties should not have to litigate to know which conflicts rule applied to their transfers. It was also stated that the fact that some States might be party to a bilateral or multilateral convention on conflicts of law that would in some measure be applicable to a credit transfer was no more of a reason not to include provisions on the subject in the Model Law than would be the existence of national provisions on the substance of the law governing credit transfers.

36. It was noted that any rule on conflicts of law should take into consideration the needs of certain States where the substantive law governing credit transfers was the law of the constituent jurisdictions rather than of the State itself.

37. After discussion the Working Group decided to retain a provision based upon article 15(1).

38. The suggestion was made that the conflicts of law provision should indicate that the substantive provisions of the Model Law applicable to the relations between the originator and the originator's bank should be governed by the law of the originator's bank but that the rest of the credit transfer should be governed by the law of the beneficiary's bank. It was noted that the identity and the location of the beneficiary's bank were known from the commencement of the credit transfer and were known to all relevant parties.

39. In opposition to the suggestion it was stated that, while it would be desirable for the Model Law to apply to an entire international credit transfer, it was no more feasible for that result to be accomplished by a conflicts of law provision in the Model Law dealing with electronic transfers than it would be by a choice of law by a funds transfer system, a proposal that had already been rejected. Application of the Model Law to the entire credit transfer could be achieved only by its adoption by the several States concerned.

40. The Working Group decided that article 15(1) should continue to be drafted so as to apply to individual segments of the transfer.

41. There was general agreement that the parties to the credit transfer, or to any segment of it, should be free to choose the law applicable to their relations. It was noted that that was not only the general rule in respect of conflicts of law, but that it was specifically stated in the Rome Convention (see paragraph 33 above). It was said that including such a rule in article 15(1) would reduce the possibility of conflict between the Model Law and the Convention, thereby reducing the difficulties for the parties to that Convention to adopt the Model Law.

42. A discussion took place as to whether the Model Law should set forth any limits on the freedom of the parties to choose the law applicable to their relations. It was noted that the provision as currently drafted limited the choice of the parties to the law of the State of the sender, of the receiver or of the State in whose currency the payment order was denominated.

43. Under one view, the Model Law should contain a requirement that some reasonable link existed between the

law chosen by the parties and the credit transfer operation. In that respect, it was suggested that, in addition to the three possibilities that were currently provided, the law of the State in which a funds transfer system through which the credit transfer would pass might be included. A concern was also expressed that the freedom of choice by the parties should be limited by public order considerations. It was stated that the choice of some irrelevant law by the parties should not allow them to avoid application of any mandatory provisions of the Model Law, for example as regards the money-back guarantee in article 11*(b)*.

44. Under another view, the Model Law should recognize the absolute freedom of choice of the applicable law by the parties. It was stated that it would be contrary to the general principles of private international law on party autonomy to create mandatory rules that the parties could not avoid by choosing another law. It was stated that such mandatory rules were highly exceptional in private international law and different from public policy rules under national legislation.

45. The Working Group decided that article 15(1) should contain a general rule that, except where otherwise provided in the Model Law, parties were free to choose the applicable law.

46. The Working Group then considered the law that should be applicable to a segment of the credit transfer when the parties had not exercised their right to choose the applicable law. Under one view the characteristic performance in the transfer process was that of the sender. Under another view the characteristic performance was that of the receiving bank which was faced with the obligation to verify the source of the payment order, to accept it or give notice of rejection, and, if the bank accepted it, to issue a new payment order consistent with the payment order received. Under that view the appropriate law to be applied to that segment should be the law of the receiving bank. It was stated that the only exception to such a rule arising out of the current text of the Model Law was to be found in article 4(1) on the authority of the actual sender to bind the purported sender. However, there was general agreement that the Model Law should not attempt to provide which law would be applicable to the question as to whether the actual sender of a payment order was authorized to bind the purported sender.

47. After discussion, the Working Group decided that, unless otherwise agreed, the law of the receiving bank should apply to that segment of the transfer and that article 15(1) should make it clear that it did not apply to the law applicable to the authority of the actual sender to bind the purported sender.

Paragraph 2

48. In view of the fact that the primary rules on the effect of a credit transfer on the discharge of a monetary obligation had been deleted from article 14 (see paragraphs 15 to 17 above), the view was expressed that paragraph (2) might be deleted as well. In any case, it was stated, it did not set forth appropriate rules. However, the Working Group decided that, since a rule had been retained as to the time when an obligation would be discharged by a credit transfer, paragraph (2) should be retained provisionally.

Square brackets

49. At the close of the discussion the Working Group decided that the entire text of article 15 should be placed in square brackets pending a final review at a later session.

Article 16

50. A proposal for a new article 16 was submitted in A/CN.9/WG.IV/WP.47. The first paragraph of the proposed new article read as follows:

> "Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party."

The proposed new article provided in its second paragraph that rules adopted by a funds transfer system could be effective between the participating banks "even if the rule conflicts with this law and indirectly affects another party to the funds transfer who does not consent to the rule".

51. Considering that the corresponding proposed amendments of article 15 had not been accepted by the Working Group, the entire proposal was withdrawn by its proponents. The Working Group noted that at its eighteenth session it had decided that the extent to which the Model Law would be subject to the agreement of the parties would be considered in connection with the individual provisions (A/CN.9/318, para. 34). The Working Group also noted that the draft before it mentioned the effect of contractual rules in a number of provisions.

52. Subsequently, the Working Group decided to adopt the first paragraph of the proposed article 16 and to review each of the substantive articles to determine whether the previous statements as to the effect of an agreement should be retained or could be deleted.

Review of the text: General comments

53. The suggestion was made that the legal issues arising out of the use of netting should be addressed in the Model Law and that all provisions of the Model Law should be reviewed with a view to their compatibility with the operation of netting systems. While there was general agreement that the Model Law should take account of the use of netting, the Working Group recalled that at its nineteenth session it had decided to wait for the study on the topic that was expected from the Bank for International Settlements (BIS) (A/CN.9/328, para. 65) and that the study had not yet been made available. The Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not made available soon.

54. The question was raised as to whether the text of the Model Law should take into account exchange control regulations that existed in some countries. The Working

Group agreed that that question should remain outside the scope of the Model Law, although national legislators might have to consider such issues when adopting the Model Law. It was also suggested that the effect of exchange control regulations might be discussed in any commentary that might later be prepared on the Model Law once it has been adopted by the Commission.

55. The view was expressed that the Model Law should not become too favourably oriented to the interests of banks. A contrary view was expressed that the Model Law should be neutral in its coverage concerning all commercial parties rather than focusing on one party, i.e. banks, as a problem. It was said that in some States business users of electronic credit transfer systems had expressed a clear preference for less protection in exchange for lower costs or service fees.

56. It was stated that the general direction of the Model Law might be viewed as running contrary to the needs of high-value, high-speed and low-cost wire transfer of funds systems. It was also stated that UNCITRAL should focus on facilitating international commerce. A concern was expressed that the Model Law could have the effect of burdening commerce. Another view was that the money-back guarantee in article 11*(b)* should be considered in the same light.

Article 1

Paragraph (1)

57. There was strong support for the proposition that the scope of the Model Law should be as broad as possible.

Internationality

58. There was general agreement that the text of the paragraph as it had been modified by the drafting group at the twentieth session did not reflect the result of the decisions made by the Working Group (A/CN.9/329, para. 194). The Working Group decided that further discussion should be based on the text that it had adopted at its twentieth session (A/CN.9/329, para. 23). That text read as follows:

> "This law applies to credit transfers where the originator's bank and the beneficiary's bank are in different States or, if the originator is a bank, that bank and its receiving bank are in different States."

59. The view was expressed that the test of internationality was contrary to the operation of high-value, high-speed and low-cost wire transfer of funds systems. One suggestion was that the Model Law should apply to the situation where, although the originator's bank and the beneficiary's bank were located in the same country, the transfer was denominated in a foreign currency.

60. Another suggestion was that the test of internationality adopted at the twentieth session was unsatisfactory because *(a)* there was an apparently arbitrary distinction between originators that were banks and originators that were not, and *(b)* unless information about an originator was included on a payment order, it would probably not be possible to tell if the payment order was covered by the Model Law or not. In order to overcome those problems the following text was suggested:

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

61. Under another proposal, the test of internationality of a credit transfer should be that it crossed a border. Accordingly, it was stated that the following wording should be adopted:

> "This law applies if any payment order comprising the credit transfer is sent from a sender located in one State to a receiving bank in another State."

62. In opposition to the proposal it was said that, when the transfer was to another bank in the same country but the transfer was denominated in a foreign currency and there was a clearing for that foreign currency in the country where the transfer was taking place, the originator would not be able to foresee, at the time when the credit transfer originated, whether or not the transfer would be sent to the country of the currency or whether it would remain within his country. Therefore, it would not be possible to foresee whether the transfer would be subject to the Model Law. In reply it was said that it would always be possible for the originator to specify to his bank what should be the routing of the credit transfer.

63. An additional objection to the proposal was that it would create a degree of uncertainty since it referred to the location of the sender. Location could be interpreted either as the permanent domicile of the sender or, in the case of a physical person, all possible residences to which he might move. As a solution to that difficulty, it was suggested that only the location of banks and not that of their customers should be considered.

64. After discussion the following text was adopted:

> "This law applies to a credit transfer where a sending bank and its receiving bank are in different States."

Consumers

65. It was suggested that the footnote to article 1 providing that the law "is subject to any national legislation dealing with the rights and obligations of consumers" should be deleted. It was said that the Model Law confined itself to commercial law issues. Therefore, it should neither affect the situation of consumers nor be described as "subject to" consumer legislation. In reply it was said that the footnote served an educational purpose since the Model Law would apply to all bank customers. After discussion, the Working Group decided that the footnote should be reworded to state that the Model Law was not intended to deal with issues related to the protection of consumers. The matter was referred to the drafting group.

Article 2

Definition of a "bank", subparagraph (f)

66. It was noted that the definition of the word "bank" was of particular importance in the Model Law because it was one of the elements in determining the scope of application of the law. The Working Group was in agreement that the definition should exclude telecommunications carriers and other similar entities that carried payment orders but did not perform a credit transfer service. There was also general agreement, despite some continuing opposition, that those entities that did perform a credit transfer service were intended to be covered, even though they might not be defined as banks under other legislation in their country. It was pointed out that the Model Law was not a regulatory statute that was confined to banks in the traditional sense.

67. A proposal was made that a "bank" should be defined as follows:

> "'bank' means an entity which, under the law of the State where it is permitted to act, is authorized to create, keep and destroy funds, as defined in the present Law."

There was no support for the proposal.

68. The suggestion was made to delete the words "and moving funds to other persons", which were within square brackets. It was said that the words were superfluous. In reply it was stated that the words had been added precisely to make it clear that the definition of a bank did not cover message systems. It was therefore decided that a second sentence should be added to the current definition to state specifically that entities that merely transmitted payment orders were not banks. The Working Group decided to delete the words within square brackets.

69. A discussion took place as to whether the definition of a bank should be limited to entities that executed payment orders as a regular part of their business, or whether it should also encompass entities that only occasionally engaged in executing payment orders. The proposal that the definition of a bank should be extended to cover entities that only occasionally executed payment orders was not adopted.

70. At the end of the discussion the Secretariat was requested to reconsider the possibility of using a word other than "bank" and to report to the Working Group at its next session. The Working Group recognized that any word chosen would need to serve in such compound terms as "receiving bank".

Definition of a "branch"

71. A view was expressed that the Model Law should contain a definition of a "branch" of a bank. The reason given was that under some national laws "branches" were defined in a restrictive way that would not cover certain offices or agencies of a bank that might be intended to be treated as separate banks under the Model Law. Accordingly, it was proposed that the significant feature of a "branch" under the Model Law should be that it sent and received payment orders. That proposal was objected to on the ground that the sending and receiving of payment orders were acts that could be carried out by simple message carriers. Although there was a general view that no definition of a "branch" was necessary, the delegation that had raised the question was invited, if it so wished, to prepare a draft definition and to submit it to the Working Group at either the current or the next session of the Working Group.

Definition of a "credit transfer", subparagraph (a)

72. Taking into account the newly adopted provision on completion of the credit transfer in article 14(1) (see paragraph 16 above), the Working Group decided to delete the words in square brackets in article 2*(a)* that indicated when a credit transfer was completed.

Definition of a "payment order", subparagraph (b)

73. It was generally agreed that any reference to conditional payment orders should be deleted from the Model Law. It was also agreed that, in order to accommodate high-speed credit transfers, the Model Law should expressly state that it applied only to unconditional payment orders. The Working Group noted that such a provision would be subject to contrary agreement between the parties. Following the discussion, the Working Group decided that subparagraph (i) should be deleted. The first part of subparagraph *(b)* was reworded as follows:

> "'Payment order' means an unconditional instruction by a sender to a receiving bank to place at the disposal of a designated person a fixed or determinable amount of money if: . . .".

74. A discussion took place on the status of the parties when a customer submitted a conditional payment order to a bank. It was noted that, in such a case, the contract between the sender of the conditional payment order and the receiving bank would not fall within the scope of the Model Law. In the event that the condition was fulfilled, the bank would be expected to execute the conditional payment order by issuing its own unconditional payment order. That payment order and the resulting credit transfer, if the transfer was international, would fall within the scope of the Model Law. The consequence would be that, under the Model Law, the bank would be regarded as the originator of the payment order and not as the originator's bank. The customer who had sent the conditional payment order would have no standing under the Model Law. Therefore, if the credit transfer was not carried out properly for reasons unconnected with the original condition, any rights the customer might have would arise from rules of law outside the Model Law.

75. The Working Group was in agreement that that result was not desirable and decided that a provision should be included in the Model Law so that the sender of the conditional payment order would have the rights of an originator of the credit transfer under the Model Law where the execution of the conditional payment order eventually resulted in an unconditional credit transfer. It was also agreed that the condition itself as well as the

fulfilment or non-fulfilment of the condition would remain outside the scope of the Model Law.

76. The deletion of subparagraph (ii) was suggested on the grounds that the question of reimbursement of the receiving bank should be left for the originator and his bank to agree upon on a contractual basis. After discussion, the Working Group agreed that subparagraph (ii) was necessary in order to exclude debit transfers from the scope of the Model Law.

77. A proposal to delete subparagraph (iii) received no support. Another proposal was that the subparagraph should be replaced by the following wording:

> "The payment order is to be transmitted to the receiving bank, either directly [, using or not a communication system established between banks,] or indirectly, using a funds transfer system established between banks."

78. Yet another proposal was that the words "the instruction is to be transmitted" in the existing text should be replaced by the words "the instruction is transmitted". The Working Group agreed that the two proposals should be referred to the drafting group.

79. In view of the deletion of subparagraph (i), the Working Group decided to delete subparagraph (iv).

Definition of "execution"

80. A proposal was made to add to the Model Law a definition of the "execution" of the payment order. It was said that such a definition would be helpful for the interpretation of articles 9(1) and 9(2). There was not sufficient support for the proposal to warrant a change in the text.

Definition of "authentication", subparagraph (j)

81. It was noted that some methods for authentication of the source of a payment order required verification of the contents of the payment order. It was suggested that that fact should be recognized in the definition of authentication. However, the Working Group decided to consider issues having to do with verification that the contents of a payment order as received were the same as the contents of the payment order as sent in its discussion of article 4 (see paragraph 102 below).

Definition of "pay date", subparagraph (l)

82. It was noted that Society for Worldwide Interbank Financial Telecommunication (SWIFT) payment messages no longer carried a field for the indication of a pay date and, it was stated, the International Organization for Standardization (ISO) would delete any reference to a pay date in the next revision of its standards. It was said that the date commonly used on payment orders was the value date, i.e., the date on which the funds were to be available to the receiving bank.

83. It was suggested that the term execution date could be made to serve the intended function of pay date provided that a sender could not stipulate a date earlier than the date when its receiving bank received the payment order. That suggestion was not adopted. It was stated that, even though payment orders used in inter-bank practice might not provide for the designation of a pay date, the original payment order sent by the originator to his bank might stipulate that the funds were to be paid to the beneficiary on a particular date. A proposal was made that the concept of "pay date" should be replaced by that of "payment date". The following draft was suggested:

> "'Payment date' means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary."

84. The Working Group was in agreement that the question should be reconsidered together with articles 9 and 12. In the meantime, it decided to adopt the above proposal as an interim draft.

Article 3

85. The Working Group noted that it had decided to delete former article 3 at its twentieth session. It also noted that at that session it had decided to address in some other provision the need for payment orders to disclose to receiving banks that the payment order formed part of an international credit transfer (A/CN.9/329, para. 93). It decided to return to that problem at another time.

Article 4

Paragraph (2)

86. The Working Group noted that the *chapeau* to paragraph (2) could be interpreted to mean that paragraph (2) was to apply to a payment order even though the sender was bound under paragraph (1). Therefore, it decided to redraft the *chapeau* as follows:

> "When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is, nevertheless, bound if:".

87. The Working Group discussed whether subparagraph *(b)* should be retained. In support of its deletion it was said that it was not possible to implement subparagraph *(b)* from the point of view of the operations of a bank because the bank normally could not know, at the time a payment order was received, whether the order was covered by a withdrawable credit balance. It would be able to do so only if all debits and credits to the account were entered on-line real-time. However, in even the most highly automated banks some types of payment orders were processed in batch with the resulting debits and credits entered to the accounts periodically, and often at the end of the working day. Furthermore, it was stated, subparagraph *(b)* led to an inequitable result since the purported sender of an unauthorized but authenticated payment order would be bound by the order if there was a sufficient withdrawable credit balance at the time the payment order was accepted but would not be bound if the balance was insufficient at that time.

88. In reply it was said that subparagraph *(b)* was a risk allocation rule and not an operational rule. The basic rule in paragraph (1) that a purported sender was bound by a payment order only if it had been issued by him or by another person who had the authority to bind him was reversed by paragraph (2) in the case of an authenticated order only if the conditions specified in paragraph (2) had been met. Subparagraph *(b)* was said to be an important condition because it would protect certain senders from being bound by unauthorized payment orders.

89. A suggestion was made to establish separate rules that would not include subparagraph *(b)* for high-speed electronic transfers whereas the rules for other credit transfers might include the subparagraph. In opposition to that suggestion, it was stated that high-speed transfers were precisely the transfers where the current balance of the sender's account could most easily be verified, since technology permitted on-line real-time monitoring of accounts used for such transfers. A contrary view was expressed that such monitoring of accounts was not consistent with prevailing international banking practice.

90. Another suggestion was that subparagraph *(b)* should apply when the sender was not a bank but should not apply when the sender was a bank. In support it was stated that the limitation of the responsibility of the purported sender for an unauthorized payment order was of greatest importance for non-bank originators.

91. During its discussion of paragraph (2) the Working Group decided to limit the application of subparagraph *(b)* to non-bank senders. Subsequently, in connection with its discussion of paragraph (3), it decided to delete subparagraph *(b)* entirely (see paragraph 101 below).

92. The Working Group noted that subparagraphs *(a)* and *(c)* were cumulative conditions to the application of paragraph (2) and decided to join them by the word "and".

93. The Working Group noted that at its eighteenth session it had decided that a sender and a receiving bank could not agree upon an authentication procedure that was less than commercially reasonable within the context of paragraph (2), but that it had not included a provision to that effect in the text of the Model Law. It also noted that at the current session it had adopted a new article 16 that stated a general principle of freedom of contract unless otherwise provided in the Model Law, and that it had decided to review each of the substantive articles to determine whether the previous statements as to the effect of an agreement should be retained.

94. Under one view the previous decision should be affirmed and incorporated into the text of the Model Law. It was stated that, since the receiving bank would determine the type of authentication it was prepared to receive from the sender, it should be the receiving bank's responsibility to assure that the authentication procedure was at least commercially reasonable. If the receiving bank was willing to accept payment orders even though there was not a commercially reasonable authentication, it should accept the risk that the payment order had not been authorized in accordance with paragraph (1).

95. Under another view the freedom to agree that the sender would be bound by an unauthorized payment order even though there had been no commercially reasonable authentication should come as an application of the general principle of party autonomy, which the Working Group had previously adopted (see paragraph 52 above). It was also stated that, in case of litigation, there would be uncertainty as to the commercial reasonableness of the method of authentication used until the final court decision unless parties were allowed to determine by their agreement what constituted such a procedure.

96. After discussion, the Working Group decided to include in paragraph (2) a provision to the effect that parties would not be allowed to agree on the use of an authentication procedure that was not commercially reasonable.

Paragraph (3)

97. A proposal was made to adopt the following text of paragraph (3):

> "(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender."

98. The proponents of the proposal also stated that, if the proposal was adopted, subparagraph (2)*(b)* (which at that stage applied to non-bank senders) should be deleted.

99. In support of the proposal it was pointed out that paragraph (3) dealt with the relatively rare case when there had been an unauthorized payment order that had been authenticated in accordance with paragraph (2). In such a case the purported sender would bear the loss unless he could show that the payment order resulted from the actions of a person other than a present or former employee of the purported sender. In order to meet that burden it would not be necessary to show who had sent the payment order; the fact that it could not have resulted from the actions of a present or former employee might be proved by other means. Once that burden had been met by the purported sender, he might still be bound by the payment order if the receiving bank could show that the authentication had been procured by the fault of the purported sender.

100. A suggestion was made that the general rule that had been adopted by the Working Group in article 16 that the provisions of the Model Law could be varied by agreement should be limited in paragraph (3) so that the agreement could not be to the detriment of non-bank senders. Another suggestion was that there should be no limitation on the extent to which paragraph (3) could be modified by agreement, but that the agreement could not be in the general conditions of the receiving bank; the agreement would have to be in an individual contract between the purported sender and the receiving bank.

101. After discussion the proposal set out in paragraphs 97 and 98 above was adopted. Although several delegations expressed strong disagreement, the Working Group decided that nothing needed to be said in the paragraph about the extent to which it could be modified by agreement, because article 16 would automatically be applicable. Those delegations were concerned that extensive provisions giving the parties freedom to vary the provision by contract would seriously reduce the likelihood that the Model Law would be found acceptable by national legislatures.

Errors

102. The Working Group noted that at its twentieth session it had said that, if it was intended that the Model Law should relieve the sender of the responsibility for the erroneous content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that would detect the error or corruption, that intention should be set out separately (A/CN.9/329, para. 79). The Working Group requested the Secretariat to propose a text that would implement this idea for consideration at its twenty-second session.

Paragraph (4)

103. The paragraph was not considered.

Article 12

Paragraph (1)

104. It was noted that the Working Group at its twentieth session had decided to retain the principle of paragraph (1), but to place it in square brackets in the expectation that it might be substantially redrafted. At the current session it was decided to delete the paragraph since the same matter was covered by paragraph (2).

Paragraph (2)

105. It was noted that paragraph (2) was one of the most important provisions in the Model Law because it stated which banks were responsible to the originator or to the sender for any damages that might be payable for the non-execution or improper execution of the credit transfer. It was also noted that the types of damages and the extent of the damages that might be payable to the originator or other claimant were set forth in paragraph (5). It was recognized, however, that there was a relationship between the type and the extent of damages that could be claimed and the appropriate rules for determining which bank or banks should be responsible to the originator for those damages.

106. It was suggested that the Working Group should discuss paragraph (2) as it was set forth in a proposed redraft of article 12 that had been submitted by a delegation and printed in A/CN.9/WG.IV/WP.46, comment 28 to article 12. However, the Working Group decided that it would be a more appropriate procedure to discuss the original text of article 12, including paragraph (2), and to use the suggested redraft as a source of ideas for improving the text.

107. The discussion centred on two questions: whether the originator's bank should be responsible to the originator when the non-execution or improper execution of a payment order that constituted part of the credit transfer was done by a bank that was down-stream from the originator's bank and whether the originator should have a direct claim against the intermediary bank. It was noted that paragraph (2) provided for such responsibility and provided a means by which the damages that the originator's bank would have to pay to the originator could be collected from bank to bank until the liability reached the bank where the problem had occurred.

108. In favour of changing the text to provide that a bank was responsible to the originator or the sender only for its own failures, it was said that in some countries that result would follow from the general principle of law that no one should be responsible for the actions of third parties. Furthermore, an originator's bank was often not in a position to decide what route a credit transfer should take on its way to the beneficiary's bank in a foreign country, nor even to know what route the transfer might take. It was said that when the originator requested his bank to transfer funds to a foreign country, he should know that it was likely that independent intermediary banks might have to be used.

109. Furthermore, in favour of changing the text, it was said that the originator's bank would be held responsible to the originator for the actions of intermediary banks or of the beneficiary's bank in foreign countries when those banks acted in ways that would constitute non-execution or improper execution of the payment order under the standards of the Model Law, but would constitute proper execution according to the standards of the country in question. The example given was that article 9 of the Model Law required the receiving bank to execute the payment order on the day it was received (subject to having received payment for the order) whereas banking law and practice in some countries provided only for next day execution. Not only would the originator's bank be responsible to the originator in such a situation, but it would not be able to recover from the bank in that foreign country the damages it had paid to the originator. It was stated that the final result would be that banks in the State that had adopted the Model Law would stop sending payment orders to banks in the State with laws or banking practice that were inconsistent with the Model Law. It was also said that it would be improper for a State, such as a State that had enacted the Model Law, to attempt to impose its law and banking practices on other States.

110. However, it was also said that the interpretation given to paragraph (2) was not correct since, under the choice of law provision in article 15(1), the standard of performance of the receiving bank would be determined by the law of the receiving bank. To the extent that the period of time for giving value referred to giving value to the beneficiary, it had been decided that the credit transfer came to an end when the beneficiary's bank accepted the payment order. The question as to when the beneficiary's

bank had to give value to the beneficiary was, therefore, of no relevance to the operations of the Model Law.

111. In favour of retaining the rule currently in paragraph (2) that the originator would be able to claim the damages either directly from the bank at fault or from a prior bank in the chain, including the originator's bank, it was said that the originator's bank provides a service to the originator that depends on it having established correspondent relations with other banks. If, as had been said, the originator's bank might not be able to determine or even to know the entire chain that would be used to send the credit transfer to the beneficiary's bank, the originator was even less able to determine or to know the route. The liability of the originator's bank was described as primary only, with ultimate liability being upon the intermediary bank that was at fault. Furthermore, it was said, the procedure envisaged by paragraph (2) was well known in other similar types of economic activity, such as the international transport of goods, where it was common for the carriage to be effected by several different carriers. In some, though not all, conventions on international carriage of goods the claim might be made either against the original contracting carrier or against the carrier where the damage had occurred. The procedure envisaged by paragraph (2), similar to the procedure used in those conventions, would ease the procedural problems for the originator since he would not have to claim against a bank in a foreign country with whom he had no business relationship. However, it would allow the originator's bank to have recourse against its receiving bank, a bank with which it normally had a continuing business relationship.

112. It was also said that article 12 represented a balanced compromise. The extent of consequential damages that might be recovered by the originator had been severely restricted, but the ability to recover other types of damage had been eased. In response, it was said that this so-called compromise would allocate to the originator's bank new risks arising out of international credit transfers. The so-called compromise was to the detriment of the originator's bank.

113. As to the argument that banks in some countries might not meet the standards of performance expected by the Model Law, it was said that one of the functions of the Model Law should be to establish the standards necessary for high-speed international credit transfers to be effective. It was said that receiving banks that did not meet those standards would soon learn that it was to their advantage to do so.

114. After extensive discussion the Working Group noted that the differences between the opposing views had not been reconciled. It decided, therefore, that the present text would be retained. It noted that retention of paragraph (2) did not imply any judgment on the other paragraphs of article 12, and particularly on paragraph (5). Subsequently, the Working Group decided that it should be made clear that in respect of consequential damages, only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender.

115. After a discussion on the meaning of the second sentence of paragraph (2), there was agreement that, since it had been agreed that the first sentence would be retained, the second sentence stated the correct policy and was necessary. It was observed, however, that its meaning was not clearly stated and the Secretariat was requested to propose to the Working Group at its next session a revised draft that was more easily understood. It was suggested that the Secretariat might also propose a revision of the first sentence.

Paragraph (3)

116. The Working Group noted that paragraph (3) had a technical function to make it clear that no bank subsequent to the bank where the problem occurred was liable to the originator for damages. It was noted that there were matters of drafting and of substance that were contained in the redraft proposed in the working paper to which the Working Group would have to return at a later time.

Paragraph (4)

117. It was decided that subparagraph *(a)* should include a reference to failure to perform one of the obligations under article 8. Although a preference was expressed for choosing the first of the two alternative formulations in square brackets, i.e., "account relationship", the Working Group decided not to enter into such drafting details at this time.

Paragraph (5)

*Subparagraph (*a*)*

118. The Working Group noted that the current draft of the Model Law provided for interest to be payable to the originator and to the sender, but that at its nineteenth session it had decided that in appropriate situations the beneficiary should be able to recover interest when completion of the credit transfer was delayed because of a delay by one of the banks in the chain. However, no text had been adopted to implement that decision. It was also noted that the interest was to be payable because of the fact of delay and not because of the fault of the bank. Where there had been delay, the bank had had the use of funds for a period of time that was longer than it should have been and the bank should not be able to keep the benefit arising out of the delay. It had been decided that where the transfer had been completed, but had been completed late, it was the beneficiary who should have a direct right to claim for the loss of interest, since it was the beneficiary who had been deprived of the use of the funds for the period of the delay. He should receive the interest, whether or not the beneficiary had had a right, as against the originator, for the transfer to be completed on a particular day. It was stated, however, that where the credit transfer was not completed and the originator had the right to get his funds back under article 11*(b)*, the originator should also be entitled to receive the interest.

119. It was noted that the typical way in which banks compensated one another for interest due was to adjust the date of the credit to the account so that it showed "as of"

the date on which the credit should have been entered. By changing the date of the credit, appropriate interest would be given automatically to the bank receiving the credit. It was stated that, in practice, delay in executing a payment order was almost always because the payment order had been executed improperly. As soon as the error was brought to the attention of the bank, it would immediately execute the order correctly for the original amount. Interest adjustments would be made later, usually by way of an "as of" adjustment, although that method was less often used where the person receiving the adjustment did not maintain an account with the bank. It was noted that in the United States there was a proposed rule that would require the sender or receiving bank that was the recipient of an "as of" adjustment, but that was not the ultimate party entitled to the interest, to pass on the benefit of the "as of" adjustment to the ultimate originator or beneficiary in the form of interest.

120. It was stated that, while the payment of interest to the beneficiary would usually be satisfactory compensation for the delay, it might not be adequate compensation when the delay in the execution of the credit transfer caused the originator to be late in his payment to the beneficiary. In such a case the beneficiary as creditor of an obligation might have a claim against the originator as debtor of the obligation for interest as a result of the late payment that was at a higher rate than any rate that might be applicable to the interbank relationship. It was stated that in such a case the bank that had caused the delay should have to pay to the beneficiary or to the originator (if the originator had reimbursed the beneficiary) an additional amount equal to the interest due as a result of the late payment, less the amount already paid. In reply, it was stated that such an additional amount was in the nature of consequential damages and should be treated as such under the Model Law.

121. The suggestion was made that the Model Law should indicate the appropriate rate of interest to be paid when a bank was late in executing a payment order. The Working Group recognized that it would not be possible to provide either an appropriate rate in numerical terms or to be specific as to the means of determining the rate. Nevertheless, it was suggested, the Model Law should provide that the interest would be calculated at the interbank rate in the currency in which the payment order was expressed. It was stated that with the open capital markets currently existing, those rates for any given currency tended to be essentially the same throughout the world.

122. Other suggestions were made in respect of the rate of interest that the beneficiary should receive. It was stated that, if a non-bank beneficiary's account was adjusted "as of" the date the credit should have been made, the effective amount of interest it would receive would depend on whether the account was in debit or in credit during that period of time, since the rate charged on a debit balance was always higher than the rate the beneficiary would receive if the account was in credit. One suggestion made was that the beneficiary should receive the current rate for a sight deposit. It was also noted that under the proposed rule in the United States the beneficiary would receive the interbank rate.

123. After discussion the Working Group decided that it would provide only that interest was payable without indicating how that interest should be calculated.

Subparagraph (b)

124. Although there was some support for retaining the subparagraph providing that damages might include exchange losses, the Working Group decided to delete it and to consider any possible recovery for such losses in its consideration of consequential damages.

Subparagraph (c)

125. The Working Group considered that the issues raised in the subparagraph were of minor importance that should be left for discussion at a later stage.

Subparagraph (d)

126. The Working Group noted that it had previously decided that, in respect of consequential damages, only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender (see paragraph 114 above).

127. Under one view subparagraph *(d)* should be deleted. It was said that a consequential damage provision would be inconsistent with the operation of modern wire transfer of funds systems. It was stated that a receiving bank could not anticipate the extent to which it might be held liable for consequential damages. Consequently, it would not be able to obtain appropriate insurance to cover any possibility that it might be held liable. In any case, potential liability for consequential damages would substantially increase the cost of credit transfers, a cost that would have to be borne by all users. It was suggested that the Model Law might indicate that banks were free to contract for such an increase in their responsibility if they so chose. It was noted that banks that offered two different services with different levels of responsibility would charge more for the higher level.

128. Under another view subparagraph (5)*(d)* should be retained. It would be a rare case in which a bank acted with the intent to cause improper execution of or failure to execute a payment order or acted recklessly and with knowledge that such improper execution or failure to execute would probably result. However, if such a case were to occur, it would be unconscionable for the bank not to be responsible for the consequences of its acts. It was stated that that proposition was so fundamental in many legal systems that the Model Law would be unlikely to be adopted if it were to deny such a result.

129. The current drafting of the subparagraph was criticized as making it too easy for a party to allege a bank's wrongful intent or recklessness. It was suggested that, particularly when the bank was large and foreign, there might well be a tendency for a jury to find the ordinary negligence of the bank to have been reckless behaviour. Suggestions were made that were intended to make it clear that the party alleging the reckless behaviour of the bank would have the burden of proving that the behaviour had

been reckless in fact. However, it was stated that none of the suggestions achieved the desired result.

130. A suggestion was made to delete both subparagraph (5)*(d)* and paragraph (8). Under that proposal the Model Law would not provide for consequential damages under any circumstances, but a party would not be precluded from relying on other doctrines of law that might be available in the relevant legal system to claim such damages. A similar suggestion was that subparagraph (5)*(d)* and paragraph (8) might be combined so that banks would be subject to other relevant doctrines of law when they acted in the ways described in the current text of subparagraph (5)*(d)*. In opposition to both suggestions it was pointed out that the purpose of paragraph (8) was to preserve the unity of the law in regard to international credit transfers, a unity that the Model Law sought to achieve. It was also stated that one of the purposes of paragraph (8) was to protect the banking system from unexpected claims for substantial amounts based on doctrines of law outside the Model Law.

131. The Working Group was in agreement that it would need more time to study the implications of the suggestions that had been made. It decided that it would place both texts in square brackets and reconsider them at the next session.

II. FUTURE WORK

132. The Working Group noted that it would hold its next session at Vienna from 26 November to 7 December 1990. It also noted that the Commission had requested the Working Group to finish its task of preparing a draft of the Model Law so that the Commission could consider the draft at its twenty-third session to be held at Vienna from 10 to 28 June 1991.

ANNEX

Draft Model Law on International Credit Transfers resulting from the twenty-first session of the Working Group on International Payments[a]

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

(1) This law applies to credit transfers where a sending bank and its receiving bank are in different States.

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

Article 2. *Definitions*

For the purposes of this law:

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

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

(i) *Deleted*

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

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

(iv) *Deleted*

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

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

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

(f) "Bank" means an entity which, as an ordinary part of its business, engages in executing payment orders.[e]

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

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

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

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

*This Model Law is subject to any legislation dealing with the rights and obligations of consumers.[b]

[a]At the twenty-first session the Working Group considered articles 1 to 4, 12 and 14 to 16. In addition to specific changes in the text of those articles, the Working Group made a number of decisions that the text should be changed, leaving to a later time the drafting of a specific text. All such decisions are signalled by a note indicating their location in the report. Draft proposals to implement those decisions will be submitted by the Secretariat in A/CN.9/WG.IV/WP.49.

[b]The Working Group decided that the footnote to article 1 should be reworded to state that the Model Law was not intended to deal with issues related to the protection of consumers (see para. 65).

[c]The Working Group decided that a provision should be included in the Model Law so that the sender of a conditional payment order would have the rights of an originator of a credit transfer under the Model Law where the execution of the conditional payment order eventually resulted in an unconditional credit transfer. It was also agreed that the condition itself as well as the fulfilment or non-fulfilment of the condition would remain outside the scope of the Model Law (see para. 75).

[d]A proposal was to replace the words "the instruction is to be transmitted" by the words "the instruction is transmitted". Another proposal was to reword the subparagraph as follows: "the payment order is to be transmitted to the receiving bank, either directly [, using or not a communication system established between banks,] or indirectly, using a funds transfer system established between banks". The Working Group referred the proposals to the drafting group (see paras. 77 and 78).

[e]The Secretariat was requested to reconsider the possibility of using a word other than "bank" (see para. 70). The Working Group also agreed that the definition should exclude telecommunications carriers and other similar entities that carried payment orders but did not perform a credit transfer service (see paras. 66 and 68).

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

(l) "Payment date" means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary.[f]

Article 3. *Deleted*

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

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

(2) When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless bound if:[g]

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

(b) *Deleted*

(c) the receiving bank complied with the authentication.

(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.[h]

(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.

Article 5. *Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank*[i]

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

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

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

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

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

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

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

Article 6. *Obligations of receiving bank that is not the beneficiary's bank*

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

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 9, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

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

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

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

(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 9 if, in the time required by that article, it inquires of the sender as to the further actions it should take in light of the circumstances.

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

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[f]This wording was adopted as an interim draft (see para. 84).

[g]The Working Group decided to include in paragraph (2) a provision to the effect that parties would not be allowed to agree on the use of an authentication procedure that was not commercially reasonable (see para. 96).

[h]The Working Group noted that at its twentieth session it had said that, if it was intended that the Model Law should relieve the sender of the responsibility for the erroneous content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that would detect the error or corruption, that intention should be set out separately (A/CN.9/329, para. 79). The Working Group requested the Secretariat to propose a text that would implement this idea for consideration at its twenty-second session (see para. 102).

[i]The Working Group agreed that the Model Law should take account of the use of netting. It recalled that at its nineteenth session it had decided to wait for the study on the topic that was expected from the Bank for International Settlements (BIS) (A/CN.9/328, para. 65). The Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not available soon (see para. 53).

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

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

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

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

(c) when it notifies the sender of acceptance,

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

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

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

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

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

Article 8. *Obligations of beneficiary's bank*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[j]See footnote *i* under article 5 above.

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.

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.

Article 12. *Liability and damages*

(1) *Deleted*

(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.[k]

(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 the intermediary bank 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[l]

(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) *Deleted*

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

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

(6) If a receiving bank fails to notify the sender of a misdirected payment order as provided in articles 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.]

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*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.

[k]The Working Group requested the Secretariat to prepare a revised draft of the paragraph to make it clear that in respect of consequential damages under subparagraph (5)*(d)* only the receiving bank that had committed the error that caused losses could be held responsible to the originator or to its sender (see paras. 114 and 115).

[l]The Working Group decided that subparagraph *(a)* should include a reference to failure to perform one of the obligations under article 8 (see para. 117).

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*[m]

(1) *Deleted*

(2) 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.

(2 *bis*) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

(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.[n]

(4) *Deleted*

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.[o]

(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.][p]

Article 16.

Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party.

[m]The Working Group decided that the title should be changed to reflect the new content of the article (see para. 23).

[n]The Working Group decided that paragraph (3) should state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (see para. 20).

[o]The Working Group decided to retain a provision based upon article 15(1) (see para. 37). It decided that article 15(1) should continue to be drafted so as to apply to individual segments of the transfer (see para. 40). It decided that article 15(1) should contain a general rule that, except where otherwise provided in the Model Law, parties were free to choose the applicable law (see para. 45). It decided that, unless otherwise agreed, the law of the receiving bank should apply to that segment of the transfer and that article 15(1) should make it clear that it did not apply to the law applicable to the authority of the actual sender to bind the purported sender (see para. 47).

[p]The Working Group decided that, since a rule had been retained as to the time when an obligation would be discharged by a credit transfer, paragraph (2) should be retained provisionally (see para. 48).

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

1. International credit transfers: comments on the draft Model Law on International Credit Transfers: report of the Secretary-General

(A/CN.9/WG.IV/WP.46 and Corr.1) [Original: English]

CONTENTS

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

INTRODUCTION

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

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

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

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

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

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

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Title of the Model Law

Prior discussion

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

Comments

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

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

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

4. The Working Group decided that the Model Law should be restricted to international credit transfers and that that decision should be reflected in the title (A/CN.9/318, para. 18). At its twentieth session the Working Group reaffirmed its decision to restrict the sphere of application of the Model Law to international credit transfers (A/CN.9/329, paras. 12 to 15). It noted that even though the preparation of a model law applicable to domestic credit transfers was within its mandate, and that some States might wish to apply the Model Law to both domestic and international credit transfers, there were differences between the two types of transfers that justified different treatment of some of the legal issues that arose. Furthermore, appropriate solutions might not be the same in all States for domestic credit transfers. As a result it was believed to be preferable not to confront the difficult political problems that might be created by providing in the Model Law that it applied to all credit transfers.

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

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

(1) This law applies to credit transfers where the originator's bank and the beneficiary's bank are in different States or, if the originator is a bank, that bank and the beneficiary's bank are in different States.

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

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

Prior discussion

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

Comments

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

Internationality of a transfer

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

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

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

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

4. In some cases involving a transfer from a customer's account in a financial institution in State A to an account in a financial institution in State B, application of this Law will depend on whether both financial institutions are considered to be banks under the definition of a bank in article 2*(f)*. If either financial institution was considered not to be a bank because it did not as an ordinary part of its business engage in credit transfers for other persons, the other financial institution would be both the originator's bank and the beneficiary's bank and the Model Law would not apply. Such a situation might arise where one of the financial institutions was a broker which would, on instructions of a customer, transfer a credit balance in a customer's brokerage account but which did not engage in credit transfers for its customers as an ordinary part of its business. See comments 22 and 23 to article 2.

5. A determination as to whether a credit transfer was international would also depend on how the transfer was structured. An example was given in the eighteenth session of the Working Group where the originator's bank in State A reimbursed the beneficiary's bank in State B by several different means. It was stated that those different means of reimbursing the beneficiary's bank for the transfer would determine whether some or all of the activities comprising the transfer would be considered to be international and fell within the sphere of application of the Model Law or would be considered to be domestic and fell outside of it (A/CN.9/318, paras. 25 to 26). It was said in the Working Group that that result was not appropriate since the transfer would otherwise be identical from an economic point of view. This aspect of the criteria of internationality was not further considered at the twentieth session of the Working Group.

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

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

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

9. Since the Model Law is being prepared for international credit transfers, questions of conflict of laws naturally arise. Draft provisions on the territorial application of the Model Law are contained in article 15. Further consideration was given to the question in a report that was prepared for the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80.

Consumer transfers

10. The Working Group decided at its eighteenth session that the Model Law should apply to all international credit transfers, including transfers made for consumer purposes. Not only would that preserve the basic unity of the law, it would avoid the difficult task of determining what would be a credit transfer for consumer purposes. That was also thought to be of importance since special consumer protection legislation affecting credit transfers currently exists, and could be envisaged in the future, in only some of the countries that might consider adopting the Model Law.

11. At the same time, it was recognized that the special consumer protection legislation that exists in some countries, and that may be adopted in others, could be expected to affect some international credit transfers as well as domestic credit transfers. To accommodate that possibility, the footnote to article 1 was adopted to indicate that the Model Law would be subject to any national

legislation dealing with the rights and obligations of consumers, whether the provisions of that legislation supplemented or contradicted the provisions of the Model Law (A/CN.9/318, paras. 30 to 33). The footnote was reconsidered at the twentieth session where there was no support for a suggestion that the footnote needed to be made clearer that the Model Law did not cover consumer protection issues or for a suggestion to move the footnote into the body of the article (A/CN.9/329, para. 24).

Effect of contractual agreement

12. At its eighteenth session the Working Group decided that the extent to which the Model Law would be subject to the agreement of the interested parties would be considered in connection with the individual provisions (A/CN.9/318, para. 34). In the current draft mention of the effect of contractual rules is made in articles 2*(j)*, 4(2)*(b)*, 4(4), 5(2)*(b)*, 6(5), 7(1)*(b)*, 8(4), 10(3), 10(4), 10(5), 12(7), 14(1), 14(3), 15(1) and 15(2).

Article 2. *Definitions*

For the purposes of this law:

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

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

- (i) the instruction contains no conditions other than conditions imposed by the originator that are to be satisfied on or before the issue of a payment order by the originator's bank,
- (ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender,
- (iii) the instruction is to be transmitted either directly to the receiving bank, or to an intermediary, a funds transfer system, or a communication system for transmittal to the receiving bank, and
- (iv) the instruction is not intended to establish a letter of credit.

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

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

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

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

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

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

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

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

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

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

Prior discussion

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

Comments

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

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

Chapeau

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

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

"Credit transfer"

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

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

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

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

"Payment order"

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

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

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

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

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

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

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

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

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

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

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

"Originator"

18. The definition differs from the wording of the definition in ISO 7982-1, but not from its meaning. It was approved by the Working Group at its seventeenth, eighteenth and twentieth sessions (A/CN.9/317, para. 32; A/CN.9/318, para. 41; A/CN.9/329, para. 59). Under the definition a bank that issues a payment order for its own account is an originator. See comments 2 to 4 to article 1 for the consequences on the sphere of application of the Model Law.

"Beneficiary"

19. The definition differs from the wording of ISO 7982-1 in that the beneficiary is the person named as beneficiary in the originator's payment order and a person whose account is credited in error is not a beneficiary (A/CN.9/318, para. 42; A/CN.9/329, para. 69). For the situation where the identity of the beneficiary is expressed both by words and by account number and there is a discrepancy between them, see article 8(5). Similarly to the rule in regard to an originator, a bank may be the beneficiary of a transfer.

"Sender"

20. The Working Group decided at its seventeenth and eighteenth sessions that the term should include the originator as well as any sending bank (A/CN.9/317, para. 46; A/CN.9/318, para. 44; see also A/CN.9/329, para. 61). ISO 7982-1 defines "sending bank" as the "bank that inputs a message to a service" but it has no term that includes the originator as a sender. Such a term is not necessary in the context of ISO 7982-1.

"Bank"

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

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

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

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

"Receiving bank"

25. Although the Working Group at its eighteenth session modified the wording of the definition from that found in ISO 7982-1, the meaning remained the same (A/CN.9/318, paras. 55 to 57). A bank that receives a payment order is a receiving bank even if the payment order was not addressed to it. Such a bank must react to the fact of having received the order. (The problem of mis-directed payment orders is addressed in articles 6(3) and 8(2).) A bank to which a payment order is addressed but which does not receive it is not a receiving bank. It would not be appropriate to place upon it the obligation of a receiving bank in regard to a payment order that it did not know about.

"Intermediary bank"

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

A/CN.9/329, para. 72). It differs from the definition in ISO 7982-1 in three substantial respects: first, it includes all receiving banks other than the originator's bank and the beneficiary's bank, whereas ISO 7982-1 includes only those banks between the given receiving bank and the beneficiary's bank; secondly, ISO 7982-1 includes only those banks between the receiving bank and the beneficiary's bank "through which the transfer must pass if specified by the sending bank"; and thirdly, reimbursing banks are included in this definition, even though the transfer may be considered not to pass through them and they are not in the chain of payment orders from the originator to the beneficiary's bank (A/CN.9/329, paras. 70 and 71).

"Funds" or "money"

27. The definition is modelled on the definition of "money" or "currency" contained in article 5(l) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/318, para. 59). However, it specifies that the term includes credit in an account, as is proper in the context of this Model Law. The definition was modified by the drafting group at the nineteenth session in accordance with the suggestion contained in A/CN.9/WG.IV/WP.41, article 2, comment 16. At the twentieth session it was noted that the definition included the ECU (A/CN.9/329, para. 73).

"Authentication"

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

29. The definition makes it clear that an authentication of a payment order does not refer to formal authentication by notarial seal or the equivalent, as it might be understood in some legal systems.

30. The definition differs from the definition of "message authentication" in ISO 7982-1 in that authentication as here defined does not include the aspect of validating "part or all of the text" of a payment order, even though most authentication techniques that rely upon the use of computers do both. This position was confirmed by the Working Group at its twentieth session because the problems of authentication of a payment order as to its source and verification of the accuracy of its contents were two different legal concepts. In respect of the source of a message, the basic rule in article 4(1) is that the purported sender is not bound by a payment order unless he had in fact issued it or authorized its issue. The concept of authentication and its use in article 4(2) served to describe situations in which the purported sender might be bound by a payment order in spite of the fact that it had not been issued or authorized by him. In respect of errors, the Working Group noted that the general rule was that the sender was bound by what was received by the receiving bank (A/CN.9/329, paras. 77 to 79) (although that conclusion is not specifically stated in the current draft of article 4(1) or of any other provision of the Model Law). The Working Group went on to say that if it was intended that the Model Law should relieve the sender of that responsibility because of the availability of a procedure agreed between the sender and the receiving bank that would detect errors in a payment order or corruption of the contents of a payment order, that intention should be set out separately in the Model Law. The Working Group has not as yet considered the question as to whether such an exception to the responsibility of the sender should be included in the Model Law.

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

32. The definition as adopted by the Working Group at its eighteenth session and modified at its twentieth session includes the provision that the authentication procedure is established by agreement (A/CN.9/318, paras. 75, 76 and 94; A/CN.9/329, paras. 74 and 76). That agreement may be embodied in the rules of a clearing house or message system or it may be in the form of a bilateral agreement between the sender and the receiving bank. Under article 4(2) the authentication procedure must be "commercially reasonable" in order for a purported sender to be bound by an unauthorized payment order; a sender cannot agree to be bound by a commercially unreasonable procedure. See article 4, comments 4 and 5.

"Execution date"

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

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

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

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

"Pay date"

37. The term "pay date" is also used by ISO 7982-1 to indicate the date when the funds are to be available to the beneficiary. ISO 7982-1 uses the term "payment date" to indicate the date when a payment was executed. Such a term was included in the text before the seventeenth session of the Working Group but, since the term was not used further, it was deleted in the revision by the Secretariat submitted to the eighteenth session.

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

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

Article 3. *Contents of payment order*

(Deleted)

Prior discussion

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

Comments

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

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

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

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

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

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

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

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

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

(c) the receiving bank complied with the authentication.

(3) *Variant A*

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

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

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

Variant B

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

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

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

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

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

Prior discussion

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

Comments

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

Paragraph (1)

2. Paragraph (1) states the basic rule that a purported sender is bound by a properly authorized payment order. Pursuant to the words "or revocation of a payment order" the purported sender is also bound by a properly authorized revocation of a payment order. Those words have been placed within square brackets subject to a determination whether article 10 will be retained (A/CN.9/329, para. 96).

Paragraph (2)

3. Paragraph (2) has been drafted as an exception to paragraph (1), but from the viewpoint of banking operations it provides the basic rule. In almost all cases a payment order must be authenticated. Proper authentication indicates proper authorization and the receiving bank will act on the payment order. Even if the payment order was not properly authorized under paragraph (1), the purported sender is bound by the order if the three requirements of paragraph (2) are met.

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

5. No attempt has been made to set a standard as to what constitutes a commercially reasonable authentication procedure. The standard would depend on factors related to the individual payment order, including such factors as whether the payment order was paper-based, oral, telex or data transfer, its amount and the identity of the purported sender. The standard as to what was commercially reasonable could be expected to change over time with the evolution of technology. At the twentieth session of the Working Group it was suggested that, in view of the imprecision of the term "commercially reasonable" and the unfamiliarity of many legal systems with the concept, any commentary that might be written to accompany the Model Law when it is adopted by the Commission might give a suggestion as to factors to be taken into account (A/CN.9/329, para. 98).

6. The second requirement, set out in subparagraph *(b)*, that the amount of the payment order is covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank, affords a protection for originators in some countries. By limiting the amount that can be debited to an account, a customer can limit the amount of potential loss. Such a limitation also furnishes to a limited degree an indication that an excessively large payment order may be in error or fraudulent (A/CN.9/318, paras. 82 and 85 to 87; A/CN.9/329, paras. 100 and 101).

7. The last clause was added to be sure that the provision would not cause problems in a net settlement system where a sending bank would have no account relationship with the receiving bank (A/CN.9/318, paras. 85 and 86). The clause would also seem to apply to the situation where a receiving bank was to receive reimbursement by credit in its account at a third bank. Because of the use of the words "may be", the clause governs the situation in some countries where the agreements between banks and their customers provide that the bank is permitted, but not required, to create an overdraft when it receives a payment order from its customer (A/CN.9/318, paras. 84 and 86; A/CN.9/329, para. 102).

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

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

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

Paragraph (3)

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

11. At the eighteenth session it was suggested that in order to compare better the advantages or disadvantages of the two variants, Variant A should be re-written to state, as does Variant B, what would have to be proven and by whom. Since even the supporters of Variant A seemed to assume that it would be the sender who had the burden of proving the exonerating conditions (see A/CN.9/318, para. 91), the suggestion was made in A/CN.9/WG.IV/WP.44, article 4, comment 12, that the introductory words to Variant A might read as follows:

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

(a) . . .".

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

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

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

"(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from:

(a) The actions of a person who had gained access to the authentication procedure through the fault of the purported sender, or

(b) the actions of a person other than

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

(ii) a person who obtained confidential information about the authentication procedure from a source controlled by the receiving bank.

This paragraph is subject to any agreement between the sender and the receiving bank, excluding, limiting, or extending its effect."

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

Errors in payment order or corruption of its contents

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

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

Paragraph (4)

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

18. At the eighteenth and twentieth sessions the use of the execution date as the date when the sender should be obligated to make the funds available to the receiving bank was questioned on the grounds that the execution date was defined in article 2*(k)* as the date the receiving bank was obligated to act and not the date the receiving bank had performed its obligation (A/CN.9/318, para. 104; A/CN.9/329, para. 109). At the twentieth session it was stated in reply that, while the sender should be obligated to pay on the execution date, the sender should receive interest under article 12 for the period of any delay by the receiving bank in executing the order. The latter suggestion appears to have been thought to have been the natural consequence of the text of the Model Law as currently drafted.

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

20. It can be doubted whether receiving banks will often accept payment orders for future execution prior to the execution date, unless the sender has already paid for the order. However, if the receiving bank executes the payment order prior to the execution date, it accepts the order at the time of its execution. While the sender can no longer revoke the order (article 10(1) and (2)), and becomes obligated to pay for it, the receiving bank may not debit the sender's account or otherwise require payment for the order until the execution date. See, however, article 14(4), which was said at the twentieth session to be incompatible with article 4(4) (A/CN.9/329, para. 110). See article 14, comments 14 and 15, which includes a suggestion in regard to possible amendment of article 4(4).

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

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

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

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

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

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

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

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

Prior discussion

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

Comments

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

Concept of acceptance

2. In the draft prepared by the Secretariat for the eighteenth session of the Working Group a number of the substantive rules depended on the acceptance of a payment order by the receiving bank. Discussion at that session showed that the Working Group was strongly divided on the desirability of using such a concept. Its use was advocated as a convenient means to describe in a single word a number of different actions of different receiving banks that should have the same legal consequences, making it possible to use the word in various substantive provisions. In response, it was said that use of the term "acceptance" was not necessary and that it would

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

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

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

Paragraph (2)

Subparagraph (a)

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

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

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

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

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

Subparagraph (b)

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

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

Subparagraph (c)

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

Subparagraph (d)

13. Subparagraph 2*(d)* provides for the normal way in which a receiving bank that is not the beneficiary's bank would accept a payment order it had received, i.e. by sending its own payment order intended to carry out the payment order received. If the payment order sent is consistent with the payment order received, the undertaking of obligations by the receiving bank and the execution of

the most important of those obligations under article 6(2) are simultaneous. However, a receiving bank accepts a payment order even when it sends its own order for the wrong amount, to an inappropriate bank or for credit to the account of the wrong beneficiary, so long as the payment order sent was intended to carry out the payment order received. If such an inconsistent payment order is sent, the undertaking of obligations and the failure to carry out those obligations are also simultaneous.

Paragraph (3)

14. The text of article 7(4) following the eighteenth session of the Working Group provided that "a notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order" (A/CN.9/318, annex). The drafting group at the nineteenth session moved the rule as to when the notice must be given by a receiving bank that is not the beneficiary's bank to article 5(1). In conformity with a decision of the Working Group it deleted the requirement that the notice must be given on the day the decision is made (A/CN.9/328, para. 86). At the twentieth session the rule was moved by the drafting group to the second sentence of paragraph (3).

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

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

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

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

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 9, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

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

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

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

(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 9 if, in the time required by that article, it enquires of the sender as to the further actions it should take in light of the circumstances.

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

Prior discussion

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

Comments

Paragraph (2)

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

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

Paragraph (3)

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

3. The Working Group decided at its eighteenth session that a receiving bank should be required to notify the sender when the payment order received indicated that it had been misdirected. The imposition of such a duty will help assure that the funds transfer system will function as intended (A/CN.9/318, para. 122). The duty applies whether or not the sender and the receiving bank have had any prior relationship, whether or not the receiving bank accepted the order and whether or not the bank recognized that the payment order had been misdirected (see A/CN.9/328, para. 18).

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

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

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

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

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

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

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

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

Paragraph (4)

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

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

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

Paragraph (5)

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

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

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

13. The rule is expressed in general terms to apply to payment orders between any sender and receiving bank. However, it was the expectation in the Working Group that paragraph (5) would apply in fact only between the originator and the originator's bank, since interbank payment orders in electronic form transmit the amount of the transfer in figures only (A/CN.9/318, paras. 61 and 63).

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

Paragraph (6)

15. Although a receiving bank is normally bound to follow any instructions in the payment order specifying an intermediary bank, funds transfer system or means of transmission, it can happen that it is not feasible to follow the instructions or that doing so would cause excessive costs or delay in completing the transfer (A/CN.9/328, para. 75). This paragraph gives the receiving bank an opportunity to make such a determination, so long as it does so in good faith (see other suggestions in A/CN.9/329, para. 139).

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

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

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

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

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

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

(c) when it notifies the sender of acceptance,

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

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

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

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

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

Prior discussion

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

Comments

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

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

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

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

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

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

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

Article 8. *Obligations of beneficiary's bank*

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

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

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

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

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

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

Prior discussion

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

Comments

Paragraph (1)

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

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

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

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

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

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

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

Paragraph (5)

6. Paragraph (5) applies only to a payment order received by the beneficiary's bank containing a discrepancy between the identification of the beneficiary in words and its identification in figures. No bank prior to the beneficiary's bank can be expected to have the information to be able to determine that such a discrepancy exists.

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

8. In order to reduce to a minimum the time during which the transfer is suspended, the notification to both the sender and the originator's bank must be done within the time specified in article 9(2), i.e. on the day the payment order is received, subject to articles 9(3) and (4). It is anticipated that within a reasonable time the beneficiary's bank would receive further instructions as to the proper identification of the beneficiary, or an indication that the transfer was fraudulent.

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

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

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

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

Paragraph (6)

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

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

Beneficiary's right to reject credit transfer

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

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

Obligation to make funds available on pay date

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

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

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

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

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

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

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

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

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

Prior discussion

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

Comments

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

Purpose of paragraph (1)

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

Same day execution

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

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

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

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

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

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

Notices

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

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

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

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

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

Execution date

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

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

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

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

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

Pay date

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

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

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

Derogation by contract

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

Article 10. *Revocation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prior discussion

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

Comments

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

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

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

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

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

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

Paragraphs (1) and (2)

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

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

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

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

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

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

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

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

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

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

Paragraph (3)

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

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

Paragraph (4)

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

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

Paragraphs (5) and (6)

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

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

"*(a)* if, as a result of the revocation, the payment order has not been accepted by the beneficiary's bank, or

(b) if, in spite of the revocation, the payment order has been accepted due to a failure of the receiving bank or a subsequent receiving bank to comply with its obligations consequent upon the operation of paragraphs (1) and (2) or under paragraph (4)."

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

Paragraph (7)

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

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

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

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

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

Paragraph (8)

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

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

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

Paragraph (9)

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

New proposal

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

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

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

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

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

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

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

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

Article 11. *[Assistance and refund]*

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

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

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

Prior discussion

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

Comments

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

Subparagraph (a)

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

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

Subparagraph (b)

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

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

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

6. The reason a credit transfer is not carried out successfully may be that the indication of the beneficiary or of the beneficiary's bank was incorrect on one of the payment orders in the transfer chain by reason of error or fraud. Other reasons why a credit transfer may fail to be carried out successfully are that the imposition of currency restrictions prevents the transfer from being made, for some reason a transfer cannot be made to the beneficiary's bank or to the country where the beneficiary's bank is located, the beneficiary's bank refuses to accept the payment order addressed to it or the account of the beneficiary is no longer open to receive credit transfers. In most cases where the indication of the incorrect beneficiary or beneficiary's bank was the result of an error, it could be expected that the error would be corrected and the credit transfer would be carried out as directed, though perhaps late. If the credit to the beneficiary's account is for an amount greater than the amount specified in the originator's payment order, subparagraph *(b)* should be interpreted to permit the sender to recover the payment it had made in excess of the correct amount, and it might be desirable to say so explicitly.

7. Although the general policy decision made by the Working Group at its sixteenth session, and affirmed by it on several occasions, that the originator should be able to hold its bank responsible for proper performance of the credit transfer is still open to discussion (A/CN.9/297, paras. 55 to 60; see A/CN.9/328, paras. 66 to 74 and 144 and A/CN.9/329, para. 188, question 4), the application of that policy to the return of the principal sum where the credit transfer failed was strongly endorsed at the nineteenth session (A/CN.9/328, paras. 54 to 58). The obligation of the receiving bank is absolute and the exemptions of article 13 would not apply. At the eighteenth session the Working Group rejected a suggestion that the obligation of a receiving bank should be to assign to its sender the right of reimbursement it would have from its receiving bank (A/CN.9/318, para. 153). The result of that suggestion would have been to place on the originator the obligation to pursue its claim for reimbursement from a subsequent bank in the transfer chain and to bear the risk that the reimbursement could not be fully recovered.

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

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

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

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

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

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

Article 12. *Liability and damages*

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

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 9.

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and it executed the payment order received by it within the time required by article 9.

(4) The beneficiary's bank is liable

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

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date or execution date stated in the order, as provided in article 9.

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

(a) loss of interest,

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

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

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

(6) If a receiving bank fails to notify the sender of a misdirected payment order as provided in article 6(2)[(3)] or 8(1)[(2)], and the credit transfer is delayed, the receiving bank shall be liable:

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

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

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

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

Prior discussion

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

Comments

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

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

Paragraph (1)

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

Paragraph (2)

4. The general system of liability in paragraph (2) is that the originator can hold the originator's bank liable for the proper performance of the credit transfer. That means that the bank would be responsible to the originator for loss wherever the loss occurred. In order to avoid liability the originator's bank would have to show that one of the exempting conditions in article 13 was relevant. If the loss for which the originator's bank is liable to the originator was caused by events that occurred at a subsequent bank in the credit transfer chain, the originator's bank could recover the loss from its receiving bank and each bank in turn could recover from its receiving bank until, under paragraph (3), a bank could show that the payment order received by the beneficiary's bank was consistent with the payment order received by the bank in question.

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

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

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

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

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

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

Paragraph (3)

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

Paragraph (4)

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

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

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

Paragraph (5)

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

14. Losses arising out of unauthorized payment orders are allocated by article 4(2) and (3). Liability for losses arising out of failure to give the notice required by articles 6(3) and 8(2) is set out in paragraph (6). The obligation of each receiving bank to refund to its sender any funds received from the sender where the transfer was not successfully completed is set forth in article 11*(b)*.

Interest, subparagraph (a)

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

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

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

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

Exchange losses, subparagraph (b)

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

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

Proposed new provision

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

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

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

Other losses, subparagraph (d)

22. In respect of paragraph (5)*(d)* the Working Group decided at its seventeenth session that, in exchange for a relatively strict regime of liability, the bank liable would not be responsible for indirect losses unless more stringent requirements were met than for the other elements of loss (A/CN.9/317, paras. 115 to 117). That decision was reaffirmed in another context at the eighteenth session of the Working Group (A/CN.9/318, paras. 146 to 150). As suggested at the seventeenth session the formula used in the current text was taken from article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). In order to recover the indirect losses, the claimant would have to prove the intent or the reckless behaviour of the bank.

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

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

Paragraph (6)

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

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

Paragraph (7)

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

Paragraph (8)

27. Paragraph (8), making the liability provisions of this article not dependent on a contractual relationship and making them exclusive, was added at the suggestion of the Working Group at its seventeenth session (A/CN.9/317, para. 119). Without such a provision some legal systems might permit other remedies based on general theories of obligation, thereby destroying the uniformity of law the Model Law seeks to achieve.

Suggested redraft presented by the delegation of the United Kingdom

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

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

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

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

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

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

(a) loss of interest,

(b) expenses incurred for a new payment order,

(c) any other loss that has occurred as a result, if the improper or late execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such loss, or recklessly and with knowledge that such loss might result.

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 13. *Exemptions*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 12 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to have taken into account at the time of the credit transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

Prior discussion

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

Comments

1. Since the liability of a receiving bank for the interest loss, loss caused by a change in exchange rates and expenses incurred for a new payment order would arise out of the simple fact of failure of the transfer, article 13 provides the receiving bank with its sole basis of defence in such cases.

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

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

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

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

CHAPTER IV. CIVIL CONSEQUENCES OF CREDIT TRANSFER

Article 14. *Payment and discharge of monetary obligations; obligation of bank to account holder*

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

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

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.

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

Prior discussion

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

Comments

1. This article contains a number of important provisions that are associated with the credit transfer, though they do not have to do with the credit transfer itself. In many countries such provisions would not be included in a law governing credit transfers, while in others they would be included. They are included in this draft because it is important to keep them in mind even if it is decided at a later time to exclude some or all of this article from the final text of the Model Law. Furthermore, if any portion of this article is excluded from the final text, consideration might be given to preparing a separate text containing provisions on these issues so as to be sure that these rules would be consistent with the rules on the credit transfer itself (A/CN.9/328, para. 41).

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