

## IV. LEGAL ISSUES OF ELECTRONIC DATA INTERCHANGE

### Electronic data interchange: report of the Secretary-General (A/CN.9/350) [Original: English]

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## INTRODUCTION

1. The Commission at its seventeenth session in 1984 decided to place the subject of the legal implications of automatic data processing to the flow of international trade on its programme of work as a priority item.<sup>1</sup>

2. At its eighteenth session in 1985, the Commission had before it a report by the Secretariat on the legal value of computer records (A/CN.9/265). That 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 be signed or that documents be in paper form. After discussion of the report, the Commission adopted a recommendation, the substantive provisions of which read as follows:

*"The United Nations Commission on International Trade Law,*

*(a) Recommends to Governments:*

- (i) to review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission, to be assured that the rules are consistent with developments in technology, and to provide appropriate means for a court to evaluate the credibility of the data contained in those records;
- (ii) to review legal requirements that certain trade transactions or trade related documents be in writing, whether the written form is a condition to the enforceability or to the validity of the transaction or document, with a view to permitting, where appropriate, the transaction or document to be recorded and transmitted in computer-readable form;
- (iii) to review legal requirements of a hand-written signature or other paper-based method of authentication on trade related documents with a view to permitting, where appropriate, the use of electronic means of authentication;
- (iv) to review legal requirements that documents for submission to governments be in writing and manually signed with a view to permitting, where appropriate, such documents to be submitted in computer-readable form to those administrative services which have acquired the necessary equipment and established the necessary procedures;

*(b) Recommends to international organizations elaborating legal texts related to trade to take account*

*of the present Recommendation in adopting such texts and, where appropriate, to consider modifying existing legal texts in line with the present Recommendation."*<sup>2</sup>

3. That recommendation (hereinafter referred to as the 1985 UNCITRAL Recommendation) was endorsed by the General Assembly in resolution 40/71, paragraph 5(b), of 11 December 1985 as follows:

*"The General Assembly,*

*... Calls upon Governments and international organizations to take action, where appropriate, in conformity with the Commission's recommendation so as to ensure legal security in the context of the widest possible use of automated data processing in international trade; ..."*

4. At its nineteenth and twentieth sessions (1986 and 1987, respectively), 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.

5. At its twenty-first session (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 and particularly through the medium of visual display screens. 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.<sup>3</sup>

6. At its twenty-third session (1990), the Commission had before it the report that it had requested, entitled "Preliminary study of legal issues related to the formation of contracts by electronic means" (A/CN.9/333). The report noted that in prior reports the subject had been considered under the general heading of "automatic data processing" (ADP) but that, in recent years, the term generally used to describe the use of computers for business applications had changed to "electronic data interchange" (EDI).

7. 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 was also discussed. The report suggested that the Secretariat might be requested to submit a further report to the next session of the Commission indicating developments in other organizations during the year relevant to the legal issues arising in EDI. It was also

<sup>1</sup>Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17)*, para. 136.

<sup>2</sup>*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, para. 360.

<sup>3</sup>*Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17)*, paras. 46 and 47.

suggested that the report might 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.

8. 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 the report that had been suggested. The Commission expressed the wish that the report would give it the basis on which to decide at that time what work might be undertaken by the Commission in the field.<sup>4</sup>

9. The present Report is divided into three parts. The first part describes recent work undertaken by other organizations relating to legal aspects of EDI. The second part examines and briefly compares the way in which legal issues are covered by the various communications agreements, model rules or other documents of a contractual nature that have been prepared for use between EDI users. The third part contains a short discussion of possible work items for the Commission in the field of EDI.

## I. CURRENT ACTIVITIES IN VARIOUS ORGANIZATIONS

10. The international organizations whose work is reported on in this part of the report are all based in Europe, though some of them have non-European membership as well. This is a reflection of the fact that the use of EDI for international trade purpose is developing most intensively in Europe and North America. However, the developments in Europe can be expected to be followed in other parts of the world in the near future.

11. It may also be pointed out that, with the exception of the International Maritime Committee (CMI), the international organizations whose work is reported on in this first part are not mainly concerned with the unification of legal rules. Those organizations primarily deal with the technical and administrative issues of EDI. The situation may be that an international organization is concerned with the issues of EDI because its mandate encompasses telecommunications in general. This is for example the case of the TEDIS Programme, which is carried out within the Directorate-General No. XIII (Telecommunications, Information Industries and Innovation) of the Commission of the European Communities. The situation may also be that an international organization is concerned with the development of EDI because of the impact of the new communication techniques on the facilitation of international trade. This is for example the case of the International Chamber of Commerce and the Working Party on Facilitation of International Trade Procedures (WP.4) of the United Nations Economic Commission for Europe. Yet another situation may be that an international

organization is concerned with the possible impact of EDI on commercial practices in a particular type of economic activity. This is the case of the International Rail Transport Committee and of the International Road Transport Union. Those organizations have developed legal programmes as a complement to their main activity.

### A. Commission of the European Communities

#### 1. Work undertaken under The TEDIS 1 programme

12. The first phase of the TEDIS (Trade Electronic Data Interchange Systems) programme was implemented by the Commission of the European Communities in 1988 and 1989 (see A/CN.9/333, para. 15). The decision to deal with legal matters within the TEDIS programme was based on the assumption that the legal status of EDI messages, their contractual validity and their value as evidence would be crucial factors for the development of EDI in both the commercial and public sectors. Thus the first activity of TEDIS in this area consisted of identifying the legal questions that might constitute obstacles to EDI.

13. The TEDIS Activity Report presented in July 1990 identified as obstacles to EDI various legal requirements arising out of regulations or practices which resulted essentially from a predominance of the written medium and the handwritten signature. The Activity Report noted that all obligations to issue, transmit or keep documents on paper or requirements of a signature were obviously barriers to EDI.<sup>5</sup>

14. The Commission of the European Communities had a study prepared on the legal obligations to issue, transmit or keep documents on paper or with a handwritten signature in the Member States. The study, named "*TEDIS—The legal position of the Member States with respect to Electronic Data Interchange*" (hereinafter referred to as the TEDIS study), was circulated in 1990 and is currently available both in English and French language versions.<sup>6</sup>

15. The TEDIS study was summarized in document A/CN.9/333, paras. 15 to 41. It examined the legislation of the European Community Member States using two methods of approach: a "vertical" approach involving an analysis of the legislation of each Member State; and a "horizontal" approach, analysing the constraints in the various legal systems related to the obligation to draw up written documents on paper and with a signature.

16. The analysis was oriented towards these latter requirements, the predominance of writing and handwritten signatures having been identified as a priority matter. It noted that in fields such as transport, methods of payment

<sup>4</sup>Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17 (A/45/17), paras. 34 to 40.

<sup>5</sup>TEDIS PROGRAMME 1988-1989 Activity Report, (Brussels, Commission of the European Communities, COM(90) 361 final, 25 July 1990), p.10 ff.

<sup>6</sup>TEDIS—The legal position of the Member States with respect to Electronic Data Interchange, (Brussels, Commission of the European Communities, September 1989).

or the settlement of legal disputes, paper supporting documents were required and represented a major obstacle to the development of EDI.

17. The TEDIS study allowed a typology of current constraints to be established. Those constraints are essentially of three kinds:

- those involving obligations imposed in certain areas of law, often in different ways in each of the Member States, to draw up, issue, send or keep signed paper documents, for reasons relating to the validity of the legal instrument concerned or to the validity of the data contained therein as evidence;
- obstacles related to the requirements of evidence, which can be viewed from the standpoint of "continental" law or of common law; attention was drawn to the elusive nature of information transmitted by EDI and the concomitant difficulty of establishing evidence of what has been exchanged;
- difficulties relating to the determination of the precise time and place of conclusion or completion of operations carried out by EDI.

18. The report concluded that a major barrier to the use of EDI resulted from the need for written evidence essentially in the fields of transport (negotiable bills of lading), payment techniques (cheque, bill of exchange, letter of credit), and the settlement of disputes (though international agreements have solved some of the problems in this area).

19. Taking account of the agreements reached with the EFTA Member States, plans were made to extend the analysis to those countries. The resulting report should be available late in 1991.

20. The TEDIS programme coordinated some of the work of various legal working parties set up in Europe to work on EDI-related issues. For example, it took part in meetings held by the legal advisory group of the EDI Association in the United Kingdom (UK-EDIA) for the preparation of the "Model Interchange Agreement" completed in 1989. The Commission is currently drafting a standard agreement with the cooperation of the legal experts working in the legal working parties of the sectoral projects and of UK-EDIA.

21. Finally, the Commission of the European Communities plans to publish in the near future specific reports on the following issues: contract formation; liability of network operators; trusted third parties and similar services.

22. *Contract formation.* The report on that issue is expected to analyse the impact of EDI on the formation of contracts and make proposals for reforms or changes in the law. The report will examine the legal aspects of contracts formed by EDI (in the sense of the transfer of structured data based on approved standard messages, by electronic means between computers). The report is supposed to address in particular: the principles determining

the time and place of contract formation; the impact on these two factors (time and place of formation) of the involvement of one or more intermediaries (value-added services, clearing houses, etc.); the question of the transmission of general conditions of contract; and the revocability of offers. The analysis will be made on the basis of a comparative law approach. The Report is expected to be available before the end of 1991.

23. *Liability of network operators.* The report on that issue will analyse the situation of the network operators (public and private sectors), network suppliers and service providers regarding their liability for the transmission of EDI messages and make proposals for any necessary harmonization at the European level. The analysis will also attempt to determine to what extent enterprises bear, or will bear, the risks inherent in the transmission of EDI messages, such as delays, errors, omissions, fraud, etc. and in particular, to what extent the damage resulting from such problems will be their responsibility or can be borne by third parties. Where necessary, proposals will be made to improve the situation and promote a better balance.

24. *Trusted third parties and similar services.* The report on that issue will consist of an analysis of the bodies that already exist in Europe or that are envisaged to perform the functions of a trusted third party, namely to keep a reliable record of EDI messages. The report will describe or define the models that can be envisaged for such trusted third parties and the extent to which they will meet users' legal requirements, notably as regards the later use of electronic data as evidence. The required characteristics of the models will be examined and defined on the basis of the functions to be carried out.

## 2. Future work under the TEDIS 2 programme<sup>7</sup>

25. A programme of work for the second phase of the TEDIS programme has been prepared by the Commission of the European Communities and is currently in the process of being finally approved. That second phase is scheduled to last over a period of thirty-six months, provisionally set to start on 1 July 1991. Measures of a legal nature to be taken in the second phase of the TEDIS programme will be directly linked to the implementation of "paperless trading".

26. The programme of work is described as follows:

"Further attention will be given to issues relating to the layout of contracts, the responsibility of network operators and outside certification bodies or similar services (electronic legal back-up service). Requirements as regards harmonization or adaptation of laws will be decided.

A model agreement which will provide a legal basis for EDI will be finalized by 1991. This will also serve as a reference point for European firms and possibly network operators.

<sup>7</sup>This subsection summarizes indications contained in the *Commission communication on electronic data interchange (EDI) using telecommunications services networks* (Brussels, Commission of the European Communities, COM (90) 475 final, 7 November 1990), p. 10.



There are considerable problems with regard to the value and status in law of EDI messages and the dematerialization of essential documents in commercial law such as bills of lading, letters of credit, etc. A discussion should be prepared as soon as possible, thereby enabling the appropriate legal instruments to be drawn up after suitable discussions have taken place."

### **B. Working Party on Facilitation of International Trade Procedures (WP.4)**

27. In March 1990, the Working Party on Facilitation of International Trade Procedures (WP.4) of the United Nations Economic Commission for Europe

"requested its rapporteurs on Legal Questions to establish, in cooperation with an ad hoc Group, a detailed action programme on legal aspects of trade data interchange, with indication of priorities and proposals concerning the resources which would be needed to execute the programme. The ad hoc Group will comprise France, Romania, Switzerland, the United Kingdom, the United States, UNCITRAL, the European Economic Community, and the International Chamber of Commerce. New Zealand will contribute by correspondence to the preparation of the action programme." (See TRADE/WP.4/171, para. 19).

The UNCITRAL secretariat has participated in two meetings of the ad hoc group and in the meetings of the Working Party.

#### **1. Overview of the action programme**

28. An action programme on commercial and legal aspects of trade facilitation was adopted at the thirty-third session of the Working Party in March 1991. That document (TRADE/WP.4/R.697) contains an overview of the situation, proposes a working structure and contains descriptions of the specific projects and tasks constituting the action programme. A listing of previous related documentation issued by WP.4 is also attached to that document. Some significant paragraphs of the action programme are reproduced below.

"WP.4's prime task is to ensure that the red tape of international trade is eliminated so that trade can be easier and cheaper. Red tape is not solely created by administrations; it is also created by banks, carriers, insurers, ports, etc. and even by the commercial parties themselves.

In trying to identify the nature of the issues faced, it was recognised that the proper focus is upon commercial and official practices and how the law (whether commercial, national or international) impacts on such practices. This is especially true with the use of new techniques, such as EDI, and with 'legal problems' perceived by the operators of commercial and official (regulatory) practices.

EDI is such a significant change in practice that some users start to perceive 'problems' which in reality may not be there, so it is recognised that some problems

may call for only an increased awareness of changes in commercial practices rather than the creation of a new legal solution.

EDI itself produces other versions of pre-conceptions. Some experts have suggested giving attributes to EDI 'documents' that have never been given to the paper equivalents (e.g. some ideas on security are such that, if thought necessary, one may ask why haven't all documents gone by registered post). Another way of putting this is that in most cases it is the commercial/official function (e.g. purchase order, import clearance document) that is significant in terms of what level of security is required, not the medium (e.g. paper, fax, EDI).

A final point considered is that, at least in common law countries, it has to be recognised that there is already plenty of relevant case law, with computer produced evidence, and its pre-computer equivalent having been around for years. (Telegraphic communications have been around even longer and commercial codes were widely used in 1920's-60's etc).

These considerations reflect, in the view of the rapporteurs and ad hoc group, the conflicting comments that are being made about whether or not the use of EDI raises material legal problems. However, in contrast to domestic trade, international trade poses additional problems, some of which relate to, or can be solved by, international treaties and conventions."

29. According to the action programme, the work of WP.4 should try to achieve: "awareness, coordination, concentration and action". It is suggested in the programme that:

"To achieve its objectives, the Working Party needs to see that:

- advice is offered to users on the impact on commercial and official practice of using EDI;
- guidance that there is not a legal difficulty in some cases will be as important as offering legal solutions in other cases;
- it may be necessary to give special emphasis to constructing legal solutions within civil law countries and international conventions that may need to be specifically amended;
- any legal solutions should be suitable for both common and civil law countries.

The Working Party has always had the task of coordinating work on the facilitation of international trade procedures. In practice it has generally only done work itself when no more appropriate body could be found. The CCC (with the harmonized system), the ICC (with UNCID), UNCITRAL (on evidential value) and ICS [International Chamber of Shipping] / IATA [International Air Transport Association] etc. (with standard transport documents) are all good examples of other organizations which have been, for certain projects, the appropriate bodies. Continued coordination of the work is essential."

30. As a conclusion of the overview of the action programme, the Working Party adopted the following terms of reference for its overall activity dealing with the commercial and legal aspects of trade facilitation:

"to eliminate any constraints to international trade through problems of a legal and/or commercial practice nature (with particular reference to the use of EDI) by coordinating action with all interested parties and, where necessary, carrying out specific projects."

## 2. List of projects adopted by WP.4

31. The action programme adopted by the Working Party encompasses a number of projects. The description of those projects is summarized below.

### (a) Interchange agreements

32. The objective of the project is "to ensure reasonable harmonization of interchange agreements and the development of an internationally accepted version for optional use." The action programme also states that:

"Any method of communication requires discipline in order to be effective. Such discipline is normally achieved by applying generally acceptable rules of conduct. In the EDI context, such rules have been developed as interchange agreements within a number of user groups (e.g. ODETTE), national organizations (e.g. UK-EDIA; American Bar Association) and regionally (e.g. EEC). Like the ICC Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (UNCID) on which most current examples are based, these agreements generally apply only to the interchange of data and not to the underlying commercial contracts between the parties.

The agreements, however, present in many instances different solutions with respect to the topics addressed and often address concerns of specific relevance to the identified needs within the sponsoring industry, organization, country or region. As a result, by virtue of the number of agreements and the diversity of their terms, there is a possible barrier to international trade arising from the absence of an internationally acceptable form of agreement which may be adopted for use in commercial practice."

33. The project has two elements:

- "To continue to review work currently undertaken, monitoring additional agreements developed, and
- to develop an interchange agreement (to be used in its entirety), to be recommended at the international level for optional use."

34. The Working Party decided to give "high priority" to that project and to aim for completion by 1995.

### (b) Legal part of UN/TDID

35. The project aims at incorporating into the UN/TDID (the Trade Data Interchange Directory) a part on legal

aspects of EDI including the ICC UNCID Rules. It is intended to include in the Part on legal aspects: an introductory note on UNCID; the text of UNCID; and a general statement on the evolution of interchange agreements and associated documents such as user manuals.

### (c) Negotiable documents

36. The objective of the project is to reduce barriers to international trade stemming from the commercial practice of transferring rights via the use of negotiable documents, such as bills of lading.

37. The description of the project includes:

- Review and coordination of efforts already undertaken in order to achieve negotiability of electronic documents, as well as of efforts made with a view to eliminate reliance upon negotiable paper documents (such as bills of lading) from commercial practices.
- Promotion of commercial practices which do not require the use of negotiable documents in international trade.
- If appropriate, development of procedural rules or guidelines (acceptable to different commercial sectors) which, if implemented, would permit negotiability of electronic "documents" transferred in connection with international trade.

### (d) International trade—national legal and commercial practice barriers

38. The objective of the project is to mandate one or more reports, studies or analyses, designed to:

- "Identify existing legal and commercial practice barriers (including the application of international conventions).
- Monitor on-going responsive efforts to eliminate such barriers, and evaluate and make suggestions regarding particular solutions as to their utility for other nations and with recognition of the importance [of] Customs laws and practices to international trade and payments transactions, and because of the regulatory control customs experience, particular attention should be given to customs laws and practices.
- Provide information and analysis of benefit to other international organizations considering law reform or changes in customs and practices (e.g. UNCITRAL and ICC)."

39. In order to achieve the above stated objective, the Working Party has decided to:

- "Develop a questionnaire available for use by participating members of the Working Party as a format for analysing, and reporting upon, national barriers which may exist with respect to the use of electronic data interchange and similar technologies to facilitate international trade. Such

barriers may be statutory or regulatory, may arise in case law or may be the result of customs and practices within the industry or community.

- Receive responses and prepare analytical reports, including recommendations with respect to barriers to international trade facilitated through the use of electronic data interchange and related technologies."

(e) *Electronic authentication; defining electronic messages and their "signatures"*

40. The objective of the project is:

"To secure for electronic messages and 'signatures' the same legal and commercial acceptability as is currently given to paper documents."

41. In order to achieve that objective, the Working Party has decided to:

"develop, for possible adoption at the national level, uniform definitions of 'writing', 'document', 'signature' and other appropriate terms which will include messages transmitted by electronic data interchange and related procedures for authenticating, in both legal and commercial contexts, those messages and establishing appropriate security therefor".

(f) *Coordination with other bodies*

42. The objective of the project is:

"to ensure coordination of work among WP.4 and other international bodies, including within the United Nations, with respect to the commercial and legal aspects of facilitating international trade".

43. In order to achieve that objective, the Working Party has decided to:

"provide on-going reports to the Working Party on related projects and activities of other international organizations and bodies, and assure adequate coordination with respect to the performance of the projects contained within the action programme".

44. At the meeting of the Working Party where the programme of work was adopted, the representative of the UNCITRAL secretariat recalled the general mandate given to the Commission by the General Assembly to coordinate developments on international trade law issues. He also suggested that some results of the work to be undertaken in the Working Party's action programme might usefully be taken up by UNCITRAL and that, should any legal drafting be needed as a result of that work, it would more appropriately be dealt with within the framework of an UNCITRAL working group than in the Working Party.

### C. International Chamber of Commerce (ICC)

45. In 1990, the ICC decided to create a "Joint Working Party on Legal and Commercial Aspects of EDI". The

mandate given to that Working Party is to study the work undertaken on legal issues by other organizations such as the TEDIS Group, UN/ECE WP.4, UNCITRAL and the International Data Exchange Association (IDEA), with a view to establishing "common positions which can then be presented to the relevant governmental and private sector organizations". The Working Party was also created to "monitor EDI developments, providing the impetus to address issues critical to global business practices, through close liaison with other EDI organizations".<sup>8</sup>

46. The first meeting of the Joint Working Party was held in December 1990. It was decided to create a Legal Committee for the purpose of investigating the legal issues involved in EDI. The Legal Committee was also entrusted with the task "to decide to what extent the ICC would support the various international legal efforts, and also, what work in the form of Uniform Rules, Model Contracts or Legal Guides the ICC should produce".<sup>9</sup>

47. The secretariat of UNCITRAL was represented at that meeting and briefly summarized work undertaken by the Commission in the field of electronic funds transfers, the legal value of computer records and its preparatory work on EDI. It was stated by the chairman of the Joint Working Party that a "point of no return" was being reached "with respect to out-moded national legislation" and that it might "indeed be time for international organizations to recommend that certain specific national laws be modified, and to indicate how these changes might be made".<sup>10</sup>

48. At a meeting held in April 1991, the ICC Joint Working Party recalled that it was "unfortunate that national law in many states still requires manually-signed paper documents for certain legal transactions". It was also noted that:

"The various EDI organizations, recognizing that firms desire a solid legal foundation for EDI practices, should work together to provide the business community with sufficient legal tools, studies and counselling, especially as regards the need for a clear and universally-recognized Standard Interchange Agreement."<sup>11</sup>

### D. International Rail Transport Committee (CIT)

49. The railway industry and other transport enterprises covered by the Convention concerning International Carriage by Rail (COTIF) and more particularly by the Uniform Rules concerning the Carriage of Goods by Rail (CIM) have undertaken to replace the paper-based rail consignment note provided for in the CIM Rules by an

<sup>8</sup>Joint Working Group "Legal and Commercial aspects of EDI"—Terms of Reference, (ICC Document No. 460-10/2, Paris, 22 October 1990).

<sup>9</sup>Joint Working Party on Legal and Commercial aspects of EDI—Summary record of the meeting of 14 December 1990, (ICC Document No. 460-10/4, Paris, 30 January 1991), p. 1.

<sup>10</sup>Ibid., p. 4.

<sup>11</sup>Joint Working Party on Legal and Commercial aspects of EDI—Draft ICC policy statement on the development of EDI in international trade, (ICC Document No. 460-10/Int. 14 Rev.2, Paris, 12 April 1991).

electronic document. The new system, named DOCIMEL (Electronic CIM Document), is intended to be ready for implementation in 1993.

50. The CIT has published a preliminary Report entitled "*DOCIMEL Rapport de base droit*" (March 1991), which lists a number of legal issues to be solved by the railway industry. The Report mentions some issues related to contract law, such as formation of the transport contract, modification of the contract during the transport, obstacles to the transport or delivery of the goods and claims relating to the goods. Some specific issues of "electronic law" are also listed, such as data protection, data recording, evidential value of data, storage and liability. The Report mentions the UNCID Rules and a number of model interchange agreements as being taken into account in the legal thinking carried out by the CIT.

51. The Secretariat will closely monitor the legal developments of that project.

#### E. International Road Transport Union (IRU)

52. The IRU is also undertaking the preparation of a standard EDI agreement for use between enterprises in the road transportation industry and users of road transportation services. Preliminary studies involve the drafting of a comparative study of legislation in all member States to the Convention on the Contract for the International Carriage of Goods by Road (CMR) and only once that study is completed will a draft communication agreement be prepared.

53. The Secretariat will also monitor the legal developments of that project.

#### F. International Maritime Committee (CMI)

54. At its thirty-fourth Conference (Paris, June 1990), the CMI adopted the text of "The CMI Rules for Electronic Bills of Lading" (see A/CN.9/333, para. 89), hereinafter referred to as the CMI Rules (see paragraph 69 and paragraphs 104 to 108 below). It is recalled in the introduction to those Rules that non-negotiable sea waybills should be preferred to negotiable bills of lading and that "non-negotiable sea waybills could easily be replaced by messages sent between the interested parties by electronic means".<sup>12</sup> However, it is also noted that the electronic bill of lading would play an important function as regards the commodities that are sold in transit.

#### G. The report of the Observatoire juridique des technologies de l'information (France).

55. The French Government mandated a study on the French law of evidence and the manner in which it would

need to be modified (or affirmed) in order to accommodate the development of paperless legal relationships. The results of that study were published at the end of 1990 by the Observatoire juridique des technologies de l'information (OJTI) in a report entitled "*Une société sans papier?*" (hereinafter referred to as the OJTI Report).<sup>13</sup> The scope of the OJTI Report is not limited to trade law aspects and not even limited to EDI issues. It also encompasses issues and concerns that are typical of electronic messaging applied to consumer transactions. Although it is based upon consideration of the existing rules in one legal system only, some of its general conclusions are worth being mentioned in the present document. The OJTI Report is a useful attempt by a Government to determine what changes should be made in the statutory law of evidence in order to accommodate future developments of electronics. In that respect, it can be compared to somewhat similar studies in other countries that were carried out in other types of body (e.g., trade facilitation bodies, bar associations).

56. In its conclusions, the OJTI Report does away with the widespread concern that EDI might be developing in a statutory vacuum as concerns the rules on evidence. It notes that, although there are very few statutory rules specifically designed to deal with evidence in an EDI context,<sup>14</sup> the question of the evidentiary value of EDI messages is indirectly addressed in general rules on evidence, some of which have been slightly amended with a view to accommodating some EDI-related concerns.

57. A significant example of such a general statute in France is the 1980 Statute on evidence of legal acts (*Loi du 12 juillet 1980 relative à la preuve des actes juridiques*). The 1980 statute was intended to give legal recognition to new modes of evidence and particularly to photographic documents and microforms of original paper documents. It was also interpreted by legal writers as making computer records admissible as evidence. Such an interpretation was drawn from the new text of Article 1348 of the Civil Code that gives evidentiary value to copies where the original is no longer available and where the copy is "not only accurate but also durable" ("*fidèle*" et "*durable*"). The statute indicates that "any indelible reproduction of the original, affixed on a support in such a way that it irreversibly modifies that support, is deemed to be durable". That provision was undoubtedly designed to encompass situations where a copy is stored in the form of electronic data, while the paper original is destroyed. However, it must be pointed out that in 1980 very few electronic devices were likely to meet the requirement that "the support be modified in a non-reversible way". Eleven years later, although the technique of digital recording has made significant progress and made available systems known as "WORM" (write

<sup>12</sup>Françoise Gallouédec-Genuys and others, *Une société sans papier? Nouvelles technologies de l'information et droit de la preuve*. (Paris, La documentation française, 1990).

<sup>14</sup>The French tax law was recently modified (see article 47 of the *Loi de finances rectificative pour 1991*) to treat, under certain conditions, electronic invoices as original invoices for the purposes of tax audit (*Journal officiel de la République française*, 30 December 1990).

<sup>13</sup>Comité maritime international—1990 Paris—II, XXXIVth international conference of the Comité maritime international, p. 210.

once, read multiple), most electronic supports still do not meet that condition.

58. As regards case law, the OJTI Report notes that very few cases have actually been brought before the courts. It may be recalled that a similar finding was contained in the American Bar Association (ABA) Report on Electronic Commercial Practices discussed in the report submitted to the twenty-third session of the Commission (see A/CN.9/333, para. 44). A reason for the absence of case law may lie in the fact that EDI is currently used mainly between trading partners with a long-term relationship. In such a context, litigation may be viewed as a wasteful means to resolve disputes. The ABA Report also insists on the fact that litigation and legal solutions that might be expected from the courts are seen by EDI users as excessively unpredictable. Parties to EDI relationships therefore tend to use contractual solutions to solve their possible disputes.

59. As regards specific communications agreements that may be entered into by parties, the OJTI Report notes that, although many such agreements have already been developed in France, there is no indication that one single contractual framework is going to prevail. An obvious reason for the variety of contractual patterns is that such agreements are "tailored" to fit the various needs of the user groups they apply to. Although the use of such agreements is not discouraged by the OJTI Report, a concern is expressed about the risk of incompatibilities between the different legal situations resulting from different agreements. Another major concern expressed in the OJTI Report is that communications agreements should not alter the balance of power between parties of uneven economic importance to the detriment of the weaker party. Again, it may be noted that a similar concern had been expressed in the ABA Report<sup>15</sup> and had strongly influenced the drafting of the ABA Agreement.

60. As regards the changes to be brought to the statutory law of evidence, the first recommendation of the OJTI Report is that no attempt to change legislation should be undertaken until more is known about the conditions upon which electronic messages and records created with a view to carry evidential value will be admitted as evidence by courts under the current legislation. It is also suggested that legislative changes should not be made before more is known about the policy decisions that are expected from international organizations. Another suggestion is that no changes should be made as regards the fundamental legal principles on evidence. According to the report, those fundamental principles should be reaffirmed with particular emphasis on the responsibility of the party who controls the system. The OJTI Report notes that, since further technological changes are likely to take place in the near future, no attempt should be made to draft a "technological statute" where legally acceptable means of communication would be defined by reference to technical standards.

## II. INTERCHANGE AGREEMENTS

61. With a view to overcoming what may currently be considered as insufficiencies and uncertainties of statutory law and case law regarding EDI, contractual interchange agreements have been and are currently being developed in various sectors of business activity (see A/CN.9/333, paras. 87 to 89). Such contractual developments are particularly important when they set up rules regarding evidence in an EDI environment.

62. Various conceptions of a model agreement for the implementation of EDI between trading partners are reflected in the various agreements that have been examined by the Secretariat. These model agreements also reflect the variety of needs faced by various categories of EDI users or potential users. However, it may be noted that many among these model agreements share a number of characteristics and that most of them make express or implicit reference to the UNCID Rules (see A/CN.9/333, paras. 82 to 86).

63. The number of available model agreements and other models of contractual arrangements is rapidly increasing in the EDI community. A considerable number of such model agreements have been and are currently being developed at various levels, whether by international organizations, national trade facilitation bodies or private institutions. Some such model agreements are drafted with a view to respond to the needs of international trade, others are intended to be used in a purely national context. Another distinction can be drawn between the model agreements which address the legal issues of EDI in general and those which are limited to some specific legal issues. Obviously not all such existing documents have come to the attention of the Secretariat. Moreover, those model rules and agreements which have been taken into consideration for the drafting of the present Report are of somewhat heterogeneous natures. It must also be pointed out that some among the few interchange agreements that were drafted specifically for international use are not yet available in their final form (see paragraph 64 below). It is therefore suggested that, at this stage, the Commission might not be in a position to undertake an exhaustive comparative study of the contents of such agreements. Only a brief overview of some contractual arrangements is provided in the present Report, with a view to indicate to the Commission what legal issues are likely to be addressed of within a contractual framework, the extent of the need for such communications agreements and the limits of contractual law in the field of EDI.

64. The main interchange agreements and guidelines for EDI commercial relationships that were studied by the Secretariat are the 12 following:

### *Model agreements prepared for national use:*

- The "EDI Association Standard Electronic Data Interchange Agreement" (hereinafter referred to as the UK-EDIA Agreement) prepared by the EDI Association of the United Kingdom (2nd Edition, August 1990);

<sup>15</sup>The *Commercial Use of Electronic Data Interchange—A Report*, (Chicago, Illinois, American Bar Association, 1990), p. 23. Also published in *The Business Lawyer*, vol. 45, No. 5, June 1990, p. 1661.

- The "Model Electronic Data Interchange Trading Partner Agreement" (hereinafter referred to as the ABA-Agreement) prepared by the American Bar Association (June 1990);
- The model EDI interchange agreement (hereinafter referred to as the CIREDIT Agreement) prepared by the Centre International de Recherches et d'Etudes du Droit de l'Informatique et des Télécommunications (France, 1990);
- The "Standard EDI Agreement" (hereinafter referred to as the NZEDIA Agreement) prepared by the New Zealand Electronic Data Interchange Association (New Zealand, 1990);
- The "Electronic Data Interchange Trading Partner Agreement" (hereinafter referred to as the EDICC Agreement) prepared by the EDI Council of Canada (Canada, 1990);
- The standard interchange agreement (hereinafter referred to as the Quebec Agreement) prepared by the Ministry of Communications of the Province of Quebec (Canada, 1990);
- The draft model interchange agreement (hereinafter referred to as the draft SITPROSA Agreement) prepared by the Organization for Simplification of International Trade Procedures in South Africa (March 1991);

*International model agreements covering the issues of EDI in general:*

- The draft "TEDIS European Model EDI Agreement" (hereinafter referred to as the draft TEDIS Agreement) prepared by the Commission of the European Communities (December 1990);
- The "Model Agreement on Transfer of Data in International Trade" (hereinafter referred to as the FINPRO/CMEA Agreement) agreed upon by the Republic of Finland and CMEA Member States (1991);

*International model agreements limited to some specific legal issues:*

- The draft "Guideline Concerning Customs-Trader Data Interchange Agreements and EDI User Manuals" (hereinafter referred to as the draft CCC Guidelines) prepared by the Customs Co-operation Council (March 1990);<sup>16</sup>
- The Guidelines for Interchange Agreements (hereinafter referred to as the ODETTE Guidelines) prepared by the Organization for Data Exchange through Teletransmission in Europe (1990);
- The "CMI Rules for Electronic Bills of Lading" adopted by the International Maritime Committee (CMI) in June 1990 (see paragraph 54 above).

65. Those various model rules take different stands as regards the legal issues related to the formation of contracts by electronic means that were considered in the preliminary study by the Secretariat (A/CN.9/333). In addition, their structure often reflects the different legal systems they originated from.

66. It must be noted, however, that all those model agreements, rules and guidelines are of a contractual nature and can be brought into force only by consent of the contracting parties. A clear expression of that characteristic is contained in Article 1 of the CMI Rules ("These rules shall apply whenever the parties so agree"). That situation raises difficulties where the applicable law would not allow the parties to deviate from provisions of statutory law. However, the main difficulty results from the fact that provisions of a contract cannot regulate the rights and obligations of persons who are not parties to that contract. Contractual provisions can be appropriate and even necessary to solve the legal issues of communication through EDI within a closed network but they are unlikely to regulate the same issues when they will arise in an open environment. Contractual solutions to the legal issues of EDI are therefore to be considered as a first step that can help to resolve many of the present practical difficulties and to better understand the questions that will require the preparation of future legal instruments.

#### A. The requirement of a writing

67. In many cases, model agreements contain provisions aimed at overcoming possible difficulties that might arise concerning the validity and enforceability of legal acts (particularly contracts) due to the fact that they are formed through an exchange of EDI messages instead of the usual written documents. It may be noted that no such contractual stipulation attempts to address those categories of contracts which, under certain legal systems, are required to be made in a specific form, generally a written document authenticated by a public authority (see A/CN.9/333, paras. 23 to 25). Regarding commercial contracts, several model agreements examined by the Secretariat take one or both of the two following approaches to deal with the legally binding value of EDI messages.

##### 1. Definition of EDI messages as written documents

68. The authors of many model agreements felt a need to state, through various definitions, that EDI messages and paper documents were to be put on an equal footing. This was sometimes described as a "definition strategy"<sup>17</sup> aimed at establishing the legal significance of EDI messages.

##### (a) General definition of EDI as paper

69. The broadest reliance on general definitions is probably to be found in the CMI Rules. For example,

<sup>16</sup>As regards the legal issues of EDI, the CCC Guidelines expressly follow the UNCITRAL Rules (see A/CN.9/333, paras. 82 to 86).

<sup>17</sup>The Commercial Use of Electronic Data Interchange—A Report, (Chicago, Illinois, American Bar Association, 1990), p. 73. Also published in *The Business Lawyer*, vol. 45, No. 5, June 1990, p. 1690.

Article 4(d) provides that most of the information contained in a receipt message, including description of the goods, date and place of receipt of the goods, date and place of shipment of the goods and reference to the carrier's terms and conditions of carriage, "shall have the same force and effect as if the receipt message were contained in a paper bill of lading". Several other references to paper are made in those Rules with a view to treating the parties to an EDI relationship "as if a paper bill of lading" had been issued. This is for example the approach in Article 6, on applicable law, and Article 7, on the right of control and transfer of the goods. Even more explicit are Articles 10 and 11, respectively entitled "Option to receive a paper document" and "Electronic data is equivalent to writing".

(b) *Definition of legally significant EDI communication*

*Legal effect of EDI messages*

70. The model agreements often contain a provision stating the conditions under which EDI messages will have legally binding effect on the parties. For example, Article 3.3.2. of the ABA Agreement states that:

"Any Document properly transmitted pursuant to this Agreement shall be considered . . . to be a 'writing' or 'in writing'; and any such Document when containing, or to which there is affixed, a Signature ('Signed Documents') shall be deemed for all purposes (a) to have been 'signed' and (b) to constitute an 'original' when printed from electronic files or records established and maintained in the normal course of business."

In that example, it may be noted that the concept of 'Signed Document' has been drafted against the background of local law, namely Section 2-201 of the Uniform Commercial Code, which states that certain contracts for the sale of goods are "not enforceable" unless there is "some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought".

71. A somewhat similar approach is taken by the draft SITPROSA Agreement (Article 12), which states that: "Each party guarantees that every Trade Data Message (TDM) originating from the EDI Network under its control will be binding upon it". Along the same lines, the FINPRO/CMEA Agreement (Article 8) reads as follows:

"When using electronic data interchange the legal bondage of documents is dependent on the legality of original documents and that deed is legally sound."

72. Provisions recognizing the legal effect of EDI messages are also to be found in the CIREDT Agreement (Article 2) and the Quebec Agreement (Article 6.3.(1)).

*Legal effect of contracts made through EDI*

73. Some model agreements expressly state that contracts formed by means of an exchange of electronic data are legally valid. This is for example the approach taken

in the draft TEDIS Agreement (Article 10.1.), which states that: "The parties accept that transactions are validly formed by exchange of EDI messages". Such a provision establishes a distinction between the issue of the validity of the contract and that of its evidential value, which is addressed by the draft TEDIS Agreement under the general heading of "the evidential value of EDI messages" (see paragraph 80 below).

74. It may be noted that not all model agreements address as separate issues the validity of contracts formed through an exchange of EDI messages, as does the draft TEDIS Agreement quoted above, and the enforceability of such contracts (or other legal acts formed by means of EDI messages). This situation reflects the different approaches taken by national legal systems and the different legal drafting practices. Most legal systems provide different sets of rules to determine whether a contract is created and valid and to determine how the existence and contents of that contract can be evidenced in court. However, some legal systems tend to emphasize that the enforceability of a contract is normally a consequence of its being validly created. Other legal systems concentrate more on the fact that a contract is practically made enforceable through admissible evidence of its content. Model agreements drafted for use in such countries therefore provide rules on enforceability that mainly deal with the admissibility of evidence in court and a number of other rules intended to give weight to such evidence of legal acts formed through EDI.

75. As an example of a model agreement that deals mainly with the enforceability of contracts by providing rules on evidence, the EDICC Agreement (Article 6.04 "Enforceability") reads as follows:

"The parties agree that as between them each Document that is received by the Receiver shall be deemed to constitute a memorandum in writing signed and delivered by or on behalf of the Sender thereof for the purposes of any statute or rule of law that requires a Contract to be evidenced by a written memorandum or be in writing, or requires any such written memorandum to be signed and/or delivered."

76. Another example of a provision on the legal effect of contracts made through EDI, with reference to local rules of law, is to be found in the ABA Agreement (Article 3.3.3.), which reads as follows:

"... the use of Signed Documents properly transmitted pursuant to this Agreement, shall, for all legal purposes, evidence a course of dealing and a course of performance accepted by the parties ...".

In that example, reference is made to the national rules of the Uniform Commercial Code (see paragraph 70 above), namely to Section 1-205, which states that a "Course of dealing" of the parties to a particular transaction is "to be regarded as establishing a common basis of understanding for interpreting" their expressions and other conduct. Reference is also made to Section 2-208, which states that "any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement".



## 2. Renunciation of rights in relation to EDI communication

77. The second approach, which may be described as a "waiver strategy", relies upon a mutual renunciation by the parties of the rights or claims they might have to contest the validity or enforceability of an EDI transaction under possible provisions of locally applicable law.<sup>18</sup> To that effect, the ABA Agreement (Article 3.3.4.), making reference to legal rules on evidence that require certain contracts to be evidenced in writing, provides that:

"The parties agree not to contest the validity or enforceability of Signed Documents under the provisions of any applicable law relating to whether certain agreements are to be in writing or signed by the party to be bound thereby. Signed Documents, if introduced as evidence on paper in any judicial, arbitration, mediation or administrative proceedings, will be admissible as between the parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither party shall contest the admissibility of copies of Signed Documents under either the business records exception to the hearsay rule or the best evidence rule on the basis that the Signed Documents were not originated or maintained in documentary form."

The EDICC Agreement (Article 6.04) states that:

"Each party acknowledges that in any legal proceedings between them respecting or in any way related to a Contract it hereby expressly waives any right to raise any defence or waiver of liability based upon the absence of a memorandum in writing or of a signature."

78. The draft TEDIS Agreement (Article 10.1.), making reference to the possible invalidity of a contract contains a slightly different provision according to which:

"The parties . . . expressly waive any rights to bring an action declaring the invalidity of a transaction concluded between themselves on the sole ground that the transaction arises from the operation of an information system."

## 3. Evidential value of EDI messages

### (a) Contractual rules on admissibility of evidence

79. In earlier days, controversies arose about the validity of privately agreed standards on admissibility of evidence in case of litigation. It now seems to be widely conceded that under both common law and civil law systems, such private commercial agreements on admissibility of evidence are valid or, at least, that they are not faced with a general prohibition.

80. The draft TEDIS Agreement (Article 11) reads as follows:

"In the event of litigation, the parties shall not bring into question the admissibility as evidence of messages exchanged and stored according to the provision of this Agreement".

81. The EDICC Agreement (Article 7.04), relying upon its definition of a "Transaction Log" as "the record of all Documents and other communications exchanged between the parties via the EDI Network" states that:

"Each party hereby acknowledges that a copy of the permanent record of the Transaction Log certified in the manner contemplated by this Agreement shall be admissible in any legal, administrative or other proceedings between them as *prima facie* evidence of the accuracy and completeness of its contents in the same manner as an original document in writing, and each party hereby expressly waives any right to object to the introduction of a duly certified permanent copy of the Transaction Log in evidence."

82. Provisions to the same effect are to be found in the Quebec Agreement (Article 6.3.(2)) and the draft SITPROSA Agreement (Article 18). Along the same lines, the ODETTE Guidelines (Clause 8) read as follows:

"The parties shall, in case of litigation between them or otherwise, not challenge the admissibility as evidence of a log, such as the one referred to in Clause 6, in whatever form it may be presented."

83. Whichever wording is used in contractual arrangements on admissible evidence between parties to an EDI communications agreement, it must be noted that a communications agreement cannot be used as a method to solve the problems related to evidence of EDI transactions as regards third parties to that agreement. That difficulty is particularly obvious where national legislation requires a writing to be made for accounting or tax purposes or any other regulatory purpose and where the third party is a public administration (see A/CN.9/333, paras. 38 to 41). However, it may be noted that the difficulty has already been solved in some practical situations by way of special agreements, permission or tolerances granted by public authorities permitting accounting and other records to be kept on computers. There also exist cases where the difficulty is addressed in specific statutory provisions. The same difficulty regarding the rights and obligations of third parties is also likely to arise in the commercial field where contracts have to be formed between trading partners that are parties to different EDI network systems. Commercial situations involving different EDI networks will undoubtedly become more frequent in the future as EDI becomes a more widespread technique and evolves from closed networks to a more open environment particularly through the use of integrating systems<sup>19</sup> that bring different EDI networks into contact.

<sup>18</sup>See *The Commercial Use of Electronic Data Interchange—A Report*, (Chicago, Illinois, American Bar Association, 1990), p. 56. Also published in *The Business Lawyer*, vol. 45, No. 5, June 1990, p. 1680.

<sup>19</sup>New techniques are being developed to produce an integrated electronic environment. An example of such developments is the Computer-aided Acquisition and Logistic Support initiative (CALS) in the United States.



(b) *The requirement of an original*

84. Under many legal systems, it has been a general rule of evidence that documents and other records had to be presented to a court in their original form so as to assure that the data presented to the court was the same as the original data (see A/CN.9/265, paras. 43 to 48). Several model agreements set forth a contractual definition of an original document, following the "definition strategy" adopted to do away with the requirement of a writing. For example, the ABA Agreement (Article 3.3.2.) reads as follows:

"('Signed Documents') shall be deemed for all purposes . . . to constitute an 'original' when printed from electronic files or records established and maintained in the normal course of business."

Following a similar pattern, the CIREDDIT Agreement (Article 2) contains a provision to the effect that parties "shall consider the EDI documents they exchange as original documents". A provision to the same effect is also contained in the EDICC Agreement (Article 7.04) and in the Quebec Agreement (Article 6.3.).

85. It may be noted that, at least in one civil law country, legal writers have expressed doubts as to whether a contractual definition of an original could validly deviate from a statutory provision listing a limited number of circumstances where a copy could be substituted to the normally required original with the same evidential value.<sup>20</sup>

(c) *Authentication of EDI messages*

86. The issue of authentication of documents is addressed in most model agreements. It may be recalled (see A/CN.9/333, paras. 50 to 59) that a number of techniques have been developed to authenticate electronically transmitted documents. As regards identification of the transmitting machines, telex and computer-to-computer telecommunications often employ call-back procedures and test keys to verify the source of the message. Techniques combining several keys can be used as a means of identifying the operator of the sending machine.

87. A variety of model clauses on verification of the identity of the sender and of the integrity of the message may be found. For example, the ABA Agreement (Article 1.5.) states that:

"Each party shall adopt as its signature an electronic identification consisting of symbol(s) or code(s) which are to be affixed to or contained in each Document transmitted by such party ('Signatures'). Each party agrees that any Signature of such party affixed to or contained in any transmitted Document shall be sufficient to verify such party originated such Document."

It may be noted that this provision is written against the background of the Uniform Commercial Code (Article 1-201), which provides a definition of "signature".

88. The draft TEDIS Agreement (Article 7.2.) refers to a concept of "message verification" which seems to encompass both the identification of the sender and the verification of the contents of the message. It reads as follows:

"In addition to the elements of control relevant for EDI messages provided by UN/EDIFACT, the parties shall agree on procedures, means or methods to ensure message verification. Message verification includes the identification, authentication, verification of the integrity of a message as well as non-repudiation, by use of a digital signature or any other means or procedures to establish that a message is genuine. . . ."

89. As concerns the issues of authentication, it is clear that the legal reliability of EDI techniques requires that high standards be implemented achieving legal certainty as to the identity of the sender, its level of authorization and the integrity of the message. However, it must be pointed out that the various authentication methods available involve very different costs. A prompt and reliable acknowledgement that a message has been received is possible for an insignificant cost. At some greater cost, resulting from more extensive computer processing, it is possible to verify that the message has been received intact without communication errors. At a still greater cost, encryption techniques are available that permit, in a single operation, the verification of both the non-alteration of the message and the certain identity of the sender. It may therefore be suggested that, when implementing an EDI communications agreement for their trade relationship, parties should ensure that all verification methods are adequate and that the costs involved are reasonable, given the nature of the messages that are actually exchanged. Such a reference to the reasonableness of the verification methods is rarely found in model agreements. However, it appears in a provision of the ABA Agreement (Article 1.4.) on a different issue, concerning the obligation of each party to verify that the sender of the message was properly authorized. The Article reads as follows:

"Each party shall properly use those security procedures . . . which are reasonably sufficient to ensure that all transmissions of Documents are authorized and to protect its business records and data from improper access."

The UK-EDIA Agreement (Article 4.2) and the NZEDIA Agreement (Article 4.2) also take into account the possible wish of the parties to agree on different levels of authentication to verify "the Message" or "the completeness and authenticity of the Message".

(d) *Evidential value of computer records*

90. Almost all model agreements contain a provision according to which parties are obliged to keep a record or "log" of EDI messages. In order to solve the questions of the legal recognition of computer records, a number of communications agreements provide that the recording methods used should preserve both sent and received messages in their original format, that they should provide a chronological record of messages sent or received and

<sup>20</sup>See A. Bensoussan in *La gazette de la télématique et de la communication inter-entreprises*, No. 11, spring 1991, p. 20.

that they should ensure that the recorded EDI messages are accessible in a human readable form, for example through a printing device.

91. Provisions concerning the obligation to keep a data log may be found in the EDICC Agreement and in the ODETTE Guidelines (see paragraphs 81 and 82 above), the UK-EDIA Agreement (Article 7), the NZEDIA Agreement (Article 7), the CREDIT Agreement (Article 7), the FINPRO/CMEA Agreement (Article 6). As an example of such a provision, the draft TEDIS Agreement (Article 8) reads as follows:

"8.1. Each party will keep a complete and chronological record, the 'data log', to store all EDI messages sent and received in their original transmitted format.

8.3. In addition to any relevant national legislative or regulatory requirements, when the data log is maintained in the form of electronic or computer record, the parties shall ensure that the recorded EDI messages are readily accessible and that they are readable and, where necessary, able to be printed."

## **B. Other legal issues related to the formation of contracts**

### *1. Acknowledgement of receipt of messages*

92. Most model rules and communication agreements include special provisions requiring systematic use of "functional acknowledgements" (see A/CN.9/333, paras. 48 and 49). Acknowledgement of receipt of a message merely confirms that the message is in the possession of the receiving party and is never to be confused with any decision on the part of the receiving party as to agreement with the content of the message.

### *2. Consent, offer and acceptance*

93. Provisions on offer and acceptance are not very common in existing model agreements. However, such a provision may be found in the EDICC Agreement (Article 6.02) which reads as follows:

"Notwithstanding any provision in the Supply Agreement to the contrary, the transmission and receipt of all Documents constituting a Contract shall constitute an offer to acquire or supply the products or services specified therein and an acceptance of such offer."

That provision is not to be confused with other provisions on acknowledgement of receipt of messages (see paragraph 92 above). The official comment (see TRADE/WP.4/R.732, p. 14) makes it clear that the provision is included in the Model Agreement so that the parties' use of the EDI Network to send promotional, product service, pricing or other non-contractual information does not have unintended legal effects or consequences. Article 6.02 provides that unless the data are presented in the form technically required to qualify them as a Document, they remain at the level of "commercial" messages, which are not intended to have legal effect.

94. As a matter of principle, the questions of offer and acceptance may be of particular importance in an EDI context since EDI creates new opportunities for the automation of the decision-making process (see A/CN.9/333, paras. 60 to 64). Such automation may increase the possibility that, due to the lack of a direct control by the owners of the machines, a message will be sent, and a contract will be formed, that does not reflect the actual intent of one or more parties at the time when the contract is formed. Automation also increases the possibility that, where a message is generated that does not reflect the sender's intent, the error will remain unperceived both by the sender and by the receiver until the mistaken contract has been acted upon. The consequences of such an error in the generation of a message might therefore be greater with EDI than with traditional means of communication.

## **3. General conditions**

95. It may be recalled (see A/CN.9/333, paras. 65 to 68) that the major problem regarding general conditions in a contract is to know to what extent they can be asserted against the other contracting party. In many countries, the courts will consider whether it can reasonably be inferred from the context that the party against whom general conditions are asserted has had an opportunity to be informed of their contents or whether it can be assumed that the party has expressly or implicitly agreed not to oppose all or part of their application.

96. EDI is not equipped, or even intended, to transmit all the legal terms of the general conditions that are printed on the back of purchase orders, acknowledgements and other paper documents used by trading partners. A solution to that difficulty is to incorporate the standard terms in the communications agreement concluded between the trading partners. As an example of such a provision, the EDICC Agreement (Article 6.03) states that:

"Each Contract formed between the parties shall comprise the Documents received via the EDI Network and shall incorporate and be subject to the provisions of this Agreement and the Supply Agreement. . . ."

The official comment explains that:

"Before entering into this Agreement, the parties will typically have recorded their terms of dealing in a master agreement, or by the exchange of standard form contracts. If a dispute had arisen then concerning the terms and conditions of their contracts the court or arbitrator would have attempted to resolve it by reference to those standard forms. This optional provision should be used by parties who attach old standard forms [to the contracts they enter into by electronic means]. The intended result is that their legal position is not affected by the change to EDI as a medium of communication. Whenever practicable, however, the parties should attempt to reconcile the terms and conditions of their Contracts into a single master agreement which they sign. Not only will that assist in resolving disputes, it very likely will prevent many potential grounds for dispute ever causing problems for the parties."

#### 4. Time and place of formation of contract

97. Parties to a contract have a practical interest in knowing where and when the contract is formed. When the contract is formed, the parties become bound by the legal obligations they have agreed upon and the contract may start producing effects. In different legal systems, the time when the contract is formed may determine such issues as the moment when the offeror is no longer entitled to withdraw his offer and the offeree his acceptance; whether legislation that has come into force during the negotiations is applicable; the time of transfer of the title and the passage of the risk of loss or damage in the case of the sale of identified goods; the price, where it is to be determined by market price at the time of the formation of the contract. In some countries, the place where the contract is formed may also be relevant for determining the applicable customary practices; the competent court in case of litigation; and the applicable law in private international law (see A/CN.9/333, para. 69).

98. When dealing with the issue of time and place of formation of contracts in the context of EDI relationships, the parties may often have an opportunity to choose between the dispatch rule and the reception rule, which are the two solutions most commonly found in existing legal systems (see A/CN.9/333, paras. 72 to 74). Indeed, that question is one of the important issues that may generally be settled in a communication agreement, in the absence of mandatory provisions of statutory law.

99. A provision on the place and time of formation of contracts may be found, for example in the draft TEDIS Agreement (Article 10.2.), which reads as follows:

"As far as the formation of a contract is concerned, a contract by EDI is deemed to be concluded at the time and place where the EDI message constituting the acceptance of an offer is made available to the information system of the recipient (reception rule)."

100. A provision to the same effect exists in the EDICC Agreement, which defines "proper receipt" and legal effectiveness of EDI messages as follows:

"A Document shall be deemed to have been properly received when it is accessible to the Receiver at its Receipt Computer. No Document shall be of any legal effect until it is received."

#### 5. Liability for failure or error in communication

101. A question that is not directly related to the formation of contracts but that needs to be addressed within the contractual framework of an EDI relationship is the determination of which party is to bear the risk of a failure in communication of an offer, acceptance or other form of communication intended to have a legal effect, such as an instruction to release goods to a third party. It may be noted that model agreements generally address both cases of failure to communicate and of error in communication under the same provision.

102. The draft TEDIS Agreement (Article 12) reads as follows:

"Each party shall be liable for any direct damage arising from or as a result of any deliberate breach of this agreement or any failure, delay or error in sending, receiving or acting on any message. Neither party shall be liable to the other for any incidental or consequential damage arising from or as a result of any such breach, failure, delay or error.

The obligations of each party imposed by this EDI agreement shall be suspended during the time and to the extent that a party is prevented from or delayed in complying with that obligation by *force majeure*.

Upon becoming aware of any circumstance resulting in failure, delay or error, each party shall immediately inform the other party(ies) hereto and use their best endeavours to communicate by alternative means."

103. A somewhat different approach is taken in the draft SITPROSA Agreement (Article 16), which reads as follows:

"16.1 The risk and liability for any faulty transmission and the resulting damages rests with the Sender:

- a. subject to the exceptions described in clause 16.2; and
- b. subject to the condition that the Sender will not be liable for any consequential damages other than those for which he would be liable in the case of a breach of contract in terms of the Main Contract or which have been specifically agreed to.

16.2 Although the Sender is responsible and liable for the completeness and accuracy of the TDM [Trade Data Message], the Sender will not be liable for the consequences arising from reliance on a TDM where:

- a. the error is reasonably obvious and should have been detected by the Recipient;
- b. the agreed procedures for authentication or verification have not been complied with."

#### 6. Documents of title

104. The specific issues of the negotiable bill of lading are addressed in the CMI Rules. Discussions are also taking place within WP.4 with a view to defining some form of an "electronic bill of lading". Two questions arise concerning negotiable documents in an EDI environment. The first question is whether negotiability and other characteristics of documents of title can be accommodated in an electronic context. The second question is whether the issues of documents of title can be addressed within the framework of a contract or any other optional arrangement or whether statutory law is needed.

105. The CMI Rules envisage a system which preserves the function of negotiability in the electronic bill of lading through the use of a secret code ("private key") by the carrier. Article 7 ("Right of control and transfer") reads as follows:

- "a. The Holder is the only party who may, as against the carrier:
- i. claim delivery of the goods;
  - ii. nominate the consignee or substitute a nominated consignee for any other party, including itself;
  - iii. transfer the Right of Control and Transfer to another party;
  - iv. instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of Carriage, as if he were the holder of a paper bill of lading.
- b. A transfer of the Right of Control and Transfer shall be effected:
- i. by notification of the current Holder to the carrier of its intention to transfer its Right of Control and Transfer to a proposed new Holder; and
  - ii. Confirmation by the carrier of such notification message; whereupon
  - iii. the carrier shall transmit the information as referred to in article 4 (except for the Private Key) to the proposed new Holder; whereafter
  - iv. the proposed new Holder shall advise the carrier of its acceptance of the Right of Control and Transfer; whereupon
  - v. the carrier shall cancel the current Private Key and issue a new Private Key to the new Holder.
- c. If the proposed New Holder advises the carrier that it does not accept the Right of Control and Transfer or fails to advise the carrier of such acceptance within a reasonable time, the proposed transfer of the Right of Control and Transfer shall not take place. The carrier shall notify the current Holder accordingly and the current Private Key shall retain its validity.
- d. The transfer of the Right of Control and Transfer in the manner described above shall have the same effect as the transfer of such rights under a paper bill of lading."

Article 8 ("Private key") reads as follows:

- "a. The Private key is unique to each successive Holder. It is not transferable by the Holder. The carrier and the Holder shall each maintain the security of the Private Key.
- b. The carrier shall only be obliged to send a Confirmation of an electronic message to the last Holder to whom it issued a Private Key, when such Holder secures the Transmission containing such electronic message by the use of the Private Key.
- c. The Private Key must be separate and distinct from any means used to identify the Contract of Carriage, and any security or identification used to access the computer network."

106. Another view on the questions raised by the documents of title in an EDI context favours the use of non-negotiable transport documents. That view is reflected, for example, in the first draft of a policy statement by the ICC which states that:

"Many of the perceived legal 'obstacles' to the use of EDI are not true obstacles, rather they are long-standing commercial habits which must be broken if EDI is to be used to its maximum advantage . . . One example of a perceived obstacle is found in the common misconception that transactions involving negotiable documents represented by signed writings cannot be handled with EDI. They can, via the use of non-negotiable electronic messages."<sup>21</sup>

107. As to whether an electronic system providing negotiability of transport documents can function satisfactorily on a purely contractual basis, the question arises whether all the persons to whom the title to the goods in transit would currently be transmitted by use of a paper negotiable bill of lading would be willing or able to become parties to a contractual network arrangement that would regulate the rights and obligations of the parties to the transport operation itself. For those parties absent from the network arrangement at least, statutory law or an international convention seems to be needed.

108. A commentator on the subject noted that:

"Most probably the use of the negotiable transport document would diminish in the future. Commercial practice will prefer the non-negotiable way-bill system or replace transport documents altogether by transferring the relevant information electronically. Be that as it may international commerce will have the same need to transfer legal rights from sellers to buyers in international contract of sale as previously. Is the only satisfactory solution to elaborate an international convention on transfer of title to goods in transit from one country to another? Most probably those questions will be the focus of attention from now on and during the rest of the present century."<sup>22</sup>

### III. POSSIBLE WORK FOR THE COMMISSION

#### A. Standard communications agreement

109. It has been pointed out that numerous communications agreements or guidelines for the drafting of such agreements have already been and are currently being developed (see paragraph 63 above). It has also been pointed out that such documents vary considerably according to the various needs of the different categories of users they intend to serve. The variety of contractual arrangements has sometimes been described as hindering the

<sup>21</sup>Joint Working Party on Legal and Commercial aspects of EDI—Draft ICC policy statement on the development of EDI in international trade, (ICC Document No. 460-10/Int. 14 Rev.2, Paris, 12 April 1991).

<sup>22</sup>Jan Ramberg, *The International Commercial Law Series*, vol. 1, "International Carriage of Goods: Some Legal Problems and Possible Solutions" (1988).

development of a satisfactory legal framework for the business use of EDI. None the less, the preliminary studies carried out by the Secretariat, which are summarized in A/CN.9/333 and in the present report, do not suggest that there is a need for all EDI relationships to develop along a strictly uniform legal pattern. Such uniformity is probably impossible to achieve, given the different types of business relationships that are and will be affected by EDI. However, the preliminary studies also suggest that there is 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. Another conclusion from the preliminary studies is that such a basic framework can, to a certain extent, be created by contractual arrangements between parties to an EDI relationship. It appears that the existing contractual frameworks that are proposed to the community of EDI users are often incomplete, mutually incompatible, and inappropriate for international use since they rely to a large extent upon the structures of local statutory law.

110. It may be noted that, although many efforts are currently being undertaken by different technical bodies, standardization institutions and international organizations (see paragraph 64 above) with a view to clarifying the issues of EDI, none of the organizations that are primarily concerned with worldwide harmonization of legal rules has, as yet, started working on the subject of a communications agreement. The CMI Rules, which constitute a valuable attempt to introduce the electronic bill of lading, contain substantive provision addressing the issues of negotiability in an electronic environment, but they do not address all the legal issues stemming from communication of trading partners through EDI. The Commission of the European Communities, through the TEDIS programme, is developing a model agreement that will be of great regional interest but has not been designed for worldwide use.

111. With a view to achieving the harmonization of basic EDI rules for the promotion of EDI in international trade (see paragraph 3 above) the Commission may wish to consider the desirability of preparing a standard

communication agreement for use in international trade. Work by the Commission in this field would be of particular importance since it would involve participation of all legal systems, including those of developing countries that are already or will soon be confronted with the issues of EDI.

## B. Other work

112. As was pointed out in several documents and meetings involving the EDI community, e.g. in meetings of the Working Party on Facilitation of International Trade Procedures (WP.4) of the United Nations Economic Commission for Europe, there is a general feeling that, in spite of the efforts made through the 1985 UNCITRAL Recommendation (see paragraph 2 above) and the 1979 ECE Recommendation (see A/CN.9/333, para. 51), little progress has been made to achieve the removal of the mandatory requirements in national legislation regarding the use of paper and handwritten signatures. It has been suggested by the Norwegian Committee on Trade Procedures (NORPRO) in a letter to the Secretariat that "one reason for this could be that the UNCITRAL Recommendation advises on the need for legal update, but does not give any indication of how it could be done". It may be recalled that the Working Party on Facilitation of International Trade Procedures (WP.4) of the United Nations Economic Commission for Europe, has decided to develop a questionnaire on the legal barriers to the use of EDI in different legal systems. The Secretariat will monitor that survey and report to the Commission for possible work to be undertaken on the subject.

113. Another suggestion for possible future work concerns the subject of the replacement of negotiable documents of title (see paragraphs 104 to 108 above), and more particularly transport documents, by EDI messages. This is the area where the need for statutory provisions seems to be developing most urgently with the increased use of EDI. The Commission may wish to request the Secretariat to prepare a study on the desirability and feasibility of preparing such a text.

## **V. COORDINATION OF WORK**

### **A. Current activities of international organizations related to harmonization and unification of international trade law: note by the Secretariat (A/CN.9/352) [Original: English]**

1. The General Assembly, in resolution 34/142 of 17 December 1979, requested the Secretary-General to place before the United Nations Commission on International Trade Law, at each of its sessions, a report on the legal activities of international organizations in the field of international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the activities of other organizations in the field.

2. In response to that resolution, detailed reports on the current activities of other organizations related to the harmonization and unification of international trade law have been issued at regular intervals, the last one having been submitted at the twenty-third session in 1990. For the report to the twenty-fourth session of the Commission a different focus was envisaged. It was decided to report 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.

3. Although the development of international trade law is usually thought of exclusively in terms of the preparation of legal texts governing some aspects of the law of international trade by international organizations such as those whose activities have been subject of prior reports, the international community also affects the development of international trade law when it contributes to the development of domestic commercial law. 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 all concerned to have a global picture of those activities. In particular, information was desired on the extent to which

texts of uniform law prepared at the international level formed the basis for the legal texts prepared under the auspices of the development agencies.

4. The Secretariat requested information from multilateral and bilateral development organizations on projects that they might have financed in the last five years or for which they might have given technical assistance for the modernization of the law governing an aspect of economic activity. The details requested of each project included: (1) The identity of the country in which the project was undertaken, if for a region or regional organization, the region, organization and countries directly affected; (2) date when the project was commenced and, if completed, date of completion; (3) subject area covered by the project and type of legal text drawn; (4) nature and extent of expertise furnished in the execution of the project; (5) if there was a uniform or model legal text adopted at the international level on some or all of the subject matter of the project, what the text was and whether it was (i) incorporated in whole into the project text, or (ii) used as the basis for the project text, or (iii) not used at all in the project text and (6) whether the law of a particular State, other than the State where the project was undertaken, was incorporated in whole or in part into the project text, or used as the basis for the project text and the nature of the changes made if any. The organizations were further requested to supply UNCITRAL with the legal texts as enacted.

5. While a number of the organizations that had been solicited for information replied to the Secretariat, the information received was disappointing. Law reform projects that are known to the Secretariat from other sources, and that it is understood have been financed by development agencies, were not reported.

6. Rather than report the partial information received, which may not be representative, the Secretariat proposes to continue its investigation and to report its findings to the Commission at its twenty-fifth session.

### **B. International Chamber of Commerce (ICC) INCOTERMS (A/CN.9/348) [Original: English]**

1. By letter of 24 October 1990 the Acting Secretary-General of the International Chamber of Commerce (ICC) requested the Commission to consider endorsing INCOTERMS 1990 for world-wide use. This report

gives the background to the previous actions of the Commission in respect of INCOTERMS 1953 and a short summary of the reasons for the preparation of the current revision.

2. INCOTERMS 1990 is reproduced in the annex to this document in the text as furnished to the Secretariat by ICC. At the time of the preparation of this report INCOTERMS was available in the original English language version and in a translation into French and Spanish. The English language version of INCOTERMS 1990 has been annexed to all language versions, other than French and Spanish, of this report.

## BACKGROUND

3. At the Commission's first session in 1968, in deciding on its programme of work, the Commission identified INCOTERMS 1953 as an international instrument of special importance with regard to the harmonization and unification of the law of the international sale of goods.<sup>1</sup> The report of the Commission's first session goes on to say:

"20. As regards INCOTERMS 1953, the Commission decided to request the Secretary-General to invite the International Chamber of Commerce to submit to the Secretary-General, before the second session of the Commission, a report including its views and suggestions concerning possible action that might be taken for the purpose of promoting the wider use of INCOTERMS and other trade terms by those engaged in international commerce."<sup>2</sup>

4. The report requested by the Commission was submitted to it at its second session in document A/CN.9/14. On the basis of that report the Commission included in the resolution that it adopted in respect of the international sale of goods the following paragraph:

<sup>1</sup>A/CN.9/9, para. 6, incorporated into 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. 48.

<sup>2</sup>A/CN.9/9, para. 20, incorporated into *ibid.*

*"The Commission decides:*

\* \* \*

*With regard to Incoterms 1953:*

"3. (a) To request the Secretary-General to inform the International Chamber of Commerce that, in the view of the Commission, it would be desirable to give the widest possible dissemination to INCOTERMS 1953 in order to encourage their world-wide use in international trade.

"(b) To request the Secretary-General to bring the views of the Commission concerning INCOTERMS 1953 to the attention of the United Nations regional economic commissions in connexion with their consideration of the ECE general conditions."<sup>3</sup>

5. Amendments to INCOTERMS were made and additional terms were added in 1976 and 1980. However, those changes in INCOTERMS were not officially brought to the attention of the Commission and the Commission took no action leading toward endorsing the revision.

6. By the late 1980's it was found that INCOTERMS no longer met the needs of commerce as well as they had previously. In particular, it was considered to be necessary to adapt the terms to the increasing use of electronic data interchange (EDI). Furthermore, the changes in transportation techniques called for a revision of several of the terms. In the end it was decided to revise the existing terms completely, rather than to attempt to amend them.

7. INCOTERMS 1990 has been adopted by ICC with a date of entry into force on 1 July 1990. It is available from ICC in its publication no. 460.

<sup>3</sup>Report of the United Nations Commission on International Trade Law on the work of its second session, *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 60.

**ANNEX**

**ICC INCOTERMS 1990\***

**Entry into force 1 July 1990**

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Please note that the abbreviations in three letters given for each Incoterm are a standard reference agreed upon by the ICC and the Economic Commission for Europe of the United Nations.



## FOREWORD

Sending goods from one country to another, as part of a commercial transaction, can be a risky business. If they are lost or damaged, or if delivery does not take place for some other reason, the climate of confidence between parties may degenerate to the point where a lawsuit is brought. However, above all, sellers and buyers in international contracts want their deals to be successfully completed.

If, when drawing up their contract, buyer and seller specifically refer to one of the ICC Incoterms, they can be sure of defining their respective responsibilities, simply and safely. In so doing they eliminate any possibility of misunderstanding and subsequent dispute.

Incoterms have been revised to take account of changes in transportation techniques—certain terms have been consolidated and rearranged—and to render them fully compatible with new developments in electronic data interchange (EDI). They are presented in a new format which allows seller and buyer to follow a step-by-step process to determine their respective obligations. A new lay-out makes Incoterms 1990 easier to use.

The publication is the result of extensive consideration by the ICC's Commercial Practices Commission and particularly its Trade Terms Working Party under the Chairmanship of Dr. Hans de Vries (Netherlands). Detailed drafting was entrusted to Professor Jan Ramberg (Sweden), Mr. Ray Battersby (United Kingdom), Mr. Jens Bredow and Mr. Bodo Seiffert (Germany), Mr. Mauro Ferrante (Italy), Mr. Asko Rätty and Mr. Kainu Mikkola (Finland) and to Mrs. Carol Xueref (IHQ) to whom the ICC is particularly indebted.

The other Working Party participants were as follows: Mr. Ladislaus Blaschek (Austria), Mrs. Carine Gelens, Mr. Jan Somers (†) and Mr. Robert De Roy (Belgium), Mr. Matti Elovirta and Mr. Timo Vierikko (Finland), Mr. Klaus B. Winkler (Germany), Dott. Vladimiro Sabbadini (Italy), Prof. Ryohei Asaoka (Japan), Mr. Santiago Hernandez Izal (Spain), Miss Lyn Murray, Miss Brigitte Faubert and Mr. Pat J. Moore (United Kingdom).

## INTRODUCTION

## Purpose of Incoterms

1. The purpose of "Incoterms" is to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade. Thus, the uncertainties of different interpretations of such terms in different countries can be avoided or at least reduced to a considerable degree.

2. Frequently parties to a contract are unaware of the different trading practices in their respective countries. This can give rise to misunderstandings, disputes and litigation with all the waste of time and money that this entails. In order to remedy these problems the International Chamber of Commerce first published in 1936 a set of international rules for the interpretation of trade terms. These rules were known as "Incoterms 1936". Amendments and additions were later made in 1953, 1967, 1976, 1980 and presently 1990 in order to bring the rules in line with current international trade practices.

## Why new Incoterms?

3. The main reason for the 1990 revision of Incoterms was the desire to adapt terms to the increasing use of electronic data interchange (EDI). In the present 1990 version of Incoterms this is possible when the parties have to provide various documents (such as commercial invoices, documents needed for customs clearance or documents in proof of delivery of the goods as well as transport documents). Particular problems arise when the seller has to present a negotiable transport document and notably the bill of lading which is frequently used for the purposes of selling the goods while they are being carried. In these cases it is of vital importance, when using EDI messages, to ensure that the buyer has the same legal position as he would have obtained if he had received a bill of lading from the seller.

## New transportation techniques

4. A further reason for the revision stems from changed transportation techniques, particularly the unitisation of cargo in containers, multimodal transport and roll on-roll off traffic with road vehicles and railway wagons in "short-sea" maritime transport. In Incoterms 1990 the term "Free carrier ... named place" (FCA) has now been adapted to suit all types of transport irrespective of the mode and combination of different modes. As a consequence, the terms which appear in the previous version of Incoterms dealing with some particular modes of transport (FOR/FOT and FOB Airport) have been removed.

## New method of presenting Incoterms

5. In connection with the revision work within the ICC Working Party, suggestions were made to present the trade terms in another manner for the purpose of easier reading and understanding. The terms have been grouped in four basically different categories; namely, starting with the only term whereby the seller makes the goods available to the buyer at the seller's own premises (the "E"-term Ex works); followed by the second group whereby the seller is called upon to deliver the goods to a carrier appointed by the buyer (the "F"-terms FCA, FAS and FOB); continuing with the "C"-terms where the seller has to contract for carriage, but without assuming the risk of loss of or damage to the goods or additional costs due to events occurring after shipment and dispatch (CFR, CIF, CPT and CIP); and, finally, the "D"-terms whereby the seller has to bear all costs and risks needed to bring the goods to the country of destination (DAF, DES, DEQ, DDU and DDP). A chart setting out this new classification is given hereafter.

## INCOTERMS 1990

Group E Departure	EXW	Ex Works
Group F Main carriage unpaid	FCA	Free Carrier
	FAS	Free Alongside Ship
	FOB	Free On Board
Group C Main carriage paid	CFR	Cost and Freight
	CIF	Cost, Insurance and Freight
	CPT	Carriage Paid To
	CIP	Carriage and Insurance Paid To

Group D Arrival	DAF	Delivered At Frontier
	DES	Delivered Ex Ship
	DEQ	Delivered Ex Quay
	DDU	Delivered Duty Unpaid
	DDP	Delivered Duty Paid

Further, under all terms, the respective obligations of the parties have been grouped under 10 headings where each heading on the seller's side "mirrors" the position of the buyer with respect to the same subject matter. Thus, if for instance according to A.3. the seller has to arrange and pay for the contract of carriage we find the words "No obligation" under the heading "Contract of carriage" in B.3. setting forth the buyer's position. Needless to say, this does not mean that the buyer would not in his own interest make such contracts as may be needed to bring the goods to the desired destination, but he has no "obligation" to the seller to do so. However, with respect to the division between the parties of duties, taxes and other official charges, as well as the costs of carrying out customs formalities, the terms explain for the sake of clarity how such costs are divided between the parties although, of course, the seller might not have any interest at all in the buyer's further disposal of the goods after they have been delivered to him. Conversely, under some terms such as the "D"-terms, the buyer is not interested in costs which the seller might incur in order to bring the goods all the way to the agreed destination point.

#### Customs of the port or of a particular trade

6. Since the trade terms must necessarily be possible to use in different trades and regions it is impossible to set forth the obligations of the parties with precision. To some extent it is therefore necessary to refer to the custom of the particular trade place or to the practices which the parties themselves may have established in their previous dealings (cf. Article 9 of the 1980 United Nations Convention on Contracts for the International Sale of Goods). It is, of course, desirable that sellers and buyers keep themselves duly informed of such customs of the trade when they negotiate their contract and that, whenever uncertainty arises, clarify their legal position by appropriate clauses in their contract of sale. Such special provisions in the individual contract would supersede or vary anything which is set forth as a rule of interpretation in the various Incoterms.

#### The buyer's options

7. In some situations, it may not be possible at the time when the contract of sale is entered into to decide precisely on the exact point or even the place where the goods should be delivered by the seller for carriage or at the final destination. For instance, reference might have been made at this stage merely to a "range" or to a rather large place, e.g. seaport, and it is then usually stipulated that the buyer can have the right or duty to name later on the more precise point within the range or the place. If the buyer has a duty to name the precise point as aforesaid his failure to do so might result in liability to bear the risks and additional costs resulting from such failure. In addition, the buyer's failure to use his right to indicate the point may give the seller the right to select the point which best suits his purpose.

#### Customs clearance

8. It is normally desirable that customs clearance is arranged by the party domiciled in the country where such clearance

should take place or at least by somebody acting there on his behalf. Thus, the exporter should normally clear the goods for export, while the importer should clear the goods for import. However, under some trade terms, the buyer might undertake to clear the goods for export in the seller's country (EXW, FAS) and, in other terms, the seller might undertake to clear the goods for import into the buyer's country (DEQ and DDP). Needless to say, in these cases the buyer and the seller respectively must assume any risk of export and import prohibition. Also they must ascertain that a customs clearance performed by, or on behalf of, a party not domiciled in the respective country is accepted by the authorities. Particular problems arise when the seller undertakes to deliver the goods into the buyer's country in places which cannot be reached until the goods have been cleared for import but where his ability to reach that place is adversely affected by the buyer's failure to fulfil his obligation to clear the goods for import (see further the comment to DDU below).

It may well be that a buyer would wish to collect the goods at the seller's premises under the term EXW or to receive the goods alongside a ship under the trade term FAS, but would like the seller to clear the goods for export. If so, the words "cleared for export" could be added after the respective trade term. Conversely, it may be that the seller is prepared to deliver the goods under the trade term DEQ or DDP, but without assuming wholly or partly the obligation to pay the duty or other taxes or official charges levied upon importation of the goods. If so, the words "duty unpaid" might be added after DEQ; or the particular taxes or charges which the seller does not wish to pay may be specifically excluded, e.g. DEQ or DDP "VAT unpaid".

It has also been observed that in many countries it is difficult for a foreign company to obtain not only the import licence, but also duty reliefs (VAT deduction, etc.). "Delivered, Duty Unpaid", can solve these problems by removing from the seller the obligation to clear the goods for import.

In some cases, however, the seller whose obligation of carriage extends to the buyer's premises in the country of import, wants to carry out customs formalities, without paying the duties. If so, the DDU term should be added with words to that effect such as "DDU, cleared". Corresponding additions may be used with other "D"-terms, e.g. "DDP, VAT unpaid", "DEQ, duty unpaid".

#### Packaging

9. In most cases, the parties would know beforehand which packaging is required for the safe carriage of the goods to the destination. However, since the seller's obligation to pack the goods may well vary according to the type and duration of the transport envisaged, it has been felt necessary to stipulate that the seller is obliged to pack the goods in such a manner as is required for the transport, but only to the extent that the circumstances relating to the transport are made known to him before the contract of sale is concluded (cf. Articles 35.1 and 35.2.b. of the 1980 United Nations Convention on Contracts for the International Sale of Goods where the goods, including packaging, must be "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement").

#### Inspection of goods

10. In many cases, the buyer may be well advised to arrange for inspection of the goods before or at the time they are

handed over by the seller for carriage (so-called pre-shipment inspection or PSI). Unless the contract stipulates otherwise, the buyer would himself have to pay the cost for such inspection which is arranged in his own interest. However, if the inspection has been made in order to enable the seller to comply with any mandatory rules applicable to the export of the goods in his own country he would have to pay for that inspection.

#### Free carrier ... named place (FCA)

11. As has been said, the FCA-term could be used whenever the seller should fulfil his obligation by handing over the goods to a carrier named by the buyer. It is expected that this term will also be used for maritime transport in all cases where the cargo is not handed to the ship in the traditional method over the ship's rail. Needless to say, the traditional FOB-term is inappropriate where the seller is called upon to hand over the goods to a cargo terminal before the ship arrives, since he would then have to bear the risks and costs after the time when he has no possibility to control the goods or to give instructions with respect to their custody.

It should be stressed that under the "F"-terms, the seller should hand over the goods for carriage as instructed by the buyer, since the buyer would make the contract of carriage and name the carrier. Thus, it is not necessary to spell out in the trade term precisely how the goods should be handed over by the seller to the carrier. Nevertheless, in order to make it possible for traders to use FCA as an "overriding" "F"-term, explanations are given with respect to the customary modalities of delivery for the different modes of transport.

In the same manner, it may well be superfluous to introduce a definition of "carrier", since it is for the buyer to instruct the seller to whom the goods should be delivered for carriage. However, since the carrier and the document of transport are of great importance to traders, the preamble to the FCA-term contains a definition of "carrier". In this context, it should be noted that the term "carrier" not only refers to an enterprise actually performing the carriage but it also includes an enterprise merely having undertaken to perform or to procure the performance of the carriage as long as such enterprise assumes liability as a carrier for the carriage. In other words, the term "carrier" comprises performing as well as contracting carriers. Since the position in this respect of the freight forwarder varies from country to country and according to practices in the freight forwarding industry, the preamble contains a reminder that the seller must, of course, follow the buyer's instructions to deliver the goods to a freight forwarder even if the freight forwarder would have refused to accept carrier liability and thus fall outside the definition of "carrier".

#### The "C"-terms (CFR, CIF, CPT and CIP)

12. Under the "C"-terms, the seller must contract for carriage on usual terms at his own expense. Therefore, a point up to which he would have to pay transportation costs must necessarily be indicated after the respective "C"-term. Under the CIF and CIP terms the seller also has to take out insurance and bear the insurance cost.

Since the point for the division of costs refers to the country of destination, the "C"-terms are frequently mistakenly believed to be arrival contracts, whereby the seller is not relieved from any risks or costs until the goods have actually arrived at the agreed point. However, it must be stressed over and over again that the "C"-terms are of the same nature as

the "F"-terms in that the seller fulfils the contract in the country of shipment or dispatch. Thus, the contracts of sale under the "C"-terms, like the contracts under the "F"-terms, fall under the category of shipment contracts.

While the seller would have to pay the normal transportation cost for the carriage of the goods by a usual route and in a customary manner to the agreed place of destination, the risk for loss of or damage to the goods, as well as additional costs resulting from events occurring after the goods having been handed over for carriage, fall upon the buyer. Hence, the "C"-terms as distinguished from all other terms contain two "critical" points, one for the division of costs and another one for the division of risks. For this reason, the greatest caution must be observed when adding obligations of the seller to the "C"-terms referring to a time after the aforementioned "critical" point for the division of risk. It is the very essence of the "C"-terms to relieve the seller from any further risk and cost after he has duly fulfilled his contract by contracting for carriage and handing over the goods to the carrier and by providing for insurance under the CIF- and CIP-terms.

It should also be possible for the seller to agree with the buyer to collect payment under a documentary credit by presenting the agreed shipping documents to the bank. It would be quite contrary to this common method of payment in international trade if the seller were to have to bear further risks and costs after the moment when payment had been made under documentary credits or otherwise upon shipment and dispatch of the goods. Needless to say, however, the seller would have to pay every cost which is due to the carrier irrespective of whether freight should be pre-paid upon shipment or is payable at destination (freight collect), except such additional costs which may result from events occurring subsequent to shipment and dispatch.

If it is customary to procure several contracts of carriage involving transshipment of the goods at intermediate places in order to reach the agreed destination, the seller would have to pay all these costs, including any costs when the goods are transhipped from one means of conveyance to the other. If, however, the carrier exercised his rights under a transshipment—or similar clause—in order to avoid unexpected hindrances (such as ice, congestion, labour disturbances, government orders, war or warlike operations) then any additional cost resulting therefrom would be for the account of the buyer.

13. It happens quite often that the parties wish to clarify to which extent the seller should procure a contract of carriage including the costs of discharge. Since such costs are normally covered by the freight when the goods are carried by regular shipping lines, the contract of sale would frequently stipulate that the goods would have to be so carried or at least that they should be carried under "liner terms". In other cases, the word "landed" is added after CFR or CIF. Nevertheless, it is advisable not to use abbreviations added to the "C"-terms unless, in the relevant trade, the meaning of the abbreviations is clearly understood and accepted by the contracting parties or under any applicable law or custom of the trade. In any event, the seller should not—and indeed could not—without changing the very nature of the "C"-terms undertake any obligation with respect to the arrival of the goods at destination, since the risk for any delay during the carriage is borne by the buyer. Thus, any obligation with respect to time must necessarily refer to the place of shipment or dispatch, e.g. "shipment (dispatch) not later than ...". An agreement e.g. "CFR Hamburg not later than ..." is really a misnomer and thus open to different possible interpretations. The parties could be taken to have meant either that the goods must actually arrive at Hamburg at the specified date, in

which case the contract is not a shipment contract but an arrival contract or, alternatively, that the seller must ship the goods at such a time that they would normally arrive at Hamburg before the specified date unless the carriage would have been delayed because of unforeseen events.

14. It happens in commodity trades that goods are bought while they are carried at sea and that, in such cases, the word "afloat" is added after the trade term. Since the risk for loss of or damage to the goods would then, under the CFR- and CIF-terms, have passed from the seller to the buyer, difficulties of interpretation might arise. One possibility would be to maintain the ordinary meaning of the CFR- and CIF-terms with respect to the division of risk between seller and buyer which would mean that the buyer might have to assume risks which have already occurred at the time when the contract of sale has entered into force. The other possibility would be to let the passing of the risk coincide with the time when the contract of sale is concluded. The former possibility might well be practical, since it is usually impossible to ascertain the condition of the goods while they are being carried. For this reason the 1980 UN Convention on Contracts for the International Sale of Goods Article 68 stipulates that "if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage". There is, however, an exception to this rule when "the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer". Thus, the interpretation of a CFR- or CIF-term with the addition of the word "afloat" will depend upon the law applicable to the contract of sale. The parties are advised to ascertain the applicable law and any solution which might follow therefrom. In case of doubt, the parties are advised to clarify the matter in their contract.

#### "Incoterms" and the Contract of Carriage

15. It should be stressed that Incoterms only relate to trade terms used in the contract of sale and thus do not deal with terms—sometimes of the same or similar wording—which may be used in contracts of carriage, particularly as terms of various charterparties. Charterparty terms are usually more specific with respect to costs of loading and discharge and the time available for these operations (so-called "demurrage"-provisions). Parties to contracts of sale are advised to consider this problem by specific stipulations in their contracts of sale so that it is made clear as exactly as possible how much time would be available for the seller to load the goods on a ship or other means of conveyance provided by the buyer and for the buyer to receive the goods from the carrier at destination and, further, to specify to which extent the seller would have to bear the risk and cost of loading operations under the "F"-terms and discharging operations under the "C"-terms. The mere fact that the seller might have procured a contract of carriage, e.g. under the charterparty term "free out" whereby the carrier in the contract of carriage would be relieved from the discharging operations, does not necessarily mean that the risk and cost for such operations would fall upon the buyer under the contract of sale, since it might follow from the stipulations of the latter contract, or the custom of the port, that the contract of carriage procured by the seller should have included the discharging operations.

#### The "on board requirement" under FOB, CFR and CIF

16. The contract of carriage would determine the obligations of the shipper or the sender with respect to handing over the

goods for carriage to the carrier. It should be noted that FOB, CFR and CIF all retain the traditional practice to deliver the goods on board the vessel. While, traditionally, the point for delivery of the goods according to the contract of sale coincided with the point for handing over the goods for carriage, contemporary transportation techniques create a considerable problem of "synchronisation" between the contract of carriage and the contract of sale. Nowadays goods are usually delivered by the seller to the carrier before the ship has arrived in the seaport. In such cases, merchants are advised to use such "F"- or "C"-terms which do not attach the handing over of the goods for carriage to shipment on board, namely FCA, CPT or CIP instead of FOB, CFR and CIF.

#### The "D"-terms (DAF, DES, DEQ, DDU and DDP)

17. As has been said, the "D"-terms are different in nature from the "C"-terms, since the seller according to the "D"-terms is responsible for the arrival of the goods at the agreed place or point of destination. The seller must bear all risks and costs in bringing the goods thereto. Hence, the "D"-terms signify arrival contracts, while the "C"-terms evidence shipment contracts.

The "D"-terms fall into two separate categories. Under DAF, DES and DDU the seller does not have to deliver the goods cleared for import, while under DEQ and DDP he would have to do so. Since DAF is frequently used in railway traffic, where it is practical to obtain a through document from the railway covering the entire transport to the final destination and to arrange insurance for the same period, DAF contains a stipulation in this respect in A.8. It should be stressed, however, that the seller's duty to assist the buyer in obtaining such a through document of transport is done at the buyer's risk and expense. Similarly, any costs of insurance relating to the time subsequent to the seller's delivery of the goods at the frontier would be for the account of the buyer.

The term DDU has been added in the present 1990 version of Incoterms. The term fulfils an important function whenever the seller is prepared to deliver the goods in the country of destination without clearing the goods for import and paying the duty. Whenever clearance for import does not present any problem—such as within the European Common Market—the term may be quite desirable and appropriate. However, in countries where import clearance may be difficult and time consuming, it may be risky for the seller to undertake an obligation to deliver the goods beyond the customs clearance point. Although, according to DDU B.5. and B.6., the buyer would have to bear the additional risks and costs which might follow from his failure to fulfil his obligations to clear the goods for import, the seller is advised not to use the term DDU in countries where difficulties might be expected in clearing the goods for import.

#### The bill of lading and EDI procedures

18. Traditionally, the on-board bill of lading has been the only acceptable document to be presented by the seller under the terms CFR and CIF. The bill of lading fulfils three important functions, namely:

- proof of delivery of the goods on board the vessel;
- evidence of the contract of carriage;
- a means of transferring rights to the goods in transit by the transfer of the paper document to another party.

Transport documents other than the bill of lading would fulfil the two first mentioned functions, but would not control the delivery of the goods at destination or enable a buyer to sell the goods in transit by surrendering the paper document to his buyer. Instead, other transport documents would name the party entitled to receive the goods at destination. The fact that the possession of the bill of lading is required in order to obtain the goods from the carrier at destination makes it particularly difficult to replace by EDI-procedures.

Further, it is customary to issue bills of lading in several originals but it is, of course, of vital importance for a buyer or a bank acting upon his instructions in paying the seller to ensure that all originals are surrendered by the seller (so-called "full set"). This is also a requirement under the ICC Rules for Documentary Credits (the so-called Uniform Customs and Practice, "UCP"; ICC Publication 400).

The transport document must evidence not only delivery of the goods to the carrier but also that the goods, as far as could be ascertained by the carrier, were received in good order and condition. Any notation on the transport document which would indicate that the goods had not been in such condition would make the document "unclean" and thus make it unacceptable under UCP (Art. 18; see also ICC Publication 473). In spite of the particular legal nature of the bill of lading it is expected that it will be replaced by EDI procedures in the near future. The 1990 version of Incoterms has taken this expected development into proper account.

#### Non-negotiable transport documents instead of bills of lading

19. In recent years, a considerable simplification of documentary practices has been achieved. Bills of lading are frequently replaced by non-negotiable documents similar to those which are used for other modes of transport than carriage by sea. These documents are called "sea waybills", "liner waybills", "freight receipts", or variants of such expressions. These non-negotiable documents are quite satisfactory to use except where the buyer wishes to sell the goods in transit by surrendering a paper document to the new buyer. In order to make this possible, the obligation of the seller to provide a bill of lading under CFR and CIF must necessarily be retained. However, when the contracting parties know that the buyer does not contemplate selling the goods in transit, they may specifically agree to relieve the seller from the obligation to provide a bill of lading, or, alternatively, they may use CPT and CIP where there is no requirement to provide a bill of lading.

#### MODE OF TRANSPORT AND THE APPROPRIATE INCOTERM 1990

Any Mode of Transport including multimodal	EXW	Ex Works (... named place)
	FCA	Free Carrier (... named place)
	CPT	Carriage Paid To (... named place of destination)
	CIP	Carriage and Insurance Paid To (... named place of destination)
	DAF	Delivered At Frontier (... named place)
	DDU	Delivered Duty Unpaid (... named place of destination)
	DDP	Delivered Duty Paid (... named place of destination)
Air Transport	FCA	Free Carrier (... named place)

Rail Transport	FCA	Free Carrier (... named place)
Sea and Inland Waterway Transport	FOB	Free On Board (... named port of shipment)
	CFR	Cost and Freight (... named port of destination)
	CIF	Cost, Insurance and Freight (... named port of destination)
	DES	Delivered Ex Ship (... named port of destination)
	DEQ	Delivered Ex Quay (... named port of destination)

#### The right to give instructions to the carrier

20. A buyer paying for the goods under a "C"-term should ensure that the seller upon payment is prevented from disposing of the goods by new instructions to the carrier. Some transport documents used for particular modes of transport (air, road or rail) offer the contracting parties a possibility to estop the seller from giving such new instructions to the carrier by providing the buyer with a particular original or duplicate of the waybill. These waybills will have a "no-disposal" clause. However, the documents used instead of bills of lading for maritime carriage do not normally contain such an "estoppel" function. Work is in progress within the Comité Maritime International to remedy this shortcoming of the above-mentioned documents by introducing "Uniform Rules for Sea Waybills". However, until this work has materialised, and been followed through in practice, the buyer should avoid paying against these non-negotiable documents whenever he has any reason to mistrust his seller.

#### Passing of risks and costs relating to the goods

21. The risk for loss of or damage to the goods, as well as the obligation to bear the costs relating to the goods, passes from the seller to the buyer when the seller has fulfilled his obligation to deliver the goods. Since the buyer should not be given the possibility to delay the passing of the risks and costs, all terms stipulate that the passing of risks and costs may occur even before delivery, if the buyer does not take delivery as agreed or fails to give such instructions (with respect to time for shipment and/or place for delivery) as the seller may require in order to fulfil his obligation to deliver the goods. It is a requirement for such premature passing of risk and costs that the goods have been identified as intended for the buyer or, as is stipulated in the terms, set aside for him (appropriation). This requirement is particularly important under EXW, since under all other terms the goods would normally have been identified as intended for the buyer when measures have been taken for their shipment or dispatch ("F"- and "C"-terms) or their delivery at destination ("D"-terms). In exceptional cases, however, the goods may have been sent from the seller in bulk without identification of the quantity for each buyer and, if so, passing of risk and cost does not occur before the goods have been appropriated as aforesaid (cf. also Article 69.3 of the 1980 UN Convention on the International Sale of Goods).

#### Reference to Incoterms

22. Merchants wishing to use these rules should now specify that their contracts will be governed by "Incoterms 1990".

### ICC Arbitration

Contracting parties that wish to have the possibility of resorting to ICC Arbitration in the event of a dispute with their contracting party should specifically and clearly agree upon ICC Arbitration in their contract or, in the event no single contractual document exists, in the exchange of correspondence which constitutes the agreement between them. The fact of incorporating one or more Incoterms in a

contract or the related correspondence does NOT by itself constitute an agreement to have resort to ICC Arbitration.

The following standard arbitration clause is recommended by the ICC:

"All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

### Ex Works (... named place) EXW

"Ex works" means that the seller fulfils his obligation to deliver when he has made the goods available at his premises (i.e. works, factory, warehouse, etc.) to the buyer. In particular, he is not responsible for loading the goods on the vehicle provided by the buyer or for clearing the goods for export, unless otherwise agreed. The buyer bears all costs and risks involved in taking the goods from the seller's premises to the desired destination. This term thus represents the minimum obligation for the seller. This term should not be used when the buyer cannot carry out directly or indirectly the export formalities. In such circumstances, the FCA term should be used.

#### A. THE SELLER MUST

##### A.1. Provision of goods in conformity with the contract

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

##### A.2. Licences, authorisations and formalities

Render the buyer, at the latter's request, risk and expense, every assistance in obtaining any export licence or other official authorisation necessary for the exportation of the goods.

##### A.3. Contract of carriage and insurance

###### (a) Contract of carriage

No obligation.

###### (b) Contract of insurance

No obligation.

##### A.4. Delivery

Place the goods at the disposal of the buyer at the named place of delivery on the date or within the period stipulated or, if no such place or time is stipulated, at the usual place and time for delivery of such goods.

##### A.5. Transfer of risks

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been placed at the disposal of the buyer in accordance with A.4.

#### B. THE BUYER MUST

##### B.1. Payment of the price

Pay the price as provided in the contract of sale.

##### B.2. Licences, authorisations and formalities

Obtain at his own risk and expense any export and import licence or other official authorisation and carry out all customs formalities for the exportation and importation of the goods and, where necessary, for their transit through another country.

##### B.3. Contract of carriage

No obligation.

##### B.4. Taking delivery

Take delivery of the goods as soon as they have been placed at his disposal in accordance with A.4.

##### B.5. Transfer of risks

Bear all risks of loss of or damage to the goods from the time they have been placed at his disposal in accordance with A.4.

Should he fail to give notice in accordance with B.7., bear all risks of loss of or damage to the goods from the agreed date or the expiry date of any period fixed for taking delivery provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods.

#### **A.6. Division of costs**

Subject to the provisions of B.6., pay all costs relating to the goods until such time as they have been placed at the disposal of the buyer in accordance with A.4.

#### **B.6. Division of costs**

Pay all costs relating to the goods from the time they have been placed at his disposal in accordance with A.4.

Pay any additional costs incurred by failing either to take delivery of the goods when they have been placed at his disposal, or to give appropriate notice in accordance with B.7. provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon exportation and importation of the goods and, where necessary, for their transit through another country.

Reimburse all costs and charges incurred by the seller in rendering assistance in accordance with A.2.

#### **A.7. Notice to the buyer**

Give the buyer sufficient notice as to when and where the goods will be placed at his disposal.

#### **B.7. Notice to the seller**

Whenever he is entitled to determine the time within a stipulated period and/or the place of taking delivery, give the seller sufficient notice thereof.

#### **A.8. Proof of delivery, transport document or equivalent electronic message**

No obligation.

#### **B.8. Proof of delivery, transport document or equivalent electronic message**

Provide the seller with appropriate evidence of having taken delivery.

#### **A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of placing the goods at the disposal of the buyer.

Provide at his own expense packaging (unless it is usual for the particular trade to make the goods of the contract description available unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (e.g. modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately.

#### **B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection (including inspection mandated by the authorities of the country of exportation).

#### **A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages issued or transmitted in the country of delivery and/or of origin which the buyer may require for the exportation and/or importation of the goods and, where necessary, for their transit through another country.

Provide the buyer, upon request, with the necessary information for procuring insurance.

#### **B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

**Free Carrier (... named place) FCA**

"Free Carrier" means that the seller fulfils his obligation to deliver when he has handed over the goods, cleared for export, into the charge of the carrier named by the buyer at the named place or point. If no precise point is indicated by the buyer, the seller may choose within the place or range stipulated where the carrier shall take the goods into his charge. When, according to commercial practice, the seller's assistance is required in making the contract with the carrier (such as in rail or air transport) the seller may act at the buyer's risk and expense.

This term may be used for any mode of transport, including multimodal transport.

"Carrier" means any person who, in a contract of carriage, undertakes to perform or to procure the performance of carriage by rail, road, sea, air, inland waterway or by a combination of such modes. If the buyer instructs the seller to deliver the cargo to a person, e.g. a freight forwarder who is not a "carrier", the seller is deemed to have fulfilled his obligation to deliver the goods when they are in the custody of that person.

"Transport terminal" means a railway terminal, a freight station, a container terminal or yard, a multi-purpose cargo terminal or any similar receiving point.

"Container" includes any equipment used to unitise cargo, e.g. all types of containers and/or flats, whether ISO accepted or not, trailers, swap bodies, ro-ro equipment, igloos, and applies to all modes of transport.

**A. THE SELLER MUST****A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

**A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods.

**A.3. Contract of carriage and insurance***(a) Contract of carriage*

No obligation. However, if requested by the buyer or if it is commercial practice and the buyer does not give an instruction to the contrary in due time, the seller may contract for carriage on usual terms at the buyer's risk and expense. The seller may decline to make the contract and, if he does, shall promptly notify the buyer accordingly.

*(b) Contract of insurance*

No obligation.

**A.4. Delivery**

Deliver the goods into the custody of the carrier or another person (e.g. a freight forwarder) named by the buyer, or chosen by the seller in accordance with A.3.(a), at the named place or point (e.g. transport terminal or other receiving point) on the date or within the period agreed for delivery and in the manner agreed or customary at such point. If no specific point has been agreed, and if there are several points available, the seller may select the point at the place of delivery which best suits his purpose. Failing precise instructions from the buyer, the seller may deliver the goods to the

**B. THE BUYER MUST****B.1. Payment of the price**

Pay the price as provided in the contract of sale.

**B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities for the importation of the goods and, where necessary, for their transit through another country.

**B.3. Contract of carriage**

Contract at his own expense for the carriage of the goods from the named place, except as provided for in A.3.(a).

**B.4. Taking delivery**

Take delivery of the goods in accordance with A.4.



carrier in such a manner as the transport mode of that carrier and the quantity and/or nature of the goods may require.

Delivery to the carrier is completed:

(i) In the case of rail transport when the goods constitute a wagon load (or a container load carried by rail) the seller has to load the wagon or container in the appropriate manner. Delivery is completed when the loaded wagon or container is taken over by the railway or by another person acting on its behalf.

When the goods do not constitute a wagon or container load, delivery is completed when the seller has handed over the goods at the railway receiving point or loaded them into a vehicle provided by the railway.

(ii) In the case of road transport when loading takes place at the seller's premises, delivery is completed when the goods have been loaded on the vehicle provided by the buyer.

When the goods are delivered to the carrier's premises, delivery is completed when they have been handed over to the road carrier or to another person acting on his behalf.

(iii) In the case of transport by inland waterway when loading takes place at the seller's premises, delivery is completed when the goods have been loaded on the carrying vessel provided by the buyer.

When the goods are delivered to the carrier's premises, delivery is completed when they have been handed over to the inland waterway carrier or to another person acting on his behalf.

(iv) In the case of sea transport when the goods constitute a full container load (FCL), delivery is completed when the loaded container is taken over by the sea carrier. When the container has been carried to an operator of a transport terminal acting on behalf of the carrier, the goods shall be deemed to have been taken over when the container has entered into the premises of that terminal.

When the goods are less than a container load (LCL), or are not to be containerised, the seller has to carry them to the transport terminal. Delivery is completed when the goods have been handed over to the sea carrier or to another person acting on his behalf.

(v) In the case of air transport, delivery is completed when the goods have been handed over to the air carrier or to another person acting on his behalf.

(vi) In the case of unnamed transport, delivery is completed when the goods have been handed over to the carrier or to another person acting on his behalf.

(vii) In the case of multimodal transport, delivery is completed when the goods have been handed over as specified in (i)-(vi), as the case may be.

#### A.5. Transfer of risks

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

#### B.5. Transfer of risks

Bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A.4.

Should he fail to give notice in accordance with B.7., or should the carrier named by him fail to take the goods into his charge, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of any period stipulated for delivery, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**A.6. Division of costs**

Subject to the provisions of B.6.

— pay all costs relating to the goods until such time as they have been delivered to the carrier in accordance with A.4.;

— pay the costs of customs formalities as well as all duties, taxes, and other official charges payable upon exportation.

**A.7. Notice to the buyer**

Give the buyer sufficient notice that the goods have been delivered into the custody of the carrier. Should the carrier fail to take the goods into his charge at the time agreed, the seller must notify the buyer accordingly.

**A.8. Proof of delivery, transport document or equivalent electronic message**

Provide the buyer at the seller's expense, if customary, with the usual document in proof of delivery of the goods in accordance with A.4.

Unless the document referred to in the preceding paragraph is the transport document, render the buyer at the latter's request, risk and expense, every assistance in obtaining a transport document for the contract of carriage (for example, a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, an air waybill, a railway consignment note, a road consignment note, or a multimodal transport document).

When the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

**A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods to the carrier.

Provide at his own expense packaging (unless it is usual for the particular trade to send the goods of the contract description unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (e.g. modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately.

**A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A.8.)

**B.6. Division of costs**

Pay all costs relating to the goods from the time when they have been delivered in accordance with A.4.

Pay any additional costs incurred, either because he fails to name the carrier, or the carrier named by him fails to take the goods into his charge at the agreed time, or because he has failed to give appropriate notice in accordance with B.7., provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods and, where necessary, for their transit through another country.

**B.7. Notice to the seller**

Give the seller sufficient notice of the name of the carrier and, where necessary, specify the mode of transport, as well as the date or period for delivering the goods to him and, as the case may be, of the point within the place where the goods should be delivered to the carrier.

**B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the proof of delivery in accordance with A.8.

**B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

**B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his

issued or transmitted in the country of delivery and/or of origin which the buyer may require for the importation of the goods and, where necessary, for their transit through another country.

Provide the buyer, upon request, with the necessary information for procuring insurance.

assistance in accordance therewith and in contracting for carriage in accordance with A.3.(a).

Give the seller appropriate instructions whenever the seller's assistance in contracting for carriage is required in accordance with A.3.(a).

### **Free Alongside Ship (... named port of shipment) FAS**

"Free Alongside Ship" means that the seller fulfils his obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that moment.

The FAS term requires the buyer to clear the goods for export. It should not be used when the buyer cannot carry out directly or indirectly the export formalities.

This term can only be used for sea or inland waterway transport.

#### **A. THE SELLER MUST**

#### **B. THE BUYER MUST**

##### **A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

##### **B.1. Payment of the price**

Pay the price as provided in the contract of sale.

##### **A.2. Licences, authorisations and formalities**

Render the buyer, at the latter's request, risk and expense, every assistance in obtaining any export licence or other official authorisation necessary for the exportation of the goods.

##### **B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export and import licence or other official authorisation and carry out all customs formalities for the exportation and importation of the goods and, where necessary, for their transit through another country.

##### **A.3. Contract of carriage and insurance**

###### *(a) Contract of carriage*

No obligation.

##### **B.3. Contract of carriage**

Contract at his own expense for the carriage of the goods from the named port of shipment.

###### *(b) Contract of insurance*

No obligation.

##### **A.4. Delivery**

Deliver the goods alongside the named vessel at the loading place named by the buyer at the named port of shipment on the date or within the period stipulated and in the manner customary at the port.

##### **B.4. Taking delivery**

Take delivery of the goods in accordance with A.4.

##### **A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

##### **B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A.4.

Should he fail to fulfil his obligations in accordance with B.2., bear all additional risks of loss of or damage to the goods incurred thereby and should he fail to give notice in accordance with B.7., or should the vessel named by him fail

to arrive on time, or be unable to take the goods, or close for cargo earlier than the stipulated time, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period stipulated for delivery, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

#### **A.6. Division of costs**

Subject to the provisions of B.6., pay all costs relating to the goods until such time as they have been delivered in accordance with A.4.

#### **B.6. Division of costs**

Pay all costs relating to the goods from the time they have been delivered in accordance with A.4.

Pay any additional costs incurred, either because the vessel named by him has failed to arrive on time, or will be unable to take the goods, or will close for cargo earlier than the stipulated time, or because the buyer has failed to fulfil his obligations in accordance with B.2., or to give appropriate notice in accordance with B.7., provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon exportation and importation of the goods and, where necessary, for their transit through another country.

Pay all costs and charges incurred by the seller in rendering assistance in accordance with A.2.

#### **A.7. Notice to the buyer**

Give the buyer sufficient notice that the goods have been delivered alongside the named vessel.

#### **B.7. Notice to the seller**

Give the seller sufficient notice of the vessel name, loading place and required delivery time.

#### **A.8. Proof of delivery, transport document or equivalent electronic message**

Provide the buyer at the seller's expense with the usual document in proof of delivery of the goods in accordance with A.4.

Unless the document referred to in the preceding paragraph is the transport document, render the buyer at the latter's request, risk and expense, every assistance in obtaining a transport document (for example, a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document).

When the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraphs may be replaced by an equivalent electronic data interchange (EDI) message.

#### **B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the proof of delivery in accordance with A.8.

#### **A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of placing the goods at the disposal of the buyer.

Provide at his own expense packaging (unless it is usual for the particular trade to ship the goods of the contract description unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (e.g. modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately.

#### **B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection (including inspection mandated by the authorities of the country of exportation).

**A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A.8.) issued or transmitted in the country of shipment and/or of origin which the buyer may require for the exportation and/or importation of the goods and, where necessary, for their transit through another country.

Provide the buyer, upon request, with the necessary information for procuring insurance.

**B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

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**Free on board (... named port of shipment) FOB**

"Free on Board" means that the seller fulfils his obligation to deliver when the goods have passed over the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point.

The FOB term requires the seller to clear the goods for export.

This term can only be used for sea or inland waterway transport. When the ship's rail serves no practical purpose, such as in the case of roll-on/roll-off or container traffic, the FCA term is more appropriate to use.

**A. THE SELLER MUST****A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

**A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods.

**A.3. Contract of carriage and insurance***(a) Contract of carriage*

No obligation.

*(b) Contract of insurance*

No obligation.

**A.4. Delivery**

Deliver the goods on board the vessel named by the buyer at the named port of shipment on the date or within the period stipulated and in the manner customary at the port.

**A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the named port of shipment.

**B. THE BUYER MUST****B.1. Payment of the price**

Pay the price as provided in the contract of sale.

**B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities for the importation of the goods and, where necessary, for their transit through another country.

**B.3. Contract of carriage**

Contract at his own expense for the carriage of the goods from the named port of shipment.

**B.4. Taking delivery**

Take delivery of the goods in accordance with A.4.

**B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have passed the ship's rail at the named port of shipment.

Should he fail to give notice in accordance with B.7., or should the vessel named by him fail to arrive on time, or be unable to take the goods, or close for cargo earlier than the stipulated time, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period stipulated for delivery, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

#### A.6. Division of costs

Subject to the provisions of B.6.

— pay all costs relating to the goods until such time as they have passed the ship's rail at the named port of shipment;

— pay the costs of customs formalities necessary for exportation as well as all duties, taxes and other official charges payable upon exportation.

#### B.6. Division of costs

Pay all costs relating to the goods from the time they have passed the ship's rail at the named port of shipment.

Pay any additional costs incurred, either because the vessel named by him has failed to arrive on time, or is unable to take the goods, or will close for cargo earlier than the stipulated date, or because the buyer has failed to give appropriate notice in accordance with B.7., provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods and, where necessary, for their transit through another country.

#### A.7. Notice to the buyer

Give the buyer sufficient notice that the goods have been delivered on board.

#### B.7. Notice to the seller

Give the seller sufficient notice of the vessel name, loading point and required delivery time.

#### A.8. Proof of delivery, transport document or equivalent electronic message

Provide the buyer at the seller's expense with the usual document in proof of delivery in accordance with A.4.

Unless the document referred to in the preceding paragraph is the transport document, render the buyer, at the latter's request, risk and expense, every assistance in obtaining a transport document for the contract of carriage (for example, a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, or a multimodal transport document).

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

#### B.8. Proof of delivery, transport document or equivalent electronic message

Accept the proof of delivery in accordance with A.8.

#### A.9. Checking—packaging—marking

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to ship the goods of the contract description unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (e.g. modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately.

#### B.9. Inspection of goods

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of export.

**A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A.8.) issued or transmitted in the country of shipment and/or of origin which the buyer may require for the importation of the goods and, where necessary, for their transit through another country.

Provide the buyer, upon request, with the necessary information for procuring insurance.

**B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

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**Cost and Freight (... named port of destination) CFR**

"Cost and Freight" means that the seller must pay the costs and freight necessary to bring the goods to the named port of destination but the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered on board the vessel is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment.

The CFR term requires the seller to clear the goods for export.

This term can only be used for sea and inland waterway transport. When the ship's rail serves no practical purpose, such as in the case of roll-on/roll-off or container traffic, the CPT term is more appropriate to use.

**A. THE SELLER MUST****A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

**A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods.

**A.3. Contract of carriage and insurance***(a) Contract of carriage*

Contract on usual terms at his own expense for the carriage of the goods to the named port of destination by the usual route in a seagoing vessel (or inland waterway vessel as appropriate) of the type normally used for the transport of goods of the contract description.

*(b) Contract of insurance*

No obligation.

**A.4. Delivery**

Deliver the goods on board the vessel at the port of shipment on the date or within the period stipulated.

**B. THE BUYER MUST****B.1. Payment of the price**

Pay the price as provided in the contract of sale.

**B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities for the importation of the goods and, where necessary, for their transit through another country.

**B.3. Contract of carriage**

No obligation.

**B.4. Taking delivery**

Accept delivery of the goods when they have been delivered in accordance with A.4. and receive them from the carrier at the named port of destination.

**A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the port of shipment.

**A.6. Division of costs**

Subject to the provisions of B.6.

— pay all costs relating to the goods until they have been delivered in accordance with A.4. as well as the freight and all other costs resulting from A.3.(a), including costs of loading the goods on board and any charges for unloading at the port of discharge which may be levied by regular shipping lines when contracting for carriage;

— pay the costs of customs formalities necessary for exportation as well as all duties, taxes and other official charges payable upon exportation.

**A.7. Notice to the buyer**

Give the buyer sufficient notice that the goods have been delivered on board the vessel as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take the goods.

**A.8. Proof of delivery, transport document or equivalent electronic message**

Unless otherwise agreed, at his own expense provide the buyer without delay with the usual transport document for the agreed port of destination.

This document (for example, a negotiable bill of lading, a non-negotiable sea waybill or an inland waterway document) must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the goods from the carrier at destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer (the negotiable bill of lading) or by notification to the carrier.

When such a transport document is issued in several originals, a full set of originals must be presented to the buyer. If the transport document contains a reference to a charter party, the seller must also provide a copy of this latter document.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraphs may be replaced by an equivalent electronic data interchange (EDI) message.

**B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have passed the ship's rail at the port of shipment.

Should he fail to give notice in accordance with B.7., bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period fixed for shipment, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**B.6. Division of costs**

Subject to the provisions of A.3., pay all costs relating to the goods from the time they have been delivered in accordance with A.4. and, unless such costs and charges have been levied by regular shipping lines when contracting for carriage, pay all costs and charges relating to the goods whilst in transit until their arrival at the port of destination, as well as unloading costs including lighterage and wharfage charges.

Should he fail to give notice in accordance with B.7., pay the additional costs thereby incurred for the goods from the agreed date or the expiry date of the period fixed for shipment, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods and, where necessary, for their transit through another country.

**B.7. Notice to the seller**

Whenever he is entitled to determine the time for shipping the goods and/or the port of destination, give the seller sufficient notice thereof.

**B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the transport document in accordance with A.8. if it is in conformity with the contract.



**A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to ship the goods of the contract description unpacked) which is required for the transport of the goods arranged by him. Packaging is to be marked appropriately.

**A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A.8.) issued or transmitted in the country of shipment and/or of origin which the buyer may require for the importation of the goods and, where necessary, for their transit through another country.

Provide the buyer, upon request, with the necessary information for procuring insurance.

**B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

**B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

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**Cost, insurance and freight (... named port of destination) CIF**

"Cost, Insurance and Freight" means that the seller has the same obligations as under CFR but with the addition that he has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium.

The buyer should note that under the CIF term the seller is only required to obtain insurance on minimum coverage.

The CIF term requires the seller to clear the goods for export.

This term can only be used for sea and inland waterway transport. When the ship's rail serves no practical purposes such as in the case of roll-on/roll-off or container traffic, the CIP term is more appropriate to use.

**A. THE SELLER MUST****A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

**A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods.

**A.3. Contract of carriage and insurance***(a) Contract of carriage*

Contract on usual terms at his own expense for the carriage of the goods to the named port of destination by the usual route

**B. THE BUYER MUST****B.1. Payment of the price**

Pay the price as provided in the contract of sale.

**B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities for the importation of the goods and, where necessary, for their transit through another country.

**B.3. Contract of carriage**

No obligation.

in a seagoing vessel (or inland waterway vessel as appropriate) of the type normally used for the transport of goods of the contract description.

*(b) Contract of insurance*

Obtain at his own expense cargo insurance as agreed in the contract, that the buyer, or any other person having an insurable interest in the goods, shall be entitled to claim directly from the insurer and provide the buyer with the insurance policy or other evidence of insurance cover.

The insurance shall be contracted with underwriters or an insurance company of good repute and, failing express agreement to the contrary, be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses. The duration of insurance cover shall be in accordance with B.5. and B.4. When required by the buyer, the seller shall provide at the buyer's expense war, strikes, riots and civil commotion risk insurances if procurable. The minimum insurance shall cover the price provided in the contract plus ten per cent (i.e. 110%) and shall be provided in the currency of the contract.

**A.4. Delivery**

Deliver the goods on board the vessel at the port of shipment on the date or within the period stipulated.

**A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the port of shipment.

**A.6. Division of costs**

Subject to the provisions of B.6.

— pay all costs relating to the goods until they have been delivered in accordance with A.4., as well as the freight and all other costs resulting from A.3., including costs of loading the goods on board and any charges for unloading at the port of discharge which may be levied by regular shipping lines when contracting for carriage;

— pay the costs of customs formalities necessary for exportation as well as all duties, taxes and other official charges payable upon exportation.

**A.7. Notice to the buyer**

Give the buyer sufficient notice that the goods have been delivered on board the vessel as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take the goods.

**B.4. Taking delivery**

Accept delivery of the goods when they have been delivered in accordance with A.4. and receive them from the carrier at the named port of destination.

**B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have passed the ship's rail at the port of shipment.

Should he fail to give notice in accordance with B.7., bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period fixed for shipment, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**B.6. Division of costs**

Subject to the provisions of A.3., pay all costs relating to the goods from the time they have been delivered in accordance with A.4. and, unless such costs and charges have been levied by regular shipping lines when contracting for carriage, pay all costs and charges relating to the goods whilst in transit until their arrival at the port of destination, as well as unloading costs including lighterage and wharfage charges.

Should he fail to give notice in accordance with B.7., pay the additional costs thereby incurred for the goods from the agreed date or the expiry date of the period fixed for shipment, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods and, where necessary, for their transit through another country.

**B.7. Notice to the seller**

Whenever he is entitled to determine the time for shipping the goods and/or the port of destination, give the seller sufficient notice thereof.

**A.8. Proof of delivery, transport document or equivalent electronic message**

Unless otherwise agreed, at his own expense provide the buyer without delay with the usual transport document for the agreed port of destination.

This document (for example, a negotiable bill of lading, a non-negotiable sea waybill or an inland waterway document) must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the goods from the carrier at destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer (the negotiable bill of lading) or by notification to the carrier.

When such a transport document is issued in several originals, a full set of originals must be presented to the buyer. If the transport document contains a reference to a charter party, the seller must also provide a copy of this latter document.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraphs may be replaced by an equivalent electronic data interchange (EDI) message.

**A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to ship the goods of the contract description unpacked) which is required for the transport of the goods arranged by him. Packaging is to be marked appropriately.

**A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A.8.) issued or transmitted in the country of shipment and/or of origin which the buyer may require for the importation of the goods and, where necessary, for their transit through another country.

**B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the transport document in accordance with A.8. if it is in conformity with the contract.

**B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

**B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

Provide the seller, upon request, with the necessary information for procuring insurance.

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**Carriage paid to (... named place of destination) CPT**

"Carriage paid to..." means that the seller pays the freight for the carriage of the goods to the named destination. The risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered to the carrier is transferred from the seller to the buyer when the goods have been delivered into the custody of the carrier.

"Carrier" means any person who, in a contract of carriage, undertakes to perform or to procure the performance of carriage, by rail, road, sea, air, inland waterway or by a combination of such modes.

If subsequent carriers are used for the carriage to the agreed destination, the risk passes when the goods have been delivered to the first carrier.

The CPT term requires the seller to clear the goods for export.

This term may be used for any mode of transport including multimodal transport.

**A. THE SELLER MUST****A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

**A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods.

**A.3. Contract of carriage and insurance****(a) Contract of carriage**

Contract on usual terms at his own expense for the carriage of the goods to the agreed point at the named place of destination by a usual route and in a customary manner. If a point is not agreed or is not determined by practice, the seller may select the point at the named place of destination which best suits his purpose.

**(b) Contract of insurance**

No obligation.

**A.4. Delivery**

Deliver the goods into the custody of the carrier or, if there are subsequent carriers, to the first carrier, for transportation to the named place of destination on the date or within the period stipulated.

**A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

**A.6. Division of costs**

Subject to the provisions of B.6.

— pay all costs relating to the goods until they have been delivered in accordance with A.4., as well as the freight and all other costs resulting from A.3.(a), including costs of loading the goods and any charges for unloading at the place of destination which may be included in the freight or incurred by the seller when contracting for carriage;

— pay the costs of customs formalities necessary for exportation as well as all duties, taxes or other official charges payable upon exportation.

**B. THE BUYER MUST****B.1. Payment of the price**

Pay the price as provided in the contract of sale.

**B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities for the importation of the goods and, where necessary, for their transit through another country.

**B.3. Contract of carriage**

No obligation.

**B.4. Taking delivery**

Accept delivery of the goods when they have been delivered in accordance with A.4. and receive them from the carrier at the named place of destination.

**B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A.4.

Should he fail to give notice in accordance with B.7., bear all risks of the goods from the agreed date or the expiry date of the period fixed for delivery, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**B.6. Division of costs**

Subject to the provisions of A.3.(a), pay all costs relating to the goods from the time they have been delivered in accordance with A.4. and, unless such costs and charges have been included in the freight or incurred by the seller when contracting for carriage in accordance with A.3.(a), pay all costs and charges relating to the goods whilst in transit until their arrival at the agreed place of destination, as well as unloading costs.

Should he fail to give notice in accordance with B.7., pay the additional costs thereby incurred for the goods from the agreed date or the expiry date of the period fixed for dispatch, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods and, where necessary, for their transit through another country.

#### A.7. Notice to the buyer

Give the buyer sufficient notice that the goods have been delivered in accordance with A.4. as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take the goods.

#### B.7. Notice to the seller

Whenever he is entitled to determine the time for dispatching the goods and/or the destination, give the seller sufficient notice thereof.

#### A.8. Proof of delivery, transport document or equivalent electronic message

Provide the buyer at the seller's expense, if customary, with the usual transport document (for example a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, an air waybill, a railway consignment note, a road consignment note, or a multimodal transport document).

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

#### B.8. Proof of delivery, transport document or equivalent electronic message

Accept the transport document in accordance with A.8. if it is in conformity with the contract.

#### A.9. Checking—packaging—marking

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to send the goods of the contract description unpacked) which is required for the transport of the goods arranged by him. Packaging is to be marked appropriately.

#### B.9. Inspection of goods

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

#### A.10. Other obligations

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A.8.) issued or transmitted in the country of dispatch and/or of origin which the buyer may require for the importation of the goods and, where necessary, for their transit through another country.

Provide the buyer, upon request, with the necessary information for procuring insurance.

#### B.10. Other obligations

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

### Carriage and insurance paid to (... named place of destination) CIP

"Carriage and insurance paid to..." means that the seller has the same obligations as under CPT but with the addition that the seller has to procure cargo insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium.

The buyer should note that under the CIP term the seller is only required to obtain insurance on minimum coverage.

The CIP term requires the seller to clear the goods for export.

This term may be used for any mode of transport including multimodal transport.

**A. THE SELLER MUST****A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

**A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods.

**A.3. Contract of carriage and insurance***(a) Contract of carriage*

Contract on usual terms at his own expense for the carriage of the goods to the agreed point at the named place of destination by a usual route and in a customary manner. If a point is not agreed or is not determined by practice, the seller may select the point at the named place of destination which best suits his purpose.

*(b) Contract of insurance*

Obtain at his own expense cargo insurance as agreed in the contract, that the buyer, or any other person having an insurable interest in the goods, shall be entitled to claim directly from the insurer and provide the buyer with the insurance policy or other evidence of insurance cover.

The insurance shall be contracted with underwriters or an insurance company of good repute and, failing express agreement to the contrary, be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses. The duration of insurance cover shall be in accordance with B.5. and B.4. When required by the buyer, the seller shall provide at the buyer's expense war, strikes, riots and civil commotion risk insurances if procurable. The minimum insurance shall cover the price provided in the contract plus ten per cent (i.e. 110%) and shall be provided in the currency of the contract.

**A.4. Delivery**

Deliver the goods into the custody of the carrier or, if there are subsequent carriers, to the first carrier, for transportation to the named place of destination on the date or within the period stipulated.

**A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

**B. THE BUYER MUST****B.1. Payment of the price**

Pay the price as provided in the contract of sale.

**B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities for the importation of the goods and, where necessary, for their transit through another country.

**B.3. Contract of carriage**

No obligation.

**B.4. Taking delivery**

Accept delivery of the goods when they have been delivered in accordance with A.4. and receive them from the carrier at the named port of destination.

**B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A.4.

Should he fail to give notice in accordance with B.7., bear all risks of the goods from the agreed date or the expiry date of the period fixed for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**A.6. Division of costs**

Subject to the provisions of B.6.

— pay all costs relating to the goods until they have been delivered in accordance with A.4. as well as the freight and all other costs resulting from A.3. including costs of loading the goods and any charges for unloading at the place of destination which may be included in the freight or incurred by the seller when contracting for carriage;

— pay the costs of customs formalities necessary for exportation as well as all duties, taxes or other official charges payable upon exportation.

**A.7. Notice to the buyer**

Give the buyer sufficient notice that the goods have been delivered in accordance with A.4. as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take the goods.

**A.8. Proof of delivery, transport document or equivalent electronic message**

Provide the buyer at the seller's expense, if customary, with the usual transport document (for example, a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, an air waybill, a railway consignment note, a road consignment note or a multimodal transport document).

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

**A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to send the goods of the contract description unpacked) which is required for the transport of the goods arranged by him. Packaging is to be marked appropriately.

**A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A.8.) issued or transmitted in the country of dispatch and/or of origin, which the buyer may require for the importation of the goods and where necessary, for their transit through another country.

**B.6. Division of costs**

Subject to the provisions of A.3., pay all costs relating to the goods from the time they have been delivered in accordance with A.4. and, unless such costs and charges have been included in the freight or incurred by the seller when contracting for carriage in accordance with A.3.(a), pay all costs and charges relating to the goods whilst in transit until their arrival at the agreed place of destination, as well as unloading costs.

Should he fail to give notice in accordance with B.7., pay the additional costs thereby incurred for the goods from the agreed date or the expiry date of the period fixed for dispatch provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods and, where necessary, for their transit through another country.

**B.7. Notice to the seller**

Whenever he is entitled to determine the time for dispatching the goods and/or the destination, give the seller sufficient notice thereof.

**B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the transport document in accordance with A.8. if it is in conformity with the contract.

**B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

**B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

Provide the seller, upon request, with the necessary information for procuring insurance.

**Delivered at frontier (... named place) DAF**

"Delivered at Frontier" means that the seller fulfils his obligation to deliver when the goods have been made available, cleared for export, at the named point and place at the frontier, but before the customs border of the adjoining country. The term "frontier" may be used for any frontier including that of the country of export. Therefore, it is of vital importance that the frontier in question be defined precisely by always naming the point and place in the term.

The term is primarily intended to be used when goods are to be carried by rail or road, but it may be used for any mode of transport.

**A. THE SELLER MUST****A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

**A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export licence or other official authorisation or other document necessary for placing the goods at the buyer's disposal. Carry out all customs formalities for the exportation of the goods to the named place of delivery at the frontier and, where necessary, for their prior transit through another country.

**A.3. Contract of carriage and insurance****(a) Contract of carriage**

Contract at his own expense for the carriage of the goods by a usual route and in a customary manner to the named point at the place of delivery at the frontier (including, if necessary, for their transit through another country).

If a point at the named place of delivery at the frontier is not agreed or is not determined by practice, the seller may select the point at the named place of delivery which best suits his purpose.

**(b) Contract of insurance**

No obligation.

**A.4. Delivery**

Place the goods at the disposal of the buyer at the named place of delivery at the frontier on the date or within the period stipulated.

**A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

**B. THE BUYER MUST****B.1. Payment of the price**

Pay the price as provided in the contract of sale.

**B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities at the named point of delivery at the frontier or elsewhere for the importation of the goods and, where necessary, for their subsequent transport.

**B.3. Contract of carriage**

No obligation.

**B.4. Taking delivery**

Take delivery of the goods as soon as they have been placed at his disposal in accordance with A.4.

**B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have been placed at his disposal in accordance with A.4.

Should he fail to give notice in accordance with B.7., bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period stipulated for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.



**A.6. Division of costs**

Subject to the provisions of B.6.

— pay all costs of the goods until they have been delivered in accordance with A.4. as well as in addition to costs resulting from A.3.(a), the expenses of discharge operations (including lighterage and handling charges), if it is necessary or customary for the goods to be discharged on their arrival at the named place of delivery at the frontier, in order to place them at the buyer's disposal;

— pay the costs of customs formalities necessary for exportation as well as all duties, taxes or other official charges payable upon exportation and, where necessary, for their transit through another country prior to delivery in accordance with A.4.

**A.7. Notice to the buyer**

Give the buyer sufficient notice of the dispatch of the goods to the named place at the frontier as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take the goods.

**A.8. Proof of delivery, transport document or equivalent electronic message**

Provide the buyer at the seller's expense with the usual document or other evidence of the delivery of the goods at the named place at the frontier.

Provide the buyer at the latter's request, risk and expense, with a through document of transport normally obtained in the country of dispatch covering on usual terms the transport of the goods from the point of dispatch in that country to the place of final destination in the country of importation named by the buyer.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

**A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods at the frontier and for the subsequent transport to the extent that the circumstances (e.g. modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately.

**A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A.8.) issued or transmitted in the country of dispatch and/or origin which the buyer may require for the importation of the goods and, where necessary, for their transit through another country.

**B.6. Division of costs**

Pay all costs relating to the goods from the time they have been placed at his disposal in accordance with A.4.

Should he fail to take delivery of the goods when they have been placed at his disposal in accordance with A.4., or to give notice in accordance with B.7., bear all additional costs incurred thereby provided, however, that the goods have been appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods and, where necessary, for their subsequent transport.

**B.7. Notice to the seller**

Whenever he is entitled to determine the time within a stipulated period and/or the place of taking delivery, give the seller sufficient notice thereof.

**B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the transport document and/or other evidence of delivery in accordance with A.8.

**B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

**B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

If necessary, provide the seller at his request and the buyer's risk and expense with exchange control authorisation, permits, other documents or certified copies thereof, or with the

Provide the buyer, upon request, with the necessary information for procuring insurance.

address of the final destination of the goods in the country of importation for the purpose of obtaining the through document of transport or any other document contemplated in A.8.

### **Delivered Ex Ship (... named port of destination) DES**

"Delivered Ex Ship" means that the seller fulfils his obligation to deliver when the goods have been made available to the buyer on board the ship uncleared for import at the named port of destination. The seller has to bear the all costs and risks involved in bringing the goods to the named port of destination.

This term can only be used for sea or inland waterway transport.

#### **A. THE SELLER MUST**

##### **A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

##### **A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods and, where necessary, for their transit through another country.

##### **A.3. Contract of carriage and insurance**

###### *(a) Contract of carriage*

Contract at his own expense for the carriage of the goods by a usual route and in a customary manner to the named place at the named port of destination. If a point is not agreed or is not determined by practice, the seller may select the point at the named port of destination which best suits his purpose.

###### *(b) Contract of insurance*

No obligation.

##### **A.4. Delivery**

Place the goods at the disposal of the buyer on board the vessel at the usual unloading point in the named port of destination uncleared for import on the date or within the period stipulated, in such a way as to enable them to be removed from the vessel by unloading equipment appropriate to the nature of the goods.

##### **A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

#### **B. THE BUYER MUST**

##### **B.1. Payment of the price**

Pay the price as provided in the contract of sale.

##### **B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities necessary for the importation of the goods.

##### **B.3. Contract of carriage**

No obligation.

##### **B.4. Taking delivery**

Take delivery of the goods as soon as they are placed at his disposal in accordance with A.4.

##### **B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have been placed at his disposal in accordance with A.4.

Should he fail to give notice in accordance with B.7., bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period stipulated for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**A.6. Division of costs**

Subject to the provisions of B.6.

— in addition to costs resulting from A.3.(a), pay all costs relating to the goods until such time as they have been delivered in accordance with A.4.;

— pay the costs of customs formalities necessary for exportation as well as all duties, taxes or other official charges payable upon exportation and, where necessary, for their transit through another country prior to delivery in accordance with A.4.

**A.7. Notice to the buyer**

Give the buyer sufficient notice of the estimated time of arrival of the named vessel in accordance with A.4. as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take the goods.

**A.8. Proof of delivery, transport document or equivalent electronic message**

Provide the buyer at the seller's expense with the delivery order and/or the usual transport document (for example a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, or a multimodal transport document) to enable the buyer to take delivery of the goods.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

**A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods. Packaging is to be marked appropriately.

**A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A.8.) issued or transmitted in the country of dispatch and/or of origin which the buyer may require for the importation of the goods.

Provide the buyer, upon request, with the necessary information for procuring insurance.

**B.6. Division of costs**

Pay all costs relating to the goods including unloading from the time they have been placed at his disposal in accordance with A.4.

Should he fail to take delivery of the goods when they have been placed at his disposal in accordance with A.4., or to give notice in accordance with B.7., bear all additional costs incurred thereby provided, however, that the goods have been appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods.

**B.7. Notice to the seller**

Whenever he is entitled to determine the time within a stipulated period and/or the place of taking delivery, give the seller sufficient notice thereof.

**B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the delivery order or the transport document in accordance with A.8.

**B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

**B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10. and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

**Delivered Ex Quay (duty paid) (... named port of destination) DEQ**

"Delivered Ex Quay (duty paid)" means that the seller fulfils his obligation to deliver when he has made the goods available to the buyer on the quay (wharf) at the named port of destination, cleared for importation. The seller has to bear all risks and costs including duties, taxes and other charges of delivering the goods thereto.

This term should not be used if the seller is unable directly or indirectly to obtain the import licence.

If the parties wish the buyer to clear the goods for importation and pay the duty the words "duty unpaid" should be used instead of "duty paid".

If the parties wish to exclude from the seller's obligations some of the costs payable upon importation of the goods (such as value added tax (VAT)), this should be made clear by adding words to this effect: "Delivered ex quay, VAT unpaid (... named port of destination)".

This term can only be used for sea or inland waterway transport.

**A. THE SELLER MUST****B. THE BUYER MUST****A.1. Provision of goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

**B.1. Payment of the price**

Pay the price as provided in the contract of sale.

**A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export and import licence or other official authorisation and carry out all customs formalities for the exportation and importation of the goods and, where necessary, for their transit through another country.

**B.2. Licences, authorisations and formalities**

Render the seller at the latter's request, risk and expense, every assistance in obtaining any import licence or other official authorisation necessary for the importation of the goods.

**A.3. Contract of carriage and insurance****(a) Contract of carriage**

Contract at his own expense for the carriage of the goods by a usual route and in a customary manner to the quay at the named port of destination. If a point is not agreed or is not determined by practice, the seller may select the point at the named port of destination which best suits his purpose.

**B.3. Contract of carriage**

No obligation.

**(b) Contract of insurance**

No obligation.

**A.4. Delivery**

Place the goods at the disposal of the buyer on the quay or wharf at the agreed port of destination and on the date or within the period stipulated.

**B.4. Taking delivery**

Take delivery of the goods as soon as they have been placed at his disposal in accordance with A.4.

**A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

**B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have been placed at his disposal in accordance with A.4.

Should he fail to give notice in accordance with B.7., bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period stipulated for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**A.6. Division of costs**

Subject to the provisions of B.6.

— in addition to costs resulting from A.3.(a), pay all costs relating to the goods until such time as they are delivered in accordance with A.4;

— pay the costs of customs formalities as well as all duties, taxes and other official charges payable upon exportation and importation of the goods, unless otherwise agreed and, where necessary, for their transit through another country prior to delivery in accordance with A.4.

**A.7. Notice to the buyer**

Give the buyer sufficient notice of the estimated time of arrival of the named vessel in accordance with A.4., as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take the goods.

**A.8. Transport document or equivalent electronic message**

Provide the buyer at the seller's expense with the delivery order and/or the usual transport document (for example, a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document or a multimodal transport document) to enable him to take the goods and remove them from the quay.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

**A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods. Packaging is to be marked appropriately.

**A.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in B.10. and reimburse those incurred by the buyer in rendering his assistance therewith.

Provide the buyer, upon request, with the necessary information for procuring insurance.

**B.6. Division of costs**

Pay all costs relating to the goods from the time they have been placed at his disposal in accordance with A.4.

Should he fail to take delivery of the goods when they have been placed at his disposal in accordance with A.4., or to give notice in accordance with B.7., bear all additional costs incurred thereby provided, however, that the goods have been appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**B.7. Notice to the seller**

Whenever he is entitled to determine the time within a stipulated period and/or the place of taking delivery, give the seller sufficient notice thereof.

**B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the delivery order or transport document in accordance with A.8.

**B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

**B.10. Other obligations**

Render the seller, at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages issued or transmitted in the country of importation which the seller may require for the purpose of placing the goods at the disposal of the buyer in accordance with these rules.

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**Delivered duty unpaid (... named place of destination) DDU**

"Delivered duty unpaid" means that the seller fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation. The seller has to bear the costs and risks involved in bringing the goods thereto, (excluding duties, taxes

and other official charges payable upon importation as well as the costs and risks of carrying out customs formalities). The buyer has to pay any additional costs and to bear any risks caused by his failure to clear the goods for import in time.

If the parties wish the seller to carry out customs formalities and bear the costs and risks resulting therefrom, this has to be made clear by adding words to this effect.

If the parties wish to include in the seller's obligations some of the costs payable upon importation of the goods (such as value added tax (VAT)), this should be made clear by adding words to this effect: "Delivered duty unpaid, VAT paid, (... named place of destination)".

This term may be used irrespective of the mode of transport.

## **A. THE SELLER MUST**

### **A.1. Provision of the goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

### **A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export licence and other official authorisation and carry out all customs formalities for the exportation of the goods and, where necessary, for their transit through another country.

### **A.3. Contract of carriage and insurance**

#### **(a) Contract of carriage**

Contract on usual terms at his own expense for the carriage of the goods by a usual route and in the customary manner to the agreed point at the named place of destination. If a point is not agreed or is not determined by practice, the seller may select the point at the named place of destination which best suits his purpose.

#### **(b) Contract of insurance**

No obligation.

### **A.4. Delivery**

Place the goods at the disposal of the buyer in accordance with A.3. on the date or within the period stipulated.

### **A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

## **B. THE BUYER MUST**

### **B.1. Payment of the price**

Pay the price as provided in the contract of sale.

### **B.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities necessary for the importation of the goods.

### **B.3. Contract of carriage**

No obligation.

### **B.4. Taking delivery**

Take delivery of the goods as soon as they have been placed at his disposal in accordance with A.4.

### **B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have been placed at his disposal in accordance with A.4.

Should he fail to fulfil his obligations in accordance with B.2., bear all additional risks of loss of or damage to the goods incurred thereby and should he fail to give notice in accordance with B.7., bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period stipulated for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**A.6. Division of costs**

Subject to the provisions of B.6.

— in addition to costs resulting from A.3.(a), pay all costs relating to the goods until such time as they have been delivered in accordance with A.4.;

— pay the costs of customs formalities necessary for exportation as well as all duties, taxes and other official charges payable upon exportation and, where necessary, for their transit through another country prior to delivery in accordance with A.4.

**A.7. Notice to the buyer**

Give the buyer sufficient notice of the dispatch of the goods as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take the goods.

**A.8. Proof of delivery, transport document or equivalent electronic message**

Provide at his own expense the delivery order and/or the usual transport document (for example a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, an air waybill, a railway consignment note, a road consignment note, or a multimodal transport document) which the buyer may require to take delivery of the goods.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

**A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods. Packaging is to be marked appropriately.

**A.10. Other obligations**

Render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages other than those mentioned in A.8. issued or transmitted in the country of dispatch and/or of origin which the buyer may require for the importation of the goods.

Provide the buyer, upon request, with the necessary information for procuring insurance.

**B.6. Division of costs**

Pay all costs relating to the goods from the time they have been placed at his disposal at the named point of destination in accordance with A.4.

Should he fail to fulfil his obligations in accordance with B.2., or to take delivery of the goods when they have been placed at his disposal in accordance with A.4., or to give notice in accordance with B.7., bear all additional costs incurred thereby provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

Pay all duties, taxes and other official charges as well as the costs of carrying out customs formalities payable upon importation of the goods.

**B.7. Notice to the seller**

Whenever he is entitled to determine the time within a stipulated period and/or the place of taking delivery, give the seller sufficient notice thereof.

**B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the appropriate delivery order or transport document in accordance with A.8.

**B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

**B.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A.10 and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

**Delivered duty paid (... named place of destination) DDP**

"Delivered duty paid" means that the seller fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation. The seller has to bear the risks and costs, including duties, taxes and other charges of delivering the goods thereto, cleared for importation. Whilst the EXW term represents the minimum obligation for the seller, DDP represents the maximum obligation.

This term should not be used if the seller is unable directly or indirectly to obtain the import licence.

If the parties wish the buyer to clear the goods for importation and to pay the duty, the term DDU should be used.

If the parties wish to exclude from the seller's obligations some of the costs payable upon importation of the goods (such as value added tax (VAT)), this should be made clear by adding words to this effect: "Delivered duty paid, VAT unpaid (... named place of destination)".

This term may be used irrespective of the mode of transport.

**A. THE SELLER MUST****B. THE BUYER MUST****A.1. Provision of the goods in conformity with the contract**

Provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

**B.1. Payment of the price**

Pay the price as provided in the contract of sale.

**A.2. Licences, authorisations and formalities**

Obtain at his own risk and expense any export and import licence and other official authorisation and carry out all customs formalities for the exportation and importation of the goods and, where necessary, for their transit through another country.

**B.2. Licences, authorisations and formalities**

Render the seller at the latter's request, risk and expense every assistance in obtaining any import licence and other official authorisation necessary for the importation of the goods.

**A.3. Contract of carriage and insurance***(a) Contract of carriage*

Contract at his own expense for the carriage of the goods by a usual route and in a customary manner to the agreed point at the named place of destination. If a point is not agreed or is not determined by practice, the seller may select the point at the named place of destination which best suits his purpose.

**B.3. Contract of carriage**

No obligation.

*(b) Contract of insurance*

No obligation.

**A.4. Delivery**

Place the goods at the disposal of the buyer in accordance with A.3. on the date or within the period stipulated.

**B.4. Taking delivery**

Take delivery of the goods as soon as they have been placed at his disposal in accordance with A.4.

**A.5. Transfer of risks**

Subject to the provisions of B.5., bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A.4.

**B.5. Transfer of risks**

Bear all risks of loss of or damage to the goods from the time they have been placed at his disposal in accordance with A.4.

Should he fail to give notice in accordance with B.7., bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period stipulated for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.



**A.6. Division of costs**

Subject to the provisions of B.6.

— in addition to costs resulting from A.3.(a), pay all costs relating to the goods until such time as they have been delivered in accordance with A.4.;

— pay the costs of customs formalities as well as all duties, taxes and other official charges payable upon exportation and importation of the goods, unless otherwise agreed and, where necessary, their transit through another country prior to delivery in accordance with A.4.

**A.7. Notice to the buyer**

Give the buyer sufficient notice of the dispatch of the goods as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take the goods.

**A.8. Proof of delivery, transport document or equivalent electronic message**

Provide the buyer at the seller's expense with the delivery order and/or the usual transport document (for example, a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, an air waybill, a railway consignment note, a road consignment note, or a multimodal transport document) which the buyer may require to take the goods.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

**A.9. Checking—packaging—marking**

Pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A.4.

Provide at his own expense packaging (unless it is usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods. Packaging is to be marked appropriately.

**A.10. Other obligations**

Pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in B.10. and reimburse those incurred by the buyer in rendering his assistance therewith.

Provide the buyer, upon request, with the necessary information for procuring insurance.

**B.6. Division of costs**

Pay all costs relating to the goods from the time they have been placed at his disposal in accordance with A.4.

Should he fail to take delivery of the goods when they have been placed at his disposal in accordance with A.4., or to give notice in accordance with B.7., bear all additional costs incurred thereby provided, however, that the goods have been appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

**B.7. Notice to the seller**

Whenever he is entitled to determine the time within a stipulated period and/or the place of taking delivery, give the seller sufficient notice thereof.

**B.8. Proof of delivery, transport document or equivalent electronic message**

Accept the appropriate delivery order or transport document in accordance with A.8.

**B.9. Inspection of goods**

Pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation.

**B.10. Other obligations**

Render the seller, at his request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages issued or transmitted in the country of importation which the seller may require for the purpose of placing the goods at the disposal of the buyer in accordance with these rules.

## VI. STATUS OF UNCITRAL TEXTS

### Status of conventions: note by the Secretariat (A/CN.9/353) [Original: English]

1. At its thirteenth session the Commission decided that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.<sup>a</sup>

2. The present note is submitted pursuant to that decision. The annex hereto sets forth the state of signatures, ratifications, accessions and approvals as of 1 June 1991 to the following conventions: Convention on the Limitation Period in the International Sale of Goods (New York, 1974); Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade; and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The latter Convention, which has not emanated from the work of the Commission, has been included because of the close interest of the Commission in it, particularly in connection with the Commission's work in the field of international commercial arbitration. In addition, the annex sets forth those jurisdictions that have

enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration.

3. Since the most recent report in this series showing the status of conventions as of 16 May 1990 (A/CN.9/337), the Convention on the Limitation Period in the International Sale of Goods received one additional accession (Guinea), the Protocol amending that Convention received one additional accession (Guinea), the United Nations Convention on Contracts for the International Sale of Goods has received seven additional ratifications or accessions (Bulgaria, Canada, Guinea, Netherlands, Romania, Spain and Union of Soviet Socialist Republics), the United Nations Convention on the Carriage of Goods by Sea, 1978 ("Hamburg Rules") has received two additional ratifications or accessions (Guinea and Malawi), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has received two additional accessions (Côte d'Ivoire and Guinea), and the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) received one accession (Guinea). The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, which was adopted on 19 April 1991, was signed by three States (Mexico, Philippines and Spain). Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in addition in Scotland.

4. The names of the States that have ratified or acceded to the conventions since the preparation of the last report are in *italic*.

<sup>a</sup>Report of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 163.

#### 1. Convention on the Limitation Period in the International Sale of Goods (New York, 1974)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval</i>	<i>Entry into force</i>
Argentina		9 October 1981	1 August 1988
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Byelorussian SSR	14 June 1974		
Costa Rica	30 August 1974		
Czechoslovakia	29 August 1975	26 May 1977	1 August 1988
Dominican Republic		23 December 1977	1 August 1988
Egypt		6 December 1982	1 August 1988
Germany*			
Ghana	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991	1 August 1991
Hungary	14 June 1974	16 June 1983	1 August 1988
Mexico		21 January 1988	1 August 1988
Mongolia	14 June 1974		

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval</i>	<i>Entry into force</i>
Nicaragua	13 May 1975		
Norway <sup>1</sup>	11 December 1975	20 March 1980	1 August 1988
Poland	14 June 1974		
Ukrainian SSR	14 June 1974		
USSR	14 June 1974		
Yugoslavia		27 November 1978	1 August 1988
Zambia		6 June 1986	1 August 1988

Signatures only: 9; ratifications and accessions: 11\*

\*The Convention was signed by the former German Democratic Republic on 14 June 1974, ratified by it on 31 August 1989 and entered into force on 1 March 1990.

#### *Declarations and reservations*

<sup>1</sup>Upon signature Norway declared, and confirmed upon ratification, that in accordance with article 34 the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Norway, Denmark, Finland, Iceland and Sweden).

### **2. Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980)**

<i>State</i>	<i>Accession</i>	<i>Entry into force</i>
Argentina	19 July 1983	1 August 1988
Czechoslovakia <sup>1</sup>	5 March 1990	1 October 1990
Egypt	6 December 1982	1 August 1988
Germany*		
Guinea	23 January 1991	1 August 1991
Hungary	16 June 1983	1 August 1988
Mexico	21 January 1988	1 August 1988
Zambia	6 June 1986	1 August 1988

In accordance with articles XI and XIV of the Protocol, the Contracting States to the Protocol are considered to be Contracting Parties to the Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol in relation to one another and Contracting Parties to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol. The four States that are parties to the unamended Convention are Dominican Republic, Ghana, Norway and Yugoslavia.

\*The Protocol was acceded to by the former German Democratic Republic on 31 August 1989 and entered into force on 1 March 1990.

#### *Declarations and reservations*

<sup>1</sup>Upon accession, Czechoslovakia declared that, pursuant to Article XII, it did not consider itself bound by Article I.

### **3. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)**

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
Austria	30 April 1979		
Barbados		2 February 1981	
Botswana		16 February 1988	
Brazil	31 March 1978		
Burkina Faso		14 August 1989	
Chile	31 March 1978	9 July 1982	
Czechoslovakia <sup>1</sup>	6 March 1979		
Denmark	18 April 1979		
Ecuador	31 March 1978		
Egypt	31 March 1978	23 April 1979	

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
Finland	18 April 1979		
France	18 April 1979		
Germany	31 March 1978		
Ghana	31 March 1978		
Guinea		23 January 1991	
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	
Kenya		31 July 1989	
Lebanon		4 April 1983	
Lesotho		26 October 1989	
Madagascar	31 March 1978		
Malawi		18 March 1991	
Mexico	31 March 1978		
Morocco		12 June 1981	
Nigeria		7 November 1988	
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982	
Senegal	31 March 1978	17 March 1986	
Sierra Leone	15 August 1978	7 October 1988	
Singapore	31 March 1978		
Sweden	18 April 1979		
Tunisia		15 September 1980	
Uganda		6 July 1979	
United Republic of Tanzania		24 July 1979	
United States of America	30 April 1979		
Venezuela	31 March 1978		
Zaire	19 April 1979		

Signatures only: 22; ratifications and accessions: 19

Ratifications and accessions necessary to bring the Convention into force: 20

#### *Declarations and reservations*

<sup>1</sup>Upon signing the Convention the Czechoslovak Socialist Republic declared in accordance with article 26 a formula for converting the amounts of liability referred to in paragraph 2 of that article into the Czechoslovak currency and the amount of the limits of liability to be applied in the territory of the Czechoslovak Socialist Republic as expressed in the Czechoslovak currency.

#### 4. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval Acceptance</i>	<i>Entry into force</i>
Argentina <sup>1</sup>		19 July 1983	1 January 1988
Australia		17 March 1988	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Bulgaria		9 July 1990	1 August 1991
Byelorussian SSR <sup>1</sup>		9 October 1989	1 November 1990
Canada <sup>4, 9</sup>		23 April 1991	1 May 1992
Chile <sup>1</sup>	11 April 1980	7 February 1990	1 March 1991
China <sup>2</sup>	30 September 1981	11 December 1986	1 January 1988
Czechoslovakia <sup>3</sup>	1 September 1981	5 March 1990	1 April 1991
Denmark <sup>4, 5</sup>	26 May 1981	14 February 1989	1 March 1990
Egypt		6 December 1982	1 January 1988
Finland <sup>4, 5</sup>	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982	1 January 1988
Germany <sup>6, 7</sup>	26 May 1981	21 December 1989	1 January 1991

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval Acceptance</i>	<i>Entry into force</i>
Ghana	11 April 1980		
Guinea		23 January 1991	1 February 1992
Hungary <sup>1, 6</sup>	11 April 1980	16 June 1983	1 January 1988
Iraq		5 March 1990	1 April 1991
Italy	30 September 1981	11 December 1986	1 January 1988
Lesotho	18 June 1981	18 June 1981	1 January 1988
Mexico		29 December 1987	1 January 1989
Netherlands	29 May 1981	13 December 1990	1 January 1992
Norway <sup>4, 5</sup>	26 May 1981	20 July 1988	1 August 1989
Poland	28 September 1981		
Romania		22 May 1991	1 June 1992
Singapore	11 April 1980		
Spain		24 July 1990	1 August 1991
Sweden <sup>4, 5</sup>	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990	1 March 1991
Syrian Arab Republic		19 October 1982	1 January 1988
United States of America <sup>3</sup>	31 August 1981	11 December 1986	1 January 1988
Venezuela	28 September 1981		
Ukrainian SSR <sup>1</sup>		3 January 1990	1 February 1991
USSR <sup>1</sup>		16 August 1990	1 September 1991
Yugoslavia	11 April 1980	27 March 1985	1 January 1988
Zambia		6 June 1986	1 January 1988

Signatures only: 4; ratifications, accessions, approval and acceptance: 32

<sup>\*</sup>The Convention was signed by the former German Democratic Republic on 13 August 1981, ratified on 23 February 1989 and entered into force on 1 March 1990.

#### *Declarations and reservations*

<sup>1</sup>Upon ratifying the Convention the Governments of Argentina, Byelorussian SSR, Chile, Hungary, Ukrainian SSR and USSR stated, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in their respective States.

<sup>2</sup>Upon approving the Convention the Government of China declared that it did not consider itself bound by sub-paragraph (b) of paragraph 1 of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11.

<sup>3</sup>Upon ratifying the Convention the Governments of Czechoslovakia and of the United States of America declared that they would not be bound by sub-paragraph (1)(b) of article 1.

<sup>4</sup>Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared in accordance with article 92(1) that they would not be bound by part II of the Convention (Formation of the Contract).

<sup>5</sup>Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Sweden, Iceland or Norway.

<sup>6</sup>Upon ratifying the Convention the Government of Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

<sup>7</sup>Upon ratifying the Convention the Government of Germany declared that it would not apply article 1(1)(b) in respect of any State that had made a declaration that that State would not apply article 1(1)(b).

<sup>8</sup>Upon accession the Government of Canada declared that, in accordance with article 93 of the Convention, that the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories.

<sup>9</sup>Upon accession the Government of Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it would not be bound by article 1(1)(b) of the Convention.

### 5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>
Algeria <sup>1, 2</sup>		7 February 1989
Antigua and Barbuda <sup>1, 2</sup>		2 February 1989
Argentina <sup>1, 2, 7</sup>	26 August 1958	14 March 1989
Australia		26 March 1975
Austria		2 May 1961
Bahrain <sup>1, 2</sup>		6 April 1988
Belgium <sup>1</sup>	10 June 1958	18 August 1975
Benin		16 May 1974
Botswana <sup>1, 2</sup>		20 December 1971
Bulgaria <sup>1, 3</sup>	17 December 1958	10 October 1961
Burkina Faso		23 March 1987
Byelorussian SSR <sup>1, 3</sup>	29 December 1958	15 November 1960
Cambodia		5 January 1960
Cameroon		19 February 1988
Canada <sup>4</sup>		12 May 1986
Central African Republic <sup>1, 2</sup>		15 October 1962
Chile		4 September 1975
China <sup>1, 2</sup>		22 January 1987
Colombia		25 September 1979
Costa Rica	10 June 1958	26 October 1987
Côte d'Ivoire		1 February 1991
Cuba <sup>1, 2, 3</sup>		30 December 1974
Cyprus <sup>1, 2</sup>		29 December 1980
Czechoslovakia <sup>1, 3</sup>	3 October 1958	10 July 1959
Denmark <sup>1, 2</sup>		22 December 1972
Djibouti		14 June 1983
Dominica		28 October 1988
Ecuador <sup>1, 2</sup>	17 December 1958	3 January 1962
Egypt		9 March 1959
El Salvador	10 June 1958	
Finland	29 December 1958	19 January 1962
France <sup>1</sup>	25 November 1958	26 June 1959
Germany <sup>*, 1</sup>	10 June 1958	30 June 1961
Ghana		9 April 1968
Greece <sup>1, 2</sup>		16 July 1962
Guatemala <sup>1, 2</sup>		21 March 1984
Guinea		23 January 1991
Haiti		5 December 1983
Holy See <sup>1, 2</sup>		14 May 1975
Hungary <sup>1, 2</sup>		5 March 1962
India <sup>1, 2</sup>	10 June 1958	13 July 1960
Indonesia <sup>1, 2</sup>		7 October 1981
Ireland <sup>1</sup>		12 May 1981
Israel	10 June 1958	5 January 1959
Italy		31 January 1969
Japan <sup>1</sup>		20 June 1961
Jordan	10 June 1958	15 November 1979
Kenya <sup>1</sup>		10 February 1989
Kuwait <sup>1</sup>		28 April 1978
Lesotho		13 June 1989
Luxembourg <sup>1</sup>	11 November 1958	9 September 1983
Madagascar <sup>1, 2</sup>		16 July 1962
Malaysia <sup>1, 2</sup>		5 November 1985
Mexico		14 April 1971
Monaco <sup>1, 2</sup>	31 December 1958	2 June 1982
Morocco <sup>1</sup>		12 February 1959
Netherlands <sup>1</sup>	10 June 1958	24 April 1964
New Zealand <sup>1</sup>		6 January 1983
Niger		14 October 1964
Nigeria <sup>1, 2</sup>		17 March 1970
Norway <sup>1, 3</sup>		14 March 1961
Pakistan	30 December 1958	
Panama		10 October 1984
Peru		7 July 1988

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>
Philippines <sup>1, 2</sup>	10 June 1958	6 July 1967
Poland <sup>1, 2</sup>	10 June 1958	3 October 1961
Republic of Korea <sup>1, 2</sup>		8 February 1973
Romania <sup>1, 2, 3</sup>		13 September 1961
San Marino		17 May 1979
Singapore <sup>1</sup>		21 August 1986
South Africa		3 May 1976
Spain		12 May 1977
Sri Lanka	30 December 1958	9 April 1962
Sweden	23 December 1958	28 January 1972
Switzerland <sup>1</sup>	29 December 1958	1 June 1965
Syrian Arab Republic		9 March 1959
Thailand		21 December 1959
Trinidad and Tobago <sup>1, 2</sup>		14 February 1966
Tunisia <sup>1, 2</sup>		17 July 1967
Ukrainian SSR <sup>1, 3</sup>	29 December 1958	10 October 1960
USSR <sup>1, 3</sup>	29 December 1958	24 August 1960
United Kingdom <sup>1</sup>		24 September 1975
United Republic of Tanzania <sup>1</sup>		13 October 1964
United States of America <sup>1, 2</sup>		30 September 1970
Uruguay		30 March 1983
Yugoslavia <sup>1, 2, 6</sup>		26 February 1982

Signatures only: 2; ratifications and accessions: 84

\*The Convention was acceded to by the former German Democratic Republic on 20 February 1975 with reservations 1, 2 and 3.

*Declarations and reservations*  
(Excludes territorial declarations and certain other reservations  
and declarations of a political nature)

<sup>1</sup>State will apply the Convention to recognition and enforcement of awards made in the territory of another Contracting State.

<sup>2</sup>State will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law.

<sup>3</sup>With regard to awards made in the territory of non-contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.

<sup>4</sup>The Government of Canada has declared that Canada will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation.

<sup>5</sup>State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.

<sup>6</sup>State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

<sup>7</sup>The present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution.

**6. United Nations Convention on International Bills of Exchange and  
International Promissory Notes (New York, 1988)**

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
Canada	7 December 1989		
Guinea		23 January 1991	
USSR	30 June 1990		
United States of America	29 June 1990		

Signatures only: 3; ratifications and accessions: 1

Ratifications and accessions necessary to bring the Convention into force: 10

**7. United Nations Convention on the Liability of Operators of Transport  
Terminals in International Trade (Vienna, 1991)**

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
Mexico	19 April 1991		
Philippines	19 April 1991		
Spain	19 April 1991		

Signatures only: 3

Ratifications and accessions necessary to bring the Convention into force: 5

**8. UNCITRAL Model Law on International Commercial Arbitration (1985)**

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Australia, Bulgaria, Canada (by the Federal Parliament and by the Legislatures of all Provinces and Territories), Cyprus, Hong Kong, Nigeria, *Scotland* and, within the United States of America, California, Connecticut and Texas.



## VII. TRAINING AND ASSISTANCE

Training and assistance: note by the Secretariat  
(A/CN.9/351) [Original: English]

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### INTRODUCTION

1. The Commission, at its twentieth session in 1987, decided that increased emphasis should be given both to training and assistance and to the promotion of the legal texts prepared by the Commission especially in developing countries. It was recognized that the holding of seminars and symposia in developing countries would make countries in those regions conscious of UNCITRAL legal texts and thereby promote and inspire the adoption of the texts. Accordingly, it was noted that "training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past".<sup>1</sup>

2. Pursuant to that decision of the Commission, beginning in 1988 the Secretariat has engaged in a more extensive programme of activities than had been previously the case. This note sets out activities of the Secretariat in respect of training and assistance subsequent to the twenty-third session of the Commission (1990) as well as possible future activities.

#### I. INTERNATIONAL REGIONAL SEMINARS

##### A. Seminars on the Hamburg Rules (COCATRAM, 3 to 13 September 1990)

3. A series of seminars was organized by the Comisión Centroamericana de Transporte Marítimo (COCATRAM)

in the member States of COCATRAM (Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica) 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 member of the Secretariat and a professor from Chile. Since Chile has ratified the Convention and has incorporated it into its domestic law with current application, the lecturer from Chile was able to speak from experience and assure the audience that the Convention works well in practice.

4. At the seminars held in Costa Rica and Honduras the participants requested that a meeting of experts from the five Central American republics be organized 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 calls 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.

<sup>1</sup>Report of the United Nations Commission on International Trade Law on the work of its twentieth session, *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, paras. 334 and 340.

### **B. UNCITRAL regional seminar on international trade law**

(Douala, Cameroon, 14 to 18 January 1991)

5. As announced to the twenty-third session of the Commission (1990) (A/45/17, para. 56), a regional seminar on international trade law was held in 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 open to participants from Algeria, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Gabon, Guinea, Mali, Mauritania, Morocco, Niger, Senegal, Togo, Tunisia and Zaïre.

6. The purpose of the seminar was to acquaint decision makers in the States concerned with UNCITRAL as an institution and with the legal texts that have emanated from its work and to promote the adoption and use of those texts. Governments from Francophone African States were invited to nominate three participants. 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. They were of such a level that they could be expected to participate in any decision whether their Government should adopt the conventions and other legal texts prepared by the Commission.

7. The seminar was conducted in French. Lectures were given by two members of the Secretariat and by one current and one former representative to the Commission.

### **C. Seminar on international trade law**

(Quito, Ecuador, 19 to 21 February 1991)

8. A subregional seminar on international trade law was held in 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.

9. 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. The export oriented sectors in the Andean Region are particularly interested in reducing the transport costs of their merchandise. In collaboration with the Commission of the Andean Pact they are engaged in a wide-ranging programme of activities. Much of the work has to do with improving the physical transport infrastructure. However, a significant portion of their programme of work is the adoption of the Hamburg Rules and the United Nations Convention on the Multimodal Carriage of Goods prepared by UNCTAD. The Government of Ecuador is expected to ratify the two Conventions in the near future. The United Nations Convention on Contracts for the International Sale of Goods has also been submitted to Congress in Ecuador for adoption.

10. One of the purposes of the seminar was to inform the private sector in the Andean region of the importance of the conventions. As a result, there was a large representation of participants from the private sector. Lectures were given in Spanish by a member of the Secretariat, one representative to the Commission and one professor who had spent an internship with the Secretariat in 1985.

### **D. Fourth UNCITRAL Symposium on International Trade Law**

(Vienna, 17 to 21 June 1991)

11. As announced to the twenty-second session of the Commission (A/44/17, para. 283), the Secretariat has organized the Fourth UNCITRAL Symposium on International Trade Law to be held on the occasion of the twenty-fourth session of the Commission (Vienna, 10 to 28 June 1991). The Symposium is designed to acquaint young lawyers with UNCITRAL as an institution and with the legal texts that have emanated from its work.

12. As was the case at the Third Symposium in 1989, lecturers have been invited primarily from representatives to the twenty-fourth session and from members of the Secretariat. In order to save on the costs of interpretation and to be able to increase the communication between participants themselves, the Symposium is being held only in English. It is expected that the Fifth Symposium, which is planned for 1993, will be held either in French or in Spanish.

13. The travel costs of approximately thirty-five participants at the Symposium are being paid from the UNCITRAL Symposium Trust Fund. In addition, a number of individuals whose travel costs are not being paid from the Trust Fund are being invited to attend. While the number of such participants is not known with precision at the present time, it is expected to equal the number of those whose travel costs are being paid.

### **E. Other seminars, conferences, courses or professional meetings**

14. Members of the Secretariat of the Commission have attended or have participated as speakers in other seminars, conferences or professional meetings where UNCITRAL legal texts were presented for examination and discussion. The UNCITRAL secretariat was represented at the following seminars, conferences, courses or professional meetings: (i) Lecturing at the International Development Law Institute (IDLI) (Rome, 7-9 May 1990); (ii) Consultations with German Lawyers (Cologne, 24-25 May 1990) and Participation in ICCA Arbitration Congress (Stockholm, 27-31 May 1990); (iii) Lecturing at Arbitration Seminar (Dallas, 20-23 June 1990); (iv) Attendance International Maritime Committee Congress (Paris, 24-30 June 1990); (v) Lecturing at UNITAR Fellowship Programme (The Hague, 7-10 August 1990); (vi) Lecturing at Symposium on the United Nations Sales Convention (Beme, 18-19 October 1990); (vii) Participation in Arbitrators' Symposium of London Court of International

Arbitration (London, 26-28 October 1990); (viii) Lecturing at Seminar on International Commercial Arbitration (Abuja, Nigeria, 19-23 November 1990); (ix) Participation in Co-ordination Meeting TEDIS DG XIII, Commission of the European Communities (Brussels, 12 December 1990) and in the joint Working Group on Legal and Commercial Aspects of Electronic Data Interchange (EDI), Commission on International Commercial Practice, ICC (Paris, 14 December 1990); (x) Lecturing at the Conference on Electronic Data Interchange and the Law (Washington, 26-28 February 1991); (xi) Participation in the Session of ICC Commissions on International Commercial Practice and on Banking Techniques and Practice (Paris, 23-24 April 1991); (xii) Attendance Thirtieth Session of the Asian-African Legal Consultative Committee (AALCC) (Cairo, 22-27 April 1991); (xiii) Lecturing at International Development Law Institute (IDLI) (Rome, 7-9 May 1991).

## II. FUTURE ACTIVITIES

### A. Seminar in Suva, Fiji

15. As announced to the twenty-third session of the Commission (1990) (A/45/17, para. 56), a seminar will be organized in cooperation with the South Pacific Forum in Suva, Fiji. The seminar is planned for 21 to 25 October 1991. The South Pacific Forum is an organization grouping the island States of the South Pacific. The seminar is being coordinated with the annual Australian Trade Law Seminar, which will be held this year on 18 and 19 October 1991.

### B. Tentative plans for country seminars

16. The seminars and symposia that bring one to three participants from each of a number of States to a central location have been an efficient way to make the work of the Commission known in a large number of States. In addition to the knowledge gained by the participants themselves, the seminars and symposia have been an effective means to distribute the texts of the conventions and other legal instruments prepared by the Commission in the countries concerned. In some cases the participants have been in a position to encourage their Governments to adopt one or more of the conventions. Therefore, the Secretariat believes that it is important to continue to hold such seminars in the future, particularly in regard to groups of States that have not yet been the focus of a regional seminar. The Secretariat is engaging in consultations for the planning of such future seminars.

17. In addition, the Secretariat plans to increase the programme of specific country seminars. It may be recalled that a seminar was held in Conakry, Guinea from 27 to 29 March 1990 for participants from Guinea. It is gratifying to note that on 23 January 1991 Guinea deposited its instrument of accession to five conventions that had been the subject of the seminar, i.e., Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); Convention on the Limitation Period in the International Sale of Goods (New York, 1974) and its 1980 amending Protocol; United Nations Convention on

Contracts for the International Sale of Goods (Vienna, 1980), 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).

18. It is also noteworthy that Lesotho, where the first regional seminar was held, has subsequently acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Hamburg Rules, in addition to having been the first State to accede to the Sales Convention. Finally, the seminars held in the five Central American States appear to have generated more interest than might have been the case if there had been only one seminar for participants from all five countries at the same time.

19. Such a difference in result might be explainable by the fact that the decision to host a seminar on the work of the Commission already shows a significant level of interest in the country concerned. Another factor that appears to be present is that a larger number of participants are able to attend from that country. Since adoption of a convention prepared by the Commission often requires the support of the business sectors concerned and the approval of several different ministries, a seminar held in one country is more likely to bring awareness of the texts to the attention of all the relevant individuals and organizations.

20. Experience has shown that a country seminar is relatively cost-effective from a financial point of view, since the only expense is normally the travel cost of the lecturers. However, country seminars require a significantly greater expenditure of time for each country where a seminar is held than do regional seminars. Therefore, an appropriate balance between regional seminars and country seminars will depend to some degree on the balance between the financial resources available to the Secretariat and the amount of time that can be devoted to the organization and holding of such seminars. One means to accommodate both concerns is to arrange a series of country seminars in the same region, as was done in Central America in respect of the Hamburg Rules. The Secretariat expects to make such arrangements during the coming year and to report to the Commission on the results at the twenty-fifth session.

### C. Maintaining contact with seminar participants

21. Periodically the Secretariat sends a letter to alumni of the regional seminars and symposia designed to keep them informed of developments in the work of the Commission. Response to the letters indicates that they are well received and that they serve an important role in maintaining contact with the seminar participants.

## III. INTERNSHIP PROGRAMME

22. The programme is designed to enable persons who have recently obtained a law degree, or who have nearly completed their work towards such a degree, to serve as interns in the Commission's Secretariat for a period that

is normally about three months. Interns are assigned specific tasks in connection with projects being worked on by the Secretariat. Persons participating in the programme are able to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law. Unfortunately, no funds are available to the Secretariat to assist the interns to cover their travel and other expenses. The interns are often sponsored by an organization, university or a governmental agency, or they cover their expenses from their own means. During the past year the Secretariat has received eight interns.

#### IV. FINANCIAL AND ADMINISTRATIVE CONSIDERATIONS

23. The continuation and further expansion, of the programme of training and assistance depends on the continued availability of sufficient financial resources. Since resources for the travel expenses of participants at seminars and symposia are not available from the regular budget, they have to be met by voluntary contributions to the UNCITRAL Symposium Trust Fund. Specific contributions were received from Canada, France and Luxembourg

for the seminar in Douala. Contributions have been received from Austria and Denmark for the Fourth Symposium to be held during the session of the Commission. Australia has indicated that it will contribute to the seminar to be held in Fiji in October 1991.

24. Of particular value have been the contributions made to the UNCITRAL Symposium Trust Fund on a multi-year basis, because they have permitted the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. Such contributions have been received from Finland and Canada. In addition, the annual contribution from Switzerland to the Trust Fund has been available for the seminar programme.

25. The Commission may wish to express its appreciation to those States and organizations that have contributed to the Commission's programme of training and assistance by the contribution of funds or staff or by the hosting of seminars. The Commission may also wish to request the Secretariat to continue its efforts to secure the financial, personnel and administrative support necessary to place the programme on a firm and continuing basis.

## VIII. UNITED NATIONS DECADE OF INTERNATIONAL LAW

United Nations Decade of International Law: note by the Secretariat  
(A/CN.9/349) [Original: English]

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### INTRODUCTION

1. 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.

2. In that resolution, the General Assembly requested the Secretary-General to seek the views of Member States and of appropriate international bodies, as well as of non-governmental organizations working in the field, on the programme for the Decade and on the appropriate action to be taken during the Decade. It further decided that at its forty-fifth session it would consider in a Working Group of the Sixth Committee the question of the programme for the Decade and of appropriate action to be taken during the Decade with a view to preparing generally acceptable recommendations for the Decade.

#### I. ACTION ON THE DECADE BY THE COMMISSION

3. The resolution was brought to the attention of the Commission at its twenty-third session in 1990 in a note by the Secretariat (A/CN.9/338). At the session the Commission discussed the implications of the Decade for its future work.<sup>1</sup> The conclusions of the Commission, which are summarized in paragraphs 4 to 7, were submitted to

the forty-fifth session of the General Assembly along with views of Governments and of other international organs and organizations (A/45/430 and Corr. 1 and Add.1 and 2).

4. At its twenty-third session the Commission observed that the programme for the Decade should take account of the fact that international trade law was an important and integral part of international law; in particular, the Commission's work was an important element in strengthening the rule of law in international economic relations.

5. The discussion in the Commission concentrated on how the Commission itself might take the occasion of the Decade to further strengthen and develop its programme of work. Several types of activities were identified in the discussion as being particularly appropriate for inclusion in the programme for the Decade. One activity was to strengthen the teaching, study, dissemination and wider appreciation of the law of international trade. Another activity was the promotion of acceptance of legal texts emanating from the work of the Commission and from the work of other intergovernmental and non-governmental organizations active in the area of international trade law. The observation was made that in respect of international law in general, and international trade law in particular, the wider adoption and effective implementation of existing texts was often of greater value than was the elaboration of new texts. The Commission noted that its activities in respect of the teaching, study, dissemination and wider appreciation of international trade law, with the associated promotion of the adoption and use of existing texts, had

<sup>1</sup>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)*, paras. 70-74.

been more limited than was desirable because of the limited resources that had been available for them.

6. The Commission noted that the suggested activities relating to the teaching, study, dissemination, wider appreciation and promotion of international trade law would have their impact in all regions, but that they would be of greatest significance in developing countries. In the same spirit, a suggestion was made that an attempt should be made to find a way to finance the travel of experts from developing countries, and especially from States members of the Commission, to the sessions of the Commission and its working groups so that those States would be in a better position to contribute actively to the creation of international trade law.<sup>2</sup>

7. In respect of the future activities of the Commission in the preparation of legal texts, it was suggested that the Commission could contribute to the Decade by undertaking work on a subject that was of underlying fundamental significance for the further development of the law of international trade, such as the formulation of general principles of contract law or of general principles in particular areas of international trade law. It was also suggested that the Secretariat might review the proposals made in past years for the programme of work that had not been acted upon, as well as subjects on which work had begun but had been terminated prior to the adoption of a legal text, to determine whether some of those items might now be appropriate for the current programme of work. Under one suggestion the Secretariat would be requested to prepare a proposed programme of work for the Commission for the period of the Decade. Furthermore, it was suggested that the preparatory work by the Secretariat relating to the Decade should address the question of the harmonization between the universal and the regional codification of international trade law. It was proposed that one plenary session of the Commission should be dedicated to a review of developments in the field of international trade law from 1980 onward.

## II. ACTION ON THE DECADE AT THE FORTY-FIFTH SESSION OF THE GENERAL ASSEMBLY

8. During the forty-fifth session of the General Assembly the Sixth Committee created the working group on the Decade that had been anticipated in resolution 44/23. The

views of Governments and international organizations that had been transmitted to the Secretary-General and placed before the forty-fifth session of the General Assembly were listed in systematic order in Annex II of the report of the working group entitled a "Comprehensive list of suggestions with respect to the programme for the United Nations Decade of International Law proposed by States and international organizations" (A/C.6/45/L.5). Annex I of the report sets forth a "Draft programme for the activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law" based on those suggestions.

9. While most of the suggestions submitted by Governments and international organizations that are not included in the draft programme of activities, as well as the activities listed in the draft programme, relate to public international law, several of the suggestions are of particular interest to the work of the Commission. Among the suggestions listed in the category "Promotion of the acceptance of and respect for international law" that are of particular importance for the effective incorporation of legal norms prepared at the international level into national legal systems were

"3. Provision of technical and financial assistance to States in their implementation of treaties, including the drafting of national legislation

"4. Recommendations for more effective ways to apply international law at the national level

(i) Application of international law (including by municipal courts) as laws of the land

(ii) Comparative studies on the subject."

10. A suggestion of particular relevance to the Commission was listed in the category "Encouragement of the progressive development of international law and its codification", namely

"4. Clearer definition of the role of the International Law Commission and the United Nations Commission on International Trade Law (UNCITRAL)."

11. The "Programme for the activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law" was adopted by the General Assembly in its resolution 45/40 of 28 November 1990, on the basis of a draft resolution prepared by the Sixth Committee that incorporated the draft programme of activities contained in the report of the Working Group. The programme of activities is grouped under four substantive headings, which are in turn the main purposes of the Decade according to resolution 44/23, that is

I. Promotion of the acceptance of and respect for the principles of international law

II. Promotion of means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice

III. Encouragement of the progressive development of international law and its codification

<sup>2</sup>In paragraph 5 of resolution 45/42 of 28 November 1990 on the report of the twenty-third session of the Commission, the General Assembly

"Requests the Secretary-General, in consultation with the Commission's secretariat, to prepare a report with a view to analysing possible ways by which assistance could be given to developing countries that are members of the Commission, in particular least developed countries, so that they may attend meetings of the Commission and its working groups, bearing in mind the arrangements that exist for United Nations bodies generally, pursuant to resolution 43/217, section IX, of 21 December 1988, and to submit it to the General Assembly at its forty-sixth session."

The report requested by the General Assembly will be submitted to its forty-sixth session.

#### IV. Encouragement of the teaching, study, dissemination and wider appreciation of international law.

12. Among the four purposes of the Decade, the two of greatest interest for the Commission are the "encouragement of the progressive development of international law and its codification" and the "encouragement of the teaching, study, dissemination and wider appreciation of international law". The suggested activities for the United Nations organs and organizations in implementation of those two purposes as described in the programme are similar to the suggestions made at the twenty-third session of the Commission and summarized in paragraphs 4 to 7.

13. A fifth heading in the programme adopted by the General Assembly was entitled "Procedures and organizational aspects" in which, among other matters, the Sixth Committee was requested to continue to prepare the programme of activities for the Decade. Of more direct relevance to the Commission is paragraph 4 of the resolution itself, in which the General Assembly

*"Invites all international organizations and institutions referred to in the programme to undertake the relevant activities outlined therein and, as appropriate, to submit to the Secretary-General interim or final reports for transmission to the General Assembly at the forty-sixth session or, at the latest, the forty-seventh session;"*

14. This short review of the principal actions taken by the General Assembly in respect of the Decade shows that the Assembly anticipates that the initiative for implementation of the programme will rest in large measure with the various international organs and organizations interested in international law. As a result the Commission may 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 is specifically related to international trade law. The Commission may wish to consider that, as a first step in the preparation of such a programme, it might organize a Congress on International Trade Law to be held in the context of the twenty-fifth session of the Commission in 1992.

### III. PROPOSED CONGRESS ON INTERNATIONAL TRADE LAW

#### A. Background

15. The declaration of the United Nations Decade of International Law comes at a fortunate moment in the history of the Commission. The Commission is completing a quarter century of existence, having been created by the General Assembly on 17 December 1966 by adoption of resolution 2205 (XXI). In 1992 the Commission will celebrate its twenty-fifth session. It would seem, therefore, appropriate for the Commission to commence its activities in respect of the Decade by considering in a comprehensive manner the current state of international trade law and the needs in this field for the next quarter century. Undertaking such a comprehensive review at this time could be expected to serve a function similar to that

served by the "Schmitthoff report" to the General Assembly in 1966.<sup>3</sup>

16. In order to determine whether the United Nations should engage in the progressive unification and harmonization of international trade law, and whether it should create a new commission for that purpose, the General Assembly in its resolution 2102 (XX) of 20 December 1965 requested the Secretary-General to submit to the General Assembly at its twenty-first session a comprehensive report including:

(a) A survey of the work in the field of unification and harmonization of the law of international trade;

(b) An analysis of the methods and approaches suitable for the unification and harmonization of the various topics, including the question whether particular topics were suitable for regional, inter-regional or worldwide action;

(c) Consideration of the United Nations organs and other agencies which might be given responsibilities with a view to furthering cooperation in the development of the law of international trade and to promoting its progressive unification and harmonization.

17. The report of the Secretary-General (A/6396), sometimes referred to as the "Schmitthoff report" in reference to the late Professor Clive M. Schmitthoff who was its principal author in the capacity of a consultant to the Secretariat, was a comprehensive document completely fulfilling the expectations of the General Assembly. The report adequately answered the question as to whether a new commission on international trade law should be created. The report did much more; it furnished the intellectual foundation upon which the Commission undertook the task of preparing its first programme of work and deciding how that programme of work would be coordinated with the activities of other organizations.<sup>4</sup> Even today, twenty-five years after its preparation, the Schmitthoff report furnishes a useful discussion of the methods, approaches and topics that are suitable for the progressive harmonization and unification of the law of international trade and a useful compendium of the organizations active in the field.<sup>5</sup>

18. Nevertheless, events have made much of what was said in the Schmitthoff report out of date. Not the least of these events is the success of the Commission itself. For example, paragraph 30 of the report includes a short description of the Convention relating to a Uniform Law on the International Sale of Goods and of the Convention relating to a Uniform Law on the Formation of Contracts

<sup>3</sup>Official Records of the General Assembly, Twenty-first Session, Annexes, (A/6396), reprinted in *UNCITRAL Yearbook*, Vol. I: 1968-1970, Part One, II, B.

<sup>4</sup>The report was distributed to the first session of the Commission and the definition of international trade law contained therein is specifically referred to in the report of the first session (A/7216, paras. 23 and 24). Although the Commission agreed that it was not essential to formulate a definition of international trade law at that time, and has never done so since, the definition referred to has served as a touchstone for the Commission's programme of work.

<sup>5</sup>The list of organizations active in the field of international trade law was brought up to date in 1988 in A/CN.9/303.

for the International Sale of Goods, both of which had been concluded at the Diplomatic Conference on the Unification of Law governing the International Sale of Goods at The Hague in April 1964 and opened for signature on 1 July 1964. The report noted that of the twenty-seven States that signed the Final Act of the Conference, all but three were countries of free enterprise economy and that geographically twenty-two were located in Europe, three in Latin America and North America and two in Asia. While the two Hague Conventions came into force with, at their high point, nine and eight States parties respectively, thirty-one States from all five continents are currently parties to its successor, the United Nations Convention on Contracts for the International Sale of Goods.<sup>6</sup>

### B. Organization of the Congress

19. In order to undertake such a comprehensive review of the current state of international trade law and the needs in this field for the next quarter century, it is suggested that one week of the twenty-fifth session of the Commission, which will be held in New York in 1992, should be devoted to the holding of a Congress on International Trade Law. Such a Congress would respond to the suggestion made at the twenty-third session of the Commission that the Commission might devote one plenary session to a review of developments in the field of international trade law from 1980 onward (see paragraph 7). The Congress would be organized as an integral part of the Commission session. As a result, full conference servicing would be available at no extra cost to the Organization.

20. The Congress might be organized around the themes presented in the Schmitthoff report as well as include new themes that have arisen during the past twenty-five years, such as how to secure effective incorporation of texts of

international trade law into the domestic legal systems and the teaching of international trade law in universities. Speakers might include both individuals currently or formerly associated with the Commission and individuals not associated with the Commission but who have particular expertise. Time might be allocated for discussion of individual papers and topics.

21. 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. It could be expected that more States and interested organizations than normal would attend and that individual delegations might be larger than normal.

22. The Congress would be of a nature that specialists in international trade law who were not associated with a delegation would be interested in attending. The Commission might wish to consider whether it would be interested in inviting such specialists to attend the Congress. In anticipation of such a possibility, an adequate meeting room has been reserved for the week.

23. Because the Congress would take place within the context of the Commission session, it would not be possible to charge a fee for attending the Congress even to those participants who were not associated with a delegation. However, because of the limited space available, it would be necessary to call for advance registration. Furthermore, any participants at the Congress not associated with a delegation could be invited to make a contribution to the UNCITRAL Symposium Trust Fund. Since a contribution would be voluntary, the amount would also be voluntary. However, an appropriate amount might be suggested.

24. The papers presented by the speakers might subsequently be published in a bound form. In anticipation of such a possibility, the programme budget for 1992-1993 submitted by the Commission's Secretariat provides for publication in English, French and Spanish of the papers to be presented to the Congress.

<sup>6</sup>The two Hague Conventions have been denounced by three States, i.e., Germany, Italy and Netherlands, when they adhered to the United Nations Convention on Contracts for the International Sale of Goods.



# I. DRAFT UNCTRAL MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

## Part I. Text of articles 1 to 15 as they result from the work of the Commission at its twenty-fourth session

### CHAPTER I. GENERAL PROVISIONS

#### *Article 1 Sphere of application\**

- (1) This law applies to credit transfers where any sending bank and its receiving bank are in different States.
- (2) This law applies to other entities that as an ordinary part of their business engage in executing payment orders in the same manner as it applies to banks.
- (3) 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.

#### *Article 2 Definitions*

For the purposes of this law:

(a) "Credit transfer" means one or more 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 carry out the originator's payment order. A payment order issued for the purpose of effecting payment for such an order is considered to be part of a different credit transfer.

(b) "Payment order" means an unconditional instruction, in any 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.

Nothing in this paragraph prevents an instruction from being a payment order merely because it directs the beneficiary's bank to hold, until the beneficiary requests payment, funds for a beneficiary that does not maintain an account with it.

(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.

(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 a payment order or a revocation of a payment order was issued by the person indicated as the sender.

(k) "Execution period" means the period of one or two days beginning on the first day that a payment order may be executed under article 10(1) and ending on the last day on which it may be executed under that article, on the assumption that it is accepted on receipt.

[(l) "Execution", in so far as it applies to a receiving bank other than the beneficiary's bank, means the issue of a payment order intended to carry out the payment order received by the receiving bank.]

(n) "Interest" means the time value of the funds or money involved, which, unless otherwise agreed, is calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved.

#### *Article 2 bis Conditional instructions*

(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, thereafter the sender of the instruction 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 of a payment order.

(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.

#### *Article 3 Variation by agreement*

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

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

## CHAPTER II OBLIGATIONS OF THE PARTIES

## Article 4

*Obligations of sender*

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

(2) When a payment order or a revocation of a payment order is subject to authentication other than by means of a mere comparison of signature, a purported sender who is not bound under paragraph (1) is nevertheless bound if:

(a) the authentication is in the circumstances 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 in the circumstances.

(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) a present or former employee of the purported sender, or

(b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.

The preceding sentence does not apply if the receiving bank proves 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, the sender is not bound by an erroneous duplicate of, or an error in, a payment order if:

(a) the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates or errors in a payment order, and

(b) 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 is bound only to the extent of the amount that was intended. This paragraph applies to an error in a revocation order as it applies to an error in a payment order.

(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 beginning of the execution period.

## Article 5

*Payment to receiving bank*

For the purposes of this law, 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 banking 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 banking 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 a central bank at which the receiving bank maintains an account, or

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

a. the rules of a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally, or

b. a bilateral netting agreement with the sender; or

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

## Article 6

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

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

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

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

(b) when the bank gives notice to the sender of acceptance,

(c) when the bank issues a payment order intended to carry out the payment order received,

(d) when the bank debits an account of the sender with the bank as payment for the payment order,

(e) when the time for giving notice of rejection under paragraph (3) has elapsed without notice having been given.

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

(a) 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;

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

(c) there is insufficient information to identify the sender.

(4) A payment order ceases to have effect if it is neither accepted nor rejected under this article before the close of business on the fifth banking day following the end of the execution period.

## Article 7

*Obligations of receiving bank other than the beneficiary's bank*

(1) The provisions of this article apply to a receiving bank other than 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 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) If a receiving bank determines that it is not feasible to follow an instruction of the sender specifying an intermediary bank or funds transfer system 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 inquires of the sender what further actions it should take in the light of the circumstances, before the end of the execution period.

(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 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) 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. 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).

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

#### Article 8

##### *Acceptance or rejection of a payment order by beneficiary's bank*

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

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

(b) when the bank gives notice to the sender of acceptance,

(c) when the bank debits an account of the sender with the bank as payment for the payment order,

(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 or other competent authority,

(h) when the time for giving notice of rejection under paragraph (2) has elapsed without notice having been given.

(2) A beneficiary's bank that does not accept a payment order is required to give notice of rejection no later than on the banking day following the end of the execution period, unless:

(a) where payment is to be made by debiting an account of the sender with the beneficiary's bank, there are insufficient funds available in the account to pay for the payment order;

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

(c) there is insufficient information to identify the sender.

(3) A payment order ceases to have effect if it is neither accepted nor rejected under this article before the close of business on the fifth banking day following the end of the execution period.

#### Article 9

##### *Obligations of beneficiary's bank*

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

(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 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) When the beneficiary's 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.

(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.

(5) Unless the payment order states otherwise, the beneficiary's bank shall, within the time required for execution under article 10, 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 10

##### *Time for receiving bank to execute payment order and give notices*

(1) In principle, a receiving bank is required to execute the payment order on the banking day it is received. However, if it does not, it shall do so on the banking day after the order 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 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.

(1 bis) If the receiving bank executes the payment order on the banking day after it is received, except when complying with subparagraph (a) or (b) of paragraph (1), the receiving bank must execute for value as of the day of receipt.

(1 ter) If a receiving bank accepts a payment order only by virtue of article 6(2)(e), it must execute for value as of the day on which

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

(b) where payment is to be made by other means, payment has been made.

(2) A notice required to be given under article 7(4) or (5) or article 9(2), (3) or (4) shall be given on or before the banking day following the end of the execution period.

(3) Deleted

(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 next day the bank executes that type of payment order.

(5) If a receiving bank is required to perform an action on a day when it does not perform that type of action, it must perform the required action on the next day it performs that type of action.

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

#### *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 actual time of execution or the beginning of the day on which the payment order ought to have been executed under subparagraph (a) or (b) of article 10(1), if later.

(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 time the credit transfer is completed or the beginning of the day when the funds are to be placed at the disposal of the beneficiary, if later.

(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 bank that accepts, a payment order in respect of which an effective revocation order has been or is subsequently received is not entitled to payment for that payment order. If the credit transfer is completed, the bank shall refund any payment received by it.

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

(6 bis) A bank that is obligated 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. 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 any rule of a funds transfer system.

(6 ter) An originator entitled to a refund under this article may recover from any bank obligated to make a refund hereunder to the extent that the bank has not previously refunded. A bank that is obligated to make a refund is discharged from that obligation to the extent that it makes the refund direct to the originator. Any other bank that is obligated is discharged to the same extent.

(7) If the credit transfer is completed but a receiving bank executes a payment order in respect of which an effective revocation order has been or is subsequently received, the receiving bank has such rights to recover from the beneficiary the amount of the credit transfer as may otherwise be provided by law.

(8) The death, insolvency, 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.

(8 bis) The principles contained in this article apply to an amendment of payment order.

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

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

##### *Article 12 Assistance*

Until the credit transfer is completed, each receiving bank is under a duty to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the banking procedure of the credit transfer.

##### *Article 13 Refund*

(1) If the credit transfer is not completed, 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 except when a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfers.

(3) A receiving bank is not 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. 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 seek such directions in similar cases. The sender that first specified the use of that intermediary bank has the right to obtain the refund from the intermediary bank.

(4) A bank that is obligated 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. 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 any rule of a funds transfer system.

(5) An originator entitled to a refund under this article may recover from any bank obligated to make a refund hereunder to the extent that the bank has not previously refunded. A bank that is obligated to make a refund is discharged from that obligation to the extent that it makes the refund direct to the originator. Any other bank that is obligated is discharged to the same extent.

*Article 14*  
*Correction of underpayment*

If 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.

*Article 15*  
*Restitution of overpayment*

If the credit transfer is completed, 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 the difference from the beneficiary as may otherwise be provided by law.

**Part II. Text of articles 16 to 18 as they resulted from the work of the Working Group  
on International Payments at its twenty-second session**

(The text of those articles was not considered by the  
Commission at its twenty-fourth session.)

*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.

**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.

## 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.

## II. SUMMARY RECORDS OF MEETINGS OF THE COMMISSION ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS<sup>a</sup>

### Summary record (partial)\* of the 439th meeting

Monday, 10 June 1991, at 10.30 a.m.

[A/CN.9/SR.439\*\*]

Temporary Chairman: Mr. BERGSTEN (Secretary of the Commission)

Chairman: Mr. SONO (Japan)

*The discussion covered in the summary record began at 11.10 a.m.*

**International Payments: draft Model Law on International Credit Transfers (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)**

#### Article 1

1. The CHAIRMAN suggested that the Commission should proceed immediately to a detailed discussion of the draft Model Law taking it article by article, and should touch upon general policy issues only in so far as they related to specific provisions in the text.

2. Mr. BURMAN (United States of America) said that, although his delegation agreed in principle with the footnote to article 1 of the draft Model Law, it had proposed an amendment to that footnote for the purpose of clarifying issues which were currently obscure. It was unclear, for instance, whether the existing text of the footnote meant that the draft Model Law applied to consumers unless the internal laws of a particular State otherwise governed the transaction. Furthermore, in its current form, the footnote gave no indication whether, in cases where the consumer-protection laws of a State conflicted with provisions in the draft Model Law in some respects only, the draft Model Law would apply to parts of a credit transfer and the State's consumer-protection laws to other parts of the transaction.

3. As for his delegation's concerns about article 1(1), he preferred to postpone discussion of the matter until various other relevant provisions had been discussed.

4. The CHAIRMAN said that it had not been the intention of the Working Group on International Payments to restrict the scope of consumer-protection legislation to the extent advocated

by the United States amendment, i.e. to transactions between the originator and the originator's bank, on the one hand, and between the beneficiary and the beneficiary's bank, on the other.

5. Mr. IWAHARA (Japan) said that the proposed amendment to the footnote to article 1 might give rise to difficult questions of policy in individual States. In article 16, paragraphs 1 and 5, and elsewhere, the draft Model Law dealt with the liability relationship between parties not engaging in direct transactions with one another. If countries were forbidden to enact special regulations concerning such liability relationships for the purpose of protecting consumers, that would discourage them from adopting the draft Model Law. If local consumer-protection laws governing relationships between the originator and receiving banks other than the originator's bank or between the beneficiary and sending banks were to be forbidden, then the Model Law should itself provide for consumer protection, an area which he understood had been expressly excluded from its scope.

6. Mr. GRIFFITH (observer for Australia) said that there was no need to amend the footnote to article 1 since, as it stood, it clearly indicated that a State's consumer-protection laws should indeed apply to parts of a credit transfer transaction and the draft Model Law to other parts.

7. Mr. DUCHEK (observer for Austria) said he shared the doubts expressed by the representatives of Japan and Australia. The applicability of national consumer-protection laws should not be diminished by the operation of the Model Law; States adopting the Model Law, or acceding to a convention if the Model Law should take that form, must be able to enact their own consumer-protection laws as they deemed necessary and apply them to international credit transfers. The matter contained in the footnote might better appear somewhere in the text of the articles themselves so as to make it clear that consumer-protection laws would not be affected.

8. The proposed amendment would seem to indicate that the consumer-protection laws of a State should prevail, as far as the relationship between the originator and the originator's bank

<sup>a</sup>The summary records contained in this volume include the corrections requested by the delegations and such editorial changes as were considered necessary.

\*No summary record was prepared for the rest of the meeting.

\*\*No summary records were issued for the 426th to 438th meetings.

was concerned, only if the two parties were situated in the same State. However, that might not be the case and, according to private international law, the law of the consumer's State was decisive. Since the amendment would thus appear to run counter to the trend of private international law, he had some technical reservations. A further problem concerned the relations with third parties, which might also be regulated by consumer-protection law.

9. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the text of article 1 should be left as it stood in the Model Law.

10. Mr. ERIKSSON (observer for Sweden) said that the footnote to article 1 should be left unchanged. Adoption of the amendment would lead to serious problems in the matter of the protection of consumers. There would, for instance, be a number of difficult questions in the event that more than one bank in the chain of transactions was situated in a country with special consumer protection rules, where the consumer was also located.

11. As for the question of a conflict between the Model Law and the consumer-protection laws of a particular State, it was quite clear that, unless there were special consumer-protection regulations in the country concerned that dealt with the specific problem, it would be resolved according to the rules contained in the Model Law.

12. Mr. BURMAN (United States of America) said that the will of the Commission seemed to be clear; however, with regard to the subject under discussion and to other articles it had yet to consider, he hoped that there would be general agreement that the fundamental purpose of the Commission was to facilitate international trade by removing the impediments created by conflicting national provisions and, perhaps, by establishing special international rules. The interests of consumers had, of course, to be taken into account. In view of the difficulties created by uncertainty as to what laws would apply to a given commercial transaction, his delegation considered that it was the Commission's task to create predictability and certainty for the commercial parties. That aspect would, he hoped, be taken into account as the Commission's work proceeded since such an approach would result in great benefits to all the Member States.

13. The CHAIRMAN, having thanked the representative of the United States for his cooperative and constructive attitude, said that, although his amendment was not generally accepted, there was a feeling in the meeting that the protection of consumers was important.

14. The United States proposal was also related to the sphere of application of the article—whether it should cover only international transactions or both domestic and international transactions. In the latter case, he assumed that the delegation of the United States would prefer that certainty be maintained, both the beneficiary side and the originating side being subjected to local autonomy, and would agree that the protection of consumers should fall under local jurisdiction. Even if it were thought that certain segments of the total transaction should be excluded from consumer protection, that principle could not be imposed through the Model Law. It was clear that the aim should be to create certainty in the legal relationships involved in the credit transfer system.

15. The footnote, as currently drafted, was the result of a long debate. It was a neutral statement of a fact and was not intended to encourage local intervention. In the circumstances, he hoped that the United States representative would not insist on his amendment.

16. He had noted the suggestion by the observer for Austria that the matter contained in the footnote be included in the

actual text of the Model Law, but hoped that the suggestion would not be pursued.

17. Turning to article 1(1), he noted the United States proposal to make the Model Law applicable to both the domestic and the international parts of credit transfers. While the comments he had heard indicated that such an approach might not attract much support, it should none the less be understood that expansion of the scope of the Model Law would not necessarily be excluded.

18. Mr. BHALA (United States of America) said that he agreed with the Chairman's thinking. In the case of the test for internationality, it might not be possible to solve all the difficulties at the current session. The division of a credit transfer into an international part and a domestic part raised both conceptual and operational difficulties. Any such test was bound to be formalistic and might therefore be either under-inclusive or over-inclusive.

19. In fact, the text as currently worded might be the best that could be expected. He would, however, like to see the matter discussed in the commentary on the draft Model Law which would, he hoped, reflect his delegation's concerns.

20. Mr. SCHNEIDER (Germany) drew attention to a problem concerning the Member States of the European Economic Community. The intended creation of a single internal market would eliminate the distinction between cross-border and domestic transactions within the Community. The possibility of issuing an EEC directive incorporating the Model Law was under discussion. In that event, all transfers within the Community would be subject to the Model Law.

21. Secondly, although the Working Group had noted the global nature of international payments, national laws still existed and it was desirable that they should continue to do so. It was therefore necessary to decide whether a chain of contracts should be governed by a single law, or whether different parts of the chain should be governed by different laws. However that might be, it was by no means unlikely that full harmonization would not be achieved because some countries would, unfortunately, decide not to adopt the Model Law. As it was possible, therefore, to deal only with specific parts of the chain, he preferred to retain the existing text.

22. The CHAIRMAN suggested that, in respect of internal European Economic Community rules, an approach might be adopted similar to that in the 1980 United Nations Convention on Contracts for the International Sale of Goods which stated (article 94) that two or more contracting States having the same or closely related rules might be excluded.

23. Ideally, as advocated by the representative of the United States, international transfers should be governed by global rules. For the time being, however, as the representative of Germany had pointed out, national laws predominated. Those two views did not necessarily reflect a contradiction in philosophy but simply constituted different approaches to current realities.

24. He assumed that the Commission would adopt the approach of distinguishing between international and domestic transfers, as clearly implied in article 1(1). As indicated in the Secretariat's comments on the article (A/CN.9/346, pp. 6-9), States would still be free to extend the scope of the Model Law by applying it to international and domestic transfers.

25. Mr. GRIFFITH (observer for Australia) said he agreed that there should be an option of applying the Model Law to domestic transfers. It might be useful if that idea were included in a footnote or commentary to the Model Law, so that those



persons not attending the session of the Commission might become aware of it.

26. Mr. VASSEUR (Banking Federation of the European Community) said that the members of his Federation would wish the Model Law to apply solely to electronic credit transfers. He shared the concern of the representative of the United States arising from the significant differences between low-cost, high-speed electronic credit transfer systems and other methods of transfer involving telex, documents and the like. The Working Group had decided not to make any distinction but had suggested that, if necessary, special rules for non-electronic transfers could be drawn up. He asked for confirmation that the current text, which made no distinction between the different types of transfer, was intended to apply to all transfers of funds.

27. The CHAIRMAN said that, although the Working Group had, at one stage, concerned itself only with electronic credit transfers, it had come to realize that most of the rules would apply to all types of transfer of funds. It had therefore considered the application of the rules to all transfers of funds. Nevertheless, it was only because of the development of electronic credit transfer systems in the 1970s that the current draft Model Law had been developed. However, since it was a Model Law, Member States were perfectly free to adopt it for electronic credit transfers only.

28. Mr. ABASCAL ZAMORA (Mexico) said that the restriction to electronic credit transfers had been eliminated for various reasons. In the first place, it was difficult to distinguish between electronic and other types of transfer since, in practice, a transfer might be made in part electronically and in part by other means. It has also been thought desirable to eliminate any preference for a particular type of technology, which might preclude other forms to be developed in the future. High-speed electronic credit transfers were extremely difficult to define. It had therefore been decided that the draft Model Law should cover all transfers of funds.

29. Mr. BURMAN (United States of America) said that since the issue of the distinction between electronic fund transfer (EFT) and all other forms of transfer had been raised, he had some general comments to make, even though the subject had been discussed in the Working Group.

30. The Working Group had taken on an extremely difficult task and the ultimate fruit of its labours might prove unacceptable in practice to the commercial community if the Commission insisted on trying to combine two very different types of transactional environments which would be better served by two different sets of rules.

31. The question was not just one of speed, like, for example, the difference between a motor car driving along a motorway and a bicycle proceeding slowly and steadily with time for checking, notifying and so forth. What really distinguished electronic banking from the traditional banking world was the extremely high volume made possible by computer-assisted international banking, which had created a very different environment for the transfer of credits. Combining all those aspects in a single instrument—as the Working Group and the Commission appeared to be doing—seemed less practical than attempting to produce separate rules for the different types of transaction.

32. The members of the Commission and of the Working Group might bear in mind, however, when distinguishing the environment of high-volume computer-assisted transactions, that there might be links in the chain that used paper, telex, fax and, indeed, human messengers—there might still be room for human beings in the banking system. Nevertheless, a distinction had to be made between electronic and non-electronic banking.

33. A fundamental change had occurred in electronic commerce generally, not merely in credit transfers, and the role of the central data manager was vital. The fund transfer system should be seen as a new, important and centrally involved party. A variety of elements in a transaction might have been undertaken in media other than electronics and the high volume of transactions often caused a variety of legal relationships to change. The Commission might wish to return to the fund transfer system as to a focal point that, in the long run, changed a great deal in the relations between a variety of banking participants and ultimately the originators of the transactions at one end and their beneficiaries at the other.

34. Mr. KOMAROV (Union of Soviet Socialist Republics) said that, in his delegation's opinion, there was no need nor any good reason to revise the consensus reached in the Working Group. Since, however, questions of interpretation had arisen, it might be advisable in the interests of clarity to state clearly—in article 2(b) concerning payment orders—that the provision in question applied to all types of payments made by teletransmission or electronic transmission.

35. Mr. SCHNEIDER (Germany) said that his delegation shared the United States representative's concern about the problems connected with electronic fund transfers. In his delegation's view, high-volume and inter-bank payments were problems of codified law and might be dealt with by special contracts. The Commission should realize that it was dealing with a very broad sphere of application; it would have to take into consideration the fact that there were still paper-based payment orders and it would also have to deal with consumer transactions.

36. In that connection, he said that it was not completely clear from his country's comments, especially the second subparagraph of paragraph 15 (A/CN.9/347, p. 31), that the Model Law should apply to consumer transactions but that national consumer law would amend the Model Law. He suggested that the insertion of the word "also" or "too" in the last clause of that subparagraph would remedy the situation. The inclusion of consumer transactions should be taken into consideration throughout the text. It was important, also, that the question of freedom of contract should be considered.

37. The CHAIRMAN said that the last subject mentioned would come up under article 3. In that connection, he drew attention to the Secretariat's comments on article 3 (A/CN.9/346, p. 25, para. 3).

38. Mr. LIM (Singapore) suggested, with reference to article 1(2), that, if the reference in the second line was to separate branches of the same bank in different States, the word "a" should be replaced by the words "the same".

39. Mr. BERGSTEN (Secretary of the Commission) said that the text as drafted was intended to refer to a single bank. If the proposed amendment would make the intention clearer without changing the substance, it would be a drafting matter. It might also facilitate translation into other languages.

40. The CHAIRMAN said that, while the Commission might wish to adopt that approach in respect of article 1, it should not be forgotten that article 2 contained other provisions concerning branches and offices of banks, while other articles also might be relevant.

#### Article 2

41. Mr. BERGSTEN (Secretary of the Commission), referring to the Secretariat's comments on article 2(a) (A/CN.9/346,

pp. 12-13, paras. 4-9) reminded the Commission that there had been some problems of interpretation in the Working Group over the question whether certain credit transfers were international or not. In the case, for example, of a United States dollar transfer between two banks in the United Kingdom, one way of making the transfer would be for a payment order to be sent from bank A to bank B, both in the United Kingdom, for the credit of the account of the beneficiary; to reimburse bank B, bank A would then send a separate payment order to its correspondent bank in New York to credit the account of bank B; and bank B would receive the funds from bank A by credit to its account in New York. The direct payment order from bank A to bank B would remain within the United Kingdom and no payment order would cross a boundary from one State to another.

42. The transaction in question could be described in two ways. On the one hand, it could be argued that the reimbursement was a separate transaction which would clearly fall under

the current text of the Model Law, while the payment order—or the bank A to bank B transaction—was strictly domestic in the United Kingdom. Conversely, it could be argued that the entire set of operations was a single transaction, namely, a credit transfer from bank A or its customer to bank B, part of that credit transfer being the reimbursement, which included a payment order passing from London to New York. According to the latter interpretation, the payment order from bank A to bank B in the United Kingdom would be governed by the Model Law, on the assumption that the United Kingdom had adopted the Model Law with its article 1 as currently drafted.

43. The CHAIRMAN said that the matter raised by the Secretary of the Commission would be discussed in connection with the second sentence of article 2(a) and, depending on the outcome of that discussion, the Commission might have to return to article 1.

*The meeting rose at 12.30 p.m.*

### Summary record of the 440th meeting

Monday, 10 June 1991, at 2 p.m.

[A/CN.9/SR.440]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.10 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

#### Article 2 (continued)

1. The CHAIRMAN said that article 2 of the draft Model Law (A/CN.9/344, annex) began with some introductory words which he assumed there was no need to discuss. He would therefore invite comments on subparagraph (a). A point that had been raised by the Secretary at the previous meeting and that required discussion was whether a reimbursement relationship was to be regarded as part of the credit transfer referred to in the subparagraph.

2. Mr. FUJISHITA (Japan) said that the issue seemed to be a complex one. On the basis of comments received from business circles and experts in Japan, his delegation felt that the reimbursement relationship should be excluded from the definition. He wished to draw attention in that connection to the comments of the Secretariat on article 1 in document A/CN.9/346 with regard to the question of the internationality of a transfer. As had been pointed out, if a reimbursement relationship was regarded as included in a credit transfer, the fact that the reimbursing bank was located in another country would cause the whole series of operations constituting the transfer to be covered by the Model Law; the originator or the beneficiary might, however, be unaware that the transfer would be regarded as an international credit transfer, and that might be prejudicial to their interests. According to banking practitioners in Japan, the reimbursement relationship was regarded as something quite different from the chain of operations constituting the credit transfer; to include the reimbursement relationship in the definition might therefore cause confusion. Accordingly, his delegation proposed that the reimbursement relationship should not be

regarded as part of the original credit transfer but be considered to constitute a distinct credit transfer transaction.

3. If that point was accepted, the actual drafting was less important. His delegation would not insist on the deletion of the second sentence of article 2(a) as proposed in the second paragraph of Japan's written comments on that portion of the text (A/CN.9/347, p. 35), provided that an amendment was made to article 2(h) on the lines proposed there.

4. Mr. GREGORY (United Kingdom) associated himself with the previous speaker's remarks. He considered that, in the example that had been given by the Secretary at the previous meeting, the payment order to the reimbursing bank in the United States should be treated as separate and not as making the original credit transfer international. The present draft did not make clear whether a reimbursing bank would count as an intermediary bank. However, he thought that the second sentence of article 2(a) was useful and could be left as it stood; when the Commission took up subparagraph (h), it could make clear there that a reimbursing bank was not an intermediary bank.

5. Mr. ABASCAL ZAMORA (Mexico) supported the United Kingdom representative's comments. It was true that divergent views had been expressed on the subject in the Working Group on International Payments, but he thought that the prevailing view had been that the reimbursement operation would not be part of the credit transfer. The order to a reimbursing bank should, he thought, be regarded as something separate.

6. Mr. VASSEUR (Banking Federation of the European Community) said he thought that in the United Kingdom the situation might be a special one, since clearing agreements existed there which did not exist in other countries. In any

case, the subject under discussion related rather to article 1 than to the definition of the term "credit transfer". The wording of article 1(1) had been deliberately broadened; he thought that the current wording would make the Model Law apply where, although the originator's bank and the beneficiary's bank were in the same country, the currency used was that of another country.

7. Mr. BHALA (United States of America) said that his delegation supported the present drafting of the first two sentences of article 2(a). It did not consider that so-called reimbursement relationships should be specifically excluded from the definition. There were some credit transfer systems that were based on simultaneous message and payment, and those might then fall outside the sphere of application of the Model Law. The "credit transfer" definition was a key one and his delegation would be against deletion of the second sentence. It must be made clear that a credit transfer consisted of a series of payment orders.

8. Mr. GREGORY (United Kingdom) said he did not think that the point raised by the Secretary had anything to do with a particular practice existing in the United Kingdom, as the representative of the Banking Federation of the European Community had suggested. The situation described could arise with any two countries. He also wished to make it clear that his delegation was not suggesting the exclusion of reimbursement operations from the effects of the Model Law; the point was merely that in the case described the reimbursement operation would constitute a separate transfer. It would unnecessarily complicate the Model Law to attempt to treat reimbursing banks as intermediary banks.

9. Mr. SCHNEIDER (Germany) said that his delegation was in general agreement with the view expressed by the United Kingdom delegation that the basic credit transfer and the reimbursement were two credit transfers, and that one might be international, and therefore covered by the Model Law, and the other national.

10. A problem arose from the fact that, with the draft as it stood, a "credit transfer" meant the whole series of operations, and if any part of it was international the whole series became international. But where the originator's bank and the beneficiary's bank were in the same country, how could they foresee that the transfer would become an international transfer? The earlier text of article 1, adopted at the Working Group's twentieth session (see document A/CN.9/329, annex), spoke of the Model Law applying "where the originator's bank and the beneficiary's bank are in different States". The new draft raised problems.

11. The CHAIRMAN noted that the point just raised was discussed in paragraph 11 of the Secretariat's comments on article 1 (A/CN.9/346, p. 9).

12. Mr. PELICHET (Hague Conference on Private International Law) said that, in its written comments on article 2(a) (A/CN.9/347, p. 71), the Permanent Bureau of the Hague Conference proposed that the second sentence of article 2(a) should be deleted, but for different reasons than those given by the delegation of Japan. The Permanent Bureau considered that, when a link in the chain was international, the Model Law should apply to the whole transfer. The second sentence of the draft was not only unnecessary but presented a danger, because with it a court might interpret the sphere of application of the Model Law restrictively. It might be possible to find a different wording that would make the matter clear.

13. Mr. HUANG Yangxin (China) said that, with regard to the question of the reimbursement operation, his delegation

agreed basically with the comments of the United Kingdom delegation. But there might be a still more complicated situation: bank A might ask bank B in the same country to reimburse bank C in the same country, but bank B might credit bank C through a bank in another country. The relationship between banks A and B should then be treated as domestic. It would be hard to ask bank A, in such a case, to accept the application of the Model Law.

14. Mr. BHALA (United States of America) suggested that, in the interests of ensuring wide acceptance of the Model Law as a viable legal instrument in the international commercial world, the text of the first two sentences of article 2(a) and the definition of an "intermediary bank" in article 2(h) should remain as drafted, since they covered all the different concerns raised with regard to cases in which payment orders and payments were simultaneous and those in which they were not.

15. The CHAIRMAN said that one reason for the proposal to delete the second sentence of article 2(a) was that it might imply that the reimbursement situation, which from some points of view might be regarded as involving separate transactions, was to be included in a credit transfer. As a corollary to that it had been suggested that the definition in article 2(h) might be modified by adding the words "that receives and issues payment orders" at the end of subparagraph (h). However, it had been agreed that the second sentence of article 2(a) was important in that it complemented the definition of an "intermediary bank". If the Commission decided to exclude the reimbursement situation from the chain of credit transfers, treating it instead as a separate transfer, it might ask a drafting group to try to find wording to that effect. He suggested that the second sentence of article 2(a) might be improved if alternative wording was found for the phrase "intended to carry out".

16. Mr. BURMAN (United States of America) said that his delegation would reserve its position on subparagraph (a), since it was still reviewing the implications for simultaneous settlement systems such as that of the Federal Reserve Bank.

17. Mr. FUJISHITA (Japan) said that it was his impression that the majority favoured excluding the reimbursement situation from the original credit transfer transaction. Given that assumption, a flexible approach could be adopted with regard to the wording of subparagraphs (a) and (h) of article 2.

18. Mr. SCHNEIDER (Germany) said that problems would arise in situations where both the originator's bank and the beneficiary's bank were in the same country and where there was only one intermediary bank in another country. It would be difficult to define the rights and obligations of the originator in such circumstances. In the case of revocation, for example, how was the originator's bank to ascertain its rights when different rules applied to domestic and international payments? It was important in such cases to know whether the transaction was or was not international.

19. Mr. ABASCAL ZAMORA (Mexico) said that the issue just raised by the representative of Germany had been discussed at length in the Working Group. Two schools of thought had emerged: the first had been that the application of the Model Law should be as broad as possible, while the second had been that provision must be made for the case in which two banks within one country wished to establish whether a third bank intended to invoke the internationality of a payment order in completing a credit transfer. No solution to that problem had been found in the Working Group, but it would probably not prove to be of major practical significance.

20. Mr. SCHNEIDER (Germany) said that the problem would in fact prove significant because the developing internal market

in the European Community would give rise to many transactions of the kind he had mentioned.

21. The CHAIRMAN said that article 94 of the United Nations Convention on Contracts for the International Sale of Goods might be a relevant model for States to use when adopting the Model Law to establish cases to which the Model Law would not apply when the States concerned in the transfer had similar rules on credit transfers.

22. Mr. SCHNEIDER (Germany) said that a situation he had specifically in mind was where the originator's bank was a branch of an international bank in State A, the beneficiary's bank was also in State A and the originator's bank executed the originator's payment order by sending a payment order to its main office in State B. In the European Community that type of transaction would be encountered frequently, but it could also arise more generally in international commercial relations.

23. Mr. GREGORY (United Kingdom) said that the problem of reimbursement to banks could be solved by amending the phrase "intended to carry out" in article 2(a). The first sentence of the subparagraph might have to be changed as well in order to dispose of the ambiguity inherent in the term "series of operations", which might be held to include the transaction of reimbursement. The second sentence was not intended to stand as a definition in its own right, but rather to explain the content of the first; it would therefore be best to combine the two sentences by deleting the full stop after the word "beneficiary" and replacing it by the word "but".

24. The CHAIRMAN pointed out that the United States had already proposed, in its written comments on article 2(a) (A/CN.9/347/Add.1, p. 11), that the expression "series of operations" should be replaced by the words "series of payment orders". The precise wording of article 2(a) could perhaps best be left to the drafting group.

25. Mr. PELICHET (Hague Conference on International Private Law) said that even if the wording was referred to a drafting group, it should be clearly understood that if a single segment of a transfer operation was international in character the entire credit transfer would fall within the scope of the Model Law. Article 1 did not make it clear that when a transaction involved a sending bank and a receiving bank situated in different States, the whole transaction was to be regarded as international.

26. Mr. AL-NASSER (observer for Saudi Arabia) said that the existing wording of article 2(a) was far from clear and would not make provision for the circumstance in which reimbursement had been made to the receiving bank.

27. Mr. KOMAROV (Union of Soviet Socialist Republics) said that the definition of a credit transfer would be more comprehensive if it envisaged not only the time at which the operation began but also that at which it was concluded. He drew attention in that connection to article 17, which referred to the "completion" of a credit transfer.

28. Mr. LOJENDIO OSBORNE (Spain) said that he would prefer the words "funds transfers" to replace the words "credit transfers" in the title of the draft Model Law, since, at least in Spanish, the present title was very broad in meaning and would include debit transfers, which were not intended to fall within the scope of the Model Law.

29. Mr. ABASCAL ZAMORA (Mexico) said that he believed the problem related solely to the Spanish version of the title of the draft articles. The purport of the term "credit transfers" in the English version was not in doubt.

30. The CHAIRMAN noted that under subparagraph (a) of article 2 the Commission had to consider the question whether the Model Law should apply to transfers affected through a point-of-sale payment system. A difference of opinion existed on the subject. It had to be borne in mind that such systems had not been fully developed.

31. Ms. KOSKELO (observer for Finland) said that her Government believed that it was inappropriate to exclude point-of-sale transactions from the sphere of application of the Model Law solely on the ground that they involved debit transfers. It was in fact difficult to distinguish between credit and debit transfers in point-of-sale systems. It would therefore be preferable to leave open the possibility for point-of-sale systems to be covered by the Model Law, and accordingly to delete the sentence in square brackets in article 2(a).

32. Mr. FUJISHITA (Japan) said that his delegation too supported the deletion of the sentence, for the reasons given by the previous speaker and also because a specific reference in the Model Law to point-of-sale systems would be premature at the current stage of their development. It would be best to leave the matter of the application of the Model Law to a specific point-of-sale system to be interpreted by the legislator or the courts in the light of the provisions in subparagraphs (a) and (b) of article 2.

33. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that, in the absence of a clear definition of a point-of-sale system, his delegation favoured the deletion of the sentence in square brackets in article 2(a).

34. Mr. BHALA (United States of America) said that in his country point-of-sale systems were regarded as giving rise to debit transfers, whereas other countries considered them to generate credit transfers. That divergence of views was a good reason to keep point-of-sale systems out of the Model Law. The Model Law was intended for use by commercial parties for commercial purposes, whereas point-of-sale systems were generally used for consumer purposes and should therefore be outside the scope of the Model Law. The Model Law would be a persuasive document for commercial parties if it was flexibly drafted, but tightly drawn in terms of what it covered. It would be unfortunate to complicate it by extending its regime to systems which had unknown implications.

35. Mr. LIM (Singapore) agreed with the views expressed by the representative of the United States. Electronic funds transfer at point of sale was generally a consumer matter rather than an inter-bank one. He therefore approved the sentence excluding point-of-sale systems from the operation of the Model Law.

36. Mr. ERIKSSON (observer for Sweden) felt that it was not useful to discuss point-of-sale payment systems as though they were all alike. There were differences between them and certain systems might come within the scope of the Model Law. There was no reason for a specific rule in the Model Law to the effect that it did not apply to point-of-sale systems. He supported the proposal by Finland that the sentence in square brackets should be deleted.

37. Mr. GREGORY (United Kingdom) said that, while his delegation appreciated the concerns expressed by the United States and Singapore, there were provisions in the Model Law which went a long way towards meeting them. If a point-of-sale payment system involved a debit transaction, that transaction would be specifically excluded under the definition of the term "payment order". If it was a consumer system, its transactions would be excluded by virtue of the footnote to article 1. He saw no reason why point-of-sale systems should be excluded from the operation of the Model Law. In the future such systems

might be used for commercial transactions and it would not be right for them to be explicitly excluded. His delegation therefore favoured the deletion of the sentence in square brackets.

38. The CHAIRMAN noted that a majority of speakers appeared to favour the deletion of that sentence.

39. He invited the Commission to comment on the last sentence of article 2(b), dealing with the question of unconditionality of payment orders.

40. Mr. SCHNEIDER (Germany) recalled that the Working Group had discussed conditional payment orders at some length and had reached broad agreement on the importance of certainty for banks involved in the payment process. His delegation had originally taken the view that the number of conditional payment orders was small. However, it had recently become aware of a trend towards the imposition of conditions by some banks, actuated by the wish to offer the public new types of product. A typical condition might be a statement that payment would only be made when the beneficiary had provided his bank with certain types of document.

41. Such products were outside the purview of the Model Law, but there seemed no reason why it should prevent banks from taking advantage of evolving techniques. A situation in which, because conditional instructions were excluded from the operation of the Model Law, one body of rules of law, namely the Model Law, governed unconditional payment orders while another governed conditional payment orders was inherently undesirable. There was, of course, nothing to compel a bank to accept a conditional payment order, so it could decide itself whether to do so or not.

42. Mr. ABASCAL ZAMORA (Mexico) referred to his Government's written comments (A/CN.9/347, pp. 41-42), in which an alternative text was proposed for the last sentence of article 2(b). He wished both to explain the reasons for his Government's proposal and also to refer to the comments made by the representative of Germany.

43. In the Working Group the proposal by the representative of the United States of America to exclude conditional payment orders altogether had met with considerable opposition. Because of the abstract nature of electronically processed transactions it had been thought essential to establish clearly that payment orders covered by the Model Law had to be unconditional.

44. The representative of Germany had referred to the fact that some banks did accept and execute conditional payment orders. Misunderstandings might arise where a conditional payment order was executed and a later occurrence unconnected with the conditionality of the payment supervened. The parties to the transfer might then find themselves deprived of their rights under the Model Law. Accordingly it had been decided that when a receiving bank received a conditional payment order, the fact that a bank had executed it would not necessarily mean that parties entitled to the benefit of the Model Law were deprived of their rights. That in turn had led to an attempt to devise new language according to which the principle would be contingent on the fulfilment or otherwise of the condition, i.e. the parties to the transfer might be covered by or excluded from the Model Law according to whether the condition was met. If it was not, the rights and obligations of the parties under the Model Law would not apply. The Working Group's decision had been that if an order was conditional, it was not a payment order, but if a receiving bank carried it out in accordance with the Model Law, the rights and obligations of the parties to the transfer would come into play.

45. His Government's proposed amendment to the final sentence of article 2(b) was simply an attempt to reflect the decision taken by the Working Group. It did to some extent also reflect the concerns of the German delegation. He agreed that conditional payment orders would not be abstract in the sense of credit transfers and would therefore not normally be covered by the Model Law; if, however, parties agreed to them, banks wishing to accept conditional payment orders could do so without affecting the abstract nature of the transfer or the underlying policy. His Government's insertion of the term "originator's bank" in square brackets in its proposal was intended as a means of restricting the meaning of the sentence.

46. Mr. AL-NASSER (observer for Saudi Arabia) said that, although he personally approved the definition of a payment order as an unconditional instruction, he saw a need to address the category of conditional payment orders, as the representative of Germany had indicated, some banks were increasingly accepting and executing them. At the same time, as the representative of Mexico had rightly said, a conditional payment order was not to be considered a payment order within the meaning of the Model Law.

47. Following discussions with some Saudi Arabian banks on the Model Law proposals, he favoured the idea of allowing a margin of manoeuvre to the parties to such a contract. He took the view that banks which accepted conditional payment orders should be able to continue to do so without forfeiting their rights under the Model Law.

48. Mr. BURMAN (United States of America) wished to associate his delegation with the proposal made by the Government of Mexico. To his delegation's way of thinking, if a bank chose to accept from a customer a document imposing certain conditions with respect to the execution of a payment order, the manner in which it did so was a matter for its own judgement. It was for the bank to decide whether the conditions were satisfied or whether it had the authority to execute the payment order. If at that point the bank executed the order, presumably without conditions, it was a matter between the customer and the bank whether it did so properly, and it would not be right to deny it the benefits and obligations of the Model Law out of hand.

49. Turning to the statement made by the representative of Germany, he said that his delegation understood the concern felt over the many documents which banks issued with conditions attached to the payment process, whether they were called letters of credit, standby letters of credit or credit documents. Whatever they might be called, they related to a greater or lesser extent to underlying transactions of some sort which were covered by the working group at present engaged in discussing the issue of bank guarantees.

50. To his mind, to confuse those in one law would lead to the inevitable dilution of the focus of the Model Law and, predictably, leave the Model Law without the possibility of impact in the commercial world. He hoped that course would not be adopted. It was true that different specialities of commercial law dealt with discrete areas of transactional events between parties. It would be most beneficial if the present draft could remain focused on payment orders and the credit transfer process and leave management conditions to other areas of commercial law being pursued by another working group. The draft Model Law was, in his view, not the place to deal with those subjects.

51. Mr. GREGORY (United Kingdom) referred to the comments of the representative of Mexico regarding his Government's proposal for the last sentence of article 2(b). He agreed that the Working Group had decided that the question whether

or not a condition had been satisfied should be outside the Model Law. It was therefore true that the present wording of the sentence might not fully reflect the wishes of the Working Group. However, he was not sure that he knew exactly how the Mexican proposal would work; the point that caused him particular difficulty was the words "for the purposes of this law", because they suggested to him that the Mexican proposal amounted to the existing wording of the sentence without the qualification "but the condition is subsequently satisfied". If that was so, it would no longer be clear when an order of the kind in question came within the scope of the Model Law. Since the aim of the Model Law was to create certainty, he asked the Mexican representative to explain how conditional payment orders would become subject to the Model Law.

52. Mr. ABASCAL ZAMORA (Mexico) replied that he was in complete agreement with the representative of the United Kingdom. He believed that the points raised were linguistic ones and could be treated as a matter of drafting.

53. Mr. DE BOER (Netherlands) said that he had reacted to the Mexican proposal in the same way as the representative of the United Kingdom. He did not see how one could say that a condition would be deemed not to have been made because it was not fulfilled. The Model Law was written for unconditional payment orders; the rules of the Model Law should accordingly not apply where conditions were attached. He suggested that the point might be met, if it was decided to include conditional payment orders in some way, by saying that the provisions of the Model Law applied to conditional payment orders to the extent that the conditional character of the order permitted.

54. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the definition of a payment order as an unconditional instruction was in line with general banking practice. He instanced cheques, which were always unconditional.

55. Ms. KOSKELO (observer for Finland) said that her delegation considered the present text preferable to the Mexican

proposal because the effect of the latter would be that a receiving bank would be allowed under the Model Law to treat a conditional payment order as if it were unconditional. She believed that had not been the intention of the Working Group and that the requirement in the present draft that the condition subsequently be satisfied was an important one. If that requirement were left out, a situation would be created in which receiving banks could treat conditional payment orders as if they were unconditional and disregard the fact that they had conditions attached to them.

56. Mr. ABASCAL ZAMORA (Mexico) replied that the effect of his Government's proposal would not be as understood by the delegation of Finland. A bank receiving a conditional payment order would be well aware that it was not receiving an unconditional payment order within the meaning of the Model Law. The decision of a bank to execute a conditional payment order because it had a contract with a customer was one thing; the fulfilment or not of a condition was another and was outside the purview of the Model Law.

57. Referring to the comments on the definition of a payment order in paragraphs 73-75 of the Working Group's report on its twenty-first session (A/CN.9/341), he said that his delegation's conclusion was that if a bank decided to execute a conditional payment order it would carry it out as if it were an abstract credit transfer. His delegation was emphatically not advocating giving the bank the right to decide whether or not a payment order was conditional.

58. The CHAIRMAN agreed that the Model Law should not deal with the question of whether conditions were or were not legally satisfied. It seemed to him that much uncertainty surrounded the present wording of the last sentence of article 2(b) and that the proposal of the Government of Mexico went some considerable way towards dispelling it.

*The meeting rose at 5.05 p.m.*

## Summary record of the 441st meeting

Tuesday, 11 June 1991, at 9.30 a.m.

[A/CN.9/SR.441]

*Chairman:* Mr. SONO (Japan)

*The meeting was called to order at 9.50 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

### *Article 2 (continued)*

1. The CHAIRMAN said that, at the preceding meeting, there had been a trend towards accommodating the idea of a conditional payment order with certain modifications—although the Working Group, after a prolonged debate, had favoured a requirement of unconditionality. In the light of the Mexican proposal, it had become apparent that the existing text, in particular the wording "subsequently satisfied and thereafter" in the last paragraph of article 2(b), might give rise to problems, if it later became apparent that the condition to which a payment was subject had not been satisfied.

2. One of the objects of the Mexican proposal had been to take care of that problem. However, the observer for Finland had drawn attention to another possible difficulty, namely, the situation in the event of a payment order being executed without regard for the conditions specified. He was not certain that the Mexican proposal solved that problem.

3. Mr. ABASCAL ZAMORA (Mexico), referring to the question of the Model Law applying only if the relevant conditions had been subsequently satisfied, said that the problem of uncertainty was serious, because the parties to the transfer would not know whether the conditions had been satisfied or not and whether, therefore, they had obligations and protection under the Law or not.

4. Regarding the problem raised by the observer for Finland, he did not agree that a solution could not be found. If, for



example, a person instructed a bank to execute a payment order provided that a certain condition was fulfilled, he thereby set up a contract with his bank that was governed by another law, not the Model Law. The bank, if it accepted that contract, had an obligation to carry out the instruction, otherwise it would be responsible under the terms of that other law. If a bank receiving a conditional payment order did not fulfil the conditions, it was not respecting its contract with its client. The Model Law was not concerned with the responsibility of a bank which violated a conditional payment order: that came within the scope of another law.

5. The CHAIRMAN said that it was surely intended that the Model Law should take care of such a situation, rather than leaving it to another law.

6. Mr. ABASCAL ZAMORA (Mexico) said that the problem was outside the law on credit transfers, which did not deal with conditions, because there was always uncertainty as to whether conditions had been satisfied or not. The question whether a bank had failed to meet conditions must therefore come under another law.

7. Mr. GREGORY (United Kingdom) said that the Commission was rediscussing a number of prior decisions and trying to find ways of reconciling different elements.

8. The first such decision, which was clearly expressed in the opening words of the definition of "payment order", was that, in order to be subject to the Model Law, payment orders should be unconditional. The Commission still adhered to that principle, but its members had agreed that, once a payment order which had started as a conditional order entered the system governed by the Model Law, it should be governed by the rules of the Model Law and the parties—particularly the originator—should have the rights and obligations for which the Law provided. The difficulty was to decide the precise moment at which what had once been a conditional payment order was to be treated as unconditional and what adjustments should be made to the rights and obligations.

9. As it stood, article 2(b) provided that the relevant moment came when the condition had been satisfied and the bank had executed the instruction. But, as pointed out by the Chairman, the fact that mention was made of satisfying the condition, which brought the transaction under the Model Law, inevitably raised the question whether the condition had been satisfied or not. The Mexican proposal would remove that element from the Law, but the Commission had still to ensure that a conditional payment did not fall within the scope of the Law until the bank had executed it and that a bank that executed a conditional payment order would not be subject to the rules in the Law concerning the timing of execution.

10. He suggested that the problem might be solved by the deletion of the words "but the condition is subsequently satisfied" and "thereafter" from the last paragraph of article 2(b) and the insertion of the word "thereafter" between the words "shall" and "be" in the penultimate line of that paragraph. The principle should be that the bank executing the conditional order did so outside the Law but that, once a payment order had been executed, it should come under the Law and be treated as unconditional.

11. Mr. ABASCAL ZAMORA (Mexico) said he supported the United Kingdom proposal.

12. Ms. KOSKELO (observer for Finland) said that, while the United Kingdom proposal was an improvement, her delegation's problem was still unresolved. The Mexican proposal, as it was worded, gave the impression that, by executing a conditional

payment order, a receiving bank would somehow be able to make the condition disappear for legal purposes, though that was hardly its intention.

13. The rights of the sender against a receiving bank which had executed a conditional payment—or had failed to do so—would be governed by a separate set of rules, and that must be made quite clear in the Model Law itself. To say that the Model Law would govern the payment order once a conditional payment order had been executed might well cause a misunderstanding, because the draft Model Law contained a provision to the effect that the rights and remedies under the Model Law were to be exclusive. It must be made clear that the Model Law did not interfere with the sender's rights against the receiving bank, based on the fact that a payment order had been executed contrary to the conditions. Her delegation had no difficulty with the proposed text, as amended by the representative of the United Kingdom, provided that it was quite clear that the rights in question were not interfered with.

14. THE CHAIRMAN asked the observer for Finland whether she would be satisfied with the notion of an abstraction principle, i.e. if it were clearly understood that the obligation under the Model Law was completely independent of or abstracted from the underlying transaction.

15. Ms. KOSKELO (observer for Finland) concurred.

16. Mr. SCHNEIDER (Germany) said that it might not be desirable to use the word "abstraction" in the sense of independence from underlying obligations, since there could be conditions which had nothing to do with such obligations. It might be better to refer specifically to the conditions laid down in a payment order by the originator or the originator's bank.

17. The Commission was discussing three separate problems. In the first place, it had been stated in the discussion that the Model Law applied only if a conditional payment order had actually been executed. If it were not executed, a different body of law would apply. That solution would be a regrettable one, since he believed that the Commission should try to include in the Model Law all the legal problems relating to conditional payments and that its sphere of application should be broadened accordingly.

18. The second problem was how to handle the offer of a conditional payment order under the Model Law. If the originator offered a conditional payment order to his bank, the choice was either to make the condition void or to apply article 6. In his own opinion, article 6 would not be applicable and the bank should be free to accept or reject a conditional payment order. Obstacles placed in the way of conditional payment orders would restrict the ability of banks to offer new types of service and such orders should be deemed payment orders under article 2.

19. The third problem was that of defining the duties of a bank that had accepted a conditional payment order. It must be made clear that, once a bank accepted a conditional payment order, its duty was to execute the payment and fulfil the condition. It would be better, therefore, to make no mention of conditional payment orders in article 2. They might, however, be mentioned in article 6, where it could be stated that a bank accepting such an order must do so expressly.

20. Mr. DE BOER (Netherlands) said he could accept the text proposed by the United Kingdom with the insertion of the word "unconditionally". It should be made clear that the receiving bank had executed the payment order unconditionally.

21. Mr. VASSEUR (Banking Federation of the European Community) said that the Commission did not seem favourably disposed to conditional payment orders, upholding as it did the principle that payment orders were normally unconditional. However, since conditional payment orders existed and could not be ignored, a way must be found of first stating the principle and then qualifying it.

22. Two propositions had been put forward when the question was being discussed at the Working Group's twenty-first session in July 1990. The first was that conditional payment orders would fall outside the scope of the Model Law. That proposition had not won much support because, as had been said at the time, it was agreed as a general principle that, unless expressly decided otherwise, the parties had full freedom to derogate from the Model Law (article 3). The condition stipulated concerning a payment order was thus merely a derogation from the principle in the first sentence of article 2(b). The other proposition which had been adopted, stated that the occasional exception did not place the transaction as a whole outside the sphere of application of the Law and hence that the Law should be fully applied, especially the provisions concerning responsibility.

23. The Commission has not yet begun its consideration of article 3, which stated the principle of the contractual freedom of the parties to derogate from the provisions of the Law. He suggested, therefore, that it would be better to link conditional payment orders with that article. If that suggestion were accepted, then article 2(b) might be redrafted along the following lines: "Payment order" means an instruction which is both unconditional, unless in application of article 3 below the sender's bank has agreed to execute a conditional order, provided that the condition has been actually satisfied, and is given by a sender to a receiving bank." The rest of the article would remain unchanged.

24. Mr. ABASCAL ZAMORA (Mexico) suggested, for the consideration of the Drafting Group, that wording such as the following might meet the concern expressed by the observer for Finland: "This law does not deal with the responsibility incumbent on the receiving bank which executes a conditional instruction as if it were a payment order."

25. Mr. BURMAN (United States of America) said he supported the initial Mexican proposal with the useful suggestions for clarification made by the representatives of the United Kingdom and the Netherlands and the observer for Finland. They would all help to achieve the separation of the parts of the commercial banking process concerned with the execution of payment orders and the conditional documentation and papers respectively. It was important that that separation should be carefully maintained, although he did not deny that some banks undertook and some customers requested conditional commercial transactions. He hoped, however, that representatives would do their best not to reopen basic structural issues and thus prolong the work of the Commission.

26. Mr. HUANG Yangxin (China) said that, if a receiving bank received a conditional payment order and believed that the condition might be satisfied after execution of the order, it should be free to execute the order on the understanding that it would be responsible for any consequences if the condition were not satisfied. He proposed that the words "when it was issued" at the end of the last sentence of article 2(b) be replaced by "when the conditions were satisfied" in order to avoid the possibility of liability due to the time-lag between the issuing of an instruction and the satisfaction of the condition attached to it.

27. The CHAIRMAN asked whether the Chinese proposal meant that the receiving bank thus placed in a situation of

liability would be compensated but that such compensation would not fall within the scope of the Model Law.

28. Mr. HUANG Yangxin (China) said that, once the order had been executed, it would be deemed unconditional under the Model Law but continue to be regarded as conditional under the applicable law.

29. Mr. GREGORY (United Kingdom) said he thought there was general agreement that it should be made quite clear that, if a condition was stipulated by an originator, the Model Law in no way detracted from the responsibilities of the originator's bank in relation to the condition, but that no responsibilities in relation to the condition should be imposed on subsequent banks in the credit transfer chain. The thrust of the Finnish, Mexican and Netherlands proposals was thus to keep the part of the transaction involving the condition separate from the part in which the payment order was regarded as unconditional, without in any way denying that the condition existed. If separate rights with regard to conditional instructions were to be preserved, it was important that they should affect no parties other than the party sending the conditional payment order, the party receiving it and the latter's bank.

30. Ms. KOSKELO (observer for Finland) said that, while the previous speaker's interpretation of her views was correct, she would like to add to the wording proposed by the delegation of the United Kingdom a sentence such as the following: "The Model Law shall not affect the rights of the sender of the conditional instruction vis-à-vis the bank that received and executed the conditional instruction."

31. Mr. ABASCAL ZAMORA (Mexico) said that his intention had been to state clearly that the Model Law did not cover the responsibilities of a bank in relation to a conditional instruction that it received and executed as though it were a payment order. Such responsibilities were covered by other laws.

32. The CHAIRMAN, recapitulating, said that the proposal by the delegation of Germany that two sets of rules be prepared, one for unconditional and the other for conditional payment orders—or, at least, endeavouring to accommodate the latter—was too ambitious and time-consuming. The proposal to amend article 6 to take account of the problem of conditionality was not feasible either, because of the changes which would then become necessary in subsequent articles.

33. There seemed, however, to be general agreement that the Model Law should concern itself with unconditional payment orders only but that, once executed, a conditional order should be deemed to have become unconditional in relation to subsequent parties in the transaction and also, retroactively, in respect of the rights and obligations set forth in the Law. The conditional side would nevertheless remain subject to the applicable law and outside the scope of the Model Law. That point would be clarified by the additional sentence suggested by the observer for Finland.

34. The suggestion by the observer for the Banking Federation of the European Community that the problem of conditionality be dealt with under article 3 was not feasible in view of the agreement already reached by the Commission that conditional payment orders should be excluded from the purview of the Model Law. The suggested deletion of the phrase "but the condition is subsequently satisfied" from the last paragraph of article 2(b), while not ideal from the point of view of the German delegation, at least had the merit of distancing the Model Law from the vexed question of the satisfaction of conditions, without explicitly discouraging the inclusion of conditional payment orders within its scope.



35. Mr. DUCHEK (observer for Austria) said that there appeared to be general agreement that, where a conditional payment order was deemed to have become unconditional on execution, the time-limits provided for in article 10 of the Model Law should not apply retroactively. From the drafting point of view, however, the retention of the phrase "when it was issued" did not seem to convey that principle sufficiently clearly.

36. Mr. GREGORY (United Kingdom) said he agreed that the problem was one of drafting rather than of principle.

37. Mr. LOJENDIO OSBORNE (Spain) said he was concerned about the process whereby a conditional payment was deemed to become unconditional. Conditionality was an integral part of a conditional payment order; it could not be abstracted away, but was necessarily passed on to all the banks involved in the credit transfer chain. The Model Law and the responsibilities stipulated by it should apply to a payment order executed by a bank regardless of conditionality and at all stages of the transaction.

38. The CHAIRMAN said that a conditional payment would be deemed to become unconditional merely for the purposes of the payment system and in order to bring it within the scope of the Model Law. No loss of conditionality through the operation of the Law was implied.

39. Ms. KOSKELO (observer for Finland) said, with regard to the concern expressed by the observer for Austria about the phrase "when it was issued", that the Working Group had proceeded from the premise that a conditional instruction was not a payment order. It had thus been necessary to specify that, once executed, such an instruction would be dealt with as though it had been unconditional from the start so as to ensure that the sender of a conditional instruction had the same rights as the originator of a credit transfer. Her own suggestion that the word "thereafter" in the last clause of article 2(b), which would then read "the instruction shall thereafter be treated as if it had been unconditional when it was issued", was intended to deal with the problem raised by the observer for Austria.

40. Mr. POTYKA (observer for Austria) said that his delegation, which still wished to delete the phrase "when it was issued", did not think that the insertion of the word "thereafter" was sufficient to convey the idea that the time-limits set out in article 10 did not apply to conditional instructions.

41. Mr. BERGSTEN (Secretary of the Commission) said that, in the first place, the assumption that a condition stipulated by an originator was one to be satisfied by the originator's bank had been explicit in the earlier texts of the Model Law, but was not explicit in the current one. Secondly, the current text did not adequately reflect what seemed to be a policy decision by the Commission that cases in which there was never a "clean" instruction, i.e. cases in which conditions were passed all the way down the credit transfer chain and in which the conditions had no effect on the law itself, but only on the factual situation, fell outside the purview of the Model Law.

42. As the observer for Finland had reminded the Commission, the Working Group had, after a long discussion, concluded that, in terms of the Model Law, a credit transfer situation was created at the moment when the originator's bank sent a clean payment order. The purpose of the clause "the instruction shall be treated as if it had been unconditional when it was issued" was to ensure that the originator of the conditional instruction would also be the originator under the Model Law.

43. Mr. DE BOER (Netherlands) said he wished to repeat an earlier proposal by his delegation that wording be added to the

text to the effect that the provisions of the Model Law would apply to conditional payment orders to the extent that the conditional character of the payment order permitted.

44. The CHAIRMAN said that, although earlier texts of the paragraph under consideration had referred to the originator's bank, it should be borne in mind that certain conditions might be imposed on intermediary banks designated by the originator. For the time being, therefore, it would be wise to avoid the phrase "originator's bank" in the wording adopted. At the same time, attention should be paid to the relevant comments by the Secretariat (A/CN.9/346, pp. 14-15, para. 19) in connection with the problem of time-limits mentioned by the observers for Austria and Finland.

45. The discussion seemed to have reached a stage at which it might be appropriate to designate a drafting group to formulate a text, having regard to the points raised by the representatives of the Netherlands and the United Kingdom and the observers for Austria and Finland.

46. Mr. GREGORY (United Kingdom) said that, when a matter was referred to a drafting group the policy of the Commission regarding it should be made quite clear. The representative of the Netherlands had just introduced a new question that could not be resolved by the drafting group. However, his delegation would find the procedure acceptable if the Commission were to discuss that question after the drafting group had produced wording to express what the Commission had already agreed.

47. The point made by the Secretary had been addressed in an earlier suggestion by the delegation of the Netherlands, namely, that the word "unconditionally" be inserted after the words "executes it" in the last paragraph of article 2(b). It was important that a bank receiving a conditional payment order to implement a transfer should issue a "clean" order. That was, he thought, the purport of the discussion, though it was not clearly brought out in the text before the Commission.

48. The CHAIRMAN suggested that a drafting group consisting of the representatives of the United Kingdom and Mexico and the observer for Finland should be set up to consider article 2(a), particularly the suggestion that the words "series of operations" be replaced by "series of payment orders", and that the wording of the phrase "intended to carry out the originator's payment order" be improved, if possible.

49. *It was so agreed.*

50. Mr. BISCHOFF (observer for Switzerland) said that article 2(b)(i) should not govern the definition of a payment, since it referred to a part only of the consequences of a payment order. The point should be dealt with under article 4(6).

51. Mr. DE BOER (Netherlands) said he supported that suggestion and thought that article 2(b)(i) was superfluous.

52. Mr. BHALA (United States of America) said that article 2(b)(i) should be retained, since it was essential that the provision should be restricted to credit transfers and should not include debit transfers. In the discussion held the previous day on point-of-sale systems, the representative of the United Kingdom had said that both the sub-paragraphs ((i) and (ii)) of article 2(b) should be retained, a view which his own delegation wholeheartedly supported.

53. Mr. KOMAROV (Union of Soviet Socialist Republics) said that the provision would be clearer if it stated that a payment order might be conveyed by any means of communication.

54. The CHAIRMAN said that, while the provision in article 2(b)(i) could be interpreted as covering that concern, the drafting group might be asked to consider whether some additional words could be added, such as "sent by the sender by any means", or whether that would raise new issues and might be unnecessary.

55. Mr. KOMAROV (Union of Soviet Socialist Republics) said he could accept that approach.

56. Mr. LE GUEN (France) said that the proposal by the representative of the USSR that it be stated in article 2(b) that the payment order might be conveyed "by any means" was too broad. It might result in banks being presented with payment orders in commercially unacceptable forms.

57. Mr. GREGORY (United Kingdom) said he agreed that the definition should refer to transfers by any means, but felt that that was already implicit in the text. If it was expressly stated, he did not think it implied that payment orders had to be accepted by a bank if made in an unacceptable form.

58. The CHAIRMAN said that the receiving bank could reject any payment order not made in proper form. He suggested that the point at issue should be referred to the drafting group.

59. *It was so agreed.*

60. Mr. GREGORY (United Kingdom) said that sub-paragraph (ii) of article 2(b) specified that the instruction must not provide that payment was to be made at the request of the beneficiary. The intention had been to exclude debit transfers, but it might also have the effect of excluding credit transfers to a beneficiary who did not have an account and where the beneficiary's bank was instructed to "pay on application". To overcome that problem, he proposed the inclusion of the following new paragraph after article 2(b)(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."

61. Mr. SCHNEIDER (Germany) said that the Commission had already defined a condition as an uncertain event. The situation described by the representative of the United Kingdom was a condition.

62. Mr. GREGORY (United Kingdom) said that it was not a condition of the kind that had been discussed earlier. It was simply a method of payment.

63. Mr. SCHNEIDER (Germany) said that, in the situation envisaged by the representative of the United Kingdom, payment by the beneficiary's bank was conditional on application by the beneficiary. It was a matter of some significance.

64. Mr. ADEDIRAN (Nigeria) said he supported the United Kingdom proposal. The receiving bank was not obliged to accept a payment order that it could not carry out. In general, as many conditions as possible should be accommodated within the Model Law.

65. Mr. GREGORY (United Kingdom) said that, if his proposed new paragraph began "Nothing in this paragraph shall prevent . . .", the conditionality difficulty might be resolved.

66. The CHAIRMAN suggested that the United Kingdom proposal might be accepted in substance and its form referred to the drafting group.

67. *It was so decided.*

68. The CHAIRMAN invited the Commission to consider article 2(c).

69. Mr. POTYKA (observer for Austria) said the word "issuer" should be replaced by "sender" in article 2(c), since the word sender was defined in article 2(e).

70. The CHAIRMAN recalled that the representative of Canada had suggested that "send" should be used in place of "issue" throughout the text of the Model Law.

71. Mr. BHALA (United States of America) said he supported the views of the observer for Austria and the representative of Canada.

72. Mr. GREGORY (United Kingdom) said that, while he had no objection to the replacement of "issuer" by "sender" in article 2(c), he did have reservations about the general substitution of "send" for "issue" throughout the text of the Law. There might be cases, such as telephoned instructions, or written instructions given over a counter, when the instruction was issued but not sent.

73. Mr. GRIFFITH (observer for Australia) said he agreed that "sender" should replace "issuer" in article 2(c). However, he shared the view of the representative of the United Kingdom that the substitution should not be carried out *passim*.

74. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said he agreed with the views of the observer for Austria.

75. Ms. KOSKELO (observer for Finland) said that the Working Group had deliberately chosen the word "issue" to express the idea of giving a payment order.

76. Mr. LIM (Singapore) agreed with the observer for Finland. To eliminate the term "issue" would cause confusion.

77. Mr. ERIKSSON (observer for Sweden) said he was strongly opposed to the use of the word "sender" in article 2(c) as it might cause new problems. The text as drafted was quite acceptable.

78. Mr. AL-NASSER (observer for Saudi Arabia) said that, since the term "issuer" was preferable in Arabic, he favoured retention of the text as it stood.

79. The CHAIRMAN said that "issue" implied the giving of an instruction. "Send" had no such connotation, and might, moreover, exclude instructions that were conveyed by hand. As he heard no counter-argument from the proposers of the change, he took it that the Commission wished to retain the word "issuer".

80. *It was so decided.*

81. The CHAIRMAN invited the Commission to consider article 2(e).

82. Mr. GRIFFITH (observer for Australia) suggested that article 2(e) should refer to "a" person who issues . . . , not "the" person, since the issuer of the payment order might be more than one person.

83. Mr. GREGORY (United Kingdom) said he thought that the issuer would always be only one person, even in the case of a series of separate orders by the originator and any sending bank. "A" person would still be a single person, but he had no objection to the change.

84. The CHAIRMAN said he took it that the Commission wished to adopt the suggestion by the observer for Australia and amend article 2(e) accordingly.

85. *It was so decided.*

86. The CHAIRMAN invited the Commission to consider article 2(d).

87. Mr. BURMAN (United States of America) suggested that the discussion of article 2(d) should be postponed until after article 2(f) had been discussed, because the definition of the beneficiary was dependent on the definition of a bank.

88. *It was so agreed.*

*The meeting rose at 12.25 p.m.*

### Summary record of the 442nd meeting

Tuesday, 11 June 1991, at 2 p.m.

[A/CN.9/SR.442]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.10 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

#### Article 2 (continued)

1. The CHAIRMAN invited the Commission to consider article 2(f), which defined the term "bank".

2. Mr. ADEDIRAN (Nigeria) said that, in view of the fact that in some jurisdictions individuals were permitted to act as banks, subparagraph (f) should refer to "any person who accepts payment instructions".

3. Mr. IWAHARA (Japan) said that the definition proposed by the United States in its written comments (A/CN.9/347/Add.1, p. 12) would be unduly restrictive; it would, for example, exclude certain bank branches in Japan which executed payment orders without demanding deposits. It would also lead to confusion as to which entities were covered by the Model Law: would it, for example, cover post offices engaged in credit transfers?

4. Ms. KOSKELO (observer for Finland) said that post offices should be included in the sphere of application of the Model Law if they provided a credit transfer service. She wondered if that would be the result if banks were defined as depository institutions. In its written comments on subparagraph (f) of article 2 (A/CN.9/347, p. 16) her Government had pointed out that the second sentence of the subparagraph seemed superfluous in view of the definition of the term "execution" in subparagraph (l).

5. Mr. SCHNEIDER (Germany) agreed with the observation made by the representative of Japan.

6. Mr. LIM (Singapore) said that he supported the Canadian and United States written proposals, which made provision for licensing by a country's central banking authorities. As to the comment by the representative of Japan concerning post offices, a possible formulation would be to state that a bank was an institution licensed by the central banking authorities, including an institution authorized by those authorities to carry out international credit transfers.

7. Mr. BHALA (United States of America) said that his Government's proposed definition aimed at narrowing the scope of the term "bank" so as to exclude securities firms such as, for

example, Western Union. The textual suggestion made by the representative of Singapore was well-founded and might usefully be adopted.

8. Mr. HUANG Yangxin (China) said that most countries had regulatory bodies for the banking sector and that the existing definition took adequate account of that.

9. Mr. AL-NASSER (observer for Saudi Arabia) said that the existing definition could be made more comprehensive by specifying in the first sentence that a bank was an entity licensed to accept and give effect to payment orders.

10. Mr. POTYKA (observer for Austria) said that his delegation approved the second sentence of subparagraph (f).

11. Mr. SCHNEIDER (Germany) said that he understood that the modernization of the banking system at present under way in the United States would involve entities which were holding concerns with multiple subsidiaries. He wondered how the Model Law would affect those subsidiaries if payment orders were transmitted to them.

12. Mr. BURMAN (United States of America) said that federal legislation to regulate securities firms was pending and would cover the field of credit transfers, but that the question of such firms and their regulation had not been tackled in the Working Group. As far as the definition in article 2(f) was concerned, his delegation felt that the more narrowly a bank was defined, the more likely it was that the Model Law would gain general acceptance.

13. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that in his view a broader approach would be preferable. He therefore suggested that the definition should state that a bank meant any entity which engaged in making payment orders.

14. Mr. VASSEUR (Banking Federation of the European Community) said that the Federation had concluded that all entities engaged in credit transfer operations, including post offices, brokers, securities firms and stock exchanges should fall within the purview of the Model Law in order to ensure that they could compete on a footing of equality. It could therefore accept the existing definition but could also go along with an additional sentence stating that an entity was not a bank if it was confined to transmitting payment orders.

15. Mr. DE BOER (Netherlands) said that a reference to regulatory bodies would be out of place in the Model Law, whose provisions fell solely within the scope of private law.

16. Mr. BHALA (United States of America), responding to the comment made by the representative of Japan, said that foreign banks in the United States would be covered by sub-paragraph (ii) of the definition proposed by the United States, and also by sub-paragraphs (iii) and (iv), because they received deposits and had the power to accept demand deposits in their home countries.

17. In regard to the point raised by the representative of the Netherlands, he said that the question of supervision of the entities covered by the Model Law could not be disregarded. The distinction between public law and private law would have to give way as the discussion of the articles of the Model Law proceeded.

18. Mr. BURMAN (United States of America) expressed concern that a move was being made to bring a large number of entities within the scope of the Model Law regardless of their supervisory and regulatory arrangements and their functioning.

19. Mr. BHALA (United States of America) said that, if the Commission so wished, his delegation would be willing to modify sub-paragraphs (ii), (iii) and (iv) of its proposed definition to cover post office services.

20. Mr. RENGGER (Germany) opposed the proposal by Saudi Arabia. To include a licensing requirement in the Model Law would introduce public law into a matter of private international contract law. He was therefore unable to accept the arguments put forward by the United States delegation either.

21. Mr. GREGORY (United Kingdom) did not think it would be helpful for the Model Law to refer to a licensed institution, for the reason given by the representative of Germany. Although the Model Law did not require credit transfer institutions to be supervised, it was nevertheless being drafted to deal with transactions to which supervisory rules were crucial. The United Kingdom favoured the first sentence of the existing definition of the term "bank". The impact of the supervisory regime on other institutions, particularly in the securities business, needed to be considered further. It had not been demonstrated that the Model Law should not be applicable to all those who undertook credit transfer operations as an ordinary part of their business.

22. Mr. LE GUEN (France) said that limiting the meaning of the term "bank" to institutions that were licensed and subject to regulatory authority was unacceptable to France, a country in which the post office carried out certain financial transactions without being licensed and the central bank operated on behalf of the Government on an unlicensed basis. Furthermore, limiting the meaning of the term to institutions that received deposits would conflict with French banking law, under which a bank was either an institution that received deposits or one that made credit available. In Europe the term "credit institution" meant an institution that was not limited to receiving deposits.

23. Mr. AL-NASSER (observer for Saudi Arabia) said that he had proposed the use of the term "licensed" because some States exercised control over credit transfers by providing that an institution that was not licensed to execute payment orders could not do so. He understood that entities such as the Society for Worldwide Interbank Financial Telecommunications (SWIFT) that effected banking operations were authorized to do so by a bank.

24. Mr. LOJENDIO OSBORNE (Spain) approved the first sentence of article 2(f) as it stood. It was not reasonable for a

credit transfer to fall outside the scope of the Model Law because of national licensing practices. If a non-authorized entity engaged in transactions for which a licence was required, it would be liable to administrative sanctions in the country concerned. The Model Law would cover the consequences of events such as bankruptcy; for example, if a bank selected as an intermediary an entity that did not offer sufficient guarantees of solvency, article 16(8) would apply.

25. Mr. LOPEZ ROCA (observer for Colombia) said that the term "bank" normally referred to an institution involved in an activity restricted to entities holding a government licence, whereas the definition in article 2(f) sought to extend the term to entities executing payment orders which were not required to be licensed. A middle path would be to use in article 2(f) a term applicable to any person executing payment orders, whether licensed or not. If the Commission decided to employ the term "bank" notwithstanding what he had said, it would have to be understood in a broad sense, but the Commission might usefully consider replacing it by a different expression.

26. Mr. ADEDIRAN (Nigeria) said the meaning of the term "bank" should not be looked at in terms of traditional banks but rather in terms of the transactions undertaken. Any entity that accepted an international payment transfer should be considered a bank.

27. Mr. BURMAN (United States of America) said that his delegation was inclined to support the Colombian suggestion. If the Commission decided that the definition should include entities other than traditional banks, it would be advisable to avoid the use of the word "bank". That term had a specific meaning in many people's minds and it would be better to clarify the situation by using a term such as "credit transfer institution", which the Secretariat had suggested (A/CN.9/346, p. 18, para. 40). Its merit was that, whether broadly or narrowly defined, it had a recognized meaning.

28. Mr. BERGSTEN (Secretary of the Commission) said that there was no disagreement with the United States view that the term "bank" as presently defined raised problems. The fact remained that no suitable alternative had yet been found. The Secretariat had looked at various possible replacements and had found that each of them, like the term "bank", had a specific meaning which was not exactly what the definition was intended to convey. The objection to the term "credit transfer institution", which did describe accurately what was intended, was its awkwardness. A happy solution would be a term which produced a neat acronym such as SWIFT.

29. Mr. LE GUEN (France) suggested the term "credit transfer entity". The word "entity" could then replace the word "bank" in the terms "receiving bank", "intermediary bank", and so on.

30. The CHAIRMAN said it was his feeling that the majority approved the first sentence of article 2(f) as it stood, subject to a decision as to whether the word "bank" or another term was to be used, and that it believed that a reference to licensing would be inappropriate.

31. He invited the Commission to move on to the second sentence of subparagraph (f) of article 2. It had been suggested that the sentence might be deleted, for two reasons. The first was that it stated the obvious and added nothing to the meaning. The second was that the word "merely" carried unintended negative implications: where business other than transmission was transacted, it was thought that doubt might arise as to whether or not it was covered by the Model Law.

32. Mr. LOJENDIO OSBORNE (Spain) favoured the deletion of the sentence. The place in which to deal with what was meant by an executing entity was in the definition of the term "execution", which needed to be expanded to cover execution by the beneficiary's bank.

33. Mr. BHALA (United States of America) said that his delegation believed the second sentence to be important and certainly not unnecessary. He took the view that it added substance and clarity to the term "bank" or "entity" or whatever expression the Commission decided should be defined in article 2(f). It ensured the exclusion of mere money transmitters and precluded at least in some cases a debate as to whether or not a data manager such as SWIFT was engaged in the execution of payment orders.

34. Mr. BURMAN (United States of America) said that the negative implications ascribed to the second sentence were not apparent to his delegation, which had been advised that opinions varied as to whether transmitters of messages, such as SWIFT, were to be considered transmitters of funds. The point was not clear, and clarity as to what the Model Law covered was essential. If the sentence had negative implications they should be discussed, and a way found of dealing with them which did not result in the application of the Model Law to institutions which it was not wished to cover. If the Commission completed its work and immediately afterwards people began to ask whether SWIFT or other data managers, or INTELSAT, or a given telecommunications network was covered, the law should be clear on the point.

35. Mr. BERGSTEN (Secretary of the Commission) observed that a comparison of SWIFT with the Clearing House Interbank Payments System (CHIPS) was instructive. If SWIFT was considered a value-added network, it could be regarded as doing more than just transmit; in connection with a given payment it did not do much more than transmit a message, but it did nevertheless add a transaction number and a sequential number. That, however, did not affect the payment transaction itself. CHIPS, on the other hand, clearly did much more than transmit in that it added and netted, thus affecting the payment process itself in a way that SWIFT did not. The biggest problem was caused by the use of the word "merely", but the solution was not simply to delete that word, because a bank itself might transmit. Some banks had their own satellites, transponders and telecommunications networks as part of their banking operation, so that great care must be taken not to end up with a sentence which suggested that someone who transmitted money messages was not a bank, as that would exclude some transmitters that clearly were banks.

36. Mr. BURMAN (United States of America) thanked the Secretary for his very useful explanation. At some stage he hoped to offer some drafting suggestions to meet the problem. As to whether SWIFT was or was not engaged in the transfer of funds, both positions had their proponents; he would agree that CHIPS had a more compelling case to be included in that category, but even as to SWIFT the point needed to be dealt with.

37. Mr. AL-NASSER (observer for Saudi Arabia) remarked that it would be premature to delete the second sentence of subparagraph (f) while the first sentence remained undecided. He would prefer that part of the definition to be settled before a decision was taken on the second sentence.

38. The CHAIRMAN suggested that the discussion might proceed on the assumption that the term being defined was "bank" unless and until a better term had been found.

39. Mr. LIM (Singapore) said that, as the representative of Spain had pointed out, the notion of execution was defined in

article 2(l). Perhaps the point made in the second sentence of subparagraph (f) could be taken care of instead by adding at the end of subparagraph (f) the words "but excludes the mere transmission of a payment order".

40. Mr. LOJENDIO OSBORNE (Spain) thought it was clear from the definition of the term "execution" that it did not cover the mere transmission of a payment order.

41. The CHAIRMAN said that, if there was no opposition to the idea underlying the suggestion made by the representative of Singapore, the Secretariat might be asked to work out some formula to ensure that institutions merely transmitting payment orders were excluded from the operation of the Model Law, for consideration at a later meeting.

42. He suggested that the Commission might now deal with subparagraph (d).

43. Mr. BHALA (United States of America) said that, in view of the discussion just held on the definition of the term "bank", his delegation did not need to make its intended point regarding subparagraph (d).

44. The CHAIRMAN said that, if there was no objection, he would take it that the Commission was ready to leave subparagraph (d) as it stood.

45. He invited the Commission to consider the question whether there should be a general provision to the effect that branches of banks should be regarded as separate banks for the purposes of the Model Law.

46. Mr. BERGSTEN (Secretary of the Commission) said that, as pointed out in the Secretariat's comments (A/CN.9/346, p. 18, para. 41), it had been suggested at an earlier stage in the drafting of the Model Law that the definition of the term "bank" should provide that "for the purposes of these Rules a branch of a bank is considered to be a separate institution". However, the Working Group had decided that it should first consider in relation to each substantive article whether branches should be treated as banks. Now might be an appropriate time to consider whether branches and separate offices of a bank were always to be regarded as separate banks for the purposes of the Model Law, and if so to consider covering the point by means of a general provision in the definitions. As mentioned in paragraph 43 of document A/CN.9/346, there might be provisions of the draft other than those containing references to branches in relation to which the status of branches should be considered.

47. Ms. KOSKELO (observer for Finland) said it seemed to her that there were at least some provisions in the Model Law in which it would not be appropriate to regard branches as separate institutions—for example, the provisions regarding refunds in article 13 and those on liability and damages in article 16. Otherwise, the result would be that liability would relate only to the assets of the branch. Clearly, it must be possible to use the assets of the whole bank to fulfil an obligation in such a case. If a general rule was introduced, it would be necessary to ensure that provisions such as those were excluded from its operation.

48. The CHAIRMAN suggested that the general provision might state that, "for the purpose of credit transfer", branches and separate offices were considered separate banks.

49. Mr. ADEDIRAN (Nigeria) said that it would be important to make clear what their situation was in relation to liability.

50. Mr. AL-NASSER (observer for Saudi Arabia) said that the head office of a bank must act as the guarantor when questions of liability arose in relation to a branch.

51. The CHAIRMAN asked whether the Secretary could indicate which provisions of the Model Law would need to be excluded from the suggested general rule.

52. Mr. BERGSTEN (Secretary of the Commission) said he thought that the view of the Working Group had been that a provision that branches were to be treated as separate banks was needed in relation to the sphere of application of the Model Law and also in relation to operational matters. Articles 13 and 16 were different. The problem before the Commission was one of drafting as well as one of substance.

53. The CHAIRMAN suggested that the problem should be borne in mind during the discussion of the individual articles; once the substantive question was decided in each case, it would

be a drafting matter to decide whether separate provisions or a general provision covering all articles would be appropriate.

54. Mr. ABASCAL ZAMORA (Mexico) thought that there might be reasons of principle against making it a general rule that branches of banks were considered to be different banks. The notion of a bank as a single legal entity should be preserved; the general rule should perhaps reflect that principle, with exceptions made where necessary.

55. The CHAIRMAN said he thought there was little difference in substance between the views expressed. The point would be considered as it arose in relation to individual articles.

*The meeting rose at 5.05 p.m.*

### Summary record (partial)\* of the 443rd meeting

Wednesday, 12 June 1991, at 9.30 a.m.

[A/CN.9/SR.443]

Chairman: Mr. SONO (Japan)

*The discussion covered in the summary record began at 10.00 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

#### Article 2 (continued)

1. Mr. BERGSTEN (Secretary of the Commission), recalling the discussion that had taken place in the previous meeting, invited the members of the Commission to propose alternatives to the word "bank" for adoption by the Commission.

2. The CHAIRMAN said that an alternative word for "bank" was undoubtedly needed but that a decision was not required immediately, so there was time for reflection.

3. In the absence of any comments on article 2(g) and (h), he took it that the Commission wished to adopt those definitions.

4. *It was so decided.*

5. The CHAIRMAN invited the Commission to consider article 2(i).

6. Mr. BERGSTEN (Secretary of the Commission) drew the Commission's attention to a drafting error in the French version of article 2(i). To reflect the concept of "includes", it would be necessary to insert a word such as "notamment" in the first line, between "on entend" and "le crédit porté".

7. The CHAIRMAN said the matter could be left to the drafting group. In the absence of any other comments, he took it that the Commission wished to adopt article 2(i).

8. *It was so decided.*

9. The CHAIRMAN invited the Commission to consider article 2(j). He drew attention to the comments by the Government of the United States of America (A/CN.9/347/Add.1, p. 12)

where it was proposed to amend the definition of "authentication" by deleting the words "all or part of" and inserting, after the words "payment order", the words "an amendment of a payment order".

10. The Government of Canada wished to enlarge the definition of "authentication" by referring to procedures to detect error (A/CN.9/347, p. 5, section VI). However, the Working Group had regarded "authentication" as relating only to identification of the source and had decided to treat detection of error as a distinct question. The Working Group had drafted the current text accordingly.

11. Mr. HUANG Yangxin (China) said he agreed with the United States proposal, which did not exclude a procedure whereby one part of the payment order was authenticated in order to provide authentication of the whole.

12. He would also like to know whether, with due regard for article 4A of the Uniform Commercial Code of the United States, a comparison of signatures constituted an authentication procedure. Since the Model Law did not exclude transfers effected by means of documents, he thought that authentication would have to include a comparison of signatures.

13. Mr. BHALA (United States of America) said that the reason for his Government's proposal was to be found in the realities of banking practice. Payment orders were authenticated only in their entirety, not in part. In the event of amendment, the amendment was likewise authenticated in its entirety. The Model Law should reflect operational reality as closely as possible in order to gain acceptance in the commercial world.

14. Mr. LIM (Singapore) said that, while he thought that the reference to part of a payment order would encompass an amendment to a payment order, he had no objection to the United States proposal.

15. Ms. KOSKELO (observer for Finland) said that her only difficulty with the United States proposal was that the Model

\*No summary record was prepared for the rest of the meeting.

Law made no reference elsewhere to amendments of payment orders. To introduce the concept at that stage might give rise to problems and confusion. In her own view, an amendment to a payment order, for example to change the amount, constituted a new payment order. The receiving bank would need to consider separately whether to accept it or not. She therefore felt that the definition of "authentication" should refer only to payment orders and revocation of payment orders.

16. Mr. ABASCAL ZAMORA (Mexico) said he agreed with the reasoning of the observer for Finland. During the preparation of the initial drafts of the Model Law, the inclusion of "amendments" to payment orders had been considered but rejected, because of the difficulties arising therefrom. Consequently, the existing text referred only to payment orders and the revocation of payment orders.

17. Mr. BERGSTEN (Secretary of the Commission) drew the Commission's attention to the Secretariat's comments on the subject (A/CN.9/346, p. 64, para. 3), which gave the history of consideration by the Working Group of the possible inclusion in the Model Law of a reference to "amendments" to payment orders.

18. Mr. CONOBY (United Kingdom) said he had no difficulty with the deletion of "all or part of". The representative of China had rightly pointed out that authentication could be applied to certain elements of a payment order in order to determine the authenticity of the whole payment.

19. On the question of "amendment", he shared the concerns of the observer for Finland. He understood that the Working Group, whether implicitly or explicitly, had decided not to include "amendments".

20. Mr. DE BOER (Netherlands) pointed out that article 2 began with the words "For the purposes of this law". Article 2 should therefore define only terms that were used elsewhere in the Model Law, and "amendments" were not so used.

21. The CHAIRMAN said that, from the views expressed, it appeared that the Commission wished to follow the recommendation of the Working Group and make no reference to "amendments" of payment orders. He also took it that the Commission was prepared to accept the proposed deletion of the words "all or part of" from article 2(j).

22. *It was so decided.*

23. The CHAIRMAN invited the Commission to consider the suggestion by the Government of Finland (A/CN.9/347, p. 16) that the sentence "The term does not include comparison of a signature with a specimen." should be added at the end of article 2(j).

24. Ms. KOSKELO (observer for Finland) said that the question was whether the provisions of paragraphs 2, 3 and 4 of article 4 should apply to a signature comparison. In her view, that was not the intention, the case where an unauthorized person forged a signature being covered by article 4(1). Consequently, it should either be made clear in the definition that a comparison of signatures did not constitute authentication for the purposes of the Model Law or else the point could be dealt with in article 4.

25. Mr. ABASCAL ZAMORA (Mexico) said that documented payment orders were widely used in national and international trade, where electronic means were not available, and the normal method of authentication was still the signature or other simple means of identification. Comparison of signatures was also a commercially reasonable method of security as

specified in article 4(2). The Finnish proposal to exclude the possibility of signature comparison would be restrictive and would run counter to the autonomy of the parties concerned. It was therefore unacceptable.

26. Ms. KOSKELO (observer for Finland) said that there appeared to be a misunderstanding. Her delegation had no wish to exclude authentication by signature. The problem was that if paragraphs 2 to 4 of article 4 were extended to cover authentication of signatures, the liability of the person whose signature had been forged would also be extended, beyond the provisions of the general rules of law—at least in her own country's legal system—and that was undesirable. She therefore considered that the use of a signature to authorize a payment order should be covered by article 4(1) and that the provisions of article 4, paragraphs 2 to 4 should not be extended.

27. Mr. SCHNEIDER (Germany) said that, as a general rule, the sender was not bound if his signature was forged by a third person. If, however, the parties had agreed to the authentication procedure and if the forgery resembled the genuine signature, the sender would be bound. That might not be a commercially reasonable procedure under article 4(2), but, if a large sum of money was involved, the parties might well agree that a mere verification of the signature would not be enough. It would be better to leave the problem to agreement between the parties and keep article 4 unchanged.

28. Mr. HUANG Yangxin (China) said that, in his opinion, the forged signature problem could not be solved by article 4(1) alone. The parties concerned would have to ascertain whether a signature was genuine or not. It would be dangerous if the authentication procedure were as simple as the observer for Finland seemed to believe. In his view, the problem must be solved by the parties. If a large sum were involved, they could agree on additional methods of authentication, for example by telegram.

29. Mr. ERIKSSON (observer for Sweden) said he agreed with the observer for Finland that the problem was not simply one of definition under the Model Law, but concerned the law on the liability of parties. It might be better to deal with it under article 4.

30. Comparison of signatures was the normal method of authenticating documented orders and should obviously not be excluded by the rules of the Model Law. Paragraphs 2 to 4 of article 4 placed the liability in the case of a forged signature on the person whose signature had been forged and the Finnish proposal, which had the merit of limiting that possibility, deserved further discussion.

31. Mr. VASSEUR (Banking Federation of the European Community) said that a mere reference to a signature would not solve all the difficulties, because many payment orders were given without a written signature on paper—for example by telex or electronically. One of the problems of concern to his Federation was how electronic signatures were to be treated and whether a code was necessary. In his own opinion, the issue was covered by article 2(j), although it might be necessary to specify what types of signature were meant, such as handwritten or electronic.

32. Mr. LIM (Singapore) said he agreed with the preceding speaker. He suggested, moreover, that provision should also be made for facsimile signatures.

33. Mr. DE BOER (Netherlands) said that, like the observer for Finland, he thought that signature comparison would not normally come under the authentication procedure referred to in paragraphs 2 to 4 of article 4. Provision must be made, however, for the parties to agree and the solution might be to adopt the



Finnish proposal with the addition of wording on the following lines: "unless the parties expressly agree otherwise."

34. Ms. KOSKELO (observer for Finland) said that she would be satisfied to defer the discussion until article 4 came up for consideration. The core of the problem was whether the rules on distribution of risk under paragraphs 2 to 4 of article 4 were reasonable in the case where a signature was used. In her opinion they were not, because the provisions on authentication were based on the use of a secret code or password, whereas a signature was visible to all and could never be kept secret. The signer was always vulnerable, because a signature could always be forged.

35. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) said that he understood the concern of the observer for Finland about the possibility of forgery and whether the bank or the client was liable. In practice, however, banks and clients normally worked on the basis of signatures and working methods were subject to agreement between them. A client concerned about the possibility of forgery could always ask the bank to use other methods of verification in addition to the authentication of a signature. There was nothing in article 4 to prevent agreement between the parties and, in any case, the possibility of forgery was exceptional.

36. Mr. HERZBERG (observer for Israel) said that a payment order or a cheque with a forged signature was not, in fact, an order to pay even if, in extreme cases, a bank might have to make the payment.

37. Mr. AL-NASSER (observer for Saudi Arabia) said that the observer for the Banking Federation of the European Community had drawn attention to a possible solution whereby the Commission must make it clear whether it was dealing with electronic transfers or traditional payment orders. In the case of documented paper orders, signature comparison would raise no problems, because the official receiving and executing the payment order would have the sender's signature and would be able to make the necessary comparison. In the case of electronic transfers, there were three possibilities: transfer by telephone, where there would always be a bank official who knew the originator and it would be difficult to imitate a voice; transfer by telegram, where the bank would request verification by the sender and the possibility of forgery was practically nil; and electronic payment orders, which could be compared with traditional payment orders. As indicated by the observer for Finland, forgery was one of the risks in the execution of payment orders, just as there was always a risk that banknotes might be forged.

38. Mr. ERIKSSON (observer for Sweden) said that, in his opinion, the sender should be bound by article 4(1) only. He would therefore like to see the Finnish suggestion amended by the addition of words on the following lines: "The term does not include a method which contains merely comparison of a handwritten signature with a specimen". If that change were made he would be satisfied with the suggestion.

39. Mr. CONOBY (United Kingdom) said that he would prefer not to deal with the issue under the definition of authentication, i.e., he would not favour changing a definition which had a reasonably wide internationally accepted meaning so as to exclude signatures. The matter should be dealt with in article 4.

40. He accepted the point made by the observer for Finland that the Model Law would change domestic law in some countries—possibly including his own. His delegation's views had been well expressed by the representative of the Union of Soviet Socialist Republics, and he welcomed the emphasis on the agreement between parties. He could see no justification for

excluding handwritten signatures, which could be transmitted by electronic means and could even be written on a screen. Banks in the United Kingdom were already investing heavily in procedures for the electronic verification of signatures, and banks and their clients might well reach agreement in the future concerning electronic verification.

41. THE CHAIRMAN said that, regarding the allocation of the risk of forgery, it was common knowledge that the approaches adopted by common and civil law were in conflict. The Convention on International Bills of Exchange and International Promissory Notes provided a partial solution to the problem through its broad definition of the concept of "signature", but it was not yet in force.

42. The concern expressed by the representative of Finland that signatures were too easy to imitate to be admitted as a method of authentication was partly answered by the qualification "commercially reasonable" in article 4(2)(a) and 4(3). At any rate, it seemed clear that no reference to signatures should be included in the definition of "authentication" in article 2(j). That would not, of course, imply that signatures as a means of authentication were to be excluded.

43. Noting that the current text of the Model Law distinguished between the detection of error and identification of the source, he said it appeared that there was no support for the Canadian proposal to enlarge the definition of authentication to include the detection of error. In the absence of such support, the distinction between source and error issues would continue to be made.

44. Inviting consideration of article 2(k), he noted that the term "execution" was defined separately in article 2(l) and that that paragraph might be adjusted at a later stage in view of the proposal by the representative of Singapore to transfer to it the second sentence of article 2(f).

45. Ms. KOSKELO (observer for Finland) said that the reference to article 10 might better be omitted from the definition of "execution date", since it was inappropriate to refer to substantive articles in a definition.

46. THE CHAIRMAN reminded the Commission of the United Kingdom delegation's intention to propose a reference to a more specific paragraph of article 8 in connection with article 2(l).

47. U NYI NYI THAN (observer for Myanmar) said he supported the Finnish suggestion that the reference to article 10 in article 2(k) should be deleted.

48. Mr. GREGORY (United Kingdom) said he had no strong feelings about the Finnish suggestion; his only theoretical objection to the inclusion in a definition of a reference to other provisions of a law would be on the grounds of circularity. In other words, one should not refer in a definition to a provision in the law which itself referred to that definition, but one might quite legitimately identify an idea by reference to the provision of the law in which it appeared, as in the current case.

49. There was, however, a more serious technical problem of circularity in connection with the concept of "execution date", a problem that was described in detail in his Government's comments on the Model Law (A/CN.9/347, p. 54, para. 3). The circularity of the Model Law's provision was due to the fact that, under article 4(6), a sender was not obliged to pay for a payment order until the execution date, but it was also implicit in article 10 that a payment order did not have to be executed until it had been accepted while, under articles 6(2)(a) and



8(1)(a), acceptance did not take place until payment was received. Since the purpose of the Model Law was to ensure efficient credit transfer mechanisms, the Working Group had adopted the concept that a bank failing to act on receipt of a payment order was deemed to have accepted it if payment for the order had been received and would therefore incur obligations under the Law as a result of its failure to take action. His own and other delegations had submitted proposals to eliminate the technical problem of circularity with regard to the provisions in the current text relating to payment, execution and acceptance.

50. Furthermore, in most places where the terms "execution" and "execution date" appeared in the text, they were still in square brackets because final agreement had still to be reached on the definition of "execution" and, in particular, on its application to the beneficiary's bank.

51. The CHAIRMAN said that, in its comments contained in document A/CN.9/347, the United Kingdom Government proposed that the term "payment date" should be used only in article 10(1)(b) and be replaced elsewhere by the term "execution date". If article 10(1)(b) were then redrafted to include a definition of "payment date", the definition of the term in article 2(m) would become superfluous.

52. Mr. GREGORY (United Kingdom), noting that the Commission might wish to discuss the question separately, said that the use of the term "payment date" in the Model Law was problematic because payment orders often specified no payment date. The term should not, therefore, be defined by reference to a specific provision appearing in a payment order. Secondly, in many cases where the term appeared in the text, a reference to the "execution date" was more appropriate, particularly if the definition of "execution" were amended in the way his delegation suggested. Wherever it was genuinely appropriate to refer to a date specified in the payment order as the date when funds were to be placed at the beneficiary's disposal, that idea could be expressed in full. However, if the Commission felt that a definition of the term "payment date" would none the less be helpful, his delegation would not oppose its inclusion.

53. With regard to the definition of "execution", he wished simply to refer to his Government's proposals in paragraph 4 of its comments (A/CN.9/347, p. 54), in which the definition was adapted to include the beneficiary's bank. The Commission could take up one or other of two approaches: it could either invent a new term for making money available to the beneficiary through the beneficiary's bank or it could include that concept in the definition of execution. His delegation preferred the latter approach.

54. Mr. BHALA (United States of America) said that, on the question of whether or not a reference to article 10 should be included in the definition of "execution date", he shared the views of the representative of the United Kingdom. He did not agree, however, that the problem of circularity in connection with the provisions on payment, execution and acceptance was a purely technical one. The underlying problem concerned the concept of "deemed acceptance", which the Commission might wish to consider at a later stage in connection with articles 6(2)(a) and 8(1)(a). In his delegation's view, the concept of "deemed acceptance", as it appeared in the current text, was objectionable and did nothing to promote the efficiency of credit transfer mechanisms or to facilitate trade.

55. His second concern was that the proposals on the current question would, if accepted, entail a wholesale and unnecessary revision of what was already a workable document.

56. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said he supported the Finnish suggestion that the reference

to article 10 in the definition of "execution date" be deleted, because it introduced a condition into what should, by its very nature as a definition, be abstract and unconditional.

57. The CHAIRMAN said he took it that any decision by the Commission to delete or not to delete the reference to article 10 in article 2(k) would depend on the decision it reached concerning article 2(l).

58. Mr. LIM (Singapore) said that, if the Finnish suggestion that the reference to article 10 be deleted were accepted, the words "should execute" in article 2(k) would need to be changed to "is required to execute".

59. The CHAIRMAN said that the point would be considered when the text was being finalized.

60. He invited the Commission to consider article 2(l). The definition of "execution" in that subparagraph did not include action by a beneficiary's bank, because it had been assumed that the relationship between a beneficiary's bank and a beneficiary was outside the chain of credit transfers. Nevertheless, the drafting of the Model Law might be facilitated if the term "execution" could also be used with reference to action by a beneficiary's bank. He invited comments on that point.

61. Mr. ABASCAL ZAMORA (Mexico) said there was little point in defining execution by the beneficiary's bank, when article 17(1) stated that a credit transfer was completed when the beneficiary's bank accepted the payment order.

62. The CHAIRMAN said that a definition of "execution" which included action by the beneficiary's bank would make it possible to remove some square brackets throughout the text.

63. Mr. LE GUEN (France) said he agreed with the representative of Mexico. Moreover, he thought that any inclusion of action by the beneficiary's bank in the definition of "execution" would tend to reopen a discussion that had already been closed, regarding the time at which a transfer operation was concluded. The question of removing square brackets was a relatively minor one.

64. Mr. GREGORY (United Kingdom) said he thought it was agreed that the general approach was that the Model Law should not intervene between the beneficiary and beneficiary's bank. Nevertheless, some provisions in the Model Law did require the beneficiary's bank to make the money received available to the beneficiary, so that a term was needed to describe the action in question.

65. There would seem to be no danger in using the term "execution", on the understanding that it was not intended that the substantive provisions of the Law should intervene in the relationship between the beneficiary and the beneficiary's bank, except in the situations already agreed upon by the Working Group. Use of the term "execution" would not prejudice the rule in article 17(2) that a transfer would be completed when the beneficiary's bank accepted the payment order.

66. Mr. LOJENDIO OSBORNE (Spain) said it was questionable whether the fact that a credit transfer was completed when the beneficiary's bank accepted a payment order placed the relationship between that bank and the beneficiary outside the scope of the Model Law, particularly in the light of article 9 covering the obligations of the beneficiary's bank and the rights of the beneficiary. He could thus see no objection to the inclusion in the definition of a reference to action by the beneficiary's bank.

67. Mr. FUJISHITA (Japan) said he agreed with the comments made by the representative of the United Kingdom and supported the inclusion of a reference to actions by the beneficiary's bank in the definition. That was, however, a substantive point and not merely a drafting one.

68. Mr. SCHNEIDER (Germany) said he thought that the viewpoints of the representatives of the United Kingdom and France could be reconciled. While he was not opposed to mentioning action by the beneficiary's bank in the definition of execution, it should be made clear that the reference was to rules already included in the Model Law.

69. The CHAIRMAN assured the last speaker that the proposed change in subparagraph I was not intended to affect other rules in the Model Law.

70. Ms. KOSKELO (observer for Finland) said she agreed with the representatives of the United Kingdom and Spain that certain provisions of the Model Law, such as articles 9 and 10, did apply to the beneficiary's bank and that that aspect should be covered in the definition.

71. Mr. BERGSTEN (Secretary of the Commission) explained that the earliest drafts prepared by the Secretariat had used the term "execution" in a sense which covered action by a beneficiary's bank because a number of policy decisions on that point had not yet been taken, particularly with regard to the extent that the Model Law should cover the relationship between a beneficiary and a beneficiary's bank. At a later stage, the general policy decision had been made that the effect of the Model Law would end when a beneficiary's bank accepted a payment order. The idea of execution by a beneficiary's bank thus became more problematic, but the term had been retained because the Working Group had not yet had occasion to consider that aspect.

72. A related problem was that some payment orders, such as SWIFT, did not specify a payment date. If a payment date was specified by the originator, it was a matter of interest not only to the beneficiary's bank and the beneficiary but also to the originator. That concern was reflected in article 10(1)(b).

73. Article 9(1) had been inserted because it was felt that the text would be incomplete if the entire idea was left out, in view of the end purpose of the activity. Without specifying when the beneficiary's bank would have to make funds available—except in cases in which a payment order designated a payment date—or how it should be done, article 9(1) had been added more or less *pro memoria*.

74. At the twenty-second session, a proposal had been adopted that execution should be defined, partly on systematic grounds, reinforced by the idea that the effect of the Model Law should stop at that point.

75. He himself was not arguing either for or against the point at issue. The Working Group had noted a number of passages in which the term execution would apply to the beneficiary's bank and square brackets had been added to bring those passages to the attention of the Commission.

76. The CHAIRMAN suggested that a drafting group, consisting of the representatives of the United Kingdom, Finland and Japan, should prepare a single text of the subparagraph for consideration at the afternoon meeting.

77. *It was so decided.*

*The meeting rose at 12.40 p.m.*

## Summary record of the 444th meeting

Wednesday, 12 June 1991, at 2 p.m.

[A/CN.9/SR.444]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.20 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)**

### Article 2 (continued)

1. The CHAIRMAN invited the United Kingdom representative to report on the deliberations of the drafting group consisting of the delegations of Finland, Japan and the United Kingdom on a text for inclusion in the definition of the term "execution" in article 2(1), in respect of action by the beneficiary's bank.

2. Mr. GREGORY (United Kingdom) said that the group had extended the existing definition to cover action by the beneficiary's bank by adding a mention of the situations contemplated in article 8(1)(d) to (g) of the draft. The proposed wording took the form of the following additional sentence at the end of article 2(1):

"With respect to the beneficiary's bank, "execution" means the doing of any of the following acts:

- (i) Crediting the beneficiary's account or otherwise placing the funds transferred at its disposal;
- (ii) Giving notice to the beneficiary that it has the right to withdraw the funds or use the credit;
- (iii) Applying the credit as instructed in the payment order received by the beneficiary's bank; or
- (iv) Applying the credit to a debt of the beneficiary owed to the beneficiary's bank or in conformity with an order of a court."

The text was lengthy, but the information which it conveyed would be located more appropriately in article 2 than in article 8, which could be shortened accordingly.

3. Mr. ABASCAL ZAMORA (Mexico) said that he saw no advantage in the definition proposed by the three-delegation group since it added nothing to what the draft already provided for determining the time when the beneficiary's bank should act. Under Mexican law, the most important role of the beneficiary's bank lay in acceptance of the payment order, and that was dealt

with clearly in article 8. The notion of execution by the beneficiary's bank implied an obligation on the part of the beneficiary's bank, and to introduce it was to bring in something which, in the light of article 17(1), lay outside the scope of the Model Law. The definition raised difficulties and he could not accept it. Action by the beneficiary's bank would be examined under articles 9 and 10.

4. Mr. DE BOER (Netherlands) observed that the introductory wording of article 8(1) contained the words "at the earliest of the following times". He therefore thought it would be logical for the proposed additional sentence to refer to "the earliest of the the following acts".

5. Mr. BHALA (United States of America) felt that a definition of execution by the beneficiary's bank was needed since the definition to be adopted for the term "bank", or some equivalent, hinged on the question of execution. As a simpler alternative to the three-delegation proposal, he suggested the words "a beneficiary's bank executes an order by accepting the order". Acceptance was dealt with in article 8. His proposal would cover article 8(1) as a whole, whereas the three-delegation proposal covered only subparagraphs (d) to (g) of article 8(1).

6. Mr. RENGGER (Germany) pointed to the contrast between the definition of the term "execution" proposed by the Working Group and the definition introduced by the United Kingdom representative, which included action by the beneficiary's bank. In his view, although the receiving bank was in a direct line of contractual action, it was debatable whether the beneficiary's bank was so obliged. There was a legal difference between executing a payment order and accepting one.

7. The CHAIRMAN pointed out that the beneficiary's bank was also a receiving bank.

8. Ms. KOSKELO (observer for Finland) said that the three-delegation drafting group had been careful not to confuse the notions of acceptance and execution; the United States proposal, on the other hand, suggested that the two were the same thing. The aim of the drafting group had been to define execution by the beneficiary's bank in terms of certain acts which were tantamount to acceptance. Subparagraphs (a) to (c) of article 8(1) mentioned other acts which were to be construed as acceptance. As far as the beneficiary's bank was concerned, the group had referred solely to acts whereby the funds were made available to the beneficiary or the credit was applied. She strongly opposed the wording proposed by the United States because it would mean that acceptance could take place only through execution.

9. Mr. POTYKA (observer for Austria) said that his delegation opposed the idea that acceptance by the beneficiary's bank should mean execution. It supported the view expressed by Germany. Austria saw an inconsistency between subparagraphs (d) to (g) of article 8(1) and article 9(1). It was illustrated best by the example that if the beneficiary's bank applied his credit in conformity with an order of a court, as contemplated in article 8(1)(g), it would be obliged, in accordance with article 9(1), to place the funds at the disposal of the beneficiary. That would obviously be forbidden by the court order.

10. Mr. BHALA (United States of America) said that it had not been his delegation's intention to confuse acceptance and execution. The definition proposed by the three-delegation group provided that the beneficiary's bank would execute the payment order when it accepted it in one of the ways set out in subparagraphs (d) to (g) of article 8(1). His delegation was suggesting that the definition should cover in addition the conditions set out in subparagraphs (a) to (c) of article 8(1). It would

be best for the reader to be confronted with a brief definition in article 2 and a more comprehensive list of situations in article 8(1).

11. The CHAIRMAN asked the United States delegation to express his views about subparagraphs (a) and (b) of article 8(1) in relation to the projected use of the word "execute", and also to explain how he saw article 9(1) in the context of execution. His own understanding of the discussion at the previous meeting was that, whatever the drafting group might suggest, execution would continue to mean conduct which brought into play the provision in article 9(1).

12. Mr. DUCHEK (observer for Austria) said that he was disheartened to find that the Commission appeared to be adding complication to complication as the work went on, to the extent that the text of the draft was becoming unintelligible to those who had not worked on it from the start. He questioned the need for a definition of the term "execution"; the body of the text might be made sufficiently clear for one to be dispensed with altogether.

13. Ms. KOSKELO (observer for Finland) agreed with the previous speaker that the text was becoming increasingly complicated; however, the value of a good definition was that once the term had been defined it could be used throughout a document without further explanation. She agreed too with the observer for Austria who had spoken earlier in the meeting that there was a discrepancy between articles 8(1) and 9(1). The latter provision would need to be amended.

14. The effect of the proposal by the representative of the United States would be that execution by a beneficiary's bank would be defined as acceptance. However, subparagraphs (a) to (c) of article 8(1) described events that might constitute acceptance but could not suffice to constitute execution of a payment order. The first of them was the so-called "deemed acceptance", contemplated in subparagraph (a); the position there was basically that acceptance took place after a certain lapse of time and when the funds had arrived at the beneficiary's bank—it was merely a matter of time and required no action on the part of the bank in order to occur. Next was the situation in which acceptance took place when the bank received the payment order, as provided in subparagraph (b); receipt alone could be construed as acceptance, but not as execution. Finally, article 8(1)(c) set out the rule that acceptance took place when the receiving bank notified the sender of acceptance, meaning that it occurred when the beneficiary's bank took action towards the sender of the payment order; execution, however, must surely relate to the beneficiary and not to the sender. Her delegation took the view that execution could be deemed to have taken place only when funds were placed at the disposal of the beneficiary or when the credit received was otherwise applied for his benefit.

15. Mr. AL-NASSER (observer for Saudi Arabia) said that in attempting to define execution the Commission appeared to be seeking a solution to that problem by linking it to another one, namely time of execution. A simple proposal which avoided that pitfall was that execution should be defined as the commitment by the beneficiary's bank to accept the payment order.

16. The observer for Finland had indicated that actual execution took place when funds were credited to the beneficiary's account at his bank, but in his view agreement by the beneficiary's bank to implement a payment order meant crediting the money to the account of the beneficiary.

17. The CHAIRMAN said that he concluded from the discussion that neither the wording suggested by the drafting group nor that proposed by the United States would command acceptance. The observer for Finland had suggested that article 9(1)

should be amended, but his own feeling was that the Commission might go beyond the intent of the Model Law if it deviated too far from the existing text of that provision.

18. Mr. ADEDIRAN (Nigeria) suggested that an analysis be made of what was said in article 9 in respect of domestic law, and the results used as a guide.

19. Mr. HUANG Yangxin (China) proposed the addition to article 2(*l*) of a sentence reading: "With respect to the beneficiary's bank, 'execution' means actions taken by the beneficiary's bank in order to place funds at the disposal of the beneficiary after acceptance of the payment order."

20. The CHAIRMAN asked the representative of China whether he felt that the phrase "after acceptance of the payment order" was strictly necessary. If not, his proposal would come very close to that of the drafting group.

21. Mr. ABASCAL ZAMORA (Mexico) said that his delegation's thinking had much in common with that of the delegation of Austria. Execution needed defining in respect of articles 8(1) and 10. It was not until those articles had been looked at that it was possible to know whether a definition of the term "execution" was needed. He would like to see the drafting group's proposal held over until that time.

22. Mr. BURMAN (United States of America) supported the Mexican suggestion. His delegation would reply later to the questions put to it by the Chairman and hoped that its answers might help the Commission to deal with some of the points raised by the observer for Finland and other speakers.

23. Mr. GREGORY (United Kingdom) also supported the suggestion made by the representative of Mexico. If the matter was put to one side it might well be found later that no definition of the term "execution" was needed. The Working Group had managed without one until its twenty-second session the previous December. He agreed with the observer for Austria about the danger of drafting a text which could be understood only by its authors. There was a good case for the Model Law to use the word "execute" in its ordinary meaning and leave its interpretation to individual legislators. Further consideration of the substantive matters dealt with in articles 8, 9 and 10 would be required. He pointed out that the three-delegation drafting group had been very mindful of the importance of keeping the notions of execution and acceptance separate. In certain factual situations, however, the two operations took place simultaneously. There was certainly some potential for confusion if acceptance had not taken place by the time that execution occurred, because acceptance would then mean that the bank must execute.

24. The CHAIRMAN said he felt that the Commission had reached a tentative conclusion. It had possibly been optimistic in seeking to extend the definition of the term "execution" to include action by the beneficiary's bank. There were good reasons for the wording of the definition as it stood. Since the Model Law utilized notions of acceptance and execution in relation to the same conduct simultaneously, it became difficult to maintain the distinction between them, but the basic framework of the Model Law would collapse if they were merged. When the Commission came to consider article 6(2)(*d*), concerning the issuing of a payment order intended to carry out the payment order received, it could consider further whether the definition of the term "execution" in article 2(*l*) was really necessary.

25. To sum up, as far as the attempt to define "execution" with respect to the beneficiary's bank was concerned, it had become evident from the discussions that it was difficult to draft

an appropriate definition without risking the confusion he had mentioned between the notions of "execution" and "acceptance", and without going beyond the limit that had been established for the matters to be governed by the Model Law under the line of demarcation represented by article 9(1). He therefore suggested that the Commission should decide to do without a definition of "execution" with respect to the beneficiary's bank. He further suggested that the definition of "execution" in article 2(*l*) (in relation to a receiving bank other than the beneficiary's bank) should be retained for the time being, with the understanding that some drafting change would be needed to make it clear that there was no intention to confine the term "execution" to receiving banks other than the beneficiary's bank.

26. *It was so agreed.*

27. The CHAIRMAN invited the Commission to take up subparagraph (*m*) of article 2. In relation to that subparagraph, there was a written proposal from the United Kingdom to delete the definition (A/CN.9/347, pp. 54-55). The United Kingdom proposed that where the term "payment date" was used in the draft it should be replaced by the term "execution date", except in article 10(1), and that in article 10(1) its meaning should be spelt out, making a definition of "payment date" unnecessary.

28. The Commission might also wish to consider the question of terminology discussed in paragraph 67 on page 23 of the Secretariat's comments (A/CN.9/346).

29. Mr. DE BOER (Netherlands) supported the proposal to delete subparagraph (*m*) and do without a definition of "payment date" in article 2.

30. The CHAIRMAN noted that it might not be necessary to use the term "payment date" even in article 10(1). If the United Kingdom proposal in document A/CN.9/347 was adopted, article 10(1)(*b*) would begin: "the order specifies a date when the funds are to be placed at the disposal of the beneficiary".

31. Mr. LIM (Singapore) supported the United Kingdom proposal.

32. The CHAIRMAN said he took it that there was agreement that subparagraph (*m*) of article 2 should be deleted, on the understanding that its substance would be incorporated in article 10(1)(*b*) when that provision was taken up.

33. *It was so decided.*

34. The CHAIRMAN invited the Commission to consider proposals for adding further definitions to article 2. Three additional definitions had been proposed by the United States of America (A/CN.9/347/Add.1, pp. 12-13).

35. Mr. BHALA (United States of America) said that the United States had proposed the addition of definitions of the terms "credit transfer system", "interest" and "revocation". If the Commission decided to replace the term "bank" in article 2(*f*) by a term such as "credit transfer entity", it might be necessary to use some term such as "payment management system" instead of "credit transfer system". The additional definitions were proposed in the interests of clarity, certainty and predictability.

36. The proposed definition of "interest" was based on the *Guidelines on International Interbank Funds Transfer and Compensation* of the International Chamber of Commerce

(ICC). Interest was a frequently litigated issue and the Commission should not leave its meaning in doubt.

37. Mr. AZZIMAN (Morocco) said that his Government had pointed out in its written comments (A/CN.9/347/Add.1, p. 7, sect. 2) that the term "purported sender" was not defined in the Model Law. If other delegations also felt that the term required explanation, a definition of "purported sender" could perhaps be included in article 2(e) in combination with the definition of "sender".

38. The CHAIRMAN suggested that the point should be taken up under article 4. There were some proposals for amendments to that article; the Commission could keep in mind the point raised by the Moroccan delegation and come back later if necessary to the question of a possible definition.

39. Mr. ABASCAL ZAMORA (Mexico) pointed out that his Government's written comments in document A/CN.9/347 (p. 43) contained a proposal which included a definition of the term "interest". The proposed definition reproduced practically verbatim the definition in the ICC *Guidelines*. In the Working Group, his delegation had been hesitant to accept such a definition of interest, but now that the authorities in Mexico had had an opportunity to study the *Guidelines* his Government was in favour of including a definition of interest based on them. His delegation therefore agreed with the idea behind the United States proposal, though there were some textual differences between the definition proposed by Mexico and that proposed by the United States.

40. Mr. CONOBY (United Kingdom) said that there should be a definition of interest; the problem lay in reconciling the proposals made by the delegations of the United States and Mexico. The United States proposal defined interest as the interbank rate of interest in the currency of the State in which the receiving bank was located, whereas the Mexican proposal defined it as the time value of the transaction amount in the country of the currency involved. If that time value referred to the currency of the payment order, it might not be the same as the interbank rate of interest in the currency of the State in which the receiving bank was located. As he understood it, the ICC *Guidelines* corresponded to the Mexican proposal, so that the determining factor would be the currency.

41. Mr. ABASCAL ZAMORA (Mexico) said that his delegation's proposal drew on the ICC definition, while the preference of the United States delegation was to refer to the interbank interest rate. The difference lay in the degree of flexibility afforded by the ICC approach, which clarified the definition of interest by introducing the notion of time value.

42. The CHAIRMAN said that it was not clear from the Mexican proposal whether the currency used as the unit of account or the currency used for payment should be taken as the basis for calculating interest.

43. Mr. ABASCAL ZAMORA (Mexico) said that he would welcome some time in which to consider that point.

44. Mr. BHALA (United States of America) said that the ICC definition was the following: "Interest is the time value of the transaction amount in the country of the currency involved. Interest compensation shall be calculated at the rate and on the basis customarily accepted by the local banking community of such country". The text thus differed from the Mexican proposal only in referring to "interest compensation".

45. Mr. VASSEUR (Banking Federation of the European Community) said that the second sentence of the French text of the ICC definition referred to "*dommages-intérêts*".

46. Mr. LE GUEN (France) said that rates of interest varied with currency fluctuations, but that was obviously a factor which was of concern to the beneficiary rather than the sender. The United States definition and the definition derived from that of ICC both linked interest to the currency of a given country, but he wondered how that formula could take into account the ECU, which was not tied to any particular country. He pointed out that the ICC recommendations related exclusively to interbank transfers of funds, whereas the Model Law also made provision for payment of interest to originators or beneficiaries which were not necessarily banks.

47. Mr. BHALA (United States of America) said that the Commission's prime concern should be to arrive at a predictable and uniform Model Law. It might help in drafting a definition if it was borne in mind that the currency of the credit transfer might not be the same as that of the country in which the receiving bank was located. In practice, however, that might not prove to be a significant consideration. If interest compensation was paid, the parties to the credit transfer, either the originator or the beneficiary, might prefer compensation in a particular currency, so that the ICC definition might prove to be more workable.

48. With regard to the ECU, he said that the text of the definition could accommodate the concern voiced by the representative of France by referring to "units of account".

49. Mr. ABASCAL ZAMORA (Mexico) said that it was his impression from the discussions in the Working Group that the only interest rate which would be generally acceptable was the interbank interest rate. With regard to the term "units of account", he suggested that his delegation and that of the United States might jointly work out an agreed formulation to be submitted to the Commission.

50. Mr. KOMAROV (Union of Soviet Socialist Republics) said that his delegation favoured the wording derived from the ICC definition, as reflected in the proposal of Mexico.

51. Mr. HERZBERG (observer for Israel) agreed with the previous speaker.

52. Mr. SCHNEIDER (Germany) said that the Mexican proposal was one of the options available to the Commission. Another was to refrain from defining "interest" altogether, while a third was to leave it to the countries adopting the Model Law to establish a precise percentage for interest payable as compensation.

53. Mr. CONOBY (United Kingdom) said that his delegation would prefer a definition modelled on the ICC definition and therefore based on the interbank interest rate applicable to the currency of the transfer.

54. Mr. BURMAN (United States of America) said that his delegation's proposal was intended to prevent litigation by harmonizing national legislation in the field of interest rates. He believed that a definition would be essential for that purpose.

55. Mr. BERGSTEN (Secretary of the Commission) said that the issue raised by the definition of "interest" should be considered in the light of article 16, which related to liability and damages.

## Summary record of the 445th meeting

Thursday, 13 June 1991, at 9.30 a.m.

[A/CN.9/SR.445]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 9.40 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

*Article 2 (continued)*

1. The CHAIRMAN said that the ad hoc drafting group would, at a later stage, present drafts of article 2(a) and (f) for the Commission's consideration. He hoped that they would entail only minimal changes so that it would not be necessary to await translation and the issue of conference room papers before they were discussed.

2. Mr. BERGSTEN (Secretary of the Commission) said he felt that, at the current, final, stage of negotiations, translation and the issue of conference room papers would be necessary, even if the new texts involved only minor changes.

3. The CHAIRMAN said he agreed that translation would have to be awaited if substantive changes were made. The official drafting group would, in any case, compare all the language versions in order to ensure consistency.

4. Mr. BURMAN (United States of America) proposed that a third sentence be added to article 2(f) to read: "An entity that is a payments 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."

5. That amendment would meet the concern expressed by members of the Commission in that it would exclude from the definition of a "bank" such systems as INTELNET and SWIFT.

6. Mr. LE GUEN (France) said that he would have to await a French version of the United States amendment before commenting upon it. Under French law, bodies managing payments such as automatic clearing houses were considered to be banks; the elimination of all such institutions would go beyond a simple change in terminology and would run counter both to French legislation and to current international thinking with regard to the organization of the interbank netting system.

7. Mr. SOLIMAN (Egypt) said he thought that the word "bank" was so firmly established that it might well be retained.

8. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the representative of Morocco had, on the previous day, remarked that the term "purported sender" was used in article 4. The term should be defined in article 2.

9. The CHAIRMAN said that that was a separate proposal.

10. Mr. BURMAN (United States of America) said he thought it would be misleading to expand the term "bank" to include a large number of non-banks.

11. It was interesting to hear that, under French law, bodies transferring funds were regarded as banks, but that was not the

case in his own country. His delegation had proposed at an earlier stage that the Working Group should consider the possibility of incorporating the funds transfer system as an integral part of the text and recognizing fund transfer systems as parties. Had that course been adopted, he would have agreed with the representative of France that it was necessary to take such institutions into account in the definition of the fundamental entities to be covered.

12. However, that proposal had been rejected, partly because it would have complicated the text and led to a number of structural changes. It was probably too late for the Commission to consider including such entities, though a working group might examine the question.

13. Mr. ERIKSSON (observer for Sweden) said he thought that a wording was needed which met the concerns of the United States delegation without creating problems for others. That might, perhaps, be achieved by deleting article 2(f) and by inserting somewhere in article 2 a new sentence to the effect that what was said in the Model Law concerning banks also applied to other entities which, in the normal course of business, engaged in executing payment orders in a way similar to that of banks. It was a somewhat looser definition, but would allow all countries to interpret it in a way that might be helpful to them.

14. The CHAIRMAN pointed out that the Swedish suggestion was contrary to a decision that had already been taken.

15. Mr. HERZBERG (observer for Israel) said that the emphasis in the definition of a bank was on debiting and crediting operations. The SWIFT system and clearing houses and other institutions were mere transmission agencies. It might suffice if it were made clear that the definition of "execution" referred only to debiting and crediting.

16. Mr. BISCHOFF (observer for Switzerland) said he was somewhat disturbed by the United States proposal. He thought that there had been a consensus that the entities responsible for transmitting payments should not be subject to the Model Law. If the definition of the term "bank" were expanded in accordance with the United States proposal, some new elements would be introduced into the payment chain. The SWIFT system had not hitherto been considered as subject to the Model Law since it merely transmitted messages. The Swiss Interbank Clearing Institution was managed by a commercial company, but the debits and credits were carried out by the national bank. His delegation was therefore opposed to the United States amendment.

17. Mr. BURMAN (United States of America) said that his delegation did not wish to change the definition of a "bank". Indeed, if the word "merely" in the second sentence of article 2(f) were construed in a broad sense, he would have no problem with it. His concern was that computer-based interbank systems such as SWIFT, CHIPS and INTELNET did more than merely transmit payment orders although they did not execute them. As the Commission had decided to expand the definition of a "bank", it must ensure that it did not unintentionally include



such entities as data management systems. He was concerned that, if the Model Law did not accommodate future developments in banking practice, it might come to be regarded as a relic of the pre-computer age.

18. The CHAIRMAN said he quite understood the concern of the representative of the United States of America that entities which merely transmitted payment orders should not be included in the definition of a "bank". In fact, the Commission had already accepted that entities which did not in the ordinary course of business execute payment orders were not banks. However, the Commission, while accepting the purpose of the United States representative, seemed to have difficulty in accepting the language he had proposed.

19. Mr. BURMAN (United States of America) said that his delegation had hoped that the Commission would not produce a Model Law that was already antiquated but would prepare for future changes arising from the new electronic methods of commerce. Those engaged in future litigation would rely, not on any commentary, but on the language of the Law itself, so it was that language which was the key.

20. Mr. BERGSTEN (Secretary of the Commission) said that the basic problem was that entities engaged in credit transfers were not necessarily traditional banks. The first sentence of article 2(f) attempted to define a "bank", while the second sentence of that subparagraph was intended to ensure that the broad definition of a "bank" did not include entities such as mere transmission systems or clearing houses. There was no disagreement among the members of the Commission that mere transmitting entities, such as a telex service or SWIFT, should be excluded.

21. The representative of the United States of America wished expressly to exclude clearing houses, while the representative of France had some reservations in that regard. In fact, there were different types of clearing houses: the traditional clearing house received a message, recorded the amount received from the sender and the amount sent to the recipient, sent the message and netted off; entities such as FEDWIRE, however, did not undertake a netting operation but maintained a special account which was debited or credited.

22. He thus distinguished three types of entity: firstly, the merely transmitting entity not covered by the Model Law; secondly, the traditional netting clearing house which, he believed, should not be covered by the Model Law either; and, thirdly, the type of clearing house where there was both transmission and debiting and crediting of accounts. The latter, in his view, should be covered. It was for the Commission to decide, however, which of the three types of entity he had described should be excluded from the definition of a "bank".

23. The new third sentence which the United States representative proposed should be added to subparagraph (f) of article 2 was an alternative way of defining the entities which were not banks, namely, by listing them. It was for the Commission to decide whether the exclusion of such entities could be achieved by a definition, as in the case of the existing draft text of subparagraph (f), or by a listing of the excluded entities.

24. The CHAIRMAN said that the Commission had already agreed on the definition of a "bank", and thus on the scope of the Model Law which, he assumed, was acceptable to members in terms of the conditions in their own countries. In his view, therefore, the existing text had the flexibility to accommodate variations around the world and changes in the future.

25. Mr. LE GUEN (France) said his delegation agreed that mere transmitting entities, even where there was an element of

value added, such as SWIFT, should be excluded from the definition of a "bank". A blanket exclusion of automated clearing houses would, however, be dangerous, since, even if they had not yet engaged in banking activities, they might well do so in the future.

26. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the main concern was not so much to define a "bank", as to ensure that the Model Law applied to as wide a range of credit transfers as possible. A more comprehensive term for "bank" was needed in order to accommodate all the entities which legally executed payment orders.

27. Mr. GREGORY (United Kingdom) said that, while it was important that the Model Law should be up to date, there was a danger that, if it defined future conditions too precisely, it might rapidly become out of date, as the representative of France had rightly suggested.

28. The suggestion by the observer for Sweden was not without merit. His own delegation therefore proposed that both subparagraph (f), defining a "bank", and subparagraph (k), defining "execution", should be deleted. That would leave those words with their ordinary meaning, to be interpreted by the courts.

29. However, the Commission had taken a policy decision on the scope of the Model Law by treating as banks those entities which, as an ordinary part of their business, engaged in executing payment orders. He therefore proposed the addition of a second sentence to article 1(1) which would read: "It applies to other entities that, as an ordinary part of their business, engage in executing payment orders as it applies to banks."

30. It was not necessary to define "execution", because the subject of the Model Law was itself the execution of payment orders. Judges could turn to the substance of the Law to determine if an entity was engaged in a banking activity.

31. Mr. BURMAN (United States of America) said that the United Kingdom proposal offered a possible solution. The intent of the Commission to exclude certain types of transmitting entity would still need to be reflected in the commentary. He accepted the point that what was new today could be out of date tomorrow.

32. Mr. KOMAROV (Union of Soviet Socialist Republics) said he liked the United Kingdom proposal. It was a possible solution in view of the nature of the instrument and the conditions it was intended to address.

33. Mr. LIM (Singapore) also supported the United Kingdom proposal. In the context of a Model Law—which was not a convention—the definition of a "bank" was best left to national legislation. His own Government would have been unable to accept the definition in article 2(f).

34. Mr. ABASCAL ZAMORA (Mexico) said that the United Kingdom proposal, if he had understood it aright, might give rise to drafting problems, because the Commission would have to decide what to do about the terms "receiving bank", "intermediary bank", "beneficiary's bank" and "executing bank".

35. Mr. GREGORY (United Kingdom) explained that his proposal would, in effect, move the relevant words from the definition of "bank" to article 1(1). He did not think that it would be necessary to make any change in expressions such as "receiving bank", "beneficiary's bank" and so forth, because the initial rule would make it clear that, where such expressions were used, they would apply to any other entity that was in the same position.

36. Mr. BURMAN (United States of America) suggested that the words "as it applies to banks" should be removed, since they might give the impression that other entities were expected to comply with the same regulations and requirements as banks.

37. Mr. GREGORY (United Kingdom) said that he did not think those words bore such an implication, because the Model Law was concerned with credit transfers. They were probably not essential—although they made the provision read more smoothly—and the effect would no doubt be the same if they were omitted.

38. Mr. AL-NASSER (observer for Saudi Arabia) suggested, as a possible improvement on the United Kingdom amendment, that article 1(1) should read: "This law applies to credit transfers where a sending bank and its receiving bank are in different States, as well as to other entities which can be regarded as banks in accordance with the legislation of each State."

39. The CHAIRMAN pointed out that that wording would not be in keeping with the Commission's decision to broaden the scope of the Law's application to all entities which engaged in executing payment orders as an ordinary part of their business.

40. Mr. ERIKSSON (observer for Sweden) suggested, as an alternative which might solve the problems of the United States representative, that the proposed second sentence in article 1(1) might begin with words on the following lines: "What is stated in this model law concerning banks applies also to other entities which, as part of their business, engage in executing payment orders."

41. Mr. GREGORY (United Kingdom) thanked the observer for Sweden for his suggestion—although the words "In this law, references to banks include other entities which, as an ordinary part of their business . . ." might be more consistent with English legislative style. However, the suggested wording might cause other problems if it were interpreted as meaning that the other entities were, in some way, banks. If neutral words were used, the Law would apply to other entities, particularly if the words at the end "as it applies to banks" were deleted, so as to dissociate the banks and the other entities.

42. Mr. LOPEZ ROCA (observer for Colombia) said that, if he had understood it correctly, the earlier Swedish suggestion would meet one of the problems of the Mexican representative but would still not solve the problem of what to do with the definitions of "receiving bank", "intermediary bank" and so forth, because the definitions would then apply to the entities which were banks. The statement that the Law was applicable to banks and also to other entities did not mean that any reference to banks should be understood as including other credit transfer entities. However, the latest Swedish suggestion that a reference in the Model Law to banks also meant a reference to other entities dealing with credit transfers might be the solution.

43. Mr. ABASCAL ZAMORA (Mexico) said that the Commission seemed to be engaged in drafting rather than in discussing substance. The insertion of a definition in an article which established the sphere of application of the Law rather than in its natural place, the article on definitions, would make the Law complex and difficult to read. The basic problem facing the Commission was to identify what was meant by the word bank or whatever replacement word it chose. The Commission must find a clear definition and be itself clear about the functions of those entities that were to be called banks.

44. So far it had reached agreement that clearing houses, messenger systems and fund transfer systems should be eliminated—although the situation might change in the future. He

therefore proposed that the Commission should take note of the proposals made by the United Kingdom representative and of the United States delegation's objections to the word "merely" and ask an informal drafting group to produce a text. Drafting in the Commission itself would only make the issue more complicated.

45. The CHAIRMAN said that the Commission was still discussing substance. He asked whether it accepted the United Kingdom approach, namely, to eliminate the definition of "bank", which was a source of controversy. The term "bank" would thus not be defined, but the proposed additional sentence to article 1(1) would clarify what was meant and would give it a broader scope than the definition in article 2(f).

46. *It was so agreed.*

47. The CHAIRMAN suggested that the representatives of Singapore, the United States and the United Kingdom and the observer for Sweden might be asked to prepare a text for consideration by the Commission as soon as possible, without expanding or enlarging the substance in any way.

48. *It was so decided.*

49. Ms. KRAG JORGENSEN (Denmark) said that she favoured the Swedish and United Kingdom wordings and agreed with the underlying approach. However, after listening to the debate and examining the new text proposed by the United Kingdom delegation, she found that it left a gap in the application of the Model Law. She was raising the point as a matter for reflection. The Model Law would apply to banks and other entities which, as an ordinary part of their business, engaged in executing payment orders, the criterion being "as an ordinary part of their business". She wondered, however, whether entities which engaged in executing payment orders, not as an ordinary part of their business but from time to time should be excluded from the sphere of application of the Model Law.

50. U NYI NYI THAN (observer for Myanmar) said that, in a traditional Asian society, there were forms of credit transfer by wholesale trading houses, dealing in potatoes or onions or the like, which were more efficient than the State banks.

51. Mr. VASSEUR (Banking Federation of the European Community) said that article 1(1) had been extended to cover entities other than banks and the United States representative had referred to transmitting entities, such as SWIFT, which normally transmitted messages only but could, on occasion, do more. On behalf of his Federation, he would like a written assurance that such entities, whose main function was to transmit messages, would not be covered by the Model Law, since they did not execute payment orders in the sense understood by the Model Law.

52. The CHAIRMAN said that it was clear that SWIFT, as it currently operated, would not be covered by the Model Law, and he did not think that any speaker had said that it would. The United States representative had said, when justifying his proposal, that there might be doubts, but no one else had agreed. The observer for the Banking Federation could rest assured, therefore, that it was the understanding of the Commission that transmitting entities, such as SWIFT, would not, as they currently operated, be covered by the Law.

53. In reply to the representative of Denmark, he thought that the words "as an ordinary part of its business" were subject to interpretation. In some cases, entities which engaged in executing payment orders from time to time might be included in the scope of the Model Law.



54. Ms. KRAG JORGENSEN (Denmark) said that a possible solution to the problem of the Model Law's sphere of application would be to state that it applied to banks and other entities "whenever they engaged in executing payment orders".

55. The CHAIRMAN said that, although the phrase "as an ordinary part of its business" could not be omitted, it could be interpreted quite broadly.

56. Mr. AZZIMAN (Morocco) said that the term "purported sender" actually appeared for the first time in article 2(j). He would have no objection, however, if its meaning were clarified later in article 4.

57. The CHAIRMAN said that a decision as to whether or not a definition of the term was needed could be taken when article 4 was being discussed. If its meaning was made sufficiently clear in article 4, a definition could be dispensed with.

58. Mr. BERGSTEN (Secretary of the Commission) said that it had become apparent when the Secretariat's comments were being prepared (A/CN.9/346) that a problem of definition might arise with respect to the term "beneficiary's bank": the question was whether the "beneficiary's bank" was the bank named as such in the payment order sent to that bank or the bank named by the originator. Before dealing with that problem, however, the Commission might first wish to discuss the substantive issues raised in later provisions, particularly in articles 13, 14 and 17.

59. The CHAIRMAN said that, if the Commission was able to accept the interpretation given in the Secretariat's comments (A/CN.9/346, p. 48, para. 8, and p. 91, paras. 4 to 6), it might be unnecessary to define the term "beneficiary's bank".

### Article 3

60. The CHAIRMAN said that two approaches to article 3 were possible, the first being the one adopted in the current text and the second, and opposite, approach being a provision along the lines of: "except as otherwise provided in this law, no agreement is possible on the rights and obligations of a party to a credit transfer".

61. If the first approach was adopted, it would be understood that only articles 1 and 2 were not capable of variation whereas, if the second approach was favoured, parties would be able to change only those provisions which were specified by the Model Law as being capable of variation. It should be borne in mind, in that connection, that the approach favoured by the Commission would have a bearing on its consideration of each subsequent provision of the Law.

62. Mr. GREGORY (United Kingdom) said that, as was clear from his Government's comments (A/CN.9/347, pp. 55-56), his delegation tended to favour the second approach. It thought, moreover, that the Law should not only indicate which provisions were capable of variation, but also which provisions should be given mandatory force. Discussion of that matter would inevitably involve questions of substance as well as drafting.

63. While English common law enshrined the principle of freedom of contract, it was clear that, in the case of the Model Law, such freedom should be constrained in a number of instances to ensure the smooth operation of the mechanism of international credit transfers. It was essential to preclude situations in which an agreement to vary the provisions of the Law might detract from the rights of other parties to a credit transfer that were not parties to the agreement.

64. Mr. VASSEUR (Banking Federation of the European Community), referring to the Federation's comments on the matter in question (A/CN.9/347, p. 67), said he endorsed the remarks made by the representative of Germany and the observer for Switzerland in support of greater contractual freedom. It was the unanimous view of all the banking associations making up the Federation that practice should evolve according to need. Since there was as yet no specific legislation in the European Economic Community governing international credit transfers, such transactions were currently subject to freedom of contract, a principle which might be restricted by the Model Law.

65. The European Commission, which had carried out studies on methods of payment in the European internal market, had unofficially indicated that it might well adopt as a directive the text produced by the Commission. That was the reason for his Federation's particularly keen concern that the Model Law should not lead to the adoption of provisions which could confuse banking operations and create serious difficulties.

66. Mr. ABASCAL ZAMORA (Mexico) said that the Working Group had decided to enshrine the principle of freedom of choice, as one might expect in an area of the law concerning private relations, and to review each article separately to determine whether or not such freedom could be preserved. He did not share the concern of the United Kingdom delegation that an agreement to vary the provisions of the Model Law might affect the rights of other parties, since a contractual agreement between an originator and his bank could not create rights and obligations for parties not bound by the agreement.

67. The CHAIRMAN said that there seemed to be a general trend in the Commission towards adopting the first of the two approaches he had mentioned and examining each provision in the light thereof.

68. Mr. BHALA (United States of America) said he was not convinced by the argument put forward by the United Kingdom representative to the effect that freedom of contract should be restricted if the rights and obligations of other parties might be affected. The Model Law was, after all, intended to deal with that precise subject of rights and obligations, and the parties to credit transfers should be allowed to vary such rights and obligations as they deemed fit. Any approach not allowing for freedom of contract and flexibility in the market-place was doomed to become increasingly out of date.

69. As for the Commission's procedural approach to the matter, he would prefer that it retain freedom of contract as a basic rule rather than examine each provision to determine whether such freedom should be retained or omitted.

*The meeting rose at 12.40 p.m.*

## Summary record of the 446th meeting

Thursday, 13 June 1991, at 2 p.m.

[A/CN.9/SR.446]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.15 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

*Article 3 (continued)*

1. Mr. GRIFFITH (observer for Australia) said that article 3 appeared to involve two issues. The first was the extent to which parties had freedom to contract generally, and the second the extent to which particular articles affected their freedom to contract into the regime of the Model Law and also to contract out of it. The Working Group appeared to have accepted that they had freedom to contract out, but that left his delegation with some doubts of the kind identified by the United Kingdom in its written comments and the annex to them (A/CN.9/347, pp. 55-56, 63).

2. His delegation was keen to have an opportunity to discuss fully the basic liability to refund money, dealt with in articles 13 and 16. An important subsidiary consideration was that, where parties to a credit transfer had freedom to contract directly between themselves, the arrangements which they arrived at might affect the derived rights of third parties elsewhere in the chain of transmission of the payment order. An extreme example of what he had in mind would be a situation in which two banks agreed between themselves that no liability should arise for, say, six months after the date on which the money should be transmitted. It was vital for the Model Law to give basic protection to those derived rights. By endorsing the Working Group's proposal for article 3, the Commission would be committing itself to considering what provisions of the Model Law should be subject to the freedom which article 3 afforded, notwithstanding the acceptance of the general principle that parties had freedom to contract out of the Model Law regime.

3. The CHAIRMAN replied that the Working Group had gone into the implications of the words "by agreement of the affected party" and had concluded that only when "agreement" meant "consent" would it become binding on the party concerned. It seemed to him that the point made by the observer for Australia had in fact been addressed in the draft, although the actual wording which catered for it might not be entirely satisfactory.

4. Mr. SCHNEIDER (Germany) observed that the words "freedom of contract" were understood by different delegations in different ways. It was generally agreed that mandatory rules should protect certain special interests which required such protection, as well as third parties not directly involved in a credit transfer contract but nevertheless affected by the payment transaction concerned. Apart from that, parties should be free to organize their contractual relationships as they saw fit. Under those circumstances, the fewer mandatory rules the Model Law contained the better; everything else might be left to a provision of the kind in article 3. There was a difference between that and the approach advocated by the United Kingdom.

5. The kind of contract normally used in mass payment transactions was the standard form of contract. The Commission of the European Economic Community had recently proposed a

directive aimed at curbing the use of unfair clauses in standard forms of contract; the directive did that by reference to rules, which although not mandatory, were deemed to be a fair way of safeguarding the interests of the parties. The fact that all the rules in the Model Law would have certain implications for such a process of control pointed to the importance of deciding on what would and would not be mandatory, and of examining the content of the non-mandatory rules.

6. A second equally important point was that if the Model Law contained too many mandatory rules, banks in States which adopted it might simply advise their customers to revert from electronic systems to cheque payments when making funds transfers. One of the principal aims of the Commission was to encourage the use of electronic funds transfer and a wholesale abandonment of it would have deplorable repercussions on the whole payments system.

7. Looking at the Model Law, he did not see any circumstance at all—not even what was contemplated in paragraphs 2 and 3 of article 4—which justified a mandatory provision. Protection was no more necessary for large transnational companies than it was for small regional banks. What was being discussed was not protection of consumers, but of strong customers perfectly able to look after their own interests. Consumer protection was quite a different matter, on which his delegation would be perfectly willing to agree to the adoption of mandatory rules.

8. Mr. GREGORY (United Kingdom) noted that the Chairman had mentioned the notion of consent. That was important in regard to the way in which the Commission looked at article 3. If the words "with the consent" were added between the word "agreement" and the words "of the affected party", some of his delegation's concerns and, he thought, those to which the observer for Australia had drawn attention would be eliminated. If the Commission wished the provision to be understood as having that meaning, it should make that clear.

9. Mr. ABASCAL ZAMORA (Mexico) asked how a contract between two parties could become binding on a third party which had not given its consent to be bound.

10. Mr. GREGORY (United Kingdom) explained that under English law, such a contract could not affect a third party's rights or obligations directly. However, as the observer for Australia had pointed out, it might affect them indirectly.

11. Mr. BURMAN (United States of America) said that his delegation broadly associated itself with the remarks made by the representative of Germany. With regard to the addition which the United Kingdom had just suggested, his delegation had the same difficulty as that mentioned by the representative of Mexico. The exact wording of the article was very important. It would be most unfortunate if the text was to imply an impediment to an agreement between two parties to a credit transfer transaction—A and B—because of its possible indirect effects on other parties C, D or E. That would effectively preclude the capacity of persons in the real commercial world to conclude such agreements.

12. The CHAIRMAN observed, in regard to the United Kingdom suggestion, that the intention of the Working Group had been that the wording of article 3 at present before the Commission should express the idea which the United Kingdom wished to bring out. To him, that seemed clear from the fact that the article was worded in the singular: it spoke of "affected party". To take, for example, the situation where an originator and an originator's bank agreed on something which the beneficiary's bank should do in a chain of transfer, the inference was that if the beneficiary's bank gave effect to that agreement it was authorized to do so, but if the beneficiary did not agree to the act in question he would not be bound by it.

13. Mr. LIM (Singapore) endorsed the views expressed by the observer for Australia. He foresaw misunderstandings arising from the use of the word "agreement" in the article as presently worded. He believed that the use of the word "consent" would minimize that possibility.

14. Mr. GRIFFITH (observer for Australia) said the fact was that the expression "affected party" seemed to refer to one of the two parties directly making the agreement; if it was meant to refer to third parties who might be concerned, as the United Kingdom representative thought was the case, either the wording must be amended or the point must be made very clear in the commentary. Otherwise, there would be a real danger of that meaning being overlooked. His delegation would prefer the wording itself to be amended, on the lines suggested by the representative of the United Kingdom.

15. Mr. SCHNEIDER (Germany) asked whether the words "affected party" were to be taken in their economic or in their legal sense. Contractual relationships normally only created rights and duties between the parties to the contract and there were not more than one or two rules in the Model Law in which the third party had a right against a party with whom no contractual relationship had been entered into.

16. Mr. BERGSTEN (Secretary of the Commission) said that while the titles of the articles—in the present instance "variation by agreement", not "variation by consent"—had no legal standing, they did hold clues as to the intention of the Working Group. That was indicated to a considerable extent by the example given in paragraph 2 of the Secretariat's comments on the article (A/CN.9/346, p. 24). To begin with, "consent" had a different connotation from "agreement". The assumption had been that there would be something in the nature of a contract, an agreement in one form or another. In the Secretariat's example, the agreement to which the beneficiary's bank was not party provided that the order might be processed by account number alone, and the implication was that a discrepancy between the beneficiary's name and the account number led to financial loss. His personal understanding had been that in such a situation the originator, by making that agreement with the originator's bank, gave up one of the rights he would have under the Model Law. The agreement was certainly not with the person who received the benefit—in that instance the beneficiary's bank. That led him to conclude that it was the party adversely affected, not the one that received the benefit, that was meant by "affected party".

17. Mr. GREGORY (United Kingdom) asked what the effect on the originator's bank would be if, with the present wording, there had been such an agreement between the beneficiary's bank and the sender's bank.

18. Mr. BERGSTEN (Secretary of the Commission) said that the originator would not then be affected at all.

19. Mr. LE GUEN (France) remarked that the French version used the words "*si la partie intéressée y consent*" where the English version used the words "by agreement of the affected party".

20. The CHAIRMAN felt that the problems that had been raised were adequately covered by the ordinary law of contracts. It seemed clear that if one was not a party to an agreement one was not bound by it.

21. Mr. SCHNEIDER (Germany) said that the problem was that the word "affected" could cover anyone who was affected economically, even indirectly. Surely what was meant was "agreement between the parties".

22. Mr. POTYKA (observer for Austria) suggested that the words "of the affected party" might be deleted.

23. Mr. LIM (Singapore) said that, although parties to an agreement normally could not bind third parties, when the Model Law was enacted as a statute in a particular country it would override that general rule of law.

24. The CHAIRMAN asked whether there was any opposition to the suggested deletion of the words "of the affected party".

25. Mr. GRIFFITH (observer for Australia) thought that the words "of the affected party" were important.

26. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) suggested that the wording "by agreement of the parties concerned" should be used.

27. The CHAIRMAN pointed out that the written comments submitted by Japan (A/CN.9/347, p. 35) contained a proposal that the words "agreement of the affected party" should be replaced by the words "agreement of the parties". In the light of the discussions, that solution seemed to deserve consideration.

28. Mr. DUCHEK (observer for Austria) thought that what was intended was clear: to allow the rules to be changed by the parties concerned. The Commission should not spend too much time trying to achieve perfection of drafting on such a point when there were, in his view, much more serious problems that would require its attention if it was to draw up a model law that would be widely acceptable.

29. Mr. GREGORY (United Kingdom) said that, without prejudice to his country's written comments concerning the issues raised by article 3 (A/CN.9/347, pp. 55-56), he would like to suggest, as a contribution towards solving the present drafting problem, that the wording "... the rights and obligations of the parties to a credit transfer may be varied by agreement" might be used, with no reference being made to an "affected party".

30. Mr. BURMAN (United States of America) said that he had difficulties with that suggestion. The problem was that the Commission had not defined who the parties to a credit transfer were. Would the term cover, for example, so-called credit transfer systems?

31. Mr. KOMAROV (Union of Soviet Socialist Republics) agreed with the previous speaker, and felt that the wording just suggested by the United Kingdom representative raised new problems. He preferred the text as it stood.

32. The CHAIRMAN said that, in the light of the discussion, he would like to suggest that the first part of the text should remain as it was and that the final words "by agreement of the affected party" should be replaced by the words "by agreement

of the parties concerned". The other problems that had been raised would be covered by the ordinary law of contracts.

33. Mr. GREGORY (United Kingdom) asked whether, if that suggestion were adopted, it would mean that an agreement between the beneficiary's bank and its sender to rely on numbers only would be binding on the originator.

34. The CHAIRMAN said that that question would be decided by reference to the ordinary law of contracts. If the originator agreed to that, he was volunteering to be bound by his agreement. He asked whether he could take it that the Commission agreed that the words "by agreement of the affected party" should be replaced by the words "by agreement of the parties concerned".

35. Mr. BERGSTEN (Secretary of the Commission) said that he would like to mention a linguistic point affecting some of the language versions. In the French and Spanish versions of article 3, the word "agreement" was translated differently in the text of the provision from the way it was translated in the title. In the French and Spanish versions of the text suggested by the Chairman, the word "agreement" should presumably be translated in such a way that it would have the same meaning as in the title.

36. Mr. LE GUEN (France) said that that was a drafting point; there was in fact no difficulty in translating into French the new wording suggested by the Chairman.

37. Mr. LOJENDIO OSBORNE (Spain) said that there was no problem in Spanish either with regard to the translation of the word "agreement" in the amended text suggested. However, the expression "the parties concerned" was not completely clear. Perhaps it would be better to say something like "the rights and obligations derived from the relationships included in a credit transfer may be varied by agreement of the parties".

38. Mr. VASSEUR (Banking Federation of the European Community) said that, in French at least, it would be unsatisfactory to have the word "party" in the singular at the first mention and in the plural at the second.

39. Mr. YIN Tieou (China) said that the wording suggested by the Chairman caused no problems in the Chinese language.

40. Mr. SKELEMANI (observer for Botswana) asked whether a beneficiary was a party to a credit transfer.

41. The CHAIRMAN said that a beneficiary was not a party in the sense intended. The rights of the beneficiary were covered by the general law.

42. Mr. SOLIMAN (Egypt) said that, in the Arabic version too, the word "agreement" was translated differently in the text of the article from the way it was translated in the title. In the amended text, the term should be brought into line with the title.

43. The CHAIRMAN said that such drafting points would be taken care of by the Drafting Group.

44. Mr. SCHNEIDER (Germany) said that it was difficult to separate drafting from substance unless the concepts were clear. The Commission should have an opportunity to discuss the text again after any drafting adjustments were made.

45. The CHAIRMAN said that that would certainly be possible if a problem arose. However, if he heard no objection, he would assume that there was agreement that the text should be amended to read, in the English version, "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 parties concerned".

46. *It was so decided.*

#### *Additional article on interpretation*

47. Mr. ABASCAL ZAMORA (Mexico) recalled that a decision had been taken in the Working Group to include in the Model Law a text on uniform interpretation. The additional article on that subject proposed by his delegation in its written comments (A/CN.9/347, p. 42) was based on the United Nations Convention on Contracts for the International Sale of Goods and other relevant international instruments. Although the Model Law was not a convention, its purpose was not dissimilar, in that it was intended to have universal application. Every effort should be made to obviate discrepant interpretation of the Model Law by the courts of States which adopted it.

48. Mr. SCHNEIDER (Germany) said that it was important to bear in mind the fact that the Model Law affected both private and public international law. In his delegation's opinion, the Mexican proposal was satisfactory from both points of view.

49. Mr. PELICHET (Hague Conference on International Private Law) said that, while a provision of the kind proposed by the delegation of Mexico might logically have its place in a convention, it might not be appropriate in a model law, which must always be compatible with domestic legislation.

50. Mr. AZZIMAN (Morocco) said that his delegation had some hesitation with regard to the Mexican proposal. For example, it was unsatisfactory to define the term "bank" and subsequently to rely on the courts to generate a uniform jurisprudence on the subject.

51. Mr. KOMAROV (Union of Soviet Socialist Republics) said that his delegation also had doubts about the Mexican proposal. It would prefer that reference be made to the international dimension of the relations with which the Model Law was concerned.

52. Ms. KRAG JORGENSEN (Denmark) said that no specific provisions were made in Danish law for the interpretation of international conventions.

53. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that his delegation would have difficulty in accepting the Mexican proposal.

54. Mr. KOMAROV (Union of Soviet Socialist Republics) said that the text should be left as it was.

55. Mr. ADEDIRAN (Nigeria) said that a provision on the subject should be included in order to prevent divergent interpretations of the Model Law.

56. Mr. ERIKSSON (observer for Sweden) said that his delegation supported the suggestion made by the representative of the Soviet Union. The question of the applicability of the Model Law was perhaps best left to judges in the courts of the countries concerned.

57. Mr. SOLIMAN (Egypt) said that the general ideas embodied in the proposal by Mexico should be placed in a preamble to the Model Law and not in the text itself.

58. Mr. GRIFFITH (observer for Australia) pointed out that, when Australia had enacted the UNCITRAL Model Law on International Commercial Arbitration, the interpretation of the

instrument had been provided for as follows: "For the purposes of interpreting the Model Law, reference may be made to the documents of: (a) the United Nations Commission on International Trade Law; and (b) its working group for the preparation of the Model Law." His delegation joined those delegations which considered the article proposed by Mexico to be inappropriate for inclusion in the body of the Model Law.

59. Mr. ABASCAL ZAMORA (Mexico) withdrew his delegation's proposal.

60. The CHAIRMAN said that, unless he heard any objection, he would take it that the Commission did not wish to include a text on interpretation in the Model Law.

61. *It was so agreed.*

#### *Organization of work*

62. The CHAIRMAN announced the establishment of the Drafting Group, which would consist of the representatives of China, France, the Islamic Republic of Iran, Mexico, Morocco, Singapore, Spain, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America.

#### *Article 16 bis*

63. The CHAIRMAN recalled that at its 444th meeting the Commission had considered, under article 2, the question of adding to the Model Law a definition of the term "interest".

64. Mr. BHALA (United States of America) introduced the following text, which it proposed should be added to the Model Law as article 16 bis: "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."

65. The text had been prepared by an ad hoc drafting group on the basis of the *Guidelines on International Interbank Funds Transfer and Compensation* of the International Chamber of Commerce (ICC) and the written comments of Mexico on article 16 (A/CN.9/347, p. 43). It used the term "funds or money"

instead of "currency" because the words "funds" and "money" were defined in article 2(i); that definition covered monetary units of account and also referred to the rules of intergovernmental institutions. In response to points raised in the discussion at the 444th meeting, the text avoided mentioning the interbank interest rate as such, but that rate was implicit in the words "the time value of the transaction amount . . . customarily accepted by the local community". The proposed text omitted the word "country", which was the point of reference of the ICC *Guidelines*, because technically there was no country for a monetary unit of account. That would also help to solve the difficulty of selecting a rate when dealing with, for example, eurodollars.

66. Mr. FUJISHITA (Japan), observing that the interest rate would depend solely on the customs of the local banking community, asked whether, if the local banking community worked on the basis of a currency, the calculation could be based on the rate of the state of that currency.

67. Mr. BHALA (United States of America) confirmed that that was the case.

68. Mr. VASSEUR (Banking Federation of the European Community) welcomed the proposed text. Citing the example of a case recently handled by the French courts concerning interest on a dollar transaction between a bank in Czechoslovakia and a bank in Lebanon, he suggested that the words "local banking community" might usefully be replaced by the words "international banking community".

69. Mr. SOLIMAN (Egypt) felt that the text proposed by the United States representative could advantageously be included among the definitions in article 2.

70. Mr. POTYKA (observer for Austria) said he was concerned about the use of the words "transaction amount", which were not used in the Model Law itself. Also, although the words "funds" and "money" had been defined in the Model Law, he did not think it appropriate to use them as a replacement for the term "currency". Finally, it should be specified somewhere in the Model Law what the appropriate local banking community was.

*The meeting rose at 5.05 p.m.*

### Summary record of the 447th meeting

Friday, 14 June 1991, at 9.30 a.m.

[A/CN.9/SR.447]

*Chairman: Mr. SONO (Japan)*

*The meeting was called to order at 9.45 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)**

#### *Article 16 bis (continued)*

1. The CHAIRMAN said that the Drafting Group had made minor changes in the wording of the definition of the term "interest", to be included in the text as article 16 bis.

2. Mr. ABASCAL ZAMORA (Mexico) said that, as amended by the Drafting Group, the definition of "interest" read: "Unless

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

3. That version took account, in particular, of the comment by the observer for Austria that the term "transaction amount" was not sufficiently precise. The second amendment involved the deletion of the word "local" in the second sentence and was intended to deal with a comment by the observer for the Banking Federation of the European Community that the

word "local" was inappropriate in the context of a law of international scope.

4. Mr. VASSEUR (Banking Federation of the European Community) said that he would have preferred that the word "local" were replaced by "international" rather than merely deleted.

5. Mr. GREGORY (United Kingdom) said that the phrase "of the payment order" in the first sentence should be deleted. The first sentence would then read: "Unless otherwise agreed, 'interest' means the time value of the amount in the funds or money involved." That would avoid the problems entailed by the vagueness of the term "transaction amount", while at the same time avoiding the possibility of a discrepancy between the amount of the payment order and the amount actually transferred.

6. Mr. SCHNEIDER (Germany) said that the definition of the term "interest" was insufficiently precise since, in the first place, it did not specify what was meant by the "local banking community" and, secondly, it gave no indication of how interest was to be calculated or what kind of arrangement was involved. At the very least, it should be specified whether the bank concerned was that of the originator or of the beneficiary; the former would be his delegation's preferred choice but, in the context of the current text, the beneficiary's bank might be more appropriate.

7. Mr. HERZBERG (observer for Israel) said that the first sentence of the definition was unnecessary. Furthermore, in the second sentence, one of the two terms "funds" or "money" could be deleted without detracting from the meaning of the sentence as a whole.

8. Mr. LOJENDIO OSBORNE (Spain) said that, while he could accept the proposed paragraph in principle, he wondered where in article 16 it would be inserted. In addition, it should be made clear whether it was intended that interest should be calculated in respect of the creditor or the debtor.

9. Mr. HERZBERG (observer for Israel) said that the term "time value" took insufficient account of other components—such as risk and inflation—which were normally included in the calculation of interest. Rather than attempting a theoretical definition, it would be better to propose a practical method of calculating the interest.

10. The CHAIRMAN said that the inflation component was irrelevant to the calculation in view of the short periods of time involved in the cases covered by the Law. Interest would certainly differ according to the periods of time involved, but it had been generally felt that the phrase "time value" dealt with the problem adequately. As for the question as to where the paragraph should be inserted, the current proposal was that it should be included as article 16 *bis*, but it might just as well be transferred to article 13, which also referred to the concept of interest.

11. Mr. DUCHEK (observer for Austria) said that the current text of the paragraph deviated considerably from the International Chamber of Commerce (ICC) *Guidelines* on which the original Mexican revision had been based. The ICC text, which specified that the banking community in question was the local one, was much clearer than the text before the Commission.

12. Mr. HUANG Yangxin (China) said he endorsed the views expressed by the representatives of Spain and Germany and the observer for Israel that the paragraph should offer a method of calculating interest, rather than an abstract definition. Interest should be calculated on the basis of the interbank loan rate.

13. The CHAIRMAN said that it had already been agreed that it was unacceptable to stipulate the use of a single standard, such as the interbank loan rate, for calculating interest. That was the original reason for the proposal to use a broader phrase such as "at the rate or on the basis customarily accepted".

14. The following wording might provide a satisfactory compromise: "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." That sentence could be included in the text as a definition, the word "shall" being deleted to eliminate the impression that it was intended as a rule. The retention of the phrase "Unless otherwise agreed," would ultimately depend on the decision regarding article 3.

15. Mr. LE GUEN (France) said that the phrase "Unless otherwise agreed," might also cause problems in connection with article 16(7), which stated that the provisions of that article might be varied by agreement to the extent that the liability of one bank to another bank was increased or reduced.

16. The CHAIRMAN said that, while he recognized that the phrase in question did indeed leave a way open for parties to take action contrary to article 16(7), further discussion should be postponed until the matter of exclusivity was discussed, particularly with respect to article 16.

17. Mr. ABASCAL ZAMORA (Mexico) said that, if he understood the paragraph correctly, it meant that the parties could, by previous agreement, stipulate the rate of interest to be applied.

18. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to include the paragraph, as most recently amended, in article 2 of the text, i.e. as a definition.

19. *It was so decided.*

#### Article 4

20. The CHAIRMAN said he hoped that the problems raised by the representatives of Morocco and the Islamic Republic of Iran in connection with the term "purported sender" could be dealt with by the Drafting Group. The Commission had already discussed those aspects of article 4 which related to forgery and to the authority of one person to bind another, but had concluded that it was not necessary for the Model Law to provide a rule on either question. It had decided, however, that in article 4(2)(a) the words "under the circumstances" should be added after "a commercially reasonable method of security".

21. Structural changes had been suggested by the observer for Finland and the representative of Japan. The Finnish suggestion was that the obligations set out at the beginning of paragraph 5 should be linked to the previous paragraph by the introductory phrase "Subject to the previous paragraph.". The Japanese proposal was that the first sentence of paragraph 5 be transferred to paragraph 1 in the interests of clarity and as a means of introducing the two concepts of "source" and "error" at the very beginning of the article, which would then go on to deal with the concept of "source" in the next three paragraphs and with "error" in the fifth paragraph. The word "However," would have to be deleted from the first—formerly the second—sentence of paragraph 5.

22. Mr. HERZBERG (observer for Israel), having endorsed the Japanese proposal that the first sentence of article 4(5) should be moved to paragraph 1, suggested that, if so, paragraphs 4 and 5 of article 4 might well be combined.

23. The CHAIRMAN said that paragraphs 2, 3 and 4 of article 4 dealt with the source of a payment order while paragraph 5 covered the question of error. It might therefore be impractical to combine paragraphs 4 and 5.

24. Mr. LIM (Singapore) said that, since the first sentence of article 4(5) stated how a sender was bound under the terms of paragraphs 1 and 2, transferring that sentence to paragraph 1 would place the matter outside the scope of paragraph 2. He was unable, therefore, to support the Japanese proposal.

25. Mr. BHALA (United States of America), having endorsed the remarks of the representative of Singapore, said he agreed with the Chairman's interpretation that an altered payment order was an unauthorized one. The text of the article was satisfactory in that respect.

26. Mr. IWAHARA (Japan) withdrew his delegation's proposal, on the understanding that, as the representative of the United States had said, an altered payment order was considered to be an unauthorized one and does not bind the sender under article 4(1).

27. The CHAIRMAN invited the Commission to consider article 4(1).

28. *Article 4(1) was adopted.*

29. The CHAIRMAN invited the Commission to consider article 4(2). He recalled that a number of drafting suggestions had been made by the observers for Finland and Sweden and the representative of Canada. The observer for Finland had suggested that the words "under the circumstances" be added after the word "security in article 4(2)(a) and that the words "complied with" in article 4(2)(b) be replaced by "performed properly". The Swedish suggestion was that the word "safe" be inserted before "commercially reasonable" in article 4(2)(a), while the Canadian proposal was that the word "provided" in article 4(2)(a) be deleted.

30. If he heard no objection, he would take it that the Commission wished to add the words "under the circumstances" to article 4(2)(a).

31. *It was so decided.*

32. Mr. GREGORY (United Kingdom), speaking on the suggestion that the words "complied with" be replaced by "performed properly", said he recognized that it was necessary to make it clear that an order must in fact have been authenticated if the purported sender were to be considered as being bound. He proposed that a new subparagraph be added to that effect.

33. Mr. BHALA (United States of America) asked the observer for Finland if she would clarify the purpose of her suggestion, after which there should be further discussion of the related United Kingdom proposal.

34. Ms. KOSKELO (observer for Finland) explained that the purpose of her proposal was to make it clear that the receiving bank had to bear the risk in the event of falsely positive authentication resulting from a technical malfunction in the receiving bank.

35. The CHAIRMAN said that it might be thought that, if there had been a technical malfunction in the receiving bank,

then that bank could not be regarded as having complied with the authentication requirement.

36. Mr. BOSSA (observer for Uganda) said he wondered whether the concerns of the observer for Finland might not be satisfied by the addition of the word "duly" before the words "complied with".

37. Mr. BHALA (United States of America) said he thought it desirable to retain the wording "complied with". The valid point made by the observer for Finland should be reflected in the comments and be borne in mind during the discussion on standards of commercial reasonableness.

38. Ms. KOSKELO (observer for Finland) explained that she had been referring not so much to the commercial reasonableness of a system as to the fact that there could be a technical malfunction in a basically good system, and that might cause problems.

39. Mr. ERIKSSON (observer for Sweden) said that the term "commercially reasonable" was rather imprecise, as pointed out in the Secretariat's comments (A/CN.9/346, p. 27, para. 9), and greater clarity would be achieved by adding the words "safe and" before it.

40. He had been somewhat surprised to hear a speaker state that the term "commercially reasonable" might be used in connection with the problem of forged signatures since the term did not, he thought, provide enough guidance. Furthermore, the Working Group had already agreed that paragraphs 2 to 4 of article 4 would not apply in cases of forged signatures.

41. Mr. KOMAROV (Union of Soviet Socialist Republics) pointed out that, if the word "safe" were added, it might imply that some commercially reasonable methods were not safe, and that itself did not seem very reasonable.

42. Ms. KRAG JORGENSEN (Denmark) said that it was important that the method should be safe as well as commercially reasonable; she therefore supported the Swedish suggestion.

43. Mr. LOPEZ ROCA (observer for Colombia) said that, since article 4(2)(a) mentioned a "commercially reasonable method of security", it was hardly necessary to add the word "safe".

44. Ms. KOSKELO (observer for Finland) said she supported the suggestion in principle but suggested that some such word as "reliable" would be more appropriate than "safe", or perhaps the two could be combined. Because of the vagueness of the term "commercially reasonable", her delegation had prepared an indicative list of the factors that should be taken into account in assessing what was commercially reasonable.

45. Mr. ABASCAL ZAMORA (Mexico) said he fully agreed with the representative of the Union of Soviet Socialist Republics and the observer for Colombia. To add the word "safe" would create confusion. He did not understand what could be meant by a commercially reasonable method that was not safe. Incidentally, it was not true that the Working Group had agreed that paragraphs 2 to 4 of article 4 would not apply in the case of a handwritten signature.

46. Mr. BISCHOFF (observer for Switzerland) said he agreed with the representative of Mexico. A safe system meant a faultless system, and that did not exist. An expert would be able to determine whether a method was commercially reasonable but could not determine whether it was safe.



47. Mr. LENNARD (observer for Australia) said he supported the Swiss view. The term "commercially reasonable" would include reliability in all circumstances. The comments on the Model Law should indicate that reliability was a factor relevant to commercial reasonableness.

48. Mr. ERIKSSON (observer for Sweden) said that he would not pursue his suggestion, on the understanding that the comments would comprise a statement that the concept of a commercially reasonable method should include the notion of security of authentication.

49. The CHAIRMAN said that all the members of the Commission accepted that "commercially reasonable" incorporated the idea of "safety", a fact that would be reflected in the summary records and in the commentary.

50. Mr. BURMAN (United States of America) said that he agreed with the views expressed by the representative of the Union of Soviet Socialist Republics. He would return to the commentary on article 4(2) after the discussion of article 4(3) in order to ensure that the understanding of the Commission was correctly recorded.

51. Mr. AL-NASSER (observer for Saudi Arabia) said that the banks in his country regarded the expression "commercially reasonable" as too vague.

52. Mr. DE BOER (Netherlands) said he thought that it had been agreed that the question whether signature comparison could be considered a commercially reasonable method of authentication was to be discussed in the context of article 4.

53. The CHAIRMAN said there had been an understanding at an earlier stage that signature comparison could be an authentication procedure, if so agreed by the parties. Whether or not it was a commercially reasonable method would depend on the circumstances, such as the amount of the sum involved.

54. Mr. ERIKSSON (observer for Sweden) said that, in his country, signature comparison would never be a "commercially reasonable method". The differing views on what constituted a "commercially reasonable method" of authentication clearly revealed the vagueness of the term.

55. To solve the problem of forged signatures, an added sentence stating that paragraphs 2 to 4 of article 4 did not apply to forged signatures was needed.

56. The CHAIRMAN said he thought that the words "under the circumstances" would accommodate different practices and concepts of what was "commercially reasonable". Moreover, signature comparison might be expressly excluded from the definition of authentication in article 2(j), as the observer for Finland had suggested.

57. Mr. ABASCAL ZAMORA (Mexico) said he could not agree that paragraphs 2 to 4 of article 4 did not apply to signature comparison. It was unacceptable that the parties should be prohibited from agreeing that comparison of signatures was a means of authentication, covered by the requirement that it should be commercially reasonable. The alternative would be to place an undue restriction on the will of the parties. There was also the question of defining a "signature". Modern techniques, such as the comparison of electronic signatures, were much more secure. He therefore thought the text should be retained as it stood.

58. Ms. KOSKELO (observer for Finland) said that, although she had raised the issue in relation to article 2(j), it would be

more appropriate to resolve the problem in the context of article 4.

59. The question was not whether the procedure was commercially reasonable or not but, rather, who was to bear the risk. It would not be appropriate to apply the same rules for loss allocation in the case of forged signatures, because signatures were not secret but public and thus easily subjected to misuse. She was therefore in favour of keeping to the traditional rule whereby the receiver who relied on a signature was the one to bear the risk.

60. She therefore supported the Swedish suggestion that paragraphs 2, 3 and 4 of article 4 should not apply in the case of forged, handwritten signatures. The issue related only to signatures that were handwritten. Electronic signatures, and others which might be developed, were much safer and would be covered by paragraphs 2 to 4 of article 4. In any case, if signature comparison was excluded from article 4(2) to (4), the parties could still agree otherwise, as provided in article 3.

61. Mr. SCHNEIDER (Germany) said that, in practice, payment orders were commonly given by tape, in writing or by telephone. In the case of written payment orders, the only proof of authenticity was the signature, so it was a commercially reasonable method of authentication under the circumstances. In the case of telephone orders, reliance was placed on a key word and voice recognition. That was commercially reasonable practice, for example, in serving customers in the travel business. He could not agree with the observer for Sweden that, contrary to normal practice in many countries, banks should not be able to rely on a signature.

62. He did, however, support the general rule that the method of authentication should be commercially reasonable and secure. Nevertheless, he also thought that the parties should be free to agree on the use of a method which was not commercially reasonable. He therefore proposed that article 4(3) should be amended to read: "The parties are permitted to agree, by written agreement only, that paragraph 2 shall apply if the authentication is not commercially reasonable."

63. The CHAIRMAN said that the situation in the case of a telephone order was a question of interpretation. He could not agree with the representative of Germany on that point.

64. Mr. VASSEUR (Banking Federation of the European Community) said that the problem of payments being made on the basis of forged signatures certainly existed. Approximately 25 per cent of payment orders in France were paper based. French jurisprudence distinguished between two cases. In the first case, where there was a clear discrepancy between the signature on the order and the specimen signature—an obvious forgery—a receiving bank which failed to detect the forgery and executed the order would be responsible. In the second case, that of a perfect forgery undetected by the receiving bank, the law had ruled that the receiving bank should bear the loss because the purported sender had not sent the order.

65. He suggested that the question of forgery should be covered in the draft Model Law, a distinction being made between the two cases he had described, together with a clear statement as to who would be liable in each case.

66. The CHAIRMAN said that the question might give rise to a basic conflict between the civil law and common law approaches, which could not easily be solved. It would be better, therefore, to leave the question of risk allocation to traditional law.



67. Mr. DE BOER (Netherlands) said that the first case came under the rule that the bank must comply with a method of authentication. If the second case was a matter for national case law, forgery could be excluded from article 4(2) to (4). He would therefore support the Swedish suggestion.

68. Mr. HERZBERG (observer for Israel) said he agreed that it would be better to leave the legal situation as it stood.

69. Mr. LOJENDIO OSBORNE (Spain) said that article 4(4) could not be kept as it was if the problem of forgery were included, because it concerned the payment order, whereas a forgery presupposed a handwritten signature. However, perhaps the most important element was the burden of proof, and he therefore supported the Swedish suggestion. According to article 4(4) the sender had to prove that the order resulted from the action of another person, and the conditions seemed to him excessive.

70. The question of forgery should be treated separately, to avoid conflict with article 4(4); and the more substantive issue of burden of proof could be discussed at a later stage.

71. Mr. CONOBY (United Kingdom) said that his delegation's views had been stated earlier in the discussions. He noted that, while a signature would not be regarded as a commercially reasonable method of authentication in Sweden, the observer for Sweden accepted that it might be so regarded in other countries. That was the way in which the Working Group had intended that the Law should operate and he was satisfied to leave article 4 as it stood.

72. Ms. KRAG JORGENSEN (Denmark) said that, as she understood it, article 4(1) dealt with the matter of a person becoming a sender and being bound by a payment order issued by another person with authority, but it did not prescribe when and how a person became part of a transaction. That had apparently to be left to the national law and the national law would therefore regulate forgery.

73. According to article 4(2), however, there must be an agreement between the parties, under national law, to accept an authentication procedure. Thus, the sender and his bank would be able, under the rules of national law, to accept a certain procedure which allowed for the problem of forgery.

74. Mr. BERGSTEN (Secretary of the Commission), referring to the discussions on article 4 in the Working Group, said that paragraph 1 was the basic rule in that it stated that the sender was bound by a payment order sent by himself or by another person who had the authority to bind him. The Working Group had felt that the question of what person had the authority to bind the sender was essentially a question of agency, the legalities of which were too complicated for the Model Law to handle. The Working Group had simply accepted the consequences if the other person actually had the authority. There was no mention of authentication, merely of the factual situation.

75. According to paragraph 1, if the person sending an order was not the purported sender but someone who purported to be an agent but did not have the authority, the bank would incur the risk. Most of the discussion had turned on the circumstances in which the risk of the false or unauthorized message should be shifted from the bank to the purported sender.

76. The Working Group had been concerned almost entirely with electronic and computer communication, and there had been no discussion of oral or written communications. The representative of Mexico had correctly stated that the Working Group had not decided that a written payment order and a signature did not come within the scope of paragraphs 2 to 4: there had been no positive decision; the subject had not been discussed. In his opinion, there was no need for any change in the text.

77. Paragraph 1 and paragraphs 2 to 4 were concerned with the allocation of risk. It was essential to decide who would bear the risk in the case of non-authenticated payment orders acted on by a bank. If the Commission did not wish the rule, devised in the context of the computer, to cover the traditional situation of the written payment order also, it would be best to say that paragraphs 2 to 4 did not apply to the latter case, which would then be covered by paragraph 1 only.

78. Mr. ABASCAL ZAMORA (Mexico) said that, under article 4 as currently drafted, a bank executing an order with a forged signature would be liable whether the forgery was a good one or not. Article 4 provided that the parties could agree on a means of authentication and there was no need to prevent them from agreeing on a method which included comparison of signatures, together with passage of the risk, as appropriate. He could see no reason to change the text.

79. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) said that, at an earlier meeting, his delegation had stressed the need to use a commercially reasonable method for comparing signatures. On the question of allocating risk, if the risk were borne by the receiving bank, the cost of credit transfers would greatly increase. If the person receiving the payment order bore the risk, that party would have to insure against it and would urge his the bank to use a commercially reasonable method other than signature comparison, which would make the bank's service to its client far more expensive, and would also extend the duration of the operation. The result would be an increase in the cost of the operation to the sender, which was not desirable.

80. The CHAIRMAN said that no one was suggesting that there should never be any comparison of signatures. The question was whether paragraphs 2, 3 and 4 of article 4 should apply to handwritten signatures or not.

81. Following a show of hands which indicated a majority in favour of excluding handwritten signatures from the scope of paragraphs 2, 3 and 4, he said that there was no need to complicate matters by adding a further paragraph. It would suffice if the article were modified along the lines suggested by the Secretary.

82. He also asked the Drafting Group to insert the words "as a sender" into the second line of the opening sentence of paragraph 2 before the word "if", provided it did not consider the insertion to be a matter of substance.

83. He said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 2 as amended.

84. *It was so decided.*

*The meeting rose at 12.40 p.m.*

## Summary record of the 448th meeting

Friday, 14 June 1991, at 2 p.m.

[A/CN.9/SR.448]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.15 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

*Article 4 (continued)*

1. The CHAIRMAN invited the Commission to consider article 4(3). On the question of contracting-out of that provision, in his view it was the clear intention of the text as it stood that the parties were not permitted to agree that paragraph 2 of the article should apply to an unreasonable authentication. He would submit that it must be assumed that article 4(3) was one of the provisions referred to in the phrase "except as otherwise provided in this law" in article 3.

2. There was a proposal by Canada (A/CN.9/347, p. 6, sect. XII) to reword the paragraph in order to spell out its procedural effect, but he thought that the Commission would prefer for the time being to avoid getting into questions of procedure in the Model Law.

3. The United States of America (A/CN.9/347/Add.1, pp. 13-14) proposed the deletion of article 4(3), arguing that the parties should be permitted to agree on a procedure that was less than "commercially reasonable" if their own cost-benefit analysis persuaded them to do so. At the previous meeting, the Commission had added the words "under the circumstances" to paragraph 2(a) of the article (A/CN.9/SR.447, para. 30); the question arose whether, that being so, the parties' procedure should not be regarded as "commercially reasonable" in the circumstances. He hoped that, in the light of the previous meeting's discussions, the United States might reconsider its proposal for the deletion of the paragraph.

4. There was also a proposal from Japan on article 4(3) (A/CN.9/347, p. 36, para. 6), but he suggested that the Commission should first decide on its general approach to the paragraph.

5. Mr. BHALA (United States of America) said that the Chairman's interpretation of article 4(3) would make it easier for his delegation to accept the paragraph, but it still felt some concern. Supposing a customer—say a small business—told its bank that it would like to accept a less than "commercially reasonable" procedure for reasons of cost, and the bank agreed, then according to the Chairman's interpretation the agreement could be deemed to be commercially reasonable; as his delegation read the present text, however, the bank would have to tell the customer that it was precluded by the law from agreeing to the customer's request. Some might argue that the customer might not be sophisticated enough to assess the risks correctly. The point needed clarification.

6. The CHAIRMAN thought that a procedure might be commercially reasonable under given circumstances even if it were not in line with the prevailing criteria for commercial reasonableness. The paragraph was intended to provide a minimum safeguard, but not to prevent particular circumstances from being taken into account.

7. Mr. ABASCAL ZAMORA (Mexico) supported the United States proposal, which seemed reasonable. If the Commission wished to keep paragraph 3, he would like to reserve his delegation's position until the final amended text of paragraph 2 was available.

8. Mr. SCHNEIDER (Germany) said that he was sympathetic to the United States proposal. If "reasonableness" was understood objectively, it would be for a judge to determine whether a given procedure was reasonable. That was how he interpreted the present text; a procedure did not become reasonable simply because a party agreed to it. He therefore agreed with the United States view that it should be made clear that the customer might agree to a procedure which was not objectively reasonable. He had made that point at the previous meeting (A/CN.9/SR.447, para. 62).

9. Mr. VASSEUR (Banking Federation of the European Community) reminded the Commission that his delegation too had proposed the deletion of article 4(3) (A/CN.9/347, p. 67). It should be possible for parties to adopt in certain circumstances a method whose objective reasonableness could be disputed. Why could not, for example, parties agree that payment orders could be given by telephone and accepted on the basis of voice-recognition? It could be provided that such an agreement must be in writing, as proposed by the German delegation.

10. The CHAIRMAN wondered what the position of those who wanted article 4(3) deleted was in regard to agreements which were manifestly unfair and might be invalidated under general contract law.

11. Mr. IWAHARA (Japan) supported the interpretation of article 4(3) given by the Chairman. A minimum standard of security was needed so that customers could rely on the machinery of international credit transfers. There must be some mandatory rules, and commercial reasonableness, taking into account circumstances, should be a mandatory requirement. There might be cases where a customer with real bargaining power wished to negotiate a reduction in his bank charges, but such cases could be catered for as just indicated by the Chairman.

12. Mr. HERZBERG (observer for Israel) expressed general agreement with what had been said by the representatives of the United States and Germany. Although the Chairman's suggestions were reasonable as far as they went, it would be important to make the text clearer; otherwise the paragraph should be deleted. Moreover, as he understood the text, authentication was not necessarily required. If that was so, why could not the parties agree to have a "loose" system of partial authentication?

13. Ms. KOSKELO (observer for Finland) thought it was clear that the parties would be unable to agree to let paragraph 2 apply if there was no authentication at all. The risk in that case would be borne by the receiving bank.

14. She took the view that article 4(3) should be retained. The hypothetical case described by the United States delegation did not seem very realistic. Usually, a small customer of modest

means would not be in a position to enter into negotiations with the bank. The reality was that the bank's standard terms would govern the situation. If variation by agreement was allowed in such a case, the bank would merely have to obtain the customer's consent to standard terms. The criterion of commercial reasonableness must therefore be kept as a minimum standard, with no contracting-out permitted. She agreed that the standard should be interpreted flexibly enough to allow circumstances to be taken into account, including a situation where a customer expressly insisted on a particular method.

15. She would like to make a drafting suggestion in connection with the idea discussed at the previous meeting to insert in the article a provision that would exclude authentication by way of signature from the scope of paragraphs 2 to 4. She thought that paragraphs 2, 3 and 4 should be reformulated: the present paragraph 4 should follow paragraph 2 so that the two paragraphs could be taken together; they should be followed by a new paragraph stating that they did not apply where the authentication consisted of a comparison of a signature with a specimen signature; and those three paragraphs should follow the present paragraph 3.

16. Mr. DE BOER (Netherlands) said that his delegation believed that the effect of paragraph 3 would be to ensure that the parties were careful and perhaps preserved a record of the transaction, and that for that reason it should be retained.

17. Mr. ERIKSSON (observer for Sweden) said that he agreed with the comments made by the observer for Finland.

18. Mr. SCHNEIDER (Germany) said that the best solution might be to insert a provision stating that the parties would not be held to have agreed that paragraph 2 should apply unless the authentication was commercially reasonable under standard terms of contract. However, the parties should also be given the possibility of agreeing on terms which did not conform to the criterion of commercial reasonableness.

19. Mr. LENNARD (observer for Australia) said that an objection could be raised to the suggestion made by the German representative on the ground that there was no agreed definition of standard terms of contract.

20. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that he favoured the retention of paragraph 3 even if it did restrict the parties' freedom of action.

21. Mr. BURMAN (United States of America) said that courts would be the arbiters of what constituted commercial reasonableness. In practice, negotiations did take place between banks and clients with regard to authentication.

22. Mr. BHALA (United States of America) said that, while the customer should be the object of prime concern, it should also be borne in mind that the interests of the client included not only security but also facility of access to credit transfer services.

23. Mr. LIM (Singapore) said that banks should be in a position to determine which authentication procedures were binding on them and which were not, and thus whether or not article 4 applied in a given instance. In any case, the criterion of reasonableness must be applied in a way which made commercial sense.

24. Mr. ABASCAL ZAMORA (Mexico) said that he agreed with the viewpoint of the representative of Germany. However, security was an aspect which banks should not ignore if they were to retain their customers, and that notion fell within the scope of commercial reasonableness.

25. Mr. ADEDIRAN (Nigeria) suggested that, in order to cater for the concerns expressed by those delegations which opposed the inclusion of paragraph 3 of article 4, the words "under the circumstances" should be added to the paragraph so as to qualify the words "commercially reasonable".

26. Mr. KOMAROV (Union of Soviet Socialist Republics) welcomed that suggestion.

27. Mr. ERIKSSON (observer for Sweden) said that it would be inadvisable to amend paragraph 3 in the manner suggested by the German representative because the resulting text might produce different results in different cases. The best solution would be to adopt the existing text with the amendment suggested by Nigeria. Such a solution would almost certainly lead to the results sought by the United States delegation and would probably be the only course acceptable to the majority of delegations.

28. Mr. VASSEUR (Banking Federation of the European Community) commented that a reference to standard form contracts would be appropriate for Germany and also for Switzerland and Belgium, but not for France, because French banks did not have such highly developed general conditions as those used by German banks.

29. He felt that it would be useful to incorporate in the Model Law a definition of "commercially reasonable" that was closely based on the content of article 4A-202(c) of the Uniform Commercial Code of the United States. That would be preferable to the amendment suggested by Nigeria, although the latter would provide a useful guide for readers of the Model Law in determining what circumstances were reasonable.

30. Mr. DUCHEK (observer for Austria) said that his country approved the amendment proposed by Nigeria.

31. Mr. BURMAN (United States of America) pointed out that, although his delegation found the provisions of article 4A-202(c) of his country's Uniform Commercial Code relevant, it had not proposed that the definition it embodied should be incorporated in the Model Law.

32. Mr. SCHNEIDER (Germany) said that his delegation believed that decisions taken by a court would take into account objective criteria as to what was commercially reasonable. It was important that the provisions on authentication should cover payment orders made by means of telephone calls, a system which worked very well in Germany. He hoped that point would be brought out clearly in the Commission's report.

33. The CHAIRMAN said that he would take it, unless he heard any objection, that the Commission wished to retain paragraph 3 of article 4 and to add to it the words "under the circumstances" proposed by Nigeria; he suggested that the addition should be made at the end of the sentence.

34. *It was so agreed.*

35. The CHAIRMAN invited the Commission to consider article 4(4). He drew attention to the written comments by Canada on the words "present or former employee of the purported sender" (A/CN.9/347, p. 7, sect. XIII, second paragraph).

36. Mr. ABASCAL ZAMORA (Mexico) said it was necessary to consider the implications behind the suggestion by Canada that those words were too narrow in scope. If the question was whether the scope of the provision should be expanded to include persons related to the purported sender, his delegation would agree, and that would just be a matter of drafting.

However, the point raised by Canada had not been dealt with expressly in the Working Group.

37. Mr. BURMAN (United States of America) said that his delegation had a recommendation which he felt would accommodate the comments made by Canada and also avoid discussion of the law of agency, namely that the commentary should contain a statement explaining that the word "employee" should be construed broadly. It was well known that payment orders were often initiated by persons who were not, strictly speaking, employees of the sender. A broad definition in the commentary along the lines he had suggested would eliminate lengthy discussion and complicated drafting of the Model Law itself.

38. Mr. ABASCAL ZAMORA (Mexico) suggested that the Drafting Group should be asked to examine the Canadian suggestion.

39. The CHAIRMAN said he felt that the Drafting Group would have difficulty in dealing with the suggestion unless delegations clearly indicated their views on the matter.

40. Mr. ERIKSSON (observer for Sweden) said that his delegation could support the United States proposal provided that the definition of the word "employee" was not too broad and that care was taken not to go beyond what Canada had suggested.

41. Mr. BURMAN (United States of America) said that his delegation's proposal was rather more far-reaching than the Canadian suggestion and would specifically include agents authorized to act on behalf of the sender, with particular reference to those corporations which used electronic or computerized transfer systems set up by specialists.

42. Mr. ERIKSSON (observer for Sweden) said that his delegation could not accept anything broader than what Canada had suggested.

43. Mr. BURMAN (United States of America) said that a substantive discussion appeared to be necessary to determine whether the term "employee" was understood to refer simply to employees, officers and directors of the sender or whether it included external agents using the sender's facilities as well.

44. Ms. KOSKELO (observer for Finland) felt that the problem which the proposal of the United States delegation addressed did not in fact exist because article 4(1) covered situations involving external agents.

45. Mr. GREGORY (United Kingdom) said that the concern expressed by the United States delegation would be met if, in line with the suggestion made by Canada in its written comments, the scope of article 4(4) was extended to include persons whose relations with the purported sender might have enabled them to obtain improper access to the authentication procedure. He asked the Secretary for clarification regarding the status of a commentary to the Model Law.

46. Mr. BERGSTEN (Secretary of the Commission) said that in the history of the Commission there had only been one commentary on a finished text prepared by the Secretariat, namely the Commentary on the Convention on the Limitation Period in the International Sale of Goods. If the Commission so wished, the Secretariat would prepare a commentary on the Model Law.

47. Mr. GREGORY (United Kingdom) had no objection to the proposal that the point under consideration should be dealt with in a commentary. However, the Model Law should be

drafted in terms that could be understood readily without undue emphasis being placed on external documents.

48. Mr. BURMAN (United States of America) said that his delegation was prepared to work on the basis of what Canada had suggested in its written comments. In his view, the Commission's report, rather than a commentary, should reflect the understandings reached among delegations on various points.

49. The CHAIRMAN said that the report would be the document adopted by the Commission. He asked the Rapporteur to ensure, with the assistance of the Secretariat, that it reflected clearly the manner in which the Commission had interpreted the text of the Model Law.

50. He suggested that the Commission continue its discussion of article 4(4) by considering the following amendment: to use the words "any other person whose relations with the purported sender might have enabled him or her to obtain improper access" in order to extend the scope of the reference to employees. That wording was in line with the Canadian suggestion.

51. Mr. ABASCAL ZAMORA (Mexico) welcomed the change suggested by the Chairman.

52. Mr. LOJENDIO OSBORNE (Spain) also supported the amendment suggested by the Chairman. His delegation believed that the reference to employees should be broadened to include directors of the sender and all persons whose functions involved them in the types of procedure at which the article was aimed. At the same time he warned the Commission against broadening the scope of the paragraph too far, since a bank had thousands of employees, many of whom would have no possibility of access to authentication procedures; for that reason the word "employee" was inappropriate and should be dropped. However, if someone such as a window cleaner employed by the sender obtained access to the authentication procedure, he should not be excluded from the operation of the paragraph simply because it was not part of his functions to deal with authentication.

53. Mr. LIM (Singapore) supported the amendments suggested by the Chairman and by the Spanish representative. The word "employee" as it stood was very specific in meaning; in the absence of a definition of it, in his jurisdiction the term would not cover a director or a former director, although it might possibly cover an executive officer. It was illogical that the paragraph should fail to cover directors.

54. Mr. GREGORY (United Kingdom) said that his delegation could accept the amendment suggested by the Chairman if the words "through the fault of the purported sender" were deleted from the paragraph. If the word "improper" was used, they would become superfluous.

55. A reference to "employees" which did not mention directors or officers could certainly give rise to the difficulty which the representative of Singapore had mentioned.

56. Mr. BURMAN (United States of America) suggested that the text would be clearer without the word "improper". The intention was to cover people who had gained access to information or procedures properly, but whose use of it had been improper.

57. Ms. KOSKELO (observer for Finland) said that the wording suggested by the Chairman would be improved if the words "might have enabled" were amended to read "had enabled".

58. Mr. LIM (Singapore), commenting on the statement made by the representative of Spain, said that it seemed to him that if

a cleaner had access to the sender's authentication procedure, was an employee of the sender, and had the keys which would enable him to use the authentication equipment, he would not be someone whom the Working Group had intended to exclude from the operation of the paragraph.

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission approved paragraph 4 of article 4 with an amendment reflecting the substance of what he had suggested; and that the Drafting Group be asked to deal with that and with the other changes which delegations had proposed.

60. *It was so agreed.*

61. The CHAIRMAN invited the Commission to consider article 4(5). He drew attention to a proposal by the delegation of Finland in its written comments to add, at the beginning of the first sentence, the words "subject to the preceding paragraphs" (A/CN.9/347, p. 17). He wondered whether that change was really necessary because, supposing paragraphs 2, 3 and 4 to be in force, their provisions would surely apply to paragraph 5 also. In addition, the Canadian delegation had suggested in its written comments that the scope of paragraph 4(5) should be expanded to include revocation of a payment order (A/CN.9/347, p. 7). In his view that was correct, since paragraph 4(1) also referred to "revocation of a payment order".

62. Mr. ABASCAL ZAMORA (Mexico) said that the proposal of the delegation of Canada to broaden the sphere of application of article 4(5) was reasonable.

63. Mr. IWAHARA (Japan) said that it would be best if it is made clear in article 4(5) that the same rule as article 4(1) is applicable to discrepancies in payment orders due to fraud; if that was not done it would be desirable that this commission confirm that article 4(1) is applicable to such fraud cases.

64. Ms. KOSKELO (observer for Finland) said that her delegation's suggestion was purely one of drafting. It found the proposed wording awkward and had attempted to find something neater.

65. Mr. ERIKSSON (observer for Sweden) expressed the opinion that paragraphs 4 and 5 should both include a reference to the revocation order as well as to the payment order, since an employee might send a payment order in favour of himself and be detected, which would require his employer to send out a revocation order.

66. The CHAIRMAN asked if paragraph 5 was acceptable to the Commission with that change.

67. *It was so agreed.*

*The meeting rose at 5 p.m.*

### Summary record of the 449th meeting

Monday, 17 June 1991, at 10 a.m.

[A/CN.9/SR.449]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 10.15 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)**

#### *Article 1 (continued)*

1. The CHAIRMAN recalled that the Commission had decided that the problems that had arisen concerning the definition of a "bank" should be dealt with in the context of article 1 and had asked the representatives of Singapore, the United Kingdom and the United States of America and the observer for Finland to prepare an appropriate text. He drew attention to that text, which was to be found in conference room paper A/CN.9/XXIV/CRP.3.

2. Mr. VASSEUR (Banking Federation of the European Community) said that he had no objection to the draft text.

3. Mr. LE GUEN (France) said that, while he was satisfied with the text, he thought that it might more appropriately be placed as paragraph 2 of article 1, the existing paragraph 2 being renumbered as paragraph 3.

4. Mr. LIM (Singapore), speaking on behalf of the ad hoc drafting group, said that it had decided to add a separate paragraph in order to solve a problem raised by the representative of Mexico. If the provision were placed in paragraph 1 or paragraph 2, the reader might wonder if the application of the Model

Law to banks in different States would also apply to an entity which was not a bank.

5. Speaking for his own delegation, he said he would have no objection to the provision being placed in paragraph 2.

6. Mr. GREGORY (United Kingdom) said that he had no strong feelings either way, but the Drafting Group had discussed the question and he would prefer that the provision be included as paragraph 3. Paragraphs 1 and 2 constituted a package on the sphere of application while the new paragraph 3 viewed the sphere of application from a different angle and should logically follow those two paragraphs.

7. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said he supported the French proposal. It was more logical to move from the general to the particular—first referring to "bank" and then defining banks, branches and so forth.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished the proposed draft of article 1(3), as it appeared in conference room paper A/CN.9/XXIV/CRP.3, to be inserted as paragraph 2 of that article, the existing paragraph 2 being renumbered as paragraph 3.

9. *It was so decided.*

*Article 2 (continued)*

10. The CHAIRMAN recalled that the Commission had reached a substantive decision concerning parts of article 2 and had asked the representatives of Mexico and the United Kingdom and the observer for Finland to prepare an appropriate text. The resultant draft text was to be found in conference room paper A/CN.9/XXIV/CRP.2.

11. Mr. VASSEUR (Banking Federation of the European Community) inquired what had happened to the second sentence of article 2(f).

12. The CHAIRMAN said that the Commission had decided to delete the whole subparagraph in question.

13. Mr. VASSEUR (Banking Federation of the European Community) said that the second sentence of article 2(f), stating that the Law did not apply to an entity which merely transmitted payment orders, was a useful provision. In the interests of clarity, it ought to be retained somewhere.

14. The CHAIRMAN said that, while the Commission recognized that the second sentence of article 2(f) was important, some of its members had thought that the word "merely" might give rise to problems in connection with the use of SWIFT. It had therefore been agreed that the problem should be resolved by amending subparagraph (a) of article 2 (replacing "operations" in the first line by "payment orders" and the words "carry out" in the fourth line by "implement") and deleting subparagraph (f).

15. Mr. LE GUEN (France) said that he could not recall any discussion in the Commission on the addition of the last sentence to article 2(a) and would like an explanation from the ad hoc drafting group.

16. With respect to article 2 *bis*, he proposed that the words "and obligations" should be inserted after the word "rights" in the fourth line of paragraph 1.

17. Mr. ABASCAL ZAMORA (Mexico), speaking on behalf of the ad hoc drafting group, said that it had discussed the question whether a reimbursement payment order was part of the original credit and had decided, in the interests of clarity, that it should be a different credit transfer. A number of drafting proposals had been made during the discussions on modifying the definition of intermediary bank in article 2(h), and the group had also been asked to prepare an appropriate text. The result of the discussions was contained in the proposed third sentence under article 2(a).

18. As for article 2 *bis*, the French representative's comment regarding "rights and obligations" was applicable also in Spanish.

19. Mr. GREGORY (United Kingdom) said that the reference to "rights and obligations" should appear in the English version as well.

20. The CHAIRMAN suggested that the words "and obligations" should be inserted after the word "rights" in article 2 *bis* (1), in all language versions.

21. *It was so decided.*

22. Mr. LE GUEN (France) said he was satisfied with the explanation given by the representative of Mexico and withdrew his comment as far as the substance was concerned. He was not certain, however, that the sentence correctly interpreted the ad

hoc drafting group's idea and suggested that the wording should be reviewed when the Model Law as a whole was being re-drafted.

23. *It was so decided.*

*Article 4 (continued)*

24. The CHAIRMAN said that he had discussed with the representative of Japan a point that the latter had raised at an earlier meeting. He had explained to him that article 4(1) provided the basic rule and that all issues related to the question whether or not a payment order could be regarded as having been issued by the purported sender should be governed by the applicable law and fell outside the Model Law. Article 4(5) referred to "error"—which of course included alterations—and the first sentence of that paragraph made it clear that it was subject to the preceding paragraphs.

25. Mr. DE BOER (Netherlands) said it should be made clear that an alteration made during transmission by a third party was not covered by article 4(5).

26. The CHAIRMAN said that that had been the Japanese representative's point. Any discussion on the subject would be unproductive, however, since it would inevitably result in the conclusion that the question whether or not a particular person had authority as an agent to bind the purported sender was a matter for the applicable law, which might differ from country to country.

27. Mr. DE BOER (Netherlands) said that, if a third party changed a message during transmission, the matter should come under article 4(2) to (4) regarding unauthorized payment.

28. Ms. KOSKELO (observer for Finland) said she understood that the concern of the representative of Japan had been to make it clear that unauthorized alterations of payment orders should come under paragraphs 2 to 4 of article 4 and not under paragraph 5, which dealt with errors made by the sender and transmission errors that were not fraudulent. It should be made clear that unauthorized alterations made during transmission would be covered by the preceding paragraphs of article 4.

29. The CHAIRMAN said he thought that the difficulty had been settled when the Commission had accepted the addition of the words "subject to preceding paragraphs".

30. He asked if the Commission wished to delete the square brackets around the words "execution date" in paragraph 6. That date would then be the one on which a receiving bank was required to execute a payment order.

31. Mr. SOLIMAN (Egypt) said that article 4(6) gave indications to both the parties. The receiving bank was required to execute the order and the sender was required to make the payment. The execution date was usually the date on which a bank accepted the payment order. He had no objection to the existing text.

32. Ms. KOSKELO (observer for Finland) said that paragraph 6 gave rise to what had been termed a problem of circularity with respect to the relations between several provisions in the Model Law. It would be preferable if there were no reference to the payment or execution date in that paragraph and if it simply stated the obligation of the sender to honour the payment order, without any reference to when that should be done. Arrangements concerning the payment varied widely from one situation to another. Such arrangements, possibly bilateral or multilateral netting arrangements, were usually in existence already and payments were made accordingly.

33. Mr. GREGORY (United Kingdom) said that the question of the execution date was indeed part of a complex circular problem in the Model Law and it was difficult to consider paragraph 6 in isolation. As it stood, paragraph 6 indicated that payment was not due until the execution date but also that payment did not have to be made until the bank accepted the payment order. However, if the bank took no action, the rules on acceptance stated that acceptance did not take place until the payment was received.

34. In his view, article 4 concerning the obligations of the sender, articles 6 and 8 concerning acceptance, articles 7 and 9 concerning the obligations of the receiving bank and the beneficiary's bank, article 10 concerning the time of execution and article 16 concerning liabilities on failure to comply with obligations ought to be considered together.

35. For the time being, he proposed that the Commission confine itself to considering the suggestion by the observer for Finland.

36. Mr. BHALA (United States of America) said there could be no question at the current late stage of the Commission's restructuring its work along the lines proposed by the United Kingdom representative. The alleged problem of circularity arose only in the case of deemed acceptance under articles 6(2)(a) and 8(1)(a). The Commission itself had already approved the definition of the word "execute" and the Drafting Group had, perhaps, decided on the definition of "execution date" as well. It was not impossible that the problem of concern to the United Kingdom representative and the observer for Finland might be solved by appropriate drafting.

37. Mr. ABASCAL ZAMORA (Mexico) said that he was unable to accept the Finnish suggestion. He did not agree that there was a problem of circularity as alleged by the representative of the United Kingdom. It would be dangerous if the Model Law contained no provision regarding the execution date, for national legislation would then be applicable and it was not always appropriate. In his own country, for example, the law stipulated that payment should be made 30 days after acceptance.

38. Mr. DE BOER (Netherlands) said that he, too, found it difficult to understand the problem of circularity that was worrying the representative of the United Kingdom.

39. Ms. KOSKELO (observer for Finland) said that, in the case of payment orders, parties would normally have made advance arrangements regarding the manner in which payment was to be made, arrangements which would also cover the date of payment. Under the Model Law, the sender of a payment order had to pay for it to ensure its acceptance by the receiving bank, so that the structure of the Law gave the parties an incentive to make the necessary arrangements. Such arrangements might alter from situation to situation and it was unnecessary to go into details in the article in question.

40. The second part of the current text was related to the problem of circularity. It was not a question of making major structural changes to the Model Law, but of improving its technical drafting so that the Law could be understood and could function well in practice. For that reason, article 4(6) should begin with a rule concerning the obligation to pay.

41. The CHAIRMAN pointed out that, since the representative of Mexico had referred to situations in which no date was specified, the question was whether the applicable law should be invoked in such cases.

42. Ms. KOSKELO (observer for Finland) said that, if the general rules of law provided that an obligation to pay would normally not arise early enough for the credit transfer to function, the parties would clearly need to come to some arrangement on the point. She did not think that any problem would arise in real life.

43. The CHAIRMAN said that the second part of article 4(6) was intended to cover the situation in which the parties did not agree on some arrangement.

44. Mr. CRAWFORD (Canada) said he was concerned at the procedure that was apparently being adopted, whereby a decision was to be taken by the Commission on a particular article while a matter of major concern was left unresolved.

45. The CHAIRMAN assured the representative of Canada that no question that seriously affected the utility and validity of the Model Law would be ignored.

46. If he heard no objection, he would take it that the Commission wished to adopt article 4(6), the square brackets being removed.

47. *It was so decided.*

#### Article 5

48. The CHAIRMAN said that sub-subparagraphs (b)(i), (ii) and (iii) would be taken together, while sub-subparagraph (b)(iv) would be treated separately. He reminded the Commission of the comments made by the Governments of Finland and Japan (A/CN.9/347, pp. 17-20 and p. 36) regarding the relevance of article 5. It was for the Commission to decide whether article 5 was relevant to all the situations in which the time of payment was important, or whether it was to be made clear that the article applied only within the Model Law.

49. Ms. KOSKELO (observer for Finland) said that her delegation could not accept the idea that the introductory wording should begin with: "For the purposes of the Model Law". It was essential to make it clear that article 5 related solely to articles 6 and 8 of the Model Law.

50. Mr. DE BOER (Netherlands) said he agreed with the observer for Finland that article 5 should relate to certain articles only, and that the words "For the purposes of the Model Law" would not be enough to achieve that end.

51. Mr. LOJENDIO OSBORNE (Spain) and Mr. ERIKSSON (observer for Sweden) supported the view that article 5 should relate solely to articles 6 and 8.

52. Mr. BHALA (United States of America) said that his delegation did not share the views of the observer for Finland. Article 5 was an integral part of the Model Law and it worked well. He suggested a three-step analysis: in step one, the question was asked when acceptance occurred, and the answer was supplied in articles 6 and 8; in step two, the question was asked what the sender's obligation was on acceptance, the answer being provided in article 4(6); in step three, the question was then asked when payment of the receiving bank by the sender had occurred, the answer being given in article 5. It was all clearly laid out in the Model Law.

53. The observer for Finland would limit step three to the case of "deemed acceptance", but he could see no reason to do so.

54. Mr. CRAWFORD (Canada) said he agreed with the United States representative that article 5 was useful in respect



of the Model Law as a whole. If there were a conflict with general laws, it could be limited to the relationships governed by the Model Law but it should not be restricted to articles 6 and 8.

55. Mr. FUJISHITA (Japan) said he agreed that the application of article 5 should be restricted to articles 6 and 8. The Commission is not a proper forum to consider general provisions on payment in all situations.

56. Mr. GREGORY (United Kingdom) said that, as he had understood the discussions in the Working Group, the purpose of article 5 was to mitigate the effects of "deemed acceptance". The existing wording was thus too broad. The analysis by the Government of Finland of the relationship between article 5 and article 17 (A/CN.9/347, p. 19, third paragraph) raised some legitimate concerns. He therefore supported the proposal that the effect of article 5 should be limited to articles 6 and 8, being unable to see why it was necessary to define the time of payment for other purposes.

57. Mr. BURMAN (United States of America) said that the troubling concept of "deemed acceptance" was complicating the issue. There was a danger not only of a loss of symmetry in the three steps his delegation had outlined but also of a distraction from the need to accommodate newly emerging banking techniques, without which the Model Law would be of limited application from the outset. The high-volume, high-speed computer-based systems, and the new systems of netting, were fundamentally different from the earlier systems used. New legal relationships would arise.

58. Mr. BHALA (United States of America) said, with regard to a comment by the representative of the United Kingdom, that article 17 related to an underlying obligation whereas article 5 dealt with the settlement between the sender and receiving bank.

59. As for the reason for defining the time of payment, the sender would wish to know when the liability arising from acceptance by the receiving bank was discharged. Similarly, the receiving bank wished to know when a receivable was received. In both cases, that question was answered in article 5. It was useful, in the interests of harmonization, for both the sender and the receiving bank to know when the obligation to pay occurred.

60. The CHAIRMAN asked whether the United States delegation wished article 5 to apply to all situations in which the obligation to pay was discharged, including insolvency.

61. Mr. BHALA (United States of America) said that his delegation thought that article 5 should apply to the Model Law only and not to insolvency. It simply did not wish to see any further limitation on the scope of article 5.

62. Mr. ABASCAL ZAMORA (Mexico) drew attention to the report of the Working Group (A/CN.9/344, para. 59) which clearly indicated that the time when the obligation to pay occurred was not restricted to "deemed acceptance".

63. Ms. KOSKELO (observer for Finland) said that article 5 failed to recognize netting systems, referring them back to the applicable law. That might be regrettable but the Working Group had, in fact, failed to achieve such recognition and article 5 was thus capable of relevance to "deemed acceptance" only.

64. She could not agree that article 5 was not relevant to article 17, since article 5(b)(ii) covered reimbursement by a sending bank of a receiving bank through an account in a third bank. Such a reimbursement would be a separate credit transfer and thus might be covered by the Model Law. However, those two provisions provided a different answer to the question when payment occurred: in article 17, it was the time when the third bank accepted the payment order; in article 5(b)(ii) it could be a different time.

65. The United States representative had explained that the sender and receiving bank must know the time when the obligation to pay occurred. While that was true, article 5 was not germane to the matter. The question was most likely to arise in the event of insolvency, which would be covered by the applicable law.

66. The possibility envisaged in article 5 that the obligation to pay might occur on the day following the day on which the credit was available for use was clearly contrary to the general principles of law. It would be difficult, therefore, to adopt article 5 unless it was confined to "deemed acceptance".

67. The CHAIRMAN said it was not clear whether there was a general feeling among the members of the Commission that some form of qualifying phrase was needed in article 5. He suggested, therefore, that further discussion of article 5(b)(i), (ii) and (iii) should be suspended until sub-subparagraph (iv) on the topic of netting had been discussed. A trend might then emerge which would lead to an overall compromise acceptable to all.

*The meeting rose at 12.35 p.m.*

### Summary record of the 450th meeting

Monday, 17 June 1991, at 2 p.m.

[A/CN.9/SR.450]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.10 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

*Article 5 (continued)*

1. The CHAIRMAN invited the Commission to consider article 5(a) and article 5(b)(i) to (ii).

2. Mr. CRAWFORD (Canada) said that, as the observer for Finland had indicated at the previous meeting (A/CN.9/SR.449, para. 64), there did appear to be a conflict between article 5(b)(ii) and article 17(2). Article 5 had not been in the draft Model Law for long and an understanding of its intent and scope was still developing. His interpretation of the words "another bank" in article 5(b)(ii) was that they referred to a bank with which the receiving bank did not have an existing banking



relationship. Article 5(b)(iii), it would be noted, referred to the central bank of the State where the receiving bank was located and in that case the rule operated simply: the receiving bank was paid when it received settlement at its country's central bank. That was unquestionable. In the case contemplated in article 5(b)(ii), however, if the words "another bank" referred to a situation in which the receiving bank was offered as settlement a credit at a bank with which it had no account or central bank relationship, naturally it would be careful about accepting the credit. Accordingly, in that case the rule had to be carefully expressed along the following lines: if the receiving bank was offered settlement on the books of a bank which was not its settlement bank or a bank with which it had an established relationship, then the settlement would be regarded as payment only when the receiving bank used it.

3. If a banker-and-customer relationship had already been established by the receiving bank with the other bank, the case would probably be covered by article 17(2), so that the insolvency example given by the Government of Finland in its written comments (A/CN.9/347, p. 19) might be decided under that provision. To cover the case where such a relationship had not been established, it was better to have the rule in article 5(b)(ii), with the risk of occasional unacceptable consequences, than to have no rule at all.

4. Mr. BHALA (United States of America) said that the solution envisaged by the Canadian representative to the possible conflict between article 5(b)(ii) and article 17(2) would work well. There were now two ways of dealing with the matter. He did not believe it necessary to talk in terms of the deletion of article 17(2); the Commission was at present talking about a relatively limited problem and must be careful not to perform radical surgery on the Model Law. The idea to preface the introductory wording to article 5 with the words "for the purpose of this Model Law" was acceptable and would cater for the insolvency situation.

5. Mr. DE BOER (Netherlands) thought that if the Canadian suggestion was that article 5(b)(ii) should include the words "another bank with which there is no established relationship", difficulties would arise in determining with certainty whether there was an established relationship or not. It would be unwise not to limit the scope of article 5. The Model Law could not be considered in isolation from insolvency law; the latter did not generally refer to the time of a payment, but either to the general law of obligations or to a specific law of obligations such as the Model Law. It would not be enough to include the words "for the purpose of this Model Law" in the introductory wording to article 5 in order to exclude the operation of insolvency law; that intention must be made explicit.

6. Mr. ERIKSSON (observer for Sweden) said that the provisions of article 5 were clearly needed in relation to articles 6 and 8, but they caused some problems in relation to articles 13 and 17. Nothing that had been said in the discussion of article 5 had convinced him that the provisions of article 5 were needed for any reasons other than those related to articles 6 and 8.

7. At the previous meeting (A/CN.9/SR.449, para. 57), the United States representative had indicated that the Commission should look ahead to broader possible applications of the Model Law. He could not agree with that approach. The Commission must take care not to introduce into the Model Law rules that might have consequences that could not be foreseen at the moment. It should confine itself to applying the provisions of article 5 in relation to articles 6 and 8.

8. Mr. BHALA (United States of America) said that the Commission had not considered the effect of excluding the

operation of article 5 in respect of all situations except deemed acceptance. Moreover, his delegation was not seeking to prejudice the application of local insolvency law.

9. Mr. ABASCAL ZAMORA (Mexico) said that he had difficulty in understanding the connection of article 5 with article 17(2) since in his view they related to different matters: article 5 referred to the stage when a sender fulfilled the obligation to pay and article 17(2) to the stage when a transfer was completed and the obligation of the originator was discharged.

10. The CHAIRMAN called for comments on article 5(b)(iii).

11. Mr. LE GUEN (France) said that in his delegation's view article 5(b)(iii) as it stood was too restrictive in using the words "when final settlement is made in favour of the receiving bank at the central bank of the State where the receiving bank is located". From 1993 onwards any bank in a country in the European Economic Community would be able to carry out any banking operations in any other EEC State, even if it did not have a physical presence in that other State. The Community's central banks might therefore have to open accounts with, and include in their payments systems, commercial banks which were not physically located in their own State.

12. His delegation therefore wished article 5(b)(iii) to be drafted in broader terms along the following lines: "when final settlement is made in favour of the receiving bank by a central bank with which the receiving bank has an account". Without such an amendment, if the receiving bank was located in the same State as the central bank settlement by the central bank would be immediate, whereas if it was located in a different State settlement would take place under article 5(b)(ii), i.e. on the following business day. He saw no reason why there should be a one-day difference in the time of comparable settlements by central banks merely because of their geographical location.

13. Mr. HARRIS-BURLAND (Commission of the European Communities) supported the French proposal. The suggested wording would apply to two situations not at present covered by article 5(b)(iii). The first was when the receiving bank had a branch in a State and that was the branch involved in the credit transfer; it might be that the head office of the receiving bank was in a different State. The branch might have an account with the central bank in its own country, but under article 5(b)(iii) as it stood that would not count, since the central bank making the settlement had to be that of the country of the receiving bank itself and not that of the country of its branch. Extending the scope of article 5(b)(iii) as suggested would take account of the situation in which a branch of the receiving bank had an account with the central bank in the State where the branch was located. That was not to imply that central banks had to open accounts with such branches nor that branches should seek to have such accounts, but if they did, article 5(b)(iii) should be worded so as to cover the situation.

14. The other situation he had in mind was when the receiving bank did not have a presence in the territory of the central bank in which settlement was made but maintained an account relationship with it. In such cases there should be no objection to final settlement being possible under article 5(b)(iii).

15. The CHAIRMAN asked the Commission whether it considered that a branch or a separate office of a bank should be treated as a separate bank for the purpose of article 5.

16. Mr. CRAWFORD (Canada) said that he had had instructions to agree to that suggestion but nevertheless thought it a novel arrangement for branches of a single bank located in the same State to have separate accounts at its central bank.

17. Mr. SCHNEIDER (Germany) pointed out that a distinction must be made between the provision of cross-border services by banks and their having branches in other countries. It would not be enough merely to add that branches were regarded as separate banks for the purpose of article 5. The EEC Second Banking Directive allowed the provision of cross-border financial services without the establishment of branches. He therefore supported the French proposal.

18. Mr. GREGORY (United Kingdom) said that, for the purpose of article 5, branches of the same bank should be treated as separate banks. That made sense, since in other provisions of the Model Law which related to time there was generally a rule that branches of banks should be considered as separate banks. His delegation approved the French proposal and did not think it was incompatible with providing that branches should be treated as separate banks.

19. Mr. BURMAN (United States of America) said that his delegation also supported the French proposal.

20. Mr. EFFROS (International Monetary Fund) said that the Commission should consider article 5(b)(iii) not only within the context of the European Economic Community but also in regard to central banks located elsewhere. If a receiving bank had an account with a central bank and that account was blocked by exchange controls, as could happen in some countries outside the Community, a credit to that account which was not freely available should not be regarded as a final settlement. The Commission should therefore consider amending article 5(b)(iii) in the manner proposed by France but with the words "that is freely available for use", or wording to that effect, added at the end.

21. Mr. LE GUEN (France) said that the changes suggested by the International Monetary Fund would not affect the European Economic Community but would have serious consequences for central banks. Some countries had mandatory reserves, in other words, deposits which commercial banks must maintain at central banks. He understood the point about exchange controls but believed that, if it accepted the change in question, the Commission might well create confusion about the time when payment was made by a central bank in a situation in which the amount of the payment equalled the amount of the monetary resources which the receiving bank had to maintain at the central bank. Consequently, he opposed the text suggested by the International Monetary Fund.

22. Mr. HARRIS-BURLAND (Commission of the European Communities) said that the point made by the International Monetary Fund was also relevant to article 5(b)(ii) in connection with a credit entered to an account of the receiving bank in another bank. He supported the French representative's view that the Commission should not accept the text suggested by the Fund.

23. The CHAIRMAN said that if he heard no objection, he would take it that the Commission adopted the French proposal for article 5(b)(iii).

24. *It was so decided.*

25. The CHAIRMAN invited the Commission to consider subparagraph (b)(iv) of article 5.

26. Mr. PELICHET (Hague Conference on Private International Law) said that in its written comments (A/CN.9/347, p. 71), the Conference had proposed the deletion of the words "applicable law and". He recalled that during its discussion of the provision, the Working Group had expressed doubts about

the reference to applicable law. It was not possible to speak of interbank netting arrangements and applicable law in the same provision since there was no particular national law to which multilateral netting settlements could be subject.

27. Mr. CRAWFORD (Canada) said that his delegation supported the proposal. He thought it unnecessary for the Commission to investigate the manner in which national legal systems might regulate interbank netting schemes. For the purposes of the Model Law, it might be assumed that any bilateral or multilateral netting scheme to which banks in countries adopting the Model Law were a party would have a satisfactory foundation in the legal system of the country concerned.

28. Mr. LE GUEN (France) said that his delegation also supported the proposal. It did not think that all netting systems were capable of offering guarantees of efficiency. The work done by the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries showed clearly the need for caution in that regard. The Committee had recommended a list of minimum criteria to be met by netting systems in order for them to be regarded as valid by central banks. That suggested the possible existence of netting systems which did not meet those criteria.

29. Mr. FUJISHITA (Japan) said that his delegation thought that the entire provision should be deleted. However, if the majority of the Commission wished to retain it, Japan would agree to that and to the proposal made by the Permanent Bureau of the Hague Conference.

30. Mr. NEWMAN (United States of America) said that his delegation also supported the Hague Conference proposal.

31. With regard to the French representative's comments about unsatisfactory netting schemes, he did not believe that a new netting scheme would be approved by a central bank unless it met the guidelines set out in the document prepared on the subject by the International Monetary Fund.

32. Mr. VASSEUR (Banking Federation of the European Community) said that his delegation also supported the proposal. It welcomed the fact that the Model Law referred to bilateral and multilateral netting systems. It hoped that the Commission's report would contain the recommendation made by the Working Group on International Payments (A/CN.9/344, p. 14, para. 61) that national legislators should review domestic laws, especially laws dealing with bankruptcy and insolvency, with the objective of supporting interbank netting of payment obligations.

33. Mr. LE GUEN (France) said that he did not share the United States representative's view that a central bank would not approve an inefficient netting system. There was no legal obligation, at least under French law, for netting systems to meet the minimal criteria set out in the report of the Group of 10. A netting system was essentially a contract between participation banks and they therefore had the right to organize themselves as they wished. The report of the Group of 10 said that central banks should have the right to supervise netting systems and in some cases the right to say that such systems did not meet the minimum criteria, but it did not actually recommend a control mechanism. His delegation did not want a substandard netting system to be treated under article 5(b)(iv) as if it were making valid payments. He therefore proposed the addition at the end of article 5(b)(iv), to govern the entirety of sub-subparagraph (iv), of the words "provided the rules governing the system are compatible with this law", or wording to that effect.

34. Mr. CRAWFORD (Canada) said that, while he understood the desire of the French delegation that aberrant netting systems should not be recognized, it would be wrong for the provision to be worded in such a way that it afforded the possibility of a broad inquiry as to whether the rules of a given system were compatible with the Model Law. All central banks were well aware of the recommendations of the Group of 10 and multilateral settlement schemes were under the supervision of central banks everywhere. An alternative to the French proposal might be to provide that bilateral and multilateral netting schemes were to be considered acceptable provided that they were acceptable to the central banks of the places where they operated.

35. Mr. NEWMAN (United States of America) agreed with the representative of Canada as far as multilateral funds transfer systems were concerned. The question of bilateral netting schemes was quite a different matter; in that case, two banks exchanging messages and settling net were of no concern to central banks.

36. Mr. CRAWFORD (Canada) replied that in countries where the capital adequacy rules of the Bank for International Settlements were being enforced vigorously, central bank supervisors were very interested in bilateral netting arrangements because banks relied on them to depress their net claims against other banks to their net amount.

37. The CHAIRMAN observed that the supervisory authorities envisaged in the suggestion by the representative of Canada might not exist in all States. If the wording suggested by France was altered to read "the law" instead of "this law", the point would be covered.

38. Mr. LE GUEN (France) said that his delegation believed that, although some netting systems were very new, netting systems should be mentioned in the Model Law in order to accord them some sort of recognition. With such a complicated matter, however, it was necessary to proceed very cautiously. The Chairman's suggestion to change the words "this law" to read "the law" was open to the objection that for multilateral netting systems to be effective they must be legally valid, possibly under several different legal systems; the words "the law" could give rise to the operation of a whole range of laws, a situation which would be conducive to uncertainty.

39. Mr. GREGORY (United Kingdom) endorsed the views expressed by the representatives of Canada and the United States. His delegation's preference was for leaving the text as it stood but with the deletion of the words "applicable law and". The question of the validity of bilateral or multilateral netting systems could safely be left to be determined by whatever rules were valid under the system applicable to them in the different countries concerned; in many countries they would be subject to supervision on an individual basis by central banks or some other body.

40. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) agreed.

41. The CHAIRMAN said that, unless he heard any objection, he would take it that the Commission approved the text of article 5(b)(iv) with the deletion of the words "applicable law and".

42. *It was so agreed.*

43. The CHAIRMAN reminded the Commission that it should take a decision on the recommendation by the Working Group to which the observer for the Banking Federation of the

European Community had referred. He suggested that the Commission should state in its report that, in adopting article 5(b), it had taken note of the Working Group's recommendation.

44. *It was so agreed.*

45. The CHAIRMAN invited the Commission to consider article 5(c).

46. Mr. BERGSTEN (Secretary of the Commission) said that the observer for The Hague Conference on Private International Law had informed him that the suggestion made by the Permanent Bureau of the Conference to delete article 5(c) (A/CN.9/344, p. 32) might be taken care of instead through drafting the provision in such a way as to make it clear that it referred to rules of law generally. The observer for The Hague Conference had made an alternative suggestion with regard to subparagraph (c), namely to restructure article 5 by inserting, in the introductory wording to the article, words to the effect that payment should take place in accordance with subparagraph (a) or subparagraph (b), thereby obviating the need for subparagraph (c) altogether.

47. The CHAIRMAN said that was an interesting suggestion but it went beyond the scope of the present discussion. His own suggestion was that a form of words such as "for the purposes of this Model Law" should be introduced in such a way as to apply not only to article 5 but to articles 6 and 8 as well. The Commission might wish to reflect on the implications of that suggestion and in the meantime take up article 6.

#### Article 6

48. Mr. CRAWFORD (Canada) said that the concept of deemed acceptance had been incorporated in the draft in an attempt to guard against the vice of inertia which affected the operation of the international banking system. In his view, that left the problem solved in an unacceptable manner. It might be better to punish the vice of inactivity instead of deeming it to be something which it was not.

49. On very practical grounds, senders of payment orders might feel that the Model Law gave them less than they deserved if, through the operation of its deemed acceptance rule, they found that they had an unwilling representative in a bank abroad. A receiving bank which was bound to implement a payment order only by virtue of having missed the deadline for rejecting it was a poor representative of the sender and an unwilling participant in the credit transfer. In his view, that kind of delay in executing a payment order should be penalized in a way which affected the receiving bank only, and not, as would be the case under the existing penalty provisions in the Model Law, the sender as well. He therefore recommended providing for an interest penalty based on the length of delay.

50. Mr. BHALA (United States of America) said that the representative of Canada had summarized the problem perfectly and had shown why the remedies at present available in regard to article 6(2)(a) and article 8 were unsatisfactory. He felt that the Canadian proposal was a satisfactory basis on which to advance. It was a good idea to treat inactivity as a delay problem, an area in which the Model Law worked well, rather than penalize the sender by attaching him to a receiving bank that was pursuing his interests in a dilatory manner. He thought that interest on the amount of the payment order that had been delayed might be a fitting penalty.

51. Mr. NEWMAN (United States of America), speaking from an operational perspective, said that very few banks

processed payment orders on a real-time on-line basis; most still used the batch mode. That meant that, for several reasons, it was not until the following morning that they knew whether they had funds available to execute payment orders or whether there were problems entitling them to reject a payment order on the execution date. It would therefore be unrealistic for the Model Law to contain a rule to the effect that a payment order was deemed accepted if the transaction had not been processed by the bank and the bank had had no opportunity to reject it.

52. Mr. GREGORY (United Kingdom) said that the Canadian proposal merited consideration. It was his understanding, however, that the rules regarding deemed acceptance entailed that a payment order must either be accepted or rejected; a bank receiving a payment order was under an obligation to take action, as distinct from an obligation to pay compensation. His delegation had proposed in its written comments (A/CN.9/347, p. 57) the addition to article 6 of a paragraph 2 *bis* providing for an extra day for rejection of a payment order.

53. Ms. KOSKELO (observer for Finland) said that in her view the only penalty arising from late execution following deemed acceptance would be payment of compensation for interest. In the light of the considerations put forward by the United States delegation there might be some advantage in clarifying the circumstances in which deemed acceptance could be claimed to have occurred and in which consequential damages might be payable due to failure by the receiving bank to take action. The proper context for such a discussion would be paragraph 8 of article 16. It should be borne in mind that the concept of deemed acceptance was very useful in ensuring that banks fulfilled their obligations, but banks must also be afforded the possibility of rejecting a payment order.

54. Mr. BHALA (United States of America) said that the Canadian proposal was a significant contribution to the discussion. The point to be emphasized was that a receiving bank had a duty to give notice of rejection, as was affirmed by the existing text of article 6(3).

55. Mr. NEWMAN (United States of America) said that article 6(3) should make provision for an additional day for

rejection, thus taking account of the point made by the representative of the United Kingdom.

56. Mr. GREGORY (United Kingdom) said that in some, but not all, cases an extra day allowed for rejection would be excessive. Problems arose only in the case of deemed acceptance; other methods of acceptance all required the receiving bank to take specific action for which it should not need any additional time for reflection. His delegation's suggestion was merely to take into account those cases in which the extra day was in fact needed for rejection.

57. Mr. POTYKA (observer for Austria) said that, in practice, a bank could not be deemed to have accepted a payment order if it had not had time to process the order, and that should be the criterion in establishing time-limits. His delegation supported the suggestion made by the United States, in the interests of avoiding unnecessary complexity in the Model Law.

58. Mr. ABASCAL ZAMORA (Mexico) said that the Canadian proposal should be explored in greater depth, particularly in view of the considerations raised by article 8 and the need to ensure restitution in the event of negligence on the part of a bank which failed to execute a payment order without stating that it had rejected it. He did not think that the issue was the same as that raised by article 16. If there was to be a notion of deemed acceptance, there should equally be a notion of deemed rejection.

59. Mr. SCHNEIDER (Germany) said that the rule applicable in the countries of the European Economic Community was for a two-day time-limit, which would adequately meet the concerns of both the United States and the Austrian delegations. However, a solution might be found in the context of article 10.

60. The CHAIRMAN said that the deemed acceptance approach seemed, despite some divergences of view, to enjoy broad support, but that adjustments would have to be made to take account of concerns relating to time-limits.

*The meeting rose at 5.05 p.m.*

### Summary record of the 451st meeting

Tuesday, 18 June 1991, at 9.30 a.m.

[A/CN.9/SR.451]

*Chairman:* Mr. SONO (Japan)

*The meeting was called to order at 9.40 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

*Article 6 (continued)*

1. The CHAIRMAN recalled that, in the course of the discussion of article 6 at the previous meeting, there had been a clear majority in favour of the concept of "deemed acceptance". That had been the decision reached, although alternative paths favoured by some delegations had been examined. It had become clear that the concerns of all could be accommodated and the desired goal achieved by adjustments to the timing contained in the existing rules.

2. Mr. GREGORY (United Kingdom) said there was no doubt that the main concern was one of timing. He agreed with the suggestion by the United States representative that a possible solution was the provision of an extra day for notice of rejection. Consequently, on behalf of his own delegation and of the delegations of Canada and the United States of America, he proposed the insertion of the words "the business day following" in the last sentence of article 6(3) before the words "the execution date". A consequential change to article 6(2)(a) was then needed, the words "execution under article 10" being replaced by "giving notice of rejection under paragraph (3) below".

3. Thus, if the bank accepted a payment order, it would do so under subparagraphs (b), (c) and (d). If it did not act, the first

question would be whether subparagraph (a) applied, with due regard for paragraph 3 and whether payment had been received.

4. Where an extra day was already allowed under article 5 in respect of certain means of payment, the times allowed in articles 5 and 6 would run concurrently, there being no question of adding any other additional days to the time period.

5. Mr. POTYKA (observer for Austria) said he supported the proposal to add an additional day in article 6(3). However, as the representative of Germany had indicated, the issue should also be considered in connection with article 10. If an extra day were allowed for the rejection of a payment order, a bank might have the duty under article 10 to execute a payment order that it had not yet accepted. The problem could be solved by allowing an additional day for execution under article 10.

6. The CHAIRMAN suggested that discussion of the effect of the proposal on article 10 should be postponed until the proposal had or had not been accepted.

7. Mr. VASSEUR (Banking Federation of the European Community) said that he wished to draw the Commission's attention to the interrelationship between the Model Law and national legislation dealing with money-laundering in relation to organized crime. Many countries had laws which required banks to report suspected instances of money-laundering. In such a case, they were required to suspend execution of the credit transfer or payment order. If so ordered by a court, the suspension might be for an extended period. The preferred procedure, however, was that the bank concerned should not reject the payment order but execute it, if all was in order, after a period of, perhaps, several days.

8. That procedure would give rise to a conflict with the Model Law, which provided for acceptance or "deemed acceptance" within a fixed time-limit. European banks were concerned that the text should be made more flexible, so that such a conflict could be avoided.

9. The CHAIRMAN said that questions such as money-laundering or foreign exchange controls were outside the scope of private law. Consequently, it had been decided that they should be excluded from the Model Law.

10. Mr. HERZBERG (observer for Israel) said he agreed with the proposal put forward by the representative of the United Kingdom. He suggested, however, that the Drafting Group should address the question of defining "day" or "business day" in connection with time-limits. If "day" meant "business day", there was a definition in article 10(4), but the formulations varied from article to article.

11. Ms. KOSKELO (observer for Finland) said that, if the proposal to add an extra day for acceptance in article 6(3) were adopted, it would still be necessary to provide a time of execution in the case of "deemed acceptance". For example, if a payment order were received on day one, and there were funds available in the account, the proposed article 6(3) would give rise to "deemed acceptance" on day two. It was therefore clear, as the observer for Austria had said, that a new rule was needed in article 10 to provide yet another day for execution, i.e. execution would take place on day three.

12. Mr. ERIKSSON (observer for Sweden) said the proposal by the representative of the United Kingdom would usefully resolve the problems discussed in the previous meeting. He would be able to accept it provided that a further change in article 6(3) were made, as proposed in his Government's written comments (A/CN.9/347, p. 45) that notice of rejection should

be given at the earliest possible time, since that was in the sender's interests.

13. Mr. KAKOLECKI (observer for Poland) said that the proposed extra day would allow for the case when a payment order was received late in the day. He also supported the Swedish proposal, which would encourage notification of rejection on the same day where that was possible.

14. As for the question of money-laundering, it might, perhaps, be considered in the context of the final provisions.

15. The CHAIRMAN said that, unless there was strong support among the members of the Commission for dealing with the issue of money-laundering in the final provisions, he would assume that the Commission's basic approach remained unchanged.

16. Mr. CRAWFORD (Canada), replying to the observer for Finland, said that the proposal introduced by the representative of the United Kingdom did not entail the addition of yet another day. The key to understanding the proposal was that acceptance occurred only because it was "deemed" so to do. The duty to execute arose under article 7. If there was a failure to execute or to reject within the prescribed time-limit, then execution would be late, and a liability for value or interest would be incurred as provided for in article 16.

17. Mr. SCHNEIDER (Germany) said he had a purely editorial change to propose. Since subparagraphs (b), (c) and (d) of paragraph 2 related to the normal process of acceptance by conscious act, he proposed that they should be renumbered (a), (b) and (c). The exceptional case, "deemed acceptance", would then become subparagraph (d).

18. He agreed with the observer for Finland that it was necessary to consider the relationship between articles 6 and 10. Only one extra day was needed so that, if it were provided in article 10, there was no need for it in article 6. If two extra days were provided under article 10 and a further day under article 6, then banks would be able to wait up to three days before rejecting the payment order without any interest becoming payable; that would be very nice for the banks.

19. There was no need to deal with the question of money-laundering in the context of the Model Law. The Model Law had, of course, to be consistent with criminal and supervisory law, but that would be accommodated by appropriate interpretation and the rules for the subjection of contract law to other law.

20. Mr. HUANG Yangxin (China) said he agreed with the proposal by the representative of the United Kingdom. He also thought that the Drafting Group should consider the matter of time of acceptance, execution and rejection in relation to the Model Law as a whole.

21. It would be useful if the question of money-laundering were mentioned at the end of the Model Law.

22. U NYI NYI THAN (observer for Myanmar) said that money-laundering was a serious factor in drug-trafficking, a problem that his Government had been combating since 1948. He agreed with the representative of China and the observers for Poland and the Banking Federation of the European Community that it should be covered in the Model Law.

23. Mr. HERZBERG (observer for Israel) said that, while he recognized the importance of money-laundering in drug-trafficking, he thought it was a matter for national legislation and not for the Model Law.

24. The CHAIRMAN said that it was a problem to be dealt with by the proper organizations. If there were any further comments on the matter, he would ask the members of the Commission for an indicative vote.

25. Ms. KOSKELO (observer for Finland) said that, despite the assurances given by the representative of Canada, she was still concerned about the effect on article 10 of the proposal concerning article 6(3). As she understood it, if a payment order was received and funds were available on day one, the proposal would mean that the order would be deemed to have been executed at the end of day two and, according to article 10, interest would be payable as from and including day two. It was unclear what would happen if execution actually took place on day three. The proposal did not seem to provide for an interest-free extra day.

26. Mr. NEWMAN (United States of America) said that the issue under consideration was not the receipt or payment of interest by banks, but the value date—or execution or payment date—of a payment order. The reason for proposing an extra day in article 6 was to provide for the case of payment orders that were received late in the day when the payment systems had closed down. In such a case, time was needed for investigation, which might not be completed until the following day. If an order were rejected on the day following the receipt of the credit, the bank concerned would claim one day's interest. There was no question of trying to eliminate interest: what was sought was execution on the value date and the ability, if a problem arose, to reject a payment order on the following day.

27. Mr. LIM (Singapore) said that the observer for Finland had raised a real problem of concept and drafting. Under article 6(2) and (3) as they stood before the proposed amendment, the time of execution was linked with the timing under article 10 but, if article 6 were amended to include the words "business day following" the execution date, with the consequential change in subparagraph (a), there would be a discrepancy between the two articles. Article 10 provided that the bank was required to execute the payment order on the day it was received whereas, under the amended article 6, the bank would not be required to reject an order until the day after receipt.

28. The CHAIRMAN said that the question of the interest payable, raised by the observer for Finland, could be dealt with under article 16.

29. Mr. GREGORY (United Kingdom) said that it was implicit from the structure of the Model Law and the order in which the articles appeared that execution did not have to take place until after acceptance. If that was not clearly understood, it should be made explicit.

30. In one of the examples given by the observer for Finland, where payment for an order was received on day one but the bank did nothing, no notice of rejection being given, the result was that the order was deemed to have been accepted at the end of day two and the bank was then required, under article 7, to execute the order in the time given under article 10. If article 10 had no retrospective effect but applied only from the moment of acceptance, it would be at that moment—on day two—that the bank was required to execute the order. Interest would not normally be payable from the day the payment was received but only from the day that the bank was required to execute the payment order.

31. As for the suggestion that a bank might gain financially by holding payment orders and then rejecting them at the end of the specified period, it was his own opinion that, if a credit transfer were not completed and the "money-back" guarantee

operated, interest would have to be paid from the day the payment was received. In other words, a bank which had received a payment order with cover and then rejected it in the time allowed would have to return the money with interest, if it had held it for the two days allowed.

32. Mr. POTYKA (observer for Austria) said that it would be a waste of time to become involved in a complicated exercise to redraft article 10(1) in order to provide an extra day, when article 6(3) provided that notice of rejection must be given not later than on the execution date. All that was needed was to provide, under article 10, for one more day for execution or rejection. That would avoid such anomalies as providing that an order could be rejected after the execution date or the date on which it was deemed to have been accepted. Acceptance should not be mingled with execution.

33. The CHAIRMAN said it seemed to be the prevailing view in the Commission that an additional day should be provided for the purposes of articles 6 and 10 and that situations in which a receiving bank would have two additional days should, if possible, be avoided. If that approach was acceptable, a small ad hoc drafting group might be set up to prepare a text.

34. Ms. KOSKELO (observer for Finland) drew attention to the provisions concerning cut-off time in article 10(4), which should be taken into account in discussions on the need for an additional day.

35. Mr. BHALA (United States of America) said that, while he would be happy to serve in an ad hoc drafting group, it might be possible to solve the problem without one. The Commission was dealing with a very narrow problem, arising only in the event of deemed acceptance. Since execution could not take place before acceptance, there was no need for concern about execution until day two. If execution did not take place until day three, it would be with a value date of day two.

36. Mr. ADEDIRAN (Nigeria) proposed that article 6(3) should remain as it stood but that article 10(1) should be amended by the insertion of the words "but not later than the day of acceptance" before the word "unless" in the second line.

37. With regard to drug-trafficking, the conflict between the application of the Model Law and that of the national narcotics laws merited examination.

38. The CHAIRMAN said that, while the Commission attached great importance to the problem of money-laundering and drug-trafficking, it was not competent to deal with such problems, which should be left to the appropriate bodies. Having noted from a show of hands that more than two thirds of the members of the Commission agreed with that approach, he said that, if he heard no objection, he would take it that the Commission did not wish to include any rules on the subject in the Model Law.

39. *It was so decided.*

40. Mr. GREGORY (United Kingdom) said that his delegation was still in favour of the principle of "same-day" execution and did not, for the moment, wish to commit itself to making any adjustment to article 10 to provide an extra day. The problem the Commission had been discussing related only to the narrow issue of deemed acceptance.

41. The CHAIRMAN said that there seemed to be a general feeling that one more day might be required for execution purposes, and a number of suggestions had been made to that effect. He would prefer, however, that the appointment of an ad



hoc drafting group be postponed until the debate on article 10(1) had been completed.

42. In any case, he took it that the Commission agreed, in principle, that an extra day should be provided for deemed acceptance.

43. *It was so decided.*

44. The CHAIRMAN invited comments on the German proposal that the order of the subparagraphs in article 6(2) be changed, subparagraphs (b), (c) and (d) being renumbered (a), (b), and (c) and subparagraph (a) becoming subparagraph (d).

45. Mr. GRIFFITH (observer for Australia) and Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said they supported the proposal.

46. *The German proposal was adopted.*

#### Article 10

47. Mr. SCHNEIDER (Germany) said that there were tremendous differences between the various payment systems in the world. Advanced electronic systems were used in the United States but many transfer systems in Europe were paper-based. Furthermore, many transactions in Europe were carried out not by cheque but by credit transfer. The result was that many millions of payment orders reached the European banks every day and, if the Model Law were adopted for domestic as well as international transfers, the position of small and medium banks—which would be incapable of executing all the payment orders on the day they were received—should be taken into account.

48. If, as he feared it might, the Commission accepted the "money-back" guarantee, the appropriate routing would need to be known so that the risks involved in executing a payment order could be assessed, and such inquiries took time.

49. He pointed out that, while the Commission was dealing with the problem of harmonizing international law, some parallel efforts were being made to harmonize regional law. The European Community had quite recently adopted a recommendation dealing with the question of the execution date and it had included a rule providing an extra day for execution. The banks in European countries really did need that extra day.

50. Mr. HUANG Yangxin (China) proposed that, in article 10(1), the words "on the day it is received" should be replaced by the words "on the day it is accepted".

51. The CHAIRMAN recalled the Commission's view that acceptance of a payment order was implicit in article 10(1). The Drafting Group should ensure that the final text brought that point out clearly.

52. Mr. DE BOER (Netherlands) said he supported the principle of "same-day" execution and failed to see why the rule governing cut-off time was not considered relevant thereto. He understood that banks in some countries tended to set the cut-off time very early in the day, sometimes even before opening time. That practice gave them in effect an extra day for execution.

53. Mr. SOLIMAN (Egypt) said that, when discussing the time for the execution of payment orders, the Commission should take into account the technical possibilities available to the various States. He supported the proposal that an extra day be provided for the execution of payment orders and thought

that the appropriate amendment should be made to article 10(1) and not to article 6.

54. Mr. VASSEUR (Banking Federation of the European Community) reiterated his Federation's written comment (A/CN.9/347, p. 68) that the rule requiring a receiving bank to execute a payment order on the day it was received was too strict. Under the terms of the European Community recommendation of 14 February 1990, a beneficiary's bank had to execute a payment order on the day following receipt of the related funds, unless a later date was stipulated.

55. Problems might arise if there were different rules for transfers inside and outside the European Community. He therefore suggested a modification of article 10(1) to the effect that a receiving bank was required to execute a payment order not later than on the day after it was received. The time required for acceptance had obviously to be taken into account.

56. Moreover, in the Federation's view, the text should make it clear that, in accordance with article 3, agreements contrary to article 10 would be expressly permitted.

57. The CHAIRMAN pointed out that it had already been decided that acceptance must have taken place before article 10(1) would apply.

58. Mr. LE GUEN (France) said he agreed with the arguments of the German representative. To stipulate that a receiving bank would be required to execute a payment order on the day it was received would cause no problems for banks operating electronic transfer systems. However, the Model Law was intended to apply to paper-based transfers also. It was unreasonable to impose a "same-day" rule on banks carrying out the latter type of operation.

59. It seemed to be rather hypocritical to set a cut-off time so early in the day that, for example, orders received shortly after 9 a.m. would be regarded as having been received on the following day. In countries governed by civil law, it was the general rule and not the exception that was important. If a judge had to apply the Model Law he would apply the general rule and, if the general rule were not appropriate for a large part of the transfers covered by the Model Law, there would be difficulties of application.

60. He therefore proposed that article 10(1) be amended to require the receiving bank to execute a payment order not later than on the day after it was received. That would not, of course, rule out execution on the day on which it was received.

61. He agreed with the observer for Austria that, if the time-limits in article 10(1) were extended by one day, all the problems arising under article 6(3) would also be solved.

62. The CHAIRMAN asked the representative of France whether he was opposing article 10(4) on the grounds that a bank could set an arbitrary cut-off time.

63. Mr. HERZBERG (observer for Israel) said that it was common banking practice to set a cut-off time which marked the end of one business day and the beginning of the next. That was something that could not be ignored in the Model Law.

64. Mr. LE GUEN (France) said he was not opposed to article 10(4) as such. He simply did not think it desirable that the possibilities of article 10(4) be used to solve the general problem of the time of execution.

65. Mr. BHALA (United States of America) said that he agreed with the Netherlands representative that the answer was to set an appropriate cut-off time. He quite understood that different payment systems and different means of transmission were used and had not, in fact, stated that the "same-day" system should apply to paper-based transfers. There could be one cut-off time for the latter and one for electronic transfers. He was puzzled, however, at the use of the word "hypocritical" by one speaker, since he had thought there was a basic understanding regarding freedom of contract.

66. Mr. CONOBOY (United Kingdom) said he agreed with the representatives of the United States and the Netherlands concerning the relevance of the cut-off time in overcoming difficulties experienced with some payment systems in some countries. He did not believe that, as a general rule, a bank should be given an extra day to execute a payment order when it had already accepted that order and had received payment. That would build a "float" into the banking system.

67. The representative of Germany and the observer for the Banking Federation of the European Community had referred to the transparency recommendation of the European Community. That recommendation had no binding legal force. If UNCITRAL were to adopt a different rule, it was not impossible that the European Community might accept the UNCITRAL standpoint and introduce a "same-day" rule. He noted, in that connection, the comment by the Commission of the European Communities (A/CN.9/347, p. 70) that endeavours to induce banks to execute payment orders on the day they were received were, therefore, in principle to be welcomed.

68. Replying to the representative of Germany, he said that, if there were a rule stating that the receiving bank might execute a payment order on the day after it was received, it would be necessary to consider how that would affect other provisions of the Model Law, such as conditions regarding the completion of payment, discharge, etc. He supported the adoption of article 10(1) as it stood.

69. Mr. HERZBERG (observer for Israel) said he agreed with the remarks made by the representatives of the Netherlands, the United States and the United Kingdom. Most banks had a cut-off time which reflected the possibility of executing a payment order on the business day on which it was accepted.

70. Mr. KAKOLECKI (observer for Poland) said that it would be difficult for his Government to accept and apply such a rigid provision. He therefore supported the position of the French delegation and the Banking Federation of the European Community.

71. Mr. POTYKA (observer for Austria) said he agreed with the views expressed by the representatives of Germany and France and with the written comments by the Government of Switzerland and the Commission of the European Communities (A/CN.9/347). He pointed out that, though the Commission of the European Communities had indicated that it would welcome endeavours to induce banks to execute payment orders on the day they were received, the subsequent paragraph had suggested that a possible compromise might take the form of stipulating

that the execution of a payment order must take place no later than the following day. He also supported the French representative's view on cut-off times.

72. Mr. ERIKSSON (observer for Sweden) said he supported the "same-day" system. It was crucial that banks be given the time they needed to decide whether to accept or reject a payment order but, if that were done, banks would not need extra time. Article 10(1) should therefore be adopted as it stood, and changes should be made only to article 6.

73. Mr. IWAHARA (Japan) said he, too, supported the "same-day" system.

74. Mr. LOJENDIO OSBORNE (Spain) said that article 10(1) should be amended to require payment orders to be executed on the day following that on which they were received. It would also be necessary to provide for the possibility of executing a payment order at an earlier date, so as to facilitate the broadest general acceptance of the Model Law.

75. Mr. BISCHOFF (observer for Switzerland) said that, while a bank had every interest in executing payment orders on the day they were received, additional time might be needed, for instance, if the bank received a conditional order and had to consult its legal department on the subject. Moreover, under the law in force in his country and others, banks were required to trace the path followed by money if there was a suspicion of laundering. That took time, so that the requirement of an extra day was quite justified.

76. Mr. LIM (Singapore) said that it was essential that traders should be able to rely on the instant execution of payments. He therefore supported the "same-day" rule. There was no need for an extra day under either article 6 or 10; if problems arose, the setting of an earlier cut-off time would provide the needed flexibility.

77. If, however, the Commission wished to provide for an extra day, article 10(1)(a) should be amended so as to allow for an earlier as well as for a later date. Alternatively, the concerns of some delegations might be met by applying to article 10 the possibility of variation by agreement under article 3.

78. Mr. ABASCAL ZAMORA (Mexico) said that serious problems could be created in an international credit transfer involving six or seven banks if the process were slowed down by an extra day at each stage.

79. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that, since an extra day was being granted under article 6, it was unnecessary to grant a further day under article 10. He was thus in favour of adopting article 10(1) as it stood.

80. Mr. SKELEMANI (observer for Botswana) said that an extra day was sometimes needed to cover situations in which a bank, for good reason, could not execute an order on the day on which it was received.

*The meeting rose at 12.40 p.m.*



## Summary record of the 452nd meeting

Tuesday, 18 June 1991, at 2 p.m.

[A/CN.9/SR.452]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.15 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

### Article 10 (continued)

1. Ms. KOSKELO (observer for Finland), referring to article 10(1), said that if the receiving bank did not execute the payment order on the day of its receipt, it would not matter because deemed acceptance would not take place until the end of day two, and therefore the bank would not incur any harmful consequences for failure to observe the same-day rule. The rule set forth in article 10(1) should not cause the Commission any difficulty, because if there was no deemed acceptance until the end of day two, then in effect the same-day rule merely had the character of a recommendation. Since at the previous meeting (A/CN.9/SR.451, para. 43) the Commission had decided in principle to allow an extra day for deemed acceptance, she failed to see why there should be any argument about the same-day rule.

2. Mr. SCHNEIDER (Germany) said his delegation believed that the Model Law should provide for an extra day as a general rule, in particular to cater for the problems of small banks and regional banks. Banks which wished to follow the same-day rule could incorporate it into their individual contracts. The United Kingdom delegation had said at the previous meeting that a recommendation by the Commission of the European Communities had no legal force. His own delegation was not convinced by that argument and thought that the Commission of the European Communities expected its recommendations to be followed; if they were not, it would convert the recommendation into a directive.

3. Mr. CRAWFORD (Canada) said that in his delegation's opinion the important principle was same-day execution. It believed that those delegations which found difficulty with that principle should be content to rely on the opportunity to secure additional execution time which their banks were afforded by the power to set cut-off times under article 10(4). However, it was essential to ensure that banks could not secure an additional day through an amended article 10 and yet another by setting a self-serving cut-off time. In his opinion, therefore, it would be necessary to re-examine the cut-off time provision in order to restrict that freedom somewhat, but that might be difficult to do because banks which adhered to the same-day execution rule as a norm for their market had to be kept in mind as well.

4. Mr. KOMAROV (Union of Soviet Socialist Republics) said that his delegation approved article 10(1) as drafted by the Working Group. The provision seemed perfectly reasonable and consistent with the general principle of freedom of contract. His delegation understood the concern expressed by a number of delegations about an additional day for the execution of orders and was prepared to consider any compromise proposal on that subject.

5. Mr. BHALA (United States of America) said that at the previous meeting (A/CN.9/SR.451, para. 66) the United Kingdom

representative had indicated that the real reason for upholding the same-day execution principle was that a "float" of funds could easily build up in the banking system if it was not adhered to. That referred, of course, to the situation in which the receiving bank would have the use of the sender's funds for a day and could invest them overnight.

6. Another point was the so-called "multiplier effect" produced by a system under which the originator sent a payment order to his bank on day one and execution occurred on day two; the bank then sent its payment order to an intermediary bank on day two and that bank executed the order on day three. His delegation favoured the same-day rule, not because his country had a sophisticated electronic banking system but because it was trying to accommodate the broadest possible types of payment order methods and take into account the interests of the originator and the beneficiary. In his delegation's opinion, a balance could be struck between those interests and the other interests traditionally raised in the Commission through the use of the cut-off time provided for in article 10(4).

7. Mr. BURMAN (United States of America) said that what was at stake was whether Governments would do their utmost to promote the flow of world trade. In his delegation's opinion, that could best be accomplished through the embodiment in the Model Law of the cut-off time principle, so as to encourage all banks to enhance their methodology in order to have access to new higher-volume systems of funds transfer. It was important to establish a standard that would best strike a balance between the interests of all concerned.

8. Mr. DE BOER (Netherlands) said that a compromise could perhaps be found by retaining the same-day rule but providing an exception whereby a receiving bank could set another time for executing a payment order.

9. The CHAIRMAN suggested that the matter might be dealt with in a footnote.

10. Mr. SCHNEIDER (Germany) said his delegation would find that solution unacceptable. A problem which arose in connection with a mandatory same-day rule was the need for the originator's bank to determine the appropriate routing by which to transmit the payment order to the beneficiary's bank. That problem did not arise for large banks but was a serious one for small and medium-sized banks.

11. Mr. HEINRICH (Bank for International Settlements) wished to convey to the Commission the concern felt by the representatives of a central bank that the same-day execution rule might be unrealistic for paper-based payment orders for small amounts. The Working Group had decided at its eighteenth session (A/CN.9/318, para. 17) that the Model Law should not differentiate between paper-based and electronic-based funds transfers, but he would like to press for a distinction to be made between them and suggested that article 10 might be the best place to do that.



12. The CHAIRMAN assured the observer for the Bank for International Settlements that his comments would be duly noted. It was true that practical problems would arise with paper-based transfers, but it was debatable how far that consideration should weigh with the Commission. As far as originators and beneficiaries were concerned, it was clear that the faster the service was the better. He wished to know what support there would be for saying that if the same-day rule could not function at all in practical terms, it would be better to agree on a two-day rule. Where practical difficulties were the major obstacle, it ought to be possible to leave the matter to agreement between the parties.

13. Mr. KAKOLECKI (observer for Poland) advocated a more flexible solution than the same-day rule. He fully endorsed the views of the representative of Germany, which he knew to be shared by a number of delegations for whom a mandatory same-day rule would not pass the test of feasibility. He was in no doubt, moreover, that it would reduce the chances of future acceptance of the Model Law.

14. Mr. LE GUEN (France) said he had a number of comments on the afternoon's discussion. The first related to the Chairman's suggestion to deal by means of a footnote with the problem which the German delegation faced with the mandatory same-day execution rule. The same problem confronted his own delegation. If, as had been said, a recommendation of the Commission of the European Communities had no legal status, it must surely be admitted that UNCITRAL's Model Law would have even less. It would follow that a footnote to a Model Law which itself had little legal standing was scarcely an effective way of solving drafting problems.

15. The second point on which he wished to comment was that of the "float". He doubted if that was really the essence of the time problem, because the Model Law did not aim to regulate the terms on which banks charged their customers interest. There had been a lengthy discussion in the Working Group on various aspects of the notion of value date and it had been found that widely varying practices existed in that regard. In France there was no uniform law on value date, each bank, including the central bank, being free to adopt whatever date it wished.

16. Thirdly, in reply to the Chairman's question as to the possibility of agreeing to a two-day rule, if the same-day rule could not function in practice, the problem might perhaps be approached from a different angle. He proposed combining the two ideas—the principle of same-day execution and the need for an extra day—in a rule which would state the primary principle of same-day execution and couple it with a proviso that, failing same-day execution, execution might at the latest take place on the following day. Whatever form of words was chosen to express that rule, article 3 should apply to it. That would leave a bank free, should it so wish, to incorporate in its contract provisions arrangements to execute orders within, say, a quarter of an hour or two hours of reception. The rule would do nothing to prevent systems from operating almost instantaneously, while allowing flexibility for certain kinds of transfer to take place on terms to be settled by the banks themselves.

17. The CHAIRMAN said he found the proposal of the representative of France very encouraging. By allowing an extra day for execution it would accommodate those transfers which for operational reasons could not be conducted on the same day, but at the same time it would enshrine the principle of same-day execution.

18. Mr. NEWMAN (United States of America) disagreed with the implication in the comments made by the representative of France that value dates were treated differently by different

banks. He pointed out that France was one of the largest participants in the Society for Worldwide Interbank Financial Telecommunications (SWIFT), in which an accepted practice was the fixed value date. He could endorse the French proposal if the suggested rule was formulated in such a way as to include the words "with value backdated to original day", or wording to that effect.

19. The CHAIRMAN drew attention to the relevance of the French proposal to article 13, which would allow automatic clearance in case of refund by means of an adjustment of the credit date, i.e. the value date.

20. Mr. NEWMAN (United States of America) said that banks would always try to process payment orders as quickly as possible, given enough competition.

21. With regard to the Chairman's reference to article 13, he was of the opinion that the matters covered by that article and the French proposal were quite distinct. A forward payment based on the instructions of the originator and the originating bank was a payment which went forward to be paid on a certain date. The duty to refund was another matter altogether.

22. The CHAIRMAN replied that article 13 dealt with transactions which were not completed. In paragraph 15 of the Secretariat's commentary to article 13 (A/CN.9/346, p. 73) various measures were contemplated whereby interest could be adjusted by date shifts one day forward or one day back.

23. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) supported the French proposal.

24. Ms. KOSKELO (observer for Finland) fully agreed that the Model Law should allow sufficient time for the execution of payment orders, but not if that meant creating a "float" in the banking system. She therefore approved the rider to the French proposal suggested by the United States. It was also desirable to deny the receiving bank any opportunity of misusing the possibility of deemed acceptance in order to create a "float". She strongly maintained that the issues of who should get the additional day's interest and how to eliminate the "float" were equally important.

25. The CHAIRMAN said that if the French representative accepted the United States suggestion, the result would be a provision expressing the same-day rule in principle while permitting a cut-off point at the end of the following day, with a rider that where execution took place on the following day, the credit should be backdated to the first day.

26. Mr. LE GUEN (France) said that the United States representative had alluded to the practice whereby banks applied previous-day value dates to payment orders executed on the day after they had received them. That was a perfectly reasonable practice, but it should not be catered for in the draft because it was not for the Model Law to regulate the terms on which banks should pay interest; such points were a matter of contract and lay in the field of banking competition.

27. The CHAIRMAN observed that article 16 dealt with allocation of the time value of funds and that interest was an important element in that.

28. Mr. SCHNEIDER (Germany) said that interest would not normally be payable unless the receiving bank had not fulfilled its obligation. There was a danger that small- and medium-scale banks would go out of business if they were required to complete execution on the day of receipt.



29. Mr. VASSEUR (Banking Federation of the European Community) said that he was in favour of the French proposal and hoped that the two-day rule would be incorporated in the Model Law. He felt, however, that banks themselves were best left to determine the practicable time-limits for execution. At the same time, article 10 should explicitly provide for the possibility of agreements which did not correspond to the general rule. There was thus a need to reconcile the wording of articles 6 and 10.

30. Mr. GREGORY (United Kingdom) said that he could accept the French proposal with the rider called for by the United States.

31. The CHAIRMAN said that, in view of the need to ensure genuine competition between banks, execution on the second day should be an exception. Unless he heard any objection, he would take it that the Commission agreed in principle to include in article 10 a rule worded along the lines proposed by the representative of France and including a rider of the kind proposed by the representative of the United States. He suggested that an ad hoc drafting group consisting of the delegations of France, Germany, the United Kingdom and the United States be asked to propose a suitable provision.

32. *It was so agreed.*

33. The CHAIRMAN said that, unless he heard an objection, he would take it that the square brackets enclosing the word "execute" should be deleted from the title and paragraphs 1 and 4 of article 10 and that those portions of the text should be referred to the Drafting Group.

34. *It was so decided.*

35. The CHAIRMAN recalled that the Commission had deleted from the draft a definition of the term "payment date", which had constituted article 2(m), on the understanding that article 10(1)(b) should be revised accordingly. He therefore suggested that the Commission might wish to approve the following text of article 10(1)(b) for referral to the Drafting Group: "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".

36. *It was so decided.*

#### *Article 6 (continued)*

37. The CHAIRMAN invited comments on article 6(2)(b), (c) and (d), by which he meant the provisions so lettered in the Working Group's draft (A/CN.9/344, annex) and not what would result from the rearrangement of article 6(2) decided on at the previous meeting (A/CN.9/SR.451, para. 46).

38. Ms. KOSKELO (observer for Finland) said that in its written comments on the draft (A/CN.9/347, p. 20), her Government had proposed an additional provision to the effect that acceptance of the payment order should be regarded as taking place if and when the receiving bank debited the sender's account with the receiving bank in order to meet the payment order. Her delegation believed that the act of the receiving bank in debiting the sender's account should constitute acceptance.

39. Mr. BHALA (United States of America) said that, according to article 5(a), one of the ways in which payment of the sender's obligation took place was by the receiving bank debiting the account of the sender with the receiving bank. Since the Finnish proposal would make that action constitute acceptance, in fact deemed acceptance, he could not agree to it.

40. Mr. LE GUEN (France) supported the view expressed by the United States representative. Accepting the Finnish proposal might introduce into the Model Law the idea that banks could debit an account without executing the payment order at the same time, thus opening the door to doubtful banking practice.

41. Mr. DE BOER (Netherlands) pointed out that sub-subparagraph (i) of article 6(2)(a) (in the original arrangement) read: "... 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". Thus when sufficient funds were available the deemed acceptance could take place in one or two days. However, he considered that the act of the receiving bank in debiting the account could reasonably imply acceptance.

42. Mr. CRAWFORD (Canada) thought that the provision in question was correct as it stood in mentioning article 5(b) and (c) and in not alluding to article 5(a). Reference to the latter would conflict with sub-subparagraph (i). Article 5(a) dealt with the stage at which payment was made to a receiving bank by the bank debiting an account, but sub-subparagraph (i) could mean that deemed acceptance took place before the debit was actually made if there were funds available to meet the order.

43. Ms. KOSKELO (observer for Finland) said that the problem was how to deal with the situation when the bank did in fact make a debit to the account. The purpose of her Government's proposal—contrary to the French representative's suggestion—was to ensure that if the account was debited, acceptance of the payment order took place at the same time and the bank became bound to execute it. The proposal was designed to avoid the possibility that the bank would debit the account and not be deemed to have accepted the payment order at the same time. She did not think her proposal would give rise to questionable banking practice.

44. Mr. CRAWFORD (Canada) said that he had not understood that the Finnish suggestion was for an addition to article 6(2) rather than a substitution. He could therefore support it.

45. Mr. GREGORY (United Kingdom) was not opposed to the suggested addition; it was tantamount to saying that a bank that had paid itself should be treated as having accepted the order and must execute it. That did not, he thought, conflict with the rules about time of payment or deemed acceptance.

46. Mr. ABASCAL ZAMORA (Mexico) said that he had no difficulty in accepting the Finnish proposal.

47. Mr. BHALA (United States of America) said that the explanation of the observer for Finland had convinced him that her Government's proposal was unnecessary. There was already a deemed acceptance rule in articles 6(2)(a) (in the original arrangement) and 8(1)(a). He was concerned about changing the rule on deemed acceptance into a provision on when acceptance occurred and was unclear as to why such a provision was necessary.

48. Ms. KOSKELO (Finland) explained that at the previous meeting (A/CN.9/SR.451, para. 43) the Commission had adopted a proposal to allow an extra day for deemed acceptance. Accordingly, deemed acceptance would not take place until the end of the second day. If the payment order came in on the first day and there were sufficient funds in the account to meet it, under her Government's proposal acceptance would take place when the debit was made. There would then be a difference in the timing of the acceptance.



49. Mr. BHALA (United States of America) strongly opposed the Finnish proposal, which would nullify the Commission's decision to allow an extra day for deemed acceptance.

50. Ms. KOSKELO (observer for Finland) stressed that her proposal did not concern deemed acceptance. For the receiving bank to debit an account of a sender was a conscious step and should, in her view, constitute acceptance. It had nothing to do with the deemed acceptance situation, which related to the problem that arose when the receiving bank did nothing.

51. Mr. ERIKSSON (observer for Sweden) supported the Finnish proposal and agreed that it concerned something quite different from deemed acceptance. If the receiving bank debited an account of the sender, its act showed that it was prepared to issue the payment order.

52. Mr. VASSEUR (Banking Federation of the European Community) said that article 6(2)(d) (in the original

arrangement) implied that the bank had to take an initiative. With the progress of computer technology, banking operations now took place immediately. He therefore proposed that the text of that provision should read: "when it executes the payment order received".

53. The CHAIRMAN said that he understood that point. However, in discussing the definition of the term "execution", the Commission had agreed (A/CN.9/SR.444, para. 26) that, if in its consideration of article 6(2)(d) it became apparent that the definition was unnecessary, it might be deleted. That appeared to be the case. He would therefore take it that the Commission approved the text of article 6(2)(d) reproduced in the annex to document A/CN.9/347 and that it deleted the definition of the term "execution" in article 2(1).

54. *It was so decided.*

*The meeting rose at 5.05 p.m.*

### Summary record (partial)\* of the 453rd meeting

Wednesday, 19 June 1991, at 9.30 a.m.

[A/CN.9/SR.453]

Chairman: Mr. SONO (Japan)

*The discussion covered in the summary record began at 9.45 a.m.*

#### International Payments: Draft Model Law on International Credit Transfers (*continued*) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

##### Article 6 (*continued*)

1. The CHAIRMAN, having invited the Commission to consider paragraph 3 of article 6, said that the Canadian proposal that the word "sender's" in the first line be deleted did not seem to have met with any opposition and could be acted upon by the Drafting Group.

2. The observer for Sweden had suggested that the words "at the earliest possible time" be inserted before the word "unless" in the third line. However, difficulties of interpretation might arise because of the provisions of article 10(1), and he did not think that that suggestion was acceptable to the Commission.

3. The phrase "otherwise than by virtue of subparagraph 2(a)" was designed to solve the circularity problem. The concern expressed by the United Kingdom Government in its comments on article 6(3) (A/CN.9/347, p. 57) might have been somewhat alleviated by the changes made to article 10(1).

4. Mr. GREGORY (United Kingdom) said that the question whether notice of rejection had to be given when funds had not been received was still outstanding.

5. Mr. NEWMAN (United States of America) said he disagreed with the decision of the Working Group (A/CN.9/346, p. 45, para. 19) that a receiving bank was required to give notice of rejection if funds were not received, on the grounds that it

was impracticable, for if the arrival of funds were merely delayed, the order could be executed with a later value date. Imposition of the rejection requirement could cause problems with payment orders from less developed countries, owing to differences in time zones. However, the Commission might wish to specify an end date after which payment orders would be deemed rejected or not accepted.

6. Mr. ABASCAL ZAMORA (Mexico) said that the Working Group had taken the view that the obligation to issue a rejection notice existed even if no funds had been received. There was an unresolved problem of sanctions in the event of a failure to give such notice. The earlier suggestion that a bank that failed to issue a rejection notice might be required to pay some seven days' interest had encountered strong opposition.

7. The Commission could either leave the paragraph as it stood, amend it to provide for the imposition of a sanction or delete it altogether.

8. Mr. GREGORY (United Kingdom) said that both a policy question and a drafting question were involved. As to policy, he felt that it was desirable to have such a requirement. The Model Law contained a number of provisions that might still be of some value despite the absence of related sanctions. Once the policy decision had been taken, the matter could be left to the Drafting Group.

9. Mr. NEWMAN (United States of America) said that, as he understood it, article 6(3), taken in conjunction with article 6(2)(a), indicated that a bank was not obliged to issue a rejection notice if funds had not been received. If that were not the case, a bank receiving a payment order without funds would have to check on the following day and, if the funds had still not arrived, would have to reject the payment order and wait for a new one, an absurd situation.

\*No summary record was prepared for the rest of the meeting.



10. Under the circumstances, he proposed that the text should be amended to make it clear that no notice of rejection was needed if the receiving bank had not received the necessary funds.

11. The CHAIRMAN said that there were two conflicting interpretations: that a notice of rejection was required when no funds had been received—the view taken by the Working Group—and that no notice was required under those circumstances. That point had to be clarified.

12. Mr. BURMAN (United States of America) said that it was necessary to clarify a relatively fundamental policy issue. There seemed to be an anti-bank attitude among some delegations and a tendency to pile more and more responsibilities on to the banks. The Model Law was intended, however, not so much to regulate bank operations as to promote trade.

13. Banks did not usually issue notices when funds were not received and since the customers in question were commercial customers, they could be expected to know the state of their bank accounts. The extra expenditure of time and money by banks that would be required if they had to issue rejection notices under those circumstances was not justified. It would only slow down commercial flows.

14. Mr. DE BOER (Netherlands) said that, if no funds had been received, there was no deemed acceptance. For some reason or other, the Working Group seemed to wish to introduce an obligation without a corresponding sanction. He endorsed the remarks of the United States representative.

15. Mr. CRAWFORD (Canada) said he supported the deletion of the provision regarding notice of rejection in the absence of funds on grounds similar to those advanced by the United States delegation. If that were done, however, there was a second minor amendment that should also be made. In article 4A of the United States Uniform Commercial Code, which also stipulated that no notice of rejection was required if no funds were received, there was a provision that "stale" payment orders, which had not been executed, should be cleared out after five days. A similar provision would be useful in the Model Law, since keeping payment orders pending indefinitely might lead to confusion and error.

16. Ms. KOSKELO (observer for Finland) said that the arguments in favour of requiring a notice of rejection even if no funds had been received were not very strong and deletion of the provision was quite acceptable. She agreed, however, with the representative of Canada as to the need for a supplementary provision regarding "stale" payment orders.

17. Mr. ABASCAL ZAMORA (Mexico) said that the requirement seemed to conflict with banking practice and would probably have scant effect. Moreover, a receiving bank could incur significant costs in issuing rejection notices without any guarantee that the sums could be recovered. He agreed, therefore, with the delegations of the United States and Canada that there were no valid reasons for the obligation and supported the Canadian proposal that limits of validity for payment orders should be stipulated.

18. Mr. LIM (Singapore) said that he agreed with the United States delegation that the requirement placed an undue burden on the receiving bank. That would not be of great importance if no sanction were imposed, and the principle of exclusivity (article 16(8)) were maintained. However, if the provision under article 16(8) were removed and the duty to give notice of rejection were maintained in the Model Law, failure on the part of a receiving bank to comply with article 6(3) might give rise to

a breach of statutory duty and lead to an action in tort. He thought that no obligation should be introduced without a corresponding sanction, whether the exclusivity rule was retained or not.

19. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the United States proposal whereby the text of article 6(3) would be amended to make it clear that no notice of rejection was needed if the funds had not been received.

20. *It was so decided.*

21. The CHAIRMAN invited the Commission to consider the question of the length of validity of a payment order. He suggested a period of seven to ten days.

22. Mr. CRAWFORD (Canada) said that the period in the United States Uniform Commercial Code was five days.

23. Mr. LE GUEN (France) said that it would be better not to set a specific number of days but rather to state that the parties could agree that the validity of a payment order would be limited in time.

24. Mr. GREGORY (United Kingdom) said that a problem would arise if there were no contractual relationship between the sending and receiving banks. The Model Law should thus prescribe a specific time limit of so many days.

25. Mr. HERZBERG (observer for Israel) pointed out that, if a day were taken to mean a business day, five days would be the equivalent of one week.

26. Mr. ERIKSSON (observer for Sweden) said he agreed that it was necessary to provide a fixed number of days, as suggested by the representative of the United Kingdom. There should also be provision, however, for freedom of contract between the parties.

27. The CHAIRMAN said that article 4A of the Uniform Commercial Code set the limit at the fifth business day for funds transfers. He asked the representatives of Canada, the Netherlands, the United Kingdom and the United States to prepare a draft text on the subject.

28. U NYI NYI THAN (observer for Myanmar) said he agreed with the representative of France. It was necessary to allow flexibility in time limits to accommodate the conditions in developing countries.

29. Mr. KAKOLECKI (observer for Poland) said he supported the United Kingdom's view, since failure to fix the number of days would give rise to uncertainty regarding how long a bank should allow a payment order to remain open. He himself preferred a time-limit of five days. He also favoured the addition of the phrase "unless otherwise agreed", since it would accommodate the concern expressed by the representative of France.

30. Mr. EFFROS (International Monetary Fund) said that consideration should be given to the fact that, in practice, the relationship between sender and receiving bank might consist of a series of transactions. If funds were not available, a number of payment orders might accumulate during the viable period. It might, therefore, be necessary to provide a rule to determine the order of priority for payment of those orders when funds became available, whether FIFO, LIFO or some other such method.



31. The CHAIRMAN said that the question had been discussed in the Working Group and elsewhere, but there had been a general agreement to let it drop. Normally the FIFO (first in, first out) rule would apply. If that was the general understanding, there was no need to discuss it in the Commission.

32. Mr. ABASCAL ZAMORA (Mexico) said he agreed with the representative of the United Kingdom that there was a need to place a time-limit on the validity of a payment order. However, the Model Law should also take account of the concerns expressed by the representative of France, which also had some justification. He was, in any case, not entirely clear why it was necessary to protect the senders of payment orders without funds.

33. Mr. HERZBERG (observer for Israel) said there should be no time-limit in article 6(3). The matter of the order of the allocation of funds, as they became available, to a series of payment orders was extremely complex and varied from country to country. It should therefore be left to domestic law.

34. Mr. LIM (Singapore) said that the concerns of the representative of France and the observer for Myanmar might best be accommodated if the approach proposed by the representative of the United Kingdom were reversed. Thus the time-limit for validity of payment orders would normally be determined by national law or contractual arrangements. If, however, there were no such provisions, the Model Law would prescribe a time-limit of five days.

35. Mr. DE BOER (Netherlands) wondered what would happen when the five-day period expired and whether the payment order would then be cancelled by operation of the Law. It would be interesting to know what was provided in article 4A of the Uniform Commercial Code.

36. The CHAIRMAN said that, once the time-limit had been reached, the payment order became invalid.

37. Mr. LE GUEN (France) said there were two categories of payment order. In the first case, the payment order was sent through a funds transfer system, which, in the context of its own rules, would establish a limit on the validity of the payment order. That situation would therefore be governed by the law of contract, so there was no need to include a rule in the Model Law. In the second case, a payment order would be sent direct to a bank. Most banks applied their own rules. Consequently, even if there were no prior contractual relationship, the sender, by choosing a particular bank, would accept *a priori* the conditions of that bank. Again the law of contract applied.

38. He therefore saw no need to establish a time-limit in the Model Law. Nevertheless, he would be able to accept the proposal of the representative of Singapore.

39. With regard to the order of payment of payment orders, there were long-established procedures arising from the law of cheques and there was no need to address that question in the context of the Model Law.

40. Mr. HUANG Yangxin (China) pointed out that the Model Law applied to all forms of credit transfer. While a time-limit of five days might be sufficient in the case of electronic funds transfers, it would be insufficient in the case of paper-based transactions. It was necessary to allow for the needs of developed and developing countries alike. The time-limit should thus be left to individual countries to determine.

41. Mr. ABASCAL ZAMORA (Mexico) said he supported the proposal by the representative of Singapore. He wondered whether the phrase "as otherwise agreed" could be used, as it was used elsewhere in the text of the Law.

42. The CHAIRMAN asked the representative of Singapore to prepare a suitable text for consideration by the Commission.

43. Mr. NEWMAN (United States of America) suggested that the ad hoc drafting group should replace the words "sufficient to cover the amount" in article 6(2)(a) by "sufficient for payment of the amount". The reason was that the word "cover" was used a number of times with different meanings in the Model Law.

44. The CHAIRMAN recalled that the Commission had still to decide on the opening phrase of article 5. As the delegation of the United States had made a concession in accepting the concept of "deemed acceptance", the Commission might, perhaps, agree that article 5 should apply to the Model Law as a whole. To those delegations which wished to restrict the application of article 5 to articles 6 and 8, he put it that, in practice, those were the articles mainly affected. He therefore suggested that article 5 should begin "For the purposes of this model law".

45. Mr. GREGORY (United Kingdom) said that the Commission needed to explore the conflict between articles 5 and 17, as raised by the observer for Finland and addressed by the representative of Canada.

46. The CHAIRMAN said he agreed that article 17(2) might cause problems, but his feeling was that the Commission was following the path of confining the Law to credit transfers, in which case it might well decide to eliminate article 17(2) altogether. The Commission might thus adopt the introductory phrase to article 5, on the understanding that the question could be reopened if the decision in respect of article 17 so required.

47. Mr. ABASCAL ZAMORA (Mexico) said that the relationship with article 17 should not be left unresolved. He personally saw no contradiction between the two articles. Article 5 referred to the moment when the sender paid. Article 17(2) established when the beneficiary bank accepted the payment order at the end of the transfer. That was quite different.

48. Ms. KOSKELO (observer for Finland) said that, in her view, there was a conflict between article 5(b)(ii) and article 17 in terms of reimbursement. She would explain her reasoning at a later stage.

49. The CHAIRMAN said he took it that the Commission wished to accept the phrase "For the purposes of this model law" at the beginning of article 5, subject to the condition he had already explained.

50. *It was so decided.*

51. The CHAIRMAN recalled that it had been agreed to add the following subparagraph to article 6(2): "When the receiving bank makes a debit to an account of the sender with the receiving bank in order to cover the payment order." He was pleased to inform the Commission that agreement had been reached to accommodate the suggestion made by the observer for Finland the previous day by replacing the words "in order to cover" by the words "as payment for", thus avoiding the word "cover".

52. If there were no comments, he would take it that the Commission wished to adopt that modification.

53. *It was so decided.*



## Article 7

54. The CHAIRMAN drew the Commission's attention to the United States Government's proposal (A/CN.9/347/Add.1, p. 15) that the word "appropriate" in the third line of article 7(2) should be deleted. If he heard no objections, he would take it that the Commission wished to adopt that amendment.

55. *It was so decided.*

56. The CHAIRMAN drew attention to the proposal by the Government of France (A/CN.9/347/Add.1, p. 3) that the following sentence should be added to paragraph 2: "It must, specifically, effect the operation in the currency or unit of account stipulated by the sender." As indicated in the accompanying explanation, the purpose of the addition was to remind receiving banks that they should not take the initiative of converting funds received into another currency.

57. Mr. LE GUEN (France) said that the purpose of the amendment was to remind banks that, when they received a payment order in a specific currency, they must not convert the funds in question into local or any other currency. Although paragraph 2 as currently drafted stated that a bank must issue a payment order that was consistent with the contents of the payment order received, currency conversion was one of the most persistent problems relating to international credit transfers for banks in France.

58. Mr. NEWMAN (United States of America) said that article 7 was concerned with payments by the receiving bank either to an intermediary or to a beneficiary bank. Every effort had hitherto been made to avoid the question of currency conversion and he regretted that it had suddenly been brought up.

59. Regarding the French proposal, he did not see how a bank in France which received a payment order in foreign currency could send that foreign currency to the next bank in the chain, since he knew of no local multi-currency payment or fund transfer system there. In most cases, therefore, there would be conversion, but that would concern the beneficiary bank, which was not yet under discussion. In his opinion paragraph 2 was satisfactory and needed no addition.

60. Mr. LE GUEN (France) said that the object was to ensure that a bank receiving a payment order in a currency other than that of its own country would issue an order to the beneficiary's bank in the currency in which the order was received. The practice in France was that banks receiving a payment order in, say, United States dollars would normally arrange to issue a payment order in dollars. A bank which had no correspondent with dollar accounts simply refused the operation and left it to a better equipped bank. There were fund transfer systems in Europe, such as the French Sagittarius system, which were designed to transmit payment orders in a number of currencies.

61. Mr. VASSEUR (Banking Federation of the European Community) said that the French proposal should be viewed in the light of a case that had come before the courts in Paris. In December 1984, the Société Générale had given an order to a bank to transfer the sum of 2 million French francs to its branch in the United States of America. The order was to have been executed in French francs, but the United States correspondent bank of the Société Générale had converted the sum into United States dollars, without any instructions to do so. In January 1985, the dollar had been worth 10 French francs but the operation had been delayed and, in the interim, the dollar had fallen. That was the kind of situation the amendment was designed to remedy.

62. Mr. KOMAROV (Union of Soviet Socialist Republics) said that he preferred paragraph 2 as it stood. The wording took into account the problems of France since the word "appropriate" presupposed that the bank should take account of all aspects of the credit transfer and execute it in an appropriate manner. If the sentence proposed by the representative of France were added, it might be necessary to explain why the bank could or could not execute the credit transfer. Moreover, the problem of exchange rates would arise, which the Commission had decided not to deal with.

63. Mr. SOLIMAN (Egypt) said he supported the French proposal because it dealt with a practical problem that was extremely important for the developing countries.

64. The CHAIRMAN asked the United States delegation, in connection with the case cited by the representative of the Banking Federation of the European Community whether it was possible under United States law to make a payment in French francs and maintain a currency account in the United States of America.

65. Mr. NEWMAN (United States of America) replied that, in 1984, it had been illegal for a United States citizen to maintain a foreign currency account in the United States. The law had not been changed until 1990 and, while there might be one or two banks in the United States that offered currency accounts, they were far from usual. What had been done in the case of the Société Générale was normal banking practice in the United States.

66. The fundamental problem, however, was that it was the originator and the beneficiary that had to determine the flow of funds. In the case in question, the French bank had not realised what it was doing, because it should have known that the beneficiary did not maintain a French franc account in the United States of America.

67. Generally speaking, conversion to the local currency was appropriate, because that was the only way in which most banks could pay. If it were not deemed appropriate, it would be for the originator to make the fact known, and for the beneficiary to say where he wanted his funds. The operation should be pre-arranged and not flow in with fast payment order processing.

68. Mr. LE GUEN (France) said he wished to remind the members of the Commission that they were discussing the receiving bank. His proposal had nothing to do with the beneficiary bank, which was dealt with in article 9.

69. He agreed with the United States representative that, in the case mentioned by the representative of the Banking Federation of the European Community, the French bank had been in error in asking for a payment in French francs in the United States of America. The responsibility lay, however, with the beneficiary and not the intermediary bank. His delegation's proposal meant that a beneficiary bank which became involved in such a procedure should bear the consequences. The Model Law should not place the responsibility for ill-considered decisions on the intermediary banks.

70. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that a sender's purpose in stating that payment was to be effected in a specific currency was to guard against paying exchange commission, to avoid variations in exchange rates, etc. He understood and supported the French proposal, especially as regards payment orders made to intermediary banks.

71. Mr. NEWMAN (United States of America) explained that a bank did not always know if it was acting in the capacity of



an intermediary or a beneficiary bank. When it processed a payment order it simply processed a payment order. The word "consistent" in article 7(2) should, in his view, cover the purpose of the French proposal.

72. In some places, conversion into the local currency was effected automatically and it would give rise to a great deal of extra work if intermediary banks were obliged to process transactions in currencies in which they did not usually deal. Orders of that sort needed to be set up in advance.

73. A bank could receive a payment order such as that referred to by the representative of France in one or other of two ways. Either the bank's French franc account would be credited or it would be instructed to debit the sender's dollar account. If it was then instructed to transfer the amount to another United States bank with which it had no French franc relationship, it could either convert French francs into dollars or see if the sender had a relationship of any sort with the beneficiary. The second option would involve the bank in a great deal of time and effort.

74. Mr. BHALA (United States of America) said that, in addition to the practical difficulties involved and the burden laid on the banks by certain demands, it was necessary to take into account the position of central banks. Even if its role were restricted to that of an intermediary bank, the Federal Reserve Bank, for example, would not be in a position to carry out the type of conversion required by the French proposal. The accounts it held for its customers were all in dollars. When a payment had to be made in a different currency, that was a matter for the originator and the beneficiary to work out.

75. Mr. GREGORY (United Kingdom) said that foreign exchange was an extremely sensitive issue and had to be handled carefully. He thought it implicit from the way in which the Model Law had been drafted that it was addressing the question of international credit transfers in a single currency. Although the principle of the French proposal was perfectly correct in so far as the basis of the Law was concerned, it would present difficulties if it was stated explicitly. He considered it preferable to leave article 7(2) as it stood.

76. Mr. NEWMAN (United States of America), replying to a question by the CHAIRMAN, said that, unless a United States bank had made prior arrangements with another bank, all payment orders in foreign currencies were automatically converted to dollars in his bank and in nearly every bank that he knew in the United States. United States banks were not in the foreign currency payment business. They used dollars. Multi-currency accounts had been introduced into the United States in 1990 only and, as far as he knew, only two banks were offering that service.

77. Replying to another question by the CHAIRMAN, he said that, if his bank had a French franc account and if it received a payment order to credit it with French francs, it would of course do so.

78. The CHAIRMAN said that, in such a case, its action would be "consistent with the contents of the payment order", referred to in article 7(2).

79. Mr. BHALA (United States of America) said that the problems involved in the United States were more than merely operational and practical. Serious and sensitive central banking issues were involved in the matter. When payment orders came into United States banks, the Federal Reserve Bank might be involved and, if the credit were to be effected in foreign

currency, the Federal Reserve Bank would be concerned about the extension of credit in foreign currency and also about the monetary policy of the country whose currency it was.

80. Mr. LE GUEN (France) said that the discussion was very enlightening on the differences between banking systems. Multi-currency arrangements were already quite common in Europe. The trend was growing and a common European currency might soon be in existence in Europe, parallel to existing national currencies. It seemed to him desirable that the Model Law should take such forthcoming developments into account.

81. He quite understood the concern of central banks, which were never particularly happy to see their national currencies circulating in foreign countries. That was not, however, the point at issue. The purpose of his delegation's proposal was to allow multi-currency payment systems to function where they existed. If a bank did not have the facilities to effect payment in a foreign currency, it could always refuse a payment order and other arrangements could be made. Where such arrangements did exist, however, as they did in Europe, the Model Law should not serve as a brake on them.

82. The arguments used against the proposal seemed contradictory. It was difficult to argue that the purpose of the proposal was already covered by article 7(2) and also that its implementation would place an extra burden on banks.

83. Mr. CRAWFORD (Canada) said that the Model Law should be aimed at establishing a sustainable position that was both practical and fair. The current difficulty appeared to be due to rivalry between currencies that, in some spheres, might be competing for the dominant role. All the Commission could do for the moment was to try to draft a Model Law dealing objectively with the basic needs of banks in dealing with international credit transfers.

84. The two words, "consistent" and "appropriate" in article 7(2) seemed to him to provide ample scope for interpretation and for the development of banking relations. All in all, the article gave banks flexibility of operation and encouragement to cooperate with other banks and he supported it.

85. The CHAIRMAN said that, while there was considerable sympathy for the French views and the reasoning behind them, the Commission considered it advisable to refrain from mentioning foreign-exchange matters in the Model Law. It was unable, therefore, to accept the French proposal, but agreed that any failure to comply with an order for payment to be effected in a specific currency or unit of account would constitute a breach of the payment order under article 7(2) and, more particularly, of the words "consistent" and "appropriate" therein.

86. Mr. LE GUEN (France) said that he would bow to the will of the majority. He could not help wondering, however, which countries' problems the Model Law was intended to solve.

87. Mr. BURMAN (United States of America) said that the Model Law was, of course, intended to solve the general problems of as many countries as possible. While he was fully aware of the problems encountered by France, and the problem under discussion had been expressed in terms of payment order issues between French sending banks and United States receiving banks, the whole question of trading and providing credit in foreign currencies was of concern to the central banks of most countries.



88. Mr. ABASCAL ZAMORA (Mexico) said he hoped that the absence of agreement on the problem under discussion would not jeopardize the Model Law. He also hoped that the Commission would not view the issue as finally settled, but would be ready to consider any formulation submitted during

the days to come in an endeavour to meet the concerns of the delegations of both the United States and France.

*The meeting rose at 12.35 p.m.*

## Summary record of the 454th meeting

Wednesday, 19 June 1991, at 2.30 p.m.

[A/CN.9/SR.454]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.40 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

### Article 7 (continued)

1. Ms. KOSKELO (observer for Finland) drew attention to her Government's proposal for article 7(2) (A/CN.9/347, p. 21). Her delegation contended that the problem of adequate cover for the payment order was not solved by article 4(6). It took the view that late execution of a payment order might not be the only cause of delay to a payment order once a bank had accepted it. Failing to take the necessary steps to provide funds for the next receiving bank to implement the order was equally important. A receiving bank which had accepted a payment order had a duty to execute it, first by issuing and implementing the order, and then by taking steps to provide funds for its acceptance by the next receiving bank. Subparagraph (b) of the text proposed by her Government contained the word "cover", but she would not insist on it being used; a formulation such as "other steps necessary to implement the payment order" might be preferable.

2. Mr. DE BOER (Netherlands) supported the Finnish proposal. The idea it embodied had been accepted in principle by the Working Group and was in accord with the proposal of his own Government for article 16 (A/CN.9/347, p. 45). It was immaterial to him whether the idea was incorporated into article 7(2) or article 16.

3. Mr. BHALA (United States of America) opposed the Finnish proposal. As worded, article 4(6) of the Model Law contained an obligation to pay. Article 5 contained a clear definition as to when payment was to be made. What was proposed was a fundamental addition that would replace an obligation to pay by an obligation to have paid. Such an obligation would lead on to the thorny issue of what constituted cover. A basic objection to it was that it would impinge on the credit decisions of the banks involved. At present, an implementing payment order followed on the original payment order throughout the chain from originator to beneficiary; whether the intermediary bank accepted the payment order of the sending bank without funds was a credit decision to be left to that intermediary bank. To require the intermediary bank to have funds or the sending bank to send funds would affect their freedom of decision, with which the Model Law should not interfere. The consequences of such interference would be temporary or permanent impediment to the processing of many payment orders and obviously deleterious effects on high-speed credit transfers.

4. Finally, underlying the proposal was the assumption that the credit transfer system worked by matching payment orders

with covering payments. That was not the case; it was simply not practical for every one of, say, 18,000 payment orders a day to be matched with funds to see whether it was acceptable.

5. Mr. BURMAN (United States of America) endorsed the arguments of the previous speaker. Reasonable though the provision proposed by Finland might seem, it would conflict with existing international banking practice and would seriously interfere with a variety of transmission methods used by intermediary banks, particularly those in third world countries that did not have access at certain points of the transaction to alternative funding sources.

6. Mr. ERIKSSON (observer for Sweden) agreed with the delegation of Finland on the need for a rule on cover for payment orders.

7. Mr. GREGORY (United Kingdom) said that he was not at all sure that he agreed with the analysis made by the United States delegation of the consequences of the Finnish proposal. The United States delegation had given two particular reasons why the provision proposed by Finland would be incompatible with current practice. The first was that it would interfere with intermediary banks' credit decisions; he was not certain that would be the case. A sender had a duty to pay, and that did not affect the decision of the receiver as to whether to accept a payment order before obtaining payment. The credit decision seemed to him to be one which the receiver had to take, and his decision to accept and provide payment without waiting for payment himself seemed to be separate from the question whether his sender should send him payment.

8. The second point made by the United States delegation was the procedural problem of matching funds with payment orders. That did not seem to him to flow from the Finnish proposal, which recognized the existence of netting systems and other ways in which payment might be made, but said nothing of making individual payments to cover individual payment orders; all it required was that the bank which accepted the payment order must take appropriate steps to provide cover for its implementing payment order.

9. He agreed with the representative of the Netherlands that the issue was one which the Working Group had felt needed to be addressed in some way. It was closely related to article 4(6) and he thought that the matter was covered by the United Kingdom's written proposal to insert a reference to article 4(6) in article 16 (A/CN.9/347, p. 63, para. 29), so that a bank late in paying would incur an interest penalty. He put it forward as an alternative to the Finnish proposal.



10. Ms. KRAG JORGENSEN (Denmark) said that she had found the United Kingdom explanation very helpful. Her delegation nevertheless preferred the Finnish alternative.

11. Mr. CRAWFORD (Canada) said that in his view the matter was one of drafting rather than of principle. He believed that some sort of provision for cover should exist in the draft. In his opinion, article 7(2) was reasonably clear as it stood. If a close look was taken at its final clause, it could be construed as providing everything needed to meet the requirements of the Finnish delegation. A sending bank was already under a duty to provide cover.

12. Mr. HUANG Yangxin (China) agreed with the representative of the United Kingdom on the close link between the Finnish proposal and article 4(6). The crux of the matter lay in the point at which a receiving bank which sent out a payment order itself became a sender, and the need to determine at what point it should provide cover. Did the obligation to provide funds arise when the payment order was issued or after it had been accepted? The logical step, if the Finnish proposal was accepted, would be to bring article 4(6) into line with article 7(2).

13. Mr. ABASCAL ZAMORA (Mexico) recalled that the Working Group on International Payments had analysed at length the obligation of a receiving bank on receiving a payment order and had agreed on the present text on the understanding that the key word was "appropriate", unclear though that word might be. The Commission would do better to leave the text as it stood than to repeat the discussion which had taken place in the Working Group.

14. Mr. AZZIMAN (Morocco) said that in his view the two obligations, that of issuing a payment order and that of covering a payment order, were assumed by a bank as two separate but complementary obligations. To that extent he supported the position of the delegation of Finland.

15. As to the practical difficulties which, in the view of the United States delegation, would result from acceptance of the Finnish proposal, particularly in third world countries, he did not think they would arise if the provision was couched in general terms; problems would occur only if it included a great deal of practical detail. His suggestion for the provision on cover would be on the following lines: "the receiving bank is required to take the necessary action to ensure coverage of a payment order". That would avoid the imposition of any constraints on the bank.

16. Mr. NEWMAN (United States of America) said that the interests of ensuring consistency in the Model Law were best served by adhering to the existing text.

17. Mr. SKELEMANI (observer for Botswana) said that there was no dispute as to the principle. In his view, the paragraph as drafted highlighted what was essential. If that was not the general view, he could agree to the paragraph being amended in accordance with the proposal by Finland.

18. Mr. GREGORY (United Kingdom) said that the obligation to provide cover existed under article 4(6). He reiterated his view that the question of delay in providing it might be addressed in the context of article 16.

19. Ms. KOSKELO (observer for Finland) said that the following was an example of the problem her delegation was trying to solve: if a sending bank which had received a payment order executed it on day one by sending its own payment order to the next bank, but failed to make the funds available for the

payment until day five, the next bank might not accept the order until day five; that would mean a delay of four days in dealing with the transaction. As the draft was presently worded, however, the sending bank's duty to pay arose only upon acceptance of the payment order by the next bank in the chain. Her Government's proposal did not affect the methods of payment which banks used between themselves; those arrangements depended on the relationship between the banks concerned. She could not accept the Canadian view that the matter was catered for by the last clause of the existing wording of article 7(2).

20. Mr. HUANG Yangxin (China) said that the possibility for the Model Law to create the problem referred to by the observer for Finland would persist unless article 4(6) was modified.

21. Mr. GRIFFITH (observer for Australia) said that his delegation recommended approval of the existing text. Otherwise, it would be difficult for the Commission to make further progress without defining the notion of "cover".

22. Mr. ABASCAL ZAMORA (Mexico) said that the obligation incumbent on the receiving bank to pay was implicit in the terms of article 7(2).

23. Mr. IWAHARA (Japan) agreed with the previous speaker and approved the existing text.

24. Mr. BURMAN (United States of America) said that in his view the problem was solved satisfactorily by reference to article 4(6).

25. The CHAIRMAN said it seemed to him that the discussion indicated a majority acceptance of the approach suggested by the United Kingdom for dealing with the problem raised by the observer for Finland.

26. He invited the Commission to take up paragraph 3 of article 7. It had before it two proposals for that paragraph: one by the United Kingdom to remove the implication that the receiving bank had a duty to detect misdirection (A/CN.9/347, p. 58, sect. 10) and the other by Finland to delete the paragraph (A/CN.9/347, p. 22).

27. Mr. BHALA (United States of America) supported the Finnish proposal.

28. The CHAIRMAN said that, unless he heard an objection, he would take it that the Commission adopted the Finnish proposal to delete article 7(3).

29. *It was so decided.*

30. The CHAIRMAN invited the Commission to consider article 7(4). In its written comments (A/CN.9/347, p. 58, para. 11), the United Kingdom had expressed the view that paragraph 4 was useful but too widely drawn, and had put forward an alternative text.

31. Mr. BHALA (United States of America) suggested that discussion was needed before the Commission could reach a conclusion on the notification duties set out in paragraphs 4 and 5 of article 7. Due account must be taken of the time which a bank needed to determine in what way a payment order was insufficient and then to fulfil its duty of notification.

32. Mr. NEWMAN (United States of America) explained that in the inquiries department of United States banks most problems connected with transfers of funds could be processed quickly, but he knew of no bank where they could be processed on execution day. His own bank could do so within 24 hours if



it did not have to contact a third party, but the largest bank in the United States had a three-day standard for performance. He therefore suggested that at least one further day should be allowed for notification under article 7(4).

33. Mr. CRAWFORD (Canada) wondered whether the notion of detection should not also be embodied in paragraph 4.

34. The CHAIRMAN said that the words "the receiving bank shall give notice to the sender of the insufficiency" in article 7(4) might create implicit liability, the breach of which would be subject to damages. If that was not the intention, the text should be improved.

35. Mr. BHALA (United States of America) said that he had difficulty with the words "appears to be intended" in the United Kingdom proposal. He was concerned with the possibility of a wrongdoer sending instructions to a receiving bank that appeared to be intended as a payment order, so that he could subsequently hold the receiving bank liable for failure to notify him under article 7.

36. Mr. GREGORY (United Kingdom) said that the text proposed by his Government might be made more explicit by stating: "when a bank detects that an instruction appears to be intended". That would deal with the point raised by the Canadian representative. As to the possibility of fraud mentioned by the United States representative, under article 16(3), interest was payable only on funds that had been received for the period during which the bank retained the payment. It would be an extraordinarily speculative act for a wrongdoer to send money to a bank in the hope that it would fail to do something. On the basis that where there were no funds there would be no penalty, the Commission could safely accept the provision.

37. Mr. BHALA (United States of America) remarked that in his experience such a fraud was not as unlikely as the United Kingdom representative had suggested.

38. Mr. FELSENFELD (United States of America) said that the Commission seemed to consider that if a penalty was reduced the bank had less of a responsibility to carry out the law quite so assiduously. However, in the United States at least, the very strict bank regulations simply did not allow banks to take their legal obligations less seriously because the relevant penalty was lower. Any provision in the Model Law that placed a responsibility on a bank must be taken seriously, since bank regulators would see that it was enforced.

39. Mr. KAKOLECKI (observer for Poland) endorsed the views expressed by the United States delegation. In practice, the obligation laid down in article 7(4) would be difficult to carry out without an extra day being allowed for the purpose.

40. Mr. ADEDIRAN (Nigeria) supported the United Kingdom proposal.

41. The CHAIRMAN said that he took it that the Commission agreed that an extra day should be allowed for compliance with the obligation contained in paragraph 4 of article 7; and that the United Kingdom's written proposal, amended along the lines suggested at the present meeting by its representative, should form the basis of the paragraph.

42. *It was so agreed.*

43. The CHAIRMAN invited the Commission to consider article 7(5). Many delegations had made proposals for dealing with the problem which that provision addressed, namely an inconsistency in a payment order between the words and figures

describing the amount of money to be remitted. The Commission must therefore decide whether words or figures should prevail.

44. Mr. ABASCAL ZAMORA (Mexico) said that where an order was transmitted electronically, it was difficult to detect mistakes because figures alone were used. Inconsistencies became evident in a documented payment order given by the originator to his bank. The Working Group had considered that an adequate solution would be for a bank which had doubts about the amount of the order to conduct an investigation if it so wished, a position which took account of current banking practice. The last sentence of the paragraph left open the possibility for agreement on the subject between the parties.

45. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) thought that the inconsistency referred to in the paragraph could be regarded as a lack of the necessary information. His delegation favoured the existing wording.

46. Mr. AL-NASSER (observer for Saudi Arabia) said that, having consulted banking circles in his country, his delegation had been informed that it was sufficient, in the event of an inconsistency, to rely upon words. Furthermore, if a transfer operation was halted in order to contact the bank concerned for verification, that would have an adverse effect on the main advantage of electronic transfers, i.e. their speed. It was clear that electronic transfer systems would continue to develop and that traditional transfer operations would diminish in number.

47. Mr. LIM (Singapore) drew attention to the Secretariat's comment on the paragraph (A/CN.9/346, p. 14, para. 49, second sentence) to the effect that the Working Group had expected that paragraph 5 of article 7 would apply only between the originator and the originator's bank, in other words, only to paper-based transfers.

48. Ms. KOSKELO (observer for Finland) said that the Commission should consider what would happen if, instead of conducting an investigation into an inconsistency in the payment order between the words and the figures, the bank executed the order. In order to avoid the problem which that would create, a simple solution would be to establish a rule stating that either words or figures would prevail.

49. Mr. NEWMAN (United States of America) suggested that the words "if there is an inconsistency" should be amended to read: "If the receiving bank has knowledge that there is an inconsistency". He made that suggestion because in any manual transaction it should be the responsibility of the receiving bank to detect the error and notify the sender.

50. After a discussion in which Mr. ABASCAL ZAMORA (Mexico), Mr. CRAWFORD (Canada), Mr. POTYKA (Austria) and Mr. NEWMAN (United States of America) took part, Mr. GREGORY (United Kingdom) said that the United States suggestion did not solve the problem raised by Finland.

51. Mr. LE GUEN (France) warned the Commission against establishing in article 7(5) a distinction between credit transfers made through an electronic funds transfer system and credit transfers effected manually. If the Commission introduced the notion of an electronic funds transfer system into the article, it would have to insert a definition of such a system in article 2. As a consequence, the entire intellectual process on which the Model Law was based would be brought into question. The matter had been discussed at length in the Working Group, which had not reached agreement on it, with the result that the



present provision was a compromise. If that compromise was now upset, the balance of the Model Law might be disrupted completely.

52. The CHAIRMAN suggested that the problem might be solved if the element of detection was incorporated into the paragraph.

53. He noted from a show of hands that a fairly large majority of the Commission favoured the text of article 7(5) with the addition of wording incorporating that notion.

*The meeting rose at 5.35 p.m.*

### Summary record of the 455th meeting

Thursday, 20 June 1991, at 9.30 a.m.

[A/CN.9/SR.455]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 9.40 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)**

#### *Article 7 (continued)*

1. The CHAIRMAN said that, at the previous meeting, the Commission had completed its consideration of article 7(5).

2. Mr. BHALA (United States of America) said he thought that the Commission had been close to reaching a decision at the previous meeting on whether the Model Law should contain a clear rule stipulating that either words or figures should prevail when a payment order contained an inconsistency between the two. Some confusion on the part of his own delegation had, perhaps, prevented such a decision from being reached, and he asked if the debate might be reopened on article 7(5) and, possibly, on article 9(3) as well.

3. The CHAIRMAN, observing that discussion of article 7(5) might be linked with that of article 9(3) but not with that of article 9(4), invited comments on the United States request.

4. Mr. GREGORY (United Kingdom) said that, in response to the request made to him by the Chairman at the close of the previous meeting, he had prepared a wording for article 7(5). He had tried to meet the United States concern regarding the need to detect a discrepancy and its desire that a bank's failure to notice one and relying on the figures in a payment order would not be in breach of the law and the Finnish concern regarding the conflict arising between liability provisions if a bank did not give notice but executed an order.

5. Mr. CRAWFORD (Canada) said that the procedure followed at the previous meeting had been somewhat confusing. As he understood the situation, the ad hoc drafting group presided over by the United Kingdom representative had been invited to report back to the Commission. In addition, he saw no reason why the Commission should be precluded from reopening the debate on discrepancies between words and figures in payment orders when it came to consider article 9(3).

6. Mr. ABASCAL ZAMORA (Mexico) said that he had no objection to the United States request. The Commission had not reached a final decision at the previous meeting.

7. The CHAIRMAN recalled that the Commission had decided to retain the original text with modifications to be submitted by the United Kingdom representative.

8. He suggested that the Commission should decide not to reopen the debate on article 7(5) for the moment and not to discuss the same issue under article 9(3) or article 9(4) but to reconsider the matter later in its session.

9. *It was so decided.*

10. The CHAIRMAN invited the Commission to consider article 7(6). He drew attention to the changes proposed by the Governments of Finland and the United Kingdom in document A/CN.9/347 and by the Government of the United States of America in document A/CN.9/347/Add.1. He noted that the Government of Finland had proposed that the paragraph should be relocated to follow paragraph 2 and asked for comments on the United Kingdom's proposed new wording for the paragraph.

11. Mr. NEWMAN (United States of America) said that what he could only describe as an operational nightmare could occur if a receiving bank were allowed to change an intermediary bank. For example, if a bank instructed by the Bank of China to credit a certain amount to the Chase Manhattan Bank for a beneficiary paid that amount to Manufacturer's Hanover Trust Co. instead, the result would be that the account at Manufacturer's Hanover Trust Co. was long and the account at Chase Manhattan short, because the Bank of China had already made use of the funds. Thus no rule allowing for a change in intermediary bank without immediate notification or request for further instructions should be permitted.

12. Changing a funds transfer system was less serious, since the funds would eventually reach the bank for which they were intended. Regarding changes in the means of transmission, a bank should not be allowed to send funds by mail if instructed to send them by cable, although the reverse would be in order. A receiving bank must not, however, be allowed to disregard an instruction of the sender specifying an intermediary bank.

13. He was unable to support the United Kingdom proposal.

14. Mr. CONOBY (United Kingdom) said he failed to understand the position of the United States delegation. He shared that delegation's concern that the original text of article 7(6) would allow a receiving bank to take a unilateral decision to change an intermediary bank, thus disregarding the sender's instructions, and his Government's proposed amended text was designed to prevent such a situation from occurring.



15. Mr. POTYKA (observer for Austria) said that the United Kingdom amended text was very clear and reflected, he thought, the views of the majority.

16. Mr. IWAHARA (Japan) said he could see little difference between the standpoints of the United Kingdom and the United States delegations. Their intentions seemed to be the same and he found the United Kingdom text very clear.

17. Mr. CRAWFORD (Canada) said he supported the United Kingdom proposal which would prevent a receiving bank from changing an intermediary bank unless it had received fresh instructions from the sender. The proposal included a reference to "the time required by article 10" as did the existing text. He asked the Chairman if his ruling concerning the extra day should be carried through to all the other related paragraphs and, consequently, to article 7(6).

18. The CHAIRMAN said that the Commission had agreed to include a provision for an extra day in article 7(4) only. The question might, if necessary, be raised again at a later stage.

19. Mr. BHALA (United States of America) said that article 7(6) was concerned with changing the sender's instructions regarding an intermediary bank, the funds transfer system or the means of transmission. The United States problem concerned the changing of an intermediary bank. The original text of article 7(6) left a receiving bank free to disregard the sender's instructions regarding an intermediary bank to be used in a given transaction.

20. The reason why the United States delegation believed that a receiving bank could change the funds transfer system or the means of transmission but not an intermediary bank was the following: if a 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 that expected receipt, an overdraft might be created and damages might result. A receiving bank should not therefore be allowed unilaterally to disregard instructions on the designation of an intermediary bank.

21. A receiving bank should not be prevented from changing a funds transfer system or a means of transmission, without seeking the sender's agreement, if that would assist it to carry out a credit transfer order, but it should in no circumstances be allowed to change an intermediary bank without seeking such agreement.

22. Mr. LE GUEN (France) said he could not understand the objections raised by the United States representative. The definitions indicated that an intermediary bank was a receiving bank other than the originator's bank or the beneficiary's bank.

23. Mr. BISCHOFF (observer for Switzerland) said he supported the United Kingdom proposal, according to which the receiving bank could not unilaterally change a payment order but could merely ask the sender for further instructions. He was therefore at a loss to understand the United States objections to that proposal.

24. He was not sure whether the United Kingdom proposal referred to a payment order that had been accepted but could not be executed for routing reasons or to one that had not been accepted and could not be executed for the reasons mentioned in article 6.

25. Mr. CONOBY (United Kingdom) said that it was implicit in his Government's proposal on article 7(6) that the payment order had already been accepted. The purpose of the

reference to article 7(2) was to make it clear that, if the bank issued the notice within the prescribed time-limit, it would not be in breach of its obligation to execute appropriately following acceptance.

26. Mr. NEWMAN (United States of America) said that his delegation supported the existing text of article 7(6), apart from the reference to an intermediary bank. According to the United Kingdom proposal, a bank had to ask the sender for instructions to change a funds transfer system. That would be unwise, as it would result in loss of time. If a payment order specified notification by mail and it was known that mail would not arrive in time, the bank should be permitted to transmit by cable; that would not change the value passed on to the next bank in the chain. On the other hand, if there was to be a change in the intermediary bank, an inquiry should always be made if payment to the specified bank were impossible. However, that was not permissible under the existing text.

27. The CHAIRMAN pointed out that the United Kingdom proposal did not permit the receiving bank to change an intermediary bank unilaterally.

28. Mr. NEWMAN (United States of America) said that, while that was so, the United Kingdom proposal did not permit a change in the funds transfer system or the means of transmission either, and that was wrong. All that was needed was a provision that the intermediary bank could not be changed, which could be achieved quite simply by deleting the words "an intermediary bank" in paragraph 6.

29. Mr. CONOBY (United Kingdom) said that, according to his Government's proposal, the receiving bank would not be allowed to change the intermediary bank unilaterally, for if it did so it would be in breach of article 7(2).

30. With regard to the funds transfer system and the means of transmission, there might be a point of substance in the United States view regarding the choice of the funds transfer system and means of transmission. However, in an international environment, the choice of a funds transfer system might entail routing through a particular country, whereas the sender might have good reason not to wish funds to be routed through that country. He would have to be reassured that such a situation was very unlikely before he could accept the United States view regarding the possibility that the receiving bank might change the funds transfer system.

31. Mr. ERIKSSON (observer for Sweden) said that, if a bank wished to change the first intermediary bank, and the first intermediary bank, in its turn, wished to change the second intermediary bank, there would be two courses open to it. It could either change the second intermediary bank or, if it were not allowed to do so, it could reject the payment order. If it rejected the payment order, the same problem that was of concern to the United States delegation would seem to arise.

32. Mr. NEWMAN (United States of America) said that, in practice, if his bank was unable to pay the designated intermediary bank direct, because it did not have an account with that bank, another intermediary bank would be chosen which was a common correspondent to both the banks. That would not change the ultimate purpose of the payment order. If that course of action could not be taken, a payment order would not be rejected as such but new routing instructions would be requested, and that would be tantamount to rejection.

33. Mr. CRAWFORD (Canada) said that, while he understood the concern of the United States delegation, he did not agree with the proposed solution, for the mere deletion of three



words would still leave a number of problems. It would not be possible to permit the Model Law to empower a receiving bank to choose a different funds transfer system.

34. The United States representative had said that it would always be possible to substitute a more rapid means of transmission but the current drafting would, in fact, permit a slower means. That was a problem that could not be resolved by a minor drafting change.

35. The United States delegation appeared adamant that no change of intermediary bank could be tolerated, but the arguments it had advanced in favour of that proposition seemed hardly convincing, for the beneficiary would have no interest in the selection of the intermediary bank.

36. All in all, he thought that the United Kingdom proposal might be improved by including the possibility of substituting a more expeditious means of transmission, with a provision for referral back to the sender.

37. Mr. NEWMAN (United States of America) said that he had been referring not to the beneficiary but to the beneficiary's bank. It was the normal practice for banks to draw funds before they were credited. If his bank credited a foreign bank in, say, China, the foreign bank would receive notice that a sum of money would be available on a particular day. It would then draw the money on the day in question but there might be no funds available in the particular intermediary bank if it had been possible to change the routing.

38. With regard to the means of transmission and the related question of delay, he pointed out that mailing would cause delay while telex would not.

39. Mr. HUANG Yangxin (China) said that the discussion seemed to be straying from the point. The problem could be very simply resolved by assuming that a bank making an inquiry was thereby giving notice of rejection.

40. All delegations were of the opinion that a receiving bank should not change a payment order unilaterally. If that order specified transmission by telegram or mail, the receiving bank had no right to change it. In accordance with the normal rules, if a particular bank did not have an account with a designated intermediary bank, it could use any bank, but that would not change the payment order and would not, in essence, change the intermediary bank designated in the payment order.

41. Mr. HERZBERG (observer for Israel) said that it might be better to delete paragraph 6. According to the general rule of law, a bank had a duty to approach the sender and obtain instructions in cases of doubt. The matter could be left to the general rule of law.

42. Mr. NEWMAN (United States of America) said that the statement by the representative of China seemed to indicate that, if there were specific instructions to give advice by mail, it would rule out use of the SWIFT procedure. He doubted whether that was the intention of the Chinese delegation.

43. Mr. HUANG Yangxin (China) said that if the payment order specified dispatch by mail, such an order could be rejected but its terms could not be changed, as there might have been very good reasons for the instructions given.

44. Mr. ABASCAL ZAMORA (Mexico) said that it was generally agreed that a receiving bank should not unilaterally change the intermediary bank. As a possible compromise, he suggested that the reference in the United Kingdom's proposal

to the means of transmission be deleted and replaced by wording taken from the first sentence of article 7(6) in the existing text of the Model Law.

45. If the receiving bank wished to change the means of transmission in order to achieve faster transmission, then it should not be required to request authority.

46. Mr. LIM (Singapore) said that a decision should be reached whether or not the receiving bank was to be allowed to make a unilateral change in the designated funds transfer system and means of transmission. While there seemed to be general agreement that a bank should not be allowed to change the intermediary bank without a prior inquiry, there seemed to be no good reason why it should not change the funds transfer system or means of transmission if the payment order were executed on time.

47. He agreed with the representative of Canada that it would not be sufficient merely to delete three words from the existing text of article 7(6). The article should explicitly state what criteria were to be applicable to unilateral action. For example, if the instructions stated that a payment order should be transmitted by post and there was a postal strike, the receiving bank should be allowed to transmit it by a more expeditious means.

48. Mr. BHALA (United States of America) said he completely agreed with the representative of Singapore. The Commission should proceed on the lines that representative had suggested.

49. Mr. CONOBOY (United Kingdom) said that the concerns of many delegations might be met by simply deleting the words "means of transmission" from the text proposed by his Government. There would be no liability under the Model Law for a bank that speeded up transfers; however, if a bank unilaterally chose a slower means of transmission that resulted in delays, it would do so at its own risk and article 16 would apply.

50. Mr. KAKOLECKI (observer for Poland) said that he had sympathy for the views expressed by the representatives of Singapore, the United States and the United Kingdom. One problem that still remained was that of the general rule which specified that a payment order should be executed exactly according to instructions. However, the Model Law should, perhaps, specify that it was permissible for a bank to choose a more expeditious way of transmitting payment orders.

51. Mr. VASSEUR (Banking Federation of the European Community) said that he could not agree that the receiving bank should be able unilaterally to change a prescribed means of transmission by substituting a more rapid means. In a major French bank, transmission by post was the rule in about one quarter of the cases. As the representative of China had rightly said, if the originator had given instructions for transmission by post, he had good reasons to do so. It was not permissible, therefore, for a bank to choose a more expeditious means of transmission without consulting the sender. As a general rule, the instructions given should be obeyed.

52. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the text of article 7(6) proposed by the Government of the United Kingdom (A/CN.9/347, p. 59), with the revision made orally by the United Kingdom representative.

53. *It was so decided.*

54. The CHAIRMAN invited the Commission to consider article 7(7).



55. *Article 7(7) was approved.*

#### Article 8

56. The CHAIRMAN invited the Commission to consider article 8. He suggested that paragraph 1(a) of the article should be redrafted to bring it into line with article 6. The square brackets around "execution" would be deleted.

57. A decision regarding the square brackets in paragraph 2 would be taken when a satisfactory definition of "execution date" had been agreed upon.

58. Mr. ERIKSSON (observer for Sweden) said that the reference to "a court" in subparagraph (g) was too narrow. He suggested the addition of "or another competent legal authority".

59. Secondly, subparagraph (g) gave the impression that banks were always permitted to apply the credit to a debt of the beneficiary, although under many legal systems that was not allowed except by agreement with the beneficiary or by court order. He suggested that the reference be deleted. Alternatively, the words "if it is allowed" could be inserted after "when the bank" in order to clarify that it could be done only with the agreement of the beneficiary or in accordance with the applicable law.

60. Mr. GREGORY (United Kingdom) said that subparagraph (g) made no comment on the entitlement of a bank to apply the credit to a debt of the beneficiary. It merely stated that the fact of so doing constituted acceptance. The question of entitlement would be decided by the applicable law.

61. Mr. KAKOLECKI (observer for Poland) said he was in favour of adding the reference to a "competent authority", since there were authorities other than courts in his country capable of deciding such matters.

62. He agreed with the United Kingdom representative's comments on the entitlement of a bank to apply the credit to a debt. The assumption underlying the Model Law must be that banks would act in accordance with the applicable law, so there was no need to state it explicitly.

63. Mr. ABASCAL ZAMORA (Mexico) said that article 9(1) clearly accommodated the concern of the observer of Sweden by stating that, upon acceptance of a payment order received, the beneficiary's bank was obligated to place the funds at the disposal of the beneficiary.

64. Mr. ADEDIRAN (Nigeria) said that, if the list of earliest times when a payment order was accepted by the beneficiary's bank was intended to be exhaustive, the object could be achieved by deleting subparagraphs (d), (e) and (g), and deleting the words "as instructed in the payment order" from subparagraph (f).

65. Mr. KOMAROV (Union of Soviet Socialist Republics) said he was able to accept article 8(1) as it stood because it established the minimum legal basis for acceptance or rejection of a payment order. He agreed with the United Kingdom representative that there was no need in the case of subparagraph (g) to state expressly that the application of a credit to a debt was subject to the agreement of the beneficiary or the applicable law.

66. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve the existing text of subparagraphs (d), (e), (f) and (g) of article 8(1), on the understanding that the Drafting Group would expand the term "court" in subparagraph (g) to include the idea of "any competent authority".

67. *It was so decided.*

#### Article 9

68. The CHAIRMAN suggested that the Commission, when considering article 9, might wish to adopt the same approach that it had used when dealing with article 7.

69. Mr. BHALA (United States of America) said that his delegation had been given to understand, at an earlier stage in the meeting, that the subject of discrepancies between words and figures could be discussed under article 9(3).

70. The CHAIRMAN said that the Commission had decided to postpone discussion of that problem until later in its session, specifically mentioning that it would not be discussed under article 9(3) or 9(4).

71. After a procedural discussion in which Mr. BHALA (United States of America), Mr. NEWMAN (United States of America) and Mr. CRAWFORD (Canada) took part, the CHAIRMAN said that, while the Commission could hardly go back on such a recent decision, the issue in question might be tackled if time permitted.

72. Mr. POTYKA (observer for Austria) recalled that his delegation had raised another problem under article 8 which, it had been told, could be discussed under article 9. There seemed to be an inconsistency between the two articles, in that article 9(1) stated that the beneficiary's bank was obligated, upon acceptance of a payment order, to place the funds at the disposal of the beneficiary although, under the conditions set forth in article 8(1)(d), (e), (f) and (g), it might not be able to do so.

73. The CHAIRMAN said that the rules in article 8(1)(d), (e), (f) and (g) had nothing to do with execution. As he understood it, the problem of the Austrian observer was covered implicitly by the last part of article 9(1). The issues dealt with under articles 8 and 9 were quite distinct and the Commission, like the Working Group, had decided that article 9(1) was concerned with the relationship between the beneficiary and the beneficiary's bank, which was outside the scope of the Model Law.

74. Mr. ABASCAL ZAMORA (Mexico) said that a bank had to accept a payment order in accordance with article 8(1) and execute it in accordance with article 9. There should be no contradiction. While the concepts of acceptance and execution were legally different, the fact that a bank expressed its willingness to accept when it executed an order meant that, in practice, execution was the same as acceptance.

75. Ms. KOSKELO (observer for Finland) said that the Austrian observer's problem was probably a drafting one, stemming from the wording of article 9(1), which referred only to the placing of funds at the disposal of the beneficiary. That wording was, in fact, too narrow because it gave the impression that the beneficiary's bank must always place the funds at the disposal of the beneficiary, despite the provisions of article 8(1)(d), (e), (f) and (g). She suggested that the difficulty might be resolved if the words "or otherwise apply the credit" were inserted after the word "beneficiary" in the second line of article 9(1).

76. The CHAIRMAN said that, in his opinion, the words "place the funds at the disposal of the beneficiary" covered the situation referred to by the observer for Finland. It was a very broad reading but, since article 9(1) referred to the payment order and the applicable law, its purport was clear. All those issues were left to the applicable law.



77. Mr. LOJENDIO OSBORNE (Spain) said that article 9(1) should be left as it stood. The problem referred to by the observers for Austria and Finland could be resolved by an appropriate reference in article 16(6).

78. Mr. POTYKA (observer for Austria) explained that he had raised the issue because of certain problems under Austrian law. He would not press it, however, since it seemed that other countries did not have the same problem.

79. Mr. CRAWFORD (Canada) said that he still had some lingering doubts concerning the breadth of the interpretation of the words "placing funds at the disposal of the beneficiary" in article 9(1). The same words were used in article 8(1)(d) and were rapidly acquiring an accepted meaning in the context of the Model Law. Unless the suggestion by the observer for Finland were accepted, there was a risk of conflict between article 9(1) and article 8(1)(f), in view of the content of article 8(1)(d).

80. The CHAIRMAN said that article 8 should have no implications for article 9(1), which was concerned with the applicable law and not the Model Law. The representative of Canada seemed to be confusing the two.

81. Mr. ADEDIRAN (Nigeria) said that he, too, found an apparent contradiction between article 8 and article 9(1). He supported the suggestion made by the observer for Finland.

82. The CHAIRMAN said that the intention of the Working Group had been that the funds should be placed at the disposal of the beneficiary in accordance with the payment order, all other issues being subject to the applicable law. It was essential that acceptance and execution be kept separate.

83. Mr. GREGORY (United Kingdom) said he shared the unease of the representative of Canada. If the problem was really a drafting one, he could see no harm in the Finnish suggestion which the representative of Nigeria had supported.

84. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed that the issue was a drafting one with no substantive implications and that the suggestion by the observer for Finland should be submitted to the Drafting Group.

85. *It was so decided.*

*The meeting rose at 12.30 p.m.*

### Summary record of the 456th meeting

Thursday, 20 June 1991, at 2 p.m.

[A/CN.9/SR.456]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.15 p.m.*

#### International Payments: draft Model Law on International Credit Transfers (*continued*) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

##### Article 9 (*continued*)

1. The CHAIRMAN invited the Commission to consider article 9(5). He said that in its written comments (A/CN.9/347, p. 60, sect. 19) the United Kingdom had proposed that the words "unless the payment order states otherwise" should be added at the beginning of the paragraph.

2. Mr. BHALA (United States of America) said that he opposed the proposal. He suggested the deletion of the paragraph, on the ground that, in the case which it envisaged, the beneficiary's bank would either pay the beneficiary by cheque or notify him that the funds had been deposited. It was up to the originator to inform the beneficiary that funds had been deposited with the beneficiary's bank. The Model Law should not attempt to regulate the relationship between the beneficiary and the beneficiary's bank, yet article 9(5) imposed an obligation on the beneficiary's bank in the situation in which the beneficiary did not even have an account with that bank. From a practical point of view, it should be remembered that some banks received up to 3,000 payment orders falling into that category each day.

3. Mr. GREGORY (United Kingdom) said that it would be desirable to make provision for cases in which there was no existing relationship between the bank and the beneficiary.

4. Mr. SCHNEIDER (Germany) said that, if paragraph 5 was deleted, the effect would be to require the sender to inform the beneficiary about the transaction. His delegation favoured the retention of the paragraph.

5. Mr. IWAHARA (Japan) said that it would be better to keep the paragraph and to amend it in accordance with the United Kingdom proposal.

6. Mr. CRAWFORD (Canada) said that his primary concern was the lack of time available to the beneficiary's bank for execution of a payment order. It ought to be permissible for the beneficiary's bank to transmit a cheque to the beneficiary by post.

7. Mr. GREGORY (United Kingdom) said that he would favour the idea of allowing the beneficiary's bank a longer period for giving notice.

8. Mr. POTYKA (observer for Austria) suggested that the word "give" should be replaced by the word "send".

9. The CHAIRMAN remarked that the aim of article 9 was to establish a kind of "gentleman's agreement" rather than a criterion for compensation for non-performance within a given time.

10. Mr. GREGORY (United Kingdom) said that article 16(6) provided for the liability of the beneficiary's bank for non-performance under article 9. With that in mind, he saw merit in



the Austrian suggestion. However, problems might arise if the expression "send notice" was used in one part of the Model Law and the expression "gives notice" in another.

11. Mr. BERGSTEN (Secretary of the Commission) said that there were precedents in other UNCITRAL documents for using the word "send" in such a context.

12. Mr. ABASCAL ZAMORA (Mexico) said that the implication of the existing text was surely that the parties were bound until the moment of receipt. The point made by the representative of the United Kingdom was important. If the Austrian proposal was nevertheless accepted, that should be done on the understanding that the same solution might not apply in the case of rejection of a payment order.

13. Mr. GREGORY (United Kingdom) said that the solution proposed might be valid for article 9(5), but prove unacceptable in articles 6 and 8, which would require further discussion.

14. Mr. NEWMAN (United States of America) said that the intention of the Model Law should not be to change banking practice. The obligation incumbent on the beneficiary's bank to make the funds available was implicit in the text, but it was for the beneficiary's bank to determine the way in which that obligation was fulfilled.

15. Mr. BURMAN (United States of America) suggested that the word "shall" should be replaced by the words "should if feasible".

16. Mr. KOMAROV (Union of Soviet Socialist Republics) said that it was his understanding that, if a bank received a payment order and the beneficiary had no account with that bank, the latter should be free either to execute the order itself or to find another bank with which the beneficiary did have an account. In that case the transaction would be governed by article 7.

17. Mr. GREGORY (United Kingdom) said that, as he understood it, the duty arising from paragraph 5 of article 9 was similar, although not identical, to that imposed by paragraph 1 of the article. It was not a recommendation but a rule of law.

18. Mr. ABASCAL ZAMORA (Mexico) expressed concern at the contradiction inherent in imposing an obligation on the beneficiary's bank in the text while at the same time saying that the obligation existing between the beneficiary's bank and the beneficiary was regulated by law. If it did that, the Commission would be interfering in the law regulating the relationship between the beneficiary and his bank, which would conflict with its previous decisions.

19. Mr. ADEDIRAN (Nigeria) considered that in practice the situation which the Commission was discussing was non-existent, since if a beneficiary was expecting a payment he would contact the sender to find out where it had been sent. It would be dangerous to impose the obligation in article 9(5) on a bank that had no relationship with the beneficiary.

20. The CHAIRMAN noted from a show of hands that a majority of the Commission approved the existing text of article 9(5) with the addition of the words "unless the payment order states otherwise" at the beginning of the paragraph, as proposed by the United Kingdom. He also noted that the Commission agreed that the question of the liability of the beneficiary's bank should be discussed in connection with article 16.

21. He invited the Commission to take up article 9(4). He said that the position of the United States and the Banking Federation of the European Community, as set out in their respective written comments (A/CN.9/347/Add.1, p. 16; A/CN.9/347, p. 68), was that the account number should prevail in cases of a discrepancy between words and figures. The Working Group had taken a different view and its text was before the Commission. In addition, the United Kingdom had proposed the deletion of the reference to the originator's bank (A/CN.9/347, p. 60, sect. 18). He asked whether there was any support for the idea that the account number should prevail in cases of uncertainty.

22. He noted from a show of hands that there was no support for that idea and that the Commission preferred the existing text with the amendment proposed by the United Kingdom.

23. Mr. DE BOER (Netherlands) said that in his view it was impossible to lay down a general rule on discrepancies between words and figures, since the situation differed according to whether the payment order was electronic or paper-based. Indeed the Model Law did not contain such a rule: the only rule it did provide on the subject was that, when a discrepancy was detected, notice must be given. If the discrepancy was not detected, in his view article 4(5) would operate.

24. Mr. NEWMAN (United States of America) explained that the Society for Worldwide Interbank Financial Telecommunications (SWIFT) system was used by some 85 States, including most of the members of the Commission. Within the SWIFT standard system there were fields identified by both name and number. When automated receiving banks received SWIFT payment instructions, most of them would examine only numbers. Since they would not halt each transaction in order to compare name and number, their procedure was not compatible with the present wording of paragraph 4 of article 9 as to identification of the intended beneficiary. Banks in countries belonging to the SWIFT system would be unable to comply with the rule set out in that paragraph.

25. The CHAIRMAN observed that a clear majority of the Commission had indicated its support for the existing text of paragraph 4 with the change proposed by the United Kingdom.

26. Mr. GREGORY (United Kingdom) said that, at a previous meeting (A/CN.9/SR.454, para. 53), the Commission had indicated its wish for the existing text of article 7(5) to incorporate the notion of detection. He would therefore propose a text for that provision which met the Commission's requirement and also—since a number of the issues raised by article 9(4) were similar to those raised by article 7(5)—a corresponding text for article 9(4).

27. The CHAIRMAN suggested that the Commission should revert to article 9(4) when the United Kingdom text was available.

#### *Article 7 (continued)*

28. The CHAIRMAN recalled that at a previous meeting the Commission had decided (A/CN.9/SR.454, para. 42) that one extra day should be provided for notification under article 7(4). He asked whether it wished to allow the receiving bank an extra day for compliance with its obligations under paragraphs 5 and 6 of article 7.

29. After a short discussion in which Mr. GREGORY (United Kingdom) and Mr. NEWMAN (United States of America) took part, the CHAIRMAN said he took it that an extra day should be provided for notification under article 7(5).



30. *It was so agreed.*

31. The CHAIRMAN said that it also seemed the wish of the Commission to allow the beneficiary's bank an extra day for compliance with its obligation under article 9(2).

*Article 10 (continued)*

32. The CHAIRMAN said that the following text had been proposed by the United States delegation for paragraphs 2 and 3 of article 10:

"(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."

The proposals seemed to be of a drafting nature, in view of the fact that the Commission had agreed to extend by one day the periods referred to in article 10(4) and (5) and article 9(2) and (3). It had also decided to do away with the words "payment date" in article 10(3). That might make it possible to combine paragraphs 2 and 3 of article 10.

33. With regard to the United States proposal for article 10(3), the words "when the funds are to be placed at the disposal of the beneficiary" might be replaced by the words "if required to be executed", because the Commission had expanded the notion of execution to embrace execution by the beneficiary's bank.

34. Mr. LE GUEN (France) said that the text proposed by the United States for paragraph 2 of article 10 referred to the business day after the day on which the payment order was required to be executed. However, he wondered how it was possible to speak only of a payment order in that paragraph, since the Commission was setting a deadline for compliance with article 7(4), which dealt in addition with an instruction which was not a payment order. He would like to know how such an instruction could give rise to a requirement of notice. Likewise, the United States proposal for article 10(3) referred to article 9(2), which also dealt with an instruction that was not a payment order. It was not possible for instructions that were not payment orders in articles 7(4) and 9(2) suddenly to become payment orders in article 10(2) and (3). But the problem might be only one of drafting.

35. He found that the procedure of setting different deadlines for different purposes was becoming complex and might not be very practical for the staff of a medium-sized bank. It might be preferable to have a single deadline such as the one laid down in article 10(1); that would be clearer and help to improve the operation of international trade and financial systems.

36. Mr. CONOBOY (United Kingdom) said that his delegation would prefer the phrase "as soon as reasonable" to the words "as soon as possible". The word "possible" could give rise to different interpretations.

37. Mr. BHALA (United States of America) agreed with the French representative that the question of the term "payment order" was a matter of drafting. With regard to the question of deadlines, he agreed on the need for clarity in the text but stressed that they were important because they involved duties of notification which gave rise to liability if they were not met.

His delegation could accept the replacement of the word "possible" by the word "reasonable".

38. Mr. CRAWFORD (Canada) recalled that the expression "commercially reasonable" had caused problems when it had been discussed in connection with article 4(3). A possible alternative would be the word "promptly".

39. Mr. BURMAN (United States of America) concurred. He reiterated his delegation's view that the exact phraseology of the provision should be left to the Drafting Group.

40. Mr. LE GUEN (France) disagreed, pointing out that the Commission had not expressed a unanimous opinion on the matter.

41. The CHAIRMAN feared that the inclusion in paragraphs 2 and 3 of article 10 of a qualifying phrase of the kind under discussion could lead to disputes involving claims for breach of contract and damages.

42. Unless he heard any objection, he would take it that the Commission referred the United States proposal for paragraphs 2 and 3 of article 10 to the Drafting Group on the understanding that they would not contain the qualifying phrase "as soon as possible" but would allow an extra day for notice to be given without any element of delay.

43. *It was so decided.*

44. Mr. BISCHOFF (observer for Switzerland) said that whatever wording was finally decided on for article 10(2), it should refer to paragraph 6 as well as paragraphs 4 and 5 of article 7.

45. The CHAIRMAN replied that the Commission had decided that an extra day should be allowed for notification under paragraphs 4 and 5 of article 7 but not for action under paragraph 6.

46. Ms. KOSKELO (observer for Finland) said that one point on article 10(3) might not have been resolved, namely that of the date to which it referred. In many cases, a payment order would not contain a payment date; her preference would be to see the date referred to as an "execution date".

47. Mr. ABASCAL ZAMORA (Mexico) asked for clarification of the relationship between article 10 and the Commission's decision not to allow an extra day for action under article 7(6).

48. The CHAIRMAN repeated that in the discussion on paragraphs 4 and 5 of article 7 the Commission had agreed to provide for an extra day for notification. The decision in regard to article 7(6) had been that no such extra time was required.

49. Mr. LIM (Singapore) pointed out that article 7(6) continued to refer to article 10. He wondered if that was a drafting error.

50. The CHAIRMAN said that was a matter for the Drafting Group.

51. Mr. CONOBOY (United Kingdom) said that the United States proposal for article 10(2) referred to notice being given not later than the business day after the day when the payment order was required to be executed. However, reference back to



the decision which the Commission had taken on article 10(1), which dealt with the business day on which the payment order was required to be executed, showed that not one but two days were mentioned, namely the day on which the payment order was received and the following day.

52. The Commission should decide, before referring the paragraph to the Drafting Group, whether the time-limit for notification should be based on the day on which payment was received or the following day. He would like to know whether the extra days contemplated in the United States proposal were cumulative.

53. The CHAIRMAN said that he had assumed that the extra day proposed by the United States was additional to what was provided for under the rule in article 10(1). The reasoning behind that was that the extra day was not intended for normal business but was time required for investigation purposes. He asked the Commission to agree that the wording could be entrusted to the Drafting Group on that basis.

54. *It was so decided.*

55. The CHAIRMAN invited the Commission to take up article 10(5). He drew attention to the proposal submitted by Canada (A/CN.9/347, p. 10, para. XXXVIII).

56. Mr. BHALA (United States of America) objected that the phrase "ordinary course of business" proposed by Canada was not precise enough. His delegation felt that more than a mere drafting matter was at issue in the Canadian proposal and accordingly it could not support it.

57. The CHAIRMAN noted the absence of outright support for the Canadian proposal. He would therefore take it that the Commission approved the existing text.

58. *It was so decided.*

59. The CHAIRMAN invited the Commission to take up article 10(6).

60. Mr. SCHNEIDER (Germany) said that he had some difficulty in accepting the paragraph as it stood. He questioned whether it would always be practical to treat branches and separate offices of a bank in different States as separate banks. He cited the example of a group which provided electronic

or bank-wide payment systems and had a central office in another State than its head office as well as branch offices in that same State; with the originator's branch and the beneficiary's branch in that same State, payment orders would pass between the branches without there being, in the legal sense, a contractual relationship between them. A bank in that system would be in a position to retain monies for some time without redress. He suggested that the question of regarding separate offices as banks was more complicated than at first appeared.

61. The CHAIRMAN said that his advice from the Secretariat was that branches were mentioned in the Model Law on the assumption that they would conduct transfers independently. If the representative of Germany was linking the branch to the main office and regarding the two as conducting one operation, his position seemed to be very different from that of the Working Group.

62. Mr. SCHNEIDER (Germany) said that he would be satisfied with a mention in the Commission's report that the relationship between a branch and its main office was not a contractual relationship nor deemed to be such.

63. Mr. CRAWFORD (Canada) asked whether in that case the text itself should remain as it was.

64. Mr. NEWMAN (United States of America) said that if the representative of Germany sought it to be placed on record that branches of the same bank were not separate banks, that clashed fundamentally with paragraph 6. In the example which the representative of Germany had given of two branches and a main office, whether connected electronically or not, they were still the same bank in the same State and the originating bank which was one branch would pass a payment order to the head office to pay another branch. The question was whether they were three separate banks or not. If the answer was yes, paragraph 6 should remain as it was; if not, paragraph 6 needed amendment.

65. The CHAIRMAN said that Germany's difficulty appeared to be with the general law of contract, but that had nothing to do with the Model Law. He hoped that an accommodation could be found between the views of the representative of Germany and those delegations which could accept the paragraph as it stood.

*The meeting rose at 5.05 p.m.*

### Summary record of the 457th meeting

Friday, 21 June 1991, at 9.30 a.m.

[A/CN.9/SR.457]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 9.45 a.m.*

International Payments: draft Model Law on International Credit Transfers (*continued*) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

#### Article 11

1. The CHAIRMAN invited the Commission to take up paragraphs 1 and 2 of article 11 together, since they dealt with

comparable situations. He suggested that, for the sake of consistency with the wording of paragraph 2, the words "and the beginning" in paragraph 1 should be replaced by the words "or the beginning".

2. Mr. BHALA (United States of America) pointed out that in practice in the commercial world there was an average of one revocation order for every 30 amendments made to a payment



order. He therefore suggested that a reference to amendments should be inserted in paragraphs 1 and 2 of article 11.

3. Mr. GREGORY (United Kingdom) said that, in view of the comment made by the United States representative, the Model Law should in principle deal with amendments. If a reference to amendments was inserted, however, it would be necessary to state what an amendment was and what a bank did when it received one. He suggested that, rather than embarking on such a change at the present late stage, the Commission should leave the article as it was in that respect and note that the Model Law did not deal with the question of amendments to payment orders.

4. He approved the Chairman's drafting suggestion. He drew attention to his Government's proposal in its written comments (A/CN.9/347, p. 62, sect. 25) that the term "payment date" in paragraph 2 should be replaced by the term "execution date". Since the meaning of the latter term had been extended to include the beneficiary's bank, it would be appropriate to make that change.

5. *The United Kingdom proposal was adopted.*

6. Mr. IWAHARA (Japan) agreed with the view expressed by the representatives of the United Kingdom and the United States of America that the Model Law should not overlook the question of amendments to payment orders. Since time was short, however, it might be best to leave the matter for interpretation.

7. Mr. ADEDIRAN (Nigeria) concurred. The sender had the right to amend a payment order before it was sent. At the present juncture it would be best to allow for the exercise of that right through interpretation of the Model Law.

8. Ms. BOUM (Cameroon) said that if amendments of payment orders were more numerous than revocations, the Working Group must have discussed them. She wondered why the Working Group had not catered for them in the draft Model Law.

9. Mr. ABASCAL ZAMORA (Mexico) expressed concern at the idea that the problem should be left for interpretation. That could be taken to mean, for example, that the Model Law simply did not deal with amendments and that they were a matter for national legislation. Alternatively, the Commission might consider stating, on the lines of article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods, that matters not expressly dealt with in the Model Law would be dealt with in conformity with the general principles on which it was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

10. Mr. BHALA (United States of America) said that, if the Commission decided not to include a reference to amendments in the Model Law, he would be satisfied if it was noted in a commentary to the instrument that the issue was important in the commercial world; and that, although it was not dealt with explicitly in the Model Law, the text contained nothing to preclude amendments being made to payment orders and might be considered to cover them.

11. The CHAIRMAN suggested that, for the time being, the Commission might proceed on the assumption that the Model Law would not refer to amendments to payment orders.

12. Mr. LE GUEN (France) observed that the Commission had rejected a proposal by the United States to insert a reference

to amendments in article 2(j) (A/CN.9/SR.443, para. 22). He agreed with the view expressed on the subject by the United Kingdom representative.

13. Mr. HERZBERG (observer for Israel), referring to paragraph 1, said that if a bank executed a payment order before the date of execution, he did not see how it could act on a revocation order, unless it was able to pass it on to an intermediate bank in the chain. It might be best if the paragraph referred simply to execution.

14. Ms. KOSKELO (observer for Finland) suggested that it might be necessary to set a limit on amendments to payment orders. If an amendment entailed a very large increase in an order, it might cause difficulties for the bank concerned.

15. Mr. GREGORY (United Kingdom) said that the observer for Israel had raised an important point which deserved consideration. The Commission had not yet reached agreement on a definition of the term "execution date", but since article 10 now provided that execution must take place on the day an order was received or on the next day, the bank had a choice in the matter. For most purposes it would make sense if the execution date was defined as the date by which a bank was required to execute the payment order, which effectively would mean the later of the two days in question. That might, however, be unsatisfactory in the case with which article 11 was concerned. For example, a bank might execute a payment order on the day of receipt and receive a revocation order effected before the later of the actual time of execution and the beginning of the execution date; if the execution date was defined in the manner he had just described, the later of the two days would be the second day. Banks should not be discouraged from executing an order on the day of receipt where possible, but the fact that they might be required to act on a revocation order effected as late as the second day could have that result. He was therefore uncertain whether the rule in paragraphs 1 and 2 of article 11 was appropriate for the Model Law.

16. Mr. LE GUEN (France) said that he did not entirely agree with the United Kingdom representative's reasoning. There was nothing in article 11 to provide that a bank should automatically carry out a revocation order. If a bank received a revocation order before the execution date for the payment order, it would be free to decide if it had a reasonable opportunity to act or not. If a bank which had executed a payment order on the first day received a revocation order after execution, it could not reasonably be expected to execute the revocation order. He suggested that the problem might be solved simply by deleting the words "and the beginning of the execution date" at the end of paragraphs 1 and 2.

17. Mr. GREGORY (United Kingdom) said that the reason for the inclusion of the words "and the beginning of the execution date" was to ensure that a revocation order received before the beginning of the execution date was properly effected. Otherwise a bank could claim that it had not had a reasonable opportunity to act because it had already executed the payment order.

18. Mr. ADEDIRAN (Nigeria) agreed with the representative of France. The problem with revocation was that once a payment order had been executed in fact, it could not be revoked. If the payment order had been executed on the day it was received or the following day, the revocation order would not be valid. It would be better to provide simply that the revocation would not be valid after the actual time of execution.

19. Mr. GREGORY (United Kingdom) said he felt sure that the idea which the Commission wished to express was that the



bank must have a reasonable opportunity to act before the later of the actual time of execution of the payment order and the earliest date on which it was required to execute it under article 10. That might be the day of receipt or, if the circumstances in subparagraphs (a) and (b) of article 10(1) applied, a later date.

20. Mr. HUANG Yangxin (China) said that there was a close link between paragraphs 1 and 2 of article 11 and paragraph 5 of the article. The reason for the mention of the actual time of execution and the beginning of the execution date was that they applied mainly to a fixed date for execution as stipulated in the payment order. Under paragraph 5, if a receiving bank executed a payment order before the stipulated payment date and then received a revocation order, it would not be entitled to reimbursement; even if it had made the payment before the execution date, it would still have to execute the payment order. It might therefore be advisable to consider wording which would allow the receiving bank to execute a payment order early, without a stipulated execution date; in other words, the actual time of execution mentioned in paragraphs 1 and 2 would apply only to payment orders which specified a future date of execution.

21. Mr. LOJENDIO OSBORNE (Spain) said that the French representative had proposed the deletion from article 11 of the reference to execution date. A receiving bank late in executing a payment order was liable under article 16; if there was a revocation order in those circumstances, his understanding was that acceptance of the French proposal—leaving only the notion of effective execution in article 11—would mean that consequences would arise under article 11(5).

22. Mr. CRAWFORD (Canada) considered that the French suggestion would upset the balance of article 11. The existing text defended both the interests of the sender, in guarding against premature execution, and the right of the receiving bank to have a reasonable opportunity to take action.

23. *In response to a suggestion by the Chairman, the Commission agreed to maintain the balanced approach to revocation orders which was expressed in the existing text of paragraphs 1 and 2 of article 11.*

24. The CHAIRMAN called for comments on the use of the term "execution date" in article 11.

25. Mr. SCHNEIDER (Germany) considered that the term "execution date" meant the time when an obligation fell due, but that in construing it a distinction should be drawn between that time and the time when it was fulfilled. He therefore proposed the replacement of the words "execution date" by the words "time when a bank may execute".

26. The CHAIRMAN said that in his view the German suggestion was inconsistent with the decision which the Commission had just taken.

27. Mr. GREGORY (United Kingdom) thought that might not be the case. Acceptance of the German suggestion would exclude premature execution. It would mean that the latter part of article 11(1) would indicate that the receiving bank should have a reasonable opportunity to act before the later of the actual time of execution and the earliest date when it was permitted to execute under article 10. If the receiving bank had not executed the payment order when the revocation order arrived, the point raised by Spain would be taken care of. If it had executed the payment order, the revocation would not be applicable. If the payment order specified a later payment date, the bank would not have been allowed to execute the payment

order on the day of receipt but would have been obliged to execute it on the date specified. The solution seemed perfectly satisfactory.

28. Ms. KOSKELO (observer for Finland) suggested that it might be clearer to use the words "the later of the actual time of execution and the day on which the payment order should have been executed under article 10(1)(a) or (b)".

29. Mr. HUANG Yangxin (China) suggested that the paragraph might refer to the period between the time when the receiving bank was entitled to execute the payment order and the day on which it was obliged to execute it.

30. Mr. DE BOER (Netherlands) said he believed that banks were always permitted to execute payment orders early if no execution date was specified.

31. Mr. BHALA (United States of America) said that the question being discussed was extremely technical and consequently it was often difficult to understand the implications of every proposal. He believed that the original text catered in a perfectly satisfactory manner for the point under discussion. To illustrate that, he had worked out a hypothetical case involving a four-day period: on day one the receiving bank received a payment order with an indication that day four should be the execution date. On day two the receiving bank executed the order—prematurely. On day three the sender sent a revocation order, day four still being the execution date. With the present wording of article 11, the revocation order would be effective. Under article 10(1) as redrafted by the Commission, a receiving bank was required to execute a payment order on the day on which it received it or, at the latest, on the following day. The hypothesis he had described would be valid with article 10(1) so worded.

32. Mr. GREGORY (United Kingdom) said that he was not sure whether the final point made by the previous speaker was correct. His delegation's problem was with the term "execution date", which seemed inadequate for the situation in which an order was received by a bank which wished to execute it on the same day. If it did so and a revocation order arrived on the second day, it was not clear to him if the beginning of the execution date would be the first day or the second. If the term "execution date" meant "date by which execution must take place", which would seem sensible, the time concerned would be the end, not the beginning, of the period.

33. Mr. SCHNEIDER (Germany) said that he wished the text to embody the idea that a bank was permitted, but not obligated, to execute the payment order during a given period.

34. Mr. YIN Tieou (China) proposed that the text of paragraphs 1 and 2 of article 11 should remain as they were. If no execution date was specified in the payment order, that date should be the date of receipt of the payment order or the following day. Either was legally acceptable.

35. The CHAIRMAN recalled the Commission's decision, in regard to article 10(1), that the day on which a payment order should be executed was the day of its receipt or the following business day. In principle, execution should take place on the same day, not the "first" or the "second day"; it would, he believed, weaken that principle if reference was made to the first or the second day of execution in article 11.

36. Mr. GREGORY (United Kingdom) said that the matter under discussion involved the whole concept of execution and had implications for provisions of the text other than article 11. He regretted that he could not agree with the Chairman's view.



37. Mr. CONOBOY (United Kingdom) said that, if a bank saw any possibility that it might receive a revocation order after it would normally have executed the payment order, it would delay execution; consequently, as his delegation had indicated earlier in the meeting, acceptance of the rule in paragraphs 1 and 2 of article 11 would create a bias towards later execution. If a bank executed a payment order on the day of receipt, and a revocation order was received on the following day, the revocation order would be ineffective.

38. Mr. CRAWFORD (Canada) said that, in considering the meaning of the term "execution date", the Commission must take into account the need to adhere to the principle of same-day execution. He hoped that the comments by the United Kingdom delegation did not imply that premature execution should be encouraged.

39. Mr. LE GUEN (France) said that there was a substantial difference between the English and French versions of article 11(1). He considered the French version more satisfactory.

40. Mr. SOLIMAN (observer for Egypt) said that the French version seemed to be much clearer than the English version, in the light of the Arabic version.

41. The CHAIRMAN invited the Commission to consider the following amendment to article 11(1): to replace the words "before the later of the actual time of execution and the beginning of the execution date" by the words "before the actual time of execution or the beginning of the day on which the payment order ought to have been executed under article 10(1)(a) or (b), if later". Unless he heard any objection, he would take it that the Commission accepted his suggestion and referred article 11(1) to the Drafting Group as reproduced in document A/CN.9/344, with that change.

42. *It was so decided.*

43. Mr. HEINRICH (Bank for International Settlements) said that the Commission might have overlooked one question relating to article 11, namely the principle, accepted by the Working Group and mentioned in the Secretariat's commentary (A/CN.9/346, p. 64, para. 2), that a payment order was irrevocable. The Model Law should therefore limit the possibility of revocation and make clear what the time-limit was for revocation. One possibility mentioned by a central bank that had submitted comments to the Bank for International Settlements was to state that revocation would no longer be possible after the account of the originator had been debited.

44. Mr. ABASCAL ZAMORA (Mexico), reverting to the question of amendments to payment orders, said that UNCITRAL had a reputation for formulating viable legal instruments. His delegation believed that the Model Law would not fall into that category if it failed to refer to amendments to payment orders. The Commission might analyse the subject—which the Working Group had not done to any great extent—and seek a suitable course of action; if it decided that the Model Law would not deal with amendments, that should be stated explicitly and it should be made clear that such matters should be left to national legislation. It might, as he had suggested earlier in the meeting, formulate a provision along the lines of article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention). It would be regrettable, and bad law, if the Model Law remained silent on the question of amendments. If that proved to be the decision of the Commission, his Government wished that view to be reflected in the Commission's report.

45. Mr. BURMAN (United States of America) said that he associated himself with the views expressed by the representative of Mexico. In the real world of banking, amendments to payment orders were far more common than revocations. Most of the fundamental matters related to credit transfers were addressed in the Model Law, so there was no reason to exclude amendments.

46. Mr. GREGORY (United Kingdom) agreed that a general provision on interpretation similar to article 7(2) of the Vienna Sales Convention would be a good way of dealing with the matter. It should be included in article 18 or a later article. He did not, however, see any need to include a specific reference to amendments in article 11, since the general provision would encompass amendments. The fact that a matter was not explicitly addressed in the Model Law did not mean that it was excluded from its operation; on the principle embodied in article 7(2) of the Vienna Sales Convention, the Model Law would apply to all matters related to credit transfers. Such matters clearly included amendments to payment orders. That could, perhaps, be explained in the report of the Commission.

47. Mr. RENGGER (Germany) said the question of amendments to payment orders deserved full discussion. The Commission must first decide whether or not the Model Law should explicitly address the matter and, if not, whether it was necessary to include in the Model Law a general rule similar to article 7(2) of the Vienna Sales Convention.

48. Mr. POTYKA (observer for Austria) agreed that the matter was important and deserved careful consideration, even if the final decision was to leave the Model Law silent in respect of amendments to payment orders.

49. Mr. KAKOLECKI (observer for Poland) endorsed the views expressed by the representative of Mexico. He was also impressed by the point made by the representative of the United States of America about the greater frequency of amendments. Why should the Model Law deal only with the less frequent occurrence, revocation?

50. Mr. ADEDIRAN (Nigeria) wondered if the Commission was trying to introduce too much detail into the Model Law. Amendments to payment orders were a practical problem between sender and receiving bank. He saw nothing against permitting amendments if they were reasonable and within the power of the receiving bank to implement. He could accept a provision to that effect if it was felt necessary.

51. Mr. KOMAROV (Union of Soviet Socialist Republics) said that a provision similar to article 7(2) of the Vienna Sales Convention would be a useful way of meeting the concerns of the representative of Mexico, as the representative of the United Kingdom had demonstrated.

52. Mr. CRAWFORD (Canada) said that, to put matters in perspective, while amendments might be more common than revocations, payment orders as such were vastly more frequent than amendments. The inclusion of a general provision similar to article 7(2) of the Vienna Sales Convention was a good suggestion, but he would prefer the Model Law to indicate explicitly that amendments would be treated in the same way as revocations.

53. Mr. PELICHET (Hague Conference on Private International Law) warned the Commission of the risk implicit in transposing a provision such as article 7(2) of the Vienna Sales Convention from a convention to a model law, since the circumstances envisaged in the two kinds of instrument were not the same.



54. Mr. FUJISHITA (Japan) said he preferred that the Model Law should remain silent on the matter. Perhaps later inclusion of a general provision on interpretation might be discussed.

55. Mr. HEINRICH (Bank for International Settlements) said that an amendment could be viewed as a revocation of a payment order and the creation of a new one.

56. Mr. BOSSA (observer for Uganda) supported the explicit reference suggested by the representative of Canada.

57. Ms. PETRE (Society for Worldwide Interbank Financial Telecommunications) said that the practice in her organization, SWIFT, was to treat amendments as both a revocation and a new payment order.

*The meeting rose at 12.45 p.m.*

## Summary record of the 458th meeting

Friday, 21 June 1991, at 2 p.m.

[A/CN.9/SR.458]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.25 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

### Article 11 (continued)

1. The CHAIRMAN said that there had been general agreement in the Commission that there should be a specific reference to amendments in the Model Law. Consequently, he suggested that the following new paragraph be added to article 11, subject to any editorial changes by the Drafting Group: "The principles contained in this article will apply to the amendment of a payment order."

2. Following an indicative show of hands, he noted that most members of the Commission were in favour of the text.

3. Mr. VASSEUR (Banking Federation of the European Community) said he endorsed the Chairman's approach to the problem but wondered if the text would cover all the possible kinds of amendments, not all of which would necessarily take the form of a revocation.

4. For instance, in the case of an originator who wished to increase the amount of a payment order, no revocation would be needed. If, however, he desired to decrease the amendment, the earlier payment order would have to be revoked.

5. The CHAIRMAN said he thought that the proposal would cover all interpretations.

6. Mr. ABASCAL ZAMORA (Mexico) requested that, time permitting, the Commission should consider the adoption of a general rule on interpretation.

7. The CHAIRMAN agreed to that request.

8. He drew attention to the Secretariat's comments on paragraph 3 of article 11 (A/CN.9/346, pp. 65-66) which implied that the paragraph might be redundant. However, the Working Group had considered it useful to retain it and there appeared to be no objection in the Commission to its retention.

9. Inviting the Commission's attention to article 11(4), he recalled that it had decided to make an exception to the authentication rule in article 4(2), (3) and (4) and an amendment to the revocation of payment order provision in article 4(1). It

had added the same reference to the revocation order in article 4(4). Since the reference to authentication had already been made, he wondered whether article 11(4) was still needed.

10. Mr. CONOBOY (United Kingdom) said that it had hitherto been considered that the provision in paragraph 4 was a useful one. It was important to remember that there was no provision in the Model Law for a bank to reject a revocation order, whereas, if it had doubts about the authenticity of a payment order, it could always reject it. There was thus some merit in retaining the provision.

11. The CHAIRMAN said he wondered whether, if a payment order had been authenticated, a revocation order would have to be authenticated in the same manner.

12. Mr. CONOBOY (United Kingdom) said that, since the Working Group had not wished to insist that the method of authentication should necessarily be the same, paragraph 4 did not prescribe any rule for authentication.

13. Mr. BURMAN (United States of America) said he thought that paragraph 4 should be deleted. However, if the United Kingdom proposal were being considered, his delegation would have to propose an amendment providing that a revocation order must be authenticated if the payment order to which it attached had also to be authenticated. It would be an extraordinary restriction on commercial practice to require that all revocation orders be authenticated when article 4 did not provide that all payment orders had to be authenticated.

14. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that, in view of the important consequences of revoking a transfer, his delegation preferred to retain paragraph 4 as it stood.

15. The CHAIRMAN inquired whether the retention of article 11(4) would be compatible with the change made to article 4.

16. Mr. ABASCAL ZAMORA (Mexico) replied that there was a slight difference in interpretation. He endorsed the view of the United Kingdom representative.

17. He drew the attention of the Drafting Group to a translation error in the Spanish version of article 11(4), which referred to a payment order instead of a revocation order.



18. Mr. GREGORY (United Kingdom) said it was unclear to him why the changes to article 4 made article 11(4) unnecessary.

19. The CHAIRMAN replied that, on the assumption that the same method had to be used for the revocation as for the payment order, article 11(4) was inconsistent with article 4, since authentication was not required for the payment order. However, if the same method was not required, the paragraph could stand.

20. Mr. POTYKA (observer for Austria) said that he thought the Commission had decided that a handwritten signature would not be considered to be an authentication. He asked whether, if an ordinary customer had signed a payment order and then wished to revoke it, he could do so by sending in a signed order of revocation, even if article 11(4) was retained.

21. The CHAIRMAN, having answered the observer for Austria in the affirmative, asked how many members of the Commission were opposed to the retention of paragraph 4.

22. Mr. BURMAN (United States of America) said that, if the paragraph was amended to make it more flexible, his delegation would be able to accept it, but it still preferred to delete it.

23. Mr. LE GUEN (France) endorsed the United States position that the paragraph should either be deleted or amended to make it more flexible. In that connection, he drew attention to the French Government proposal (A/C.9/347/Add.1, p. 4) that article 11(4) should be redrafted to read: "When a revocation order must be authenticated, this need not necessarily be done by the same method as the payment order."

24. Mr. ABASCAL ZAMORA (Mexico) said he agreed with the representatives of the United Kingdom, United States and France. He suggested that the Drafting Group be asked to revise the paragraph to take account of the fact that a revocation order need not necessarily be authenticated in the same way as a payment order.

25. Mr. HUANG Yangxin (China) said that there was a contradiction in that the Model Law did not provide that the payment order must be authenticated. He suggested wording on the following lines: "A revocation order which occurs after a payment order has been authenticated must also be authenticated". If a payment order did not have to be authenticated, a later revocation should not have to be authenticated either.

26. Mr. ABASCAL ZAMORA (Mexico) said that it was necessary to state that the revocation must be authenticated or authorized, to reflect the view of the Working Group that more flexibility with regard to revocation was needed.

27. The CHAIRMAN said that he took it that the members of the Commission agreed that paragraph 4 should be retained and that the Drafting Group should be requested to clarify it, if necessary, on the lines proposed by the French delegation.

28. *It was so agreed.*

29. The CHAIRMAN, inviting the Commission to consider article 11(5) and (6), recalled that it had been proposed that paragraphs 5 and 6 should be combined. He suggested that the Drafting Group should be entrusted with the task of preparing an appropriate combined text. If he heard no objection, he would take it that the Commission wished to approve paragraphs 5 and 6 on that understanding.

30. *It was so decided.*

31. Mr. GREGORY (United Kingdom) said that his Government's proposal for a new paragraph to follow paragraph 6 (A/CN.9/347, p. 61) was also related to article 13, since both article 11 and article 13 dealt with a situation in which there would be a refund either because the payment order or credit transfer had been revoked or because the money-back guarantee had been invoked under article 13.

32. In both articles, the refund was passed backwards along the same chain as the original credit transfer in the forward direction, resulting in the fact that the banks involved in the forward direction were also involved one by one in the opposite direction. His delegation believed that it was unduly restrictive to insist that the refund had to be made in that manner. There might well be circumstances in which a refund could be provided directly to the originator and the Model Law should permit a different route in the backward direction.

33. There might be good reasons why the backward transaction should not take place in the same manner as the forward transaction if, for example, one of the banks became insolvent. Under articles 11 and 13 as currently drafted, if such an incident occurred, the operation of the chain was such that the bank downstream from the insolvent intermediary would have no choice but to pass on the refund to the insolvent bank. That clearly would not be in the interest of the originator, who wished to recover his money.

34. During the Working Group's discussion of the question, one objection to a provision whereby an insolvent bank could be skipped had been that it could interfere with netting arrangements in which the banks involved in the chain were operating. He wished to make it clear that his delegation's proposal would not disturb any netting arrangements and he drew attention to the fact that it began with the words "Without prejudice to obligations under any agreement that nets obligations bilaterally or multilaterally . . .".

35. Mr. SCHNEIDER (Germany) said he fully supported the United Kingdom proposal. He recalled the view expressed in the Working Group that all the various types of banking procedures should be covered.

36. Mr. BURMAN (United States of America) said that while his delegation understood the good intentions of the United Kingdom's proposal, it found it unacceptable. It was not realistic to use the expression "without prejudice to" netting systems, while behaving as if they did not exist.

37. In banking transactions that made use of funds transfer systems and engaged in multilateral or bilateral netting, the rights of the parties might change. The United Kingdom approach would not ensure the protection of the rights of the parties, who might in various ways have acquired obligations under a netting system. It should not be forgotten that insolvency provisions were dealt with under very separate legal regimes.

38. Mr. CONOBY (United Kingdom) said that it was not his delegation's intention to alter insolvency law and he did not believe that its proposal did so. In the real world, one of the banks in the chain might well provide a refund to the originator by simply sending a cheque through the post, thereby avoiding the refund chain of a particular forward transaction.

39. Mr. GREGORY (United Kingdom) said it was true that the existence of netting systems could not be ignored. Under his delegation's proposal, however, a bank was not required to take advantage of the rule in question. In that connection, he drew attention to the statement in the proposal that the bank "is



discharged from that obligation to the extent that it makes the refund direct to a prior sender".

40. Not all payments were made through a netting system, and a bank that was properly advised would be able to determine whether there was any risk of a conflict with a netting system. In short, it could take advantage of the rule in circumstances when it deemed it appropriate to do so.

41. Mr. BURMAN (United States of America) said that the United Kingdom proposal would authorize the skipping over of what might be prior and structural arrangements with possible legal implications. In his opinion, a Model Law that authorized a "skip" would not find easy acceptance in the commercial banking world.

42. Mr. DE BOER (Netherlands) suggested that the United States objection to the United Kingdom proposal might be met by amending the beginning of the text to read "Without prejudice to any agreement that nets obligations bilaterally or multilaterally . . .".

43. Mr. SCHNEIDER (Germany) said that the Commission was dealing not with insolvency law but rather with substantive law. In his delegation's opinion, it was essential that the funds should be returned to the originator. The point of departure in the Commission had always been that, as a general rule, the idea of netting schemes should be excluded when stating that the originator had a direct claim.

44. Mr. CRAWFORD (Canada) said he supported the United Kingdom proposal. While it was true that the Commission was trying to avoid interfering in domestic insolvency law, it was inevitable that the results of its work could have an indirect effect on such laws, which would look to the Model Law to ascertain if money was owed to the insolvent bank.

45. He had some difficulty with the opening words "Without prejudice to its obligations", as he thought that rights should, perhaps, be included as well. The alternative was to make no reference at all to netting agreements which, he agreed, were largely irrelevant. Although money being refunded was thought of as money going back into the system, the fact was that any transaction that had been netted and settled was finished. The refund was a new payment. Most schemes settled daily, so that there was little danger of refunding an unsettled payment.

46. As for the United Kingdom representative's suggestion that a bank might send a cheque to the originator, he was not sure that the words "prior sender" in the proposed text would permit that.

47. Mr. BURMAN (United States of America) said he wished to make sure that his delegation's views on that fundamental and significant topic were clearly understood. The Working Group had discussed and rejected a similar proposal on the grounds that it was disruptive, so some very strong reason would be required for that decision to be reversed.

48. He was not arguing the merits of the netting system, but endeavouring to contribute to a Model Law which would not be ignored by people using high-volume netting systems. Where there was a "skip rule", there could not be netting and that would mean that the Commission would be cutting itself off from contemporary developments in banking. If such a decision were taken, then his delegation would ask for its views to be inserted as a statement in the final report.

49. Mr. BERGSTEN (Secretary of the Commission) recalled the discussions on somewhat similar lines which had taken place

in the Working Group when a similar proposal, referred to as the "skip rule", had been studied. The arguments for fairness were manifest: if a refund had to go back to an insolvent bank, which was responsible for passing it on down the line, that was clearly a serious matter. On that occasion also, the United States delegation had expressed concern about netting arrangements.

50. He had studied the literature relating to article 4A of the Uniform Commercial Code and knew that a proposal on similar lines had been analysed by the Federal Reserve Bank in the United States in the context of CHIPS. In the context of netting through CHIPS, the proposals had not worked. It had been obvious that the matter would be raised again, and it was to be hoped that the United States delegation would make available not just its conclusions, but its background experience, such as the Federal Reserve Bank studies he had mentioned.

51. The Working Group had been well aware of the problems in the case of intercurrency transactions, where netting arrangements might well be in the middle, and it had rejected the proposal.

52. Mr. HEINRICH (observer, Bank for International Settlements (BIS)) said that, at various meetings of the Commission and the Working Group, BIS had raised a number of matters of concern in regard to netting schemes and its preference that there should be no reference at all to such schemes in the Model Law. The term "netting scheme" was far too vague, the variations in operation from country to country were too great and, for the concept to have any relevance at all, distinctly more than a simple reference would be needed.

53. Mr. GREGORY (United Kingdom) said that he had found the Secretary's intervention very helpful. The discussion taking place in the Commission at the moment did *not* in fact appear to him to be a replica of that previously held in the Working Group. In the Working Group, the United States delegation had taken the same stand as it was currently doing in the Commission. His own delegation's response at that time had been to hold back, feeling it to be inappropriate to introduce a rule which would not be implemented in the United States.

54. When, at a later stage, it had had an opportunity to study the material supplied by the United States delegation and to consider it in the light of the way banks operated in the United Kingdom, his delegation had come to the conclusion that its proposal was a feasible one.

55. If it would reassure those delegations which thought that the opening words of his Government's proposal were too narrow, they could be revised to read "Without prejudice to any rights and obligations".

56. Mr. SCHNEIDER (Germany) said that the merit of the United Kingdom proposal—which his delegation supported—was the option it offered to a refunding bank to give money back direct to the originator, instead of paying it to the receiver of an insolvent bank. In theory, the originator could work fast to obtain an injunction to stop payment to the insolvent intermediary bank, but he would probably not be quick enough in practice and even then the injunction would confer no legal right to his money.

57. Mr. CRAWFORD (Canada) said that the suggestion that there should be no reference to netting seemed a sensible one. However, if CHIPS could still not function within the Model Law, even without such a reference, that would also make it difficult for him to support the proposal.



58. Mr. CONOBY (United Kingdom), replying to a question by the CHAIRMAN, said that, if his Government's proposal were rejected, a bank which chose to make refunds under article 11 or 13 in any way other than through the chain would presumably have to rely on the contract-out provision.

59. Following an indicative show of hands, the CHAIRMAN concluded that, while more delegations were in favour of the United Kingdom proposal than opposed to it, a large number of members had not declared themselves either way. He asked the delegations of the United Kingdom and the United States to discuss the issue between themselves in an effort to arrive at a compromise. Failing such a compromise, the United Kingdom proposal would be adopted.

#### Article 13

60. The CHAIRMAN recalled that many delegations appeared to feel that a scheme of absolute liability was excessively harsh. That was particularly true of the first sentence of paragraph 2, although even the rest of that paragraph was widely thought to be too harsh. In fact, some delegations would be unable to accept the paragraph as a matter of fundamental principle, if no exceptions were provided.

61. Mr. SCHNEIDER (Germany) said he was glad to find that the Commission was prepared to discuss the matter. While he would support all efforts to find a compromise, his delegation had its own proposal to make.

62. The procedure his delegation would prefer involved focusing on the money-back guarantee in its legal environment. It was most important to understand the whole environment in relation to banking supervisory law, to deposit protection schemes and to competition between banks. If the Commission would first study the matter in that way, his delegation would then explain its own proposal.

63. Mr. BERGSTEN (Secretary of the Commission) drew the Commission's attention to a letter he had received from the

Secretary of the Basle Committee on Banking Supervision (A/CN.9/347/Add.1, pp. 24-25), which was highly pertinent to its consideration of article 13.

64. Mr. VASSEUR (Banking Federation of the European Community) said that the Federation was far from happy with the principle affirmed in paragraph 1, which it regarded as much too strict and too rigid. The notion of a money-back guarantee was itself open to question.

65. Mr. HEINRICH (observer, Bank for International Settlements) said that it was his impression from the letter referred to by the Secretary of the Commission that the Basle Committee on Banking Supervision neither approved nor disapproved of the concept of a money-back guarantee.

66. Mr. ABASCAL ZAMORA (Mexico) said that, in the Working Group, it had proved impossible to agree on any exceptions. He would not, in principle, oppose any suggestions in that regard but thought it unlikely that agreement could be reached on possible exceptions. For that reason he was in favour of retaining the article as currently drafted.

67. Mr. SCHNEIDER (Germany) said that the first sentence of paragraph 2 could be retained if provision was made for exceptions.

68. The CHAIRMAN suggested that the first sentence of paragraph 2 might be amended to read "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 execution of that payment order."

69. Mr. VASSEUR (Banking Federation of the European Community) said that he could go along with the wording proposed by the Chairman on the understanding that, if there was a high level of risk, the originator and his bank had the right to reach an agreement whereby the originator would bear the risk.

*The meeting rose at 5.05 p.m.*

### Summary record of the 459th meeting

Monday, 24 June 1991, at 9.30 a.m.

[A/CN.9/SR.459]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 9.45 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

#### Article 13 (continued)

1. The CHAIRMAN reminded the Commission that at the previous meeting it had begun considering the basic approach of article 13 to the question of the money-back guarantee. He felt that his suggestion that the first sentence of article 13(2) should provide for an exception to the general rule was useful in meeting the criticism expressed by the observer for the Banking

Federation of the European Community to the rigid nature of the rule as presently worded.

2. Mr. SCHNEIDER (Germany) said he had three problems with the article. Firstly, he was concerned at its implications for the insolvency of a bank in the credit transfer chain. Secondly, he was afraid that if credit transfers were perceived to be a high-risk procedure, banks would advise their customers to use cheques instead in order to escape the money-back guarantee liability. That would negate the purpose of the Model Law, which was to encourage international credit transfers. Finally, he thought that the Model Law should be consistent with company



and labour law. He could envisage a situation in which an employee of a bank might be liable to reimburse to his employer the amount of a payment order he had accepted, or in which a director might be held to be in breach of his duty of care. The element of discretion contained in the Chairman's suggestion should therefore be incorporated into the article.

3. His delegation believed in the principle of freedom of contract. The mandatory rule in article 13(2) should contain a proviso which allowed the customer some possibility of choice in the matter. Banks should be permitted to offer two credit transfer services, one with and one without a money-back guarantee. Since the money-back guarantee involved risk to the bank, it could charge for that risk. The customer could choose whether or not to pay for the money-back guarantee. Accordingly, on the assumption that the first sentence of paragraph 2 of article 13 would read as suggested by the Chairman at the previous meeting (A/CN.9/SR.458, para. 68), he proposed the insertion after that sentence of a provision reading along the following lines: "They may also be varied if the receiving bank has offered to the originator to accept payment orders including the duty to refund as laid down in article 13, paragraph (1)."

4. Another concern of his delegation was the relationship between the article and deposit insurance schemes, which were national rather than international in their operation and related only to non-bank claims. Under article 13(1), since the originator would have no direct claim to funds from an intermediary bank, in the event of the latter's insolvency those funds would not be insured under the applicable deposit insurance scheme. To address the situation where either one or more intermediary banks were insolvent, he suggested the addition, after the last sentence of article 13(1), of words expressing the idea that the originator was entitled to the return of any funds which were in the hands of an intermediary bank. That would allow him a direct claim against an intermediary bank.

5. Mr. FELSENFELD (United States of America) said he welcomed the original and constructive suggestion made by the Chairman. He was also sympathetic to the need for freedom of contract reflected in the first proposal made by the representative of Germany. His delegation had problems with both suggestions, however, because of the new ideas they contained. Banks might oppose the idea of a money-back guarantee as a continuing risk, while customers, whether corporate entities or individuals, might regard it as limiting their entitlement to damages. He therefore felt that the two suggestions needed full discussion not only by the Commission but by the parties affected.

6. Mr. CRAWFORD (Canada) said banks in his country had no objection to the money-back guarantee, since they already faced such a situation under article 4A of the Uniform Commercial Code of the United States. His delegation's problem was that the suggested provisos would allow banks to evade liability. In the case of the German proviso, banks could price the money-back guarantee option at such a level that the originator would be discouraged from using that option. In the case of the Chairman's suggestion, receiving banks might, as a matter of routine, stipulate a clause negating the money-back guarantee in favour of the originating bank in circumstances where a prudent organization might have declined to accept the payment order. That would throw the onus on to the originator to demonstrate, in the courts, that exceptional circumstances did not apply. Both provisos might thus have the effect of frustrating the intention of the Model Law.

7. The Model Law was intended to encourage trust in the banking system. That being so, there was no need for it to

provide for a money-back guarantee to an originator which was a bank, since banks formed part of the system. Statistics showed that the number of payments made vastly exceeded the number of underlying commercial transactions, so the incidence of the money-back guarantee would be greatly reduced.

8. Mr. ABASCAL ZAMORA (Mexico) preferred the text prepared by the Working Group. Introducing a reference to a prudent bank would create uncertainty in interpretation. It was important to take account of the need to protect the customer. It was the customer who would have to take action for the return of his money, in some cases against an intermediary bank which he did not know and with which he had no relationship. The addition of the sentence suggested by the Secretariat in its comments (A/CN.9/346, p. 75, para. 22) deserved consideration.

9. Mr. JANSSON (observer for Sweden) said that in his country banks operated the money-back guarantee and in business circles it was regarded as an integral part of the Model Law. He agreed with the representative of Canada about the negative effects which might arise from putting a price on the money-back guarantee. Accordingly, he could not support the first proposal made by the representative of Germany.

10. The exception suggested by the Chairman would be acceptable to his delegation, provided that it was worded in such a way as to make it very clear that the money-back guarantee would cease to apply only in exceptional individual circumstances.

11. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) said that article 13 as drafted by the Working Group presupposed that the originator's bank would pay the originator in any event in which the transfer was not effected—even if the intermediary bank could not pay. It seemed, however, that the originator's bank would not be so obligated in the event of the bankruptcy of the intermediary bank. The proposal of the representative of Germany on that subject therefore deserved consideration.

12. Mr. GRIFFITH (observer for Australia) endorsed the comments made by the observer for Sweden about the Chairman's suggestion.

13. Mr. LOJENDIO OSBORNE (Spain) said that the exception contained in the second sentence of article 13(2) should be extended to include the case where the originator specified an intermediary bank. In doing so, the originator assumed a risk and in that case the receiving bank should not be liable to him for the consequences. The effect would be to reduce the money-back guarantee.

14. Mr. IWAHARA (Japan) said that he could accept the proviso suggested by the Chairman if it was modified to reflect the comment made by the observer for Sweden. Basically the money-back guarantee should be mandatory and ought to be a matter of policy in any international payments system, but certain exceptions to the obligation should be permissible. For example, should an originator wish very strongly to make a high-risk international credit transfer, the originator's bank should be entitled to contract out of its duty to refund rather than have to refuse the payment order on the ground of its potential liability.

15. Ms. KOSKELO (observer for Finland) submitted that duty to refund would be an important confidence-building element in any viable international credit transfer system, especially where originators who were not banks were concerned. She shared the doubts voiced by the representative of Canada regarding the German proviso: there was a serious risk



that the variant which included the money-back guarantee would be priced prohibitively. She could accept the exception suggested by the Chairman, the advantage of which would be that the customer would truly understand what choice he was being offered and appreciate the circumstances under which it would be permissible for a bank to deviate from its duty to refund. It should, however, be rendered explicit in the text that for those circumstances to pertain, there must be an unusual and significant risk involved in the credit transfer, by which she meant at any stage of that process, and not just at the outset.

16. Ms. JAMETTI GREINER (observer for Switzerland) said that her Government had expressed very serious reservations about the duty to refund in its written comments (A/CN.9/347, p. 52). Those reservations persisted, albeit in a somewhat attenuated form as a consequence of the Chairman's suggestion. The notion of a money-back guarantee was not compatible with all banking systems. For what was, at best, to be only a Model Law, all chances of securing reciprocity must be exploited to the full, and for that reason she inclined towards acceptance of the German proviso, which took account of differences in banking systems and allowed for a certain flexibility in the rule without affecting its primary goal; it seemed to her to constitute a wise compromise, opening the way for the customer to make an informed choice.

17. Mr. GREGORY (United Kingdom) submitted that the money-back guarantee constituted an important part of a bargain whereby the provisions of the Model Law, while catering in large measure for banking interests and concerns, were also expected to reflect what might appositely be termed the other side of the coin. All questions of liability set aside, it was integral to the structure of the draft that if interest were to go to the beneficiary upon completion of the credit transfer, then the subject-matter of the transfer should be returned to the originator in case of non-completion.

18. Nevertheless, the serious concerns voiced about the duty to refund, in particular by the representative of Germany and the observer for Switzerland, must be addressed squarely. The United Kingdom delegation would be reluctant to see the money-back guarantee weakened in the absence of adequate safeguards; the appropriate course might be to accept the proviso suggested by the Chairman, modified to take account of the remarks made by the observer for Finland. The suggestion contained in the Secretariat's commentary on article 13 (A/CN.9/346, p. 75, para. 22) might also be indirectly of assistance in ensuring that banks would not systematically contract out of their duty to refund. He believed that only the originator and the originator's bank should be permitted to avail themselves of the option which would be afforded by the proviso which he was recommending. If they did not do so, it would make no sense for intermediaries further down the chain to contract out of the duty to refund.

19. Mr. TARKO (observer for Austria) said that his views were similar to those expressed by the representative of Germany and the observer for Switzerland. He believed that article 13 should provide exceptions to the mandatory duty to refund. The proviso suggested by the Chairman might be acceptable, but its present wording could lead to divergent interpretations, whereas the German proviso had the merit of offering parties the alternatives of a transfer with or without a money-back guarantee.

20. Mr. DE BOER (Netherlands) agreed with the representative of Canada that the cost to the customer of opting for a money-back guarantee under the German proviso might be prohibitively high, and that systematic evasion of their liability

by banks might be the result. He approved the text put forward by the Chairman, with a modification along the lines which had been suggested during the discussion.

21. Mr. JOLEC (observer for Czechoslovakia) approved the proviso suggested by Germany. It was consistent with the principle of freedom of contract and reflected current banking policy and practice in the matter of credit transfers.

22. Mr. BURMAN (United States of America) said that the basic proposition in article 13 was very close to that selected for United States domestic law; it reflected a fundamental compromise with commercial users and was an element of what the United Kingdom representative had referred to as a "bargain". Any exception which was provided to a guarantee, however reasonable, obviously changed the nature of that guarantee. The concerns voiced in the discussion indicated that the matter required further careful scrutiny.

23. The CHAIRMAN noted from a show of hands that the prevailing view seemed to be that the Commission should continue to seek a text for paragraph 2 of article 13 in which the first sentence of the paragraph would contain a more stringent formulation of the proviso he had suggested at the previous meeting (A/CN.9/SR.458, para. 68). Accordingly, he invited the Commission to consider the following wording for that sentence: "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 order due to exceptional circumstances because of an unusual risk involved in the credit transfer."

24. In reply to a question put by Mr. CRAWFORD (Canada), the CHAIRMAN expressed the opinion that the wording he had just suggested would eliminate the risk of originator's banks systematically including exculpatory clauses in their terms of business for credit transfers; and that it would render further reference to that eventuality superfluous.

25. Mr. BONELL (observer for Italy) said that he had some difficulty in understanding the reference to prudence in the Chairman's text and even greater difficulty in reconciling it with the mention of exceptional circumstances and unusual risk.

26. Mr. SCHNEIDER (Germany) preferred the Chairman's original suggestion for the first sentence of article 13(2). Prudent banking was a concept relevant to the matter under discussion; the new wording watered down the concept and limited the possibility of interpreting it. Cases which could by no means be qualified as exceptional might well occur in which it would be imprudent to make international credit transfers.

27. He believed that the Canadian objection to his own delegation's proviso might be overcome by including in it a reference to an adequate price.

28. Mr. CRAWFORD (Canada) said that in his view prudent banking was not a generally recognized criterion but that a court might equate it with reasonable conduct on the part of a bank.

29. He was not sure that it would be advisable, if the Chairman's new wording was accepted, to retain in article 13(2) the exclusion which it contained at present.

30. Mr. ABASCAL ZAMORA (Mexico) shared the views expressed by the observer for Italy. There might be several different ways of interpreting the notion of prudence. He saw no unambiguous definition of the term in law. The Model Law must be quite clear on the matter of the duty to refund.



31. Ms. JAMETTI GREINER (observer for Switzerland) said that in her view the Chairman's original suggestion had much to recommend it.

32. The CHAIRMAN said that he would reintroduce his original suggestion for the first sentence of paragraph 2 of article 13 with a slight modification. It now read: "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". The Commission would note that the only change was the replacement of the words "execution of that payment order" by the words "credit transfer".

33. Mr. GREGORY (United Kingdom) said he thought it necessary, since the proviso no longer mentioned exceptional circumstances and unusual risk, that the paragraph should include a reference to the systematic use of the provisions of paragraph 1 of the article.

34. Mr. FELSENFELD (United States of America) agreed.

35. Mr. GRIFFITH (observer for Australia) supported the views expressed by the two previous speakers. He would be prepared to support a text worded along the lines just indicated by the Chairman, but he believed that the Drafting Group should review it before the Commission considered it further.

36. Mr. ERIKSSON (observer for Sweden) said that the addition to the modified form of the Chairman's original proviso of the words "due to exceptional circumstances" would make its intention clearer. Without it, the text might suggest that a bank could enter into arrangements varying its duty to refund in all cases in which it was dealing with a particular country. In his view, that should not be allowed.

37. Mr. SCHNEIDER (Germany) pointed out that the issue was not simply a drafting problem but concerned the situation in the European Economic Community, in which standard contracts would most probably be introduced in the near future.

38. Mr. SOLIMAN (Egypt) observed that article 13 dealt with the non-completion of a credit transfer; for example, because the payment order was cancelled, because an error occurred or because certain conditions were placed on it. Small banks were the most likely to lose in such situations. The present drafting of the text was very comprehensive and he found it perfectly satisfactory.

39. Mr. BONELL (observer for Italy) said that, in his opinion, the second sentence of article 13(2) should be retained. He suggested that the text of article 13 might be clearer if the existing first sentence of paragraph 2 was deleted and a third paragraph was added concerning the possibility of agreements which varied the obligation to refund.

40. Mr. AL-NASSER (observer for Saudi Arabia) said that the question of differences in exchange rates should be mentioned in dealing with the topic under consideration.

41. The CHAIRMAN asked the Commission if it wished to adopt, for addition to the first sentence of article 13(2) as proposed by the Working Group, the modified formulation of his original proviso for that sentence, namely the words "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".

42. *It was so agreed.*

43. Mr. VASSEUR (Banking Federation of the European Community) said that the second sentence of article 13(2) mentioned the suspension of payment or the prevention of a refund by an intermediary bank. Since those steps might also be the act of the beneficiary's bank, the sentence should refer to the beneficiary's bank as well.

44. Another matter to which the Commission should devote attention in considering article 13 was that a difficulty could arise with a credit transfer, not as the result of a fault of the originator, the intermediary bank or the beneficiary's bank, but simply owing to a failure of the message transmission system.

45. Mr. ABASCAL ZAMORA (Mexico) said that the change suggested by the Banking Federation of the European Community seemed to imply that article 13 offered no money-back guarantee if an intermediary bank was unable to receive funds from the beneficiary's bank. In his view, that eventuality might arise in two ways: first, if the intermediary bank sent funds in advance to the beneficiary's bank and for some reason the money could not be refunded; and secondly, if the intermediary bank sent the beneficiary's bank funds but a revocation order supervened. Was the suggested amendment intended to cover those two cases?

46. The CHAIRMAN said that it seemed logical that the person who specified a beneficiary's bank should bear the same risk as the person who specified an intermediary bank.

47. Mr. CRAWFORD (Canada) said that, though the second sentence in article 13(2) might appear to support the Chairman's view, practical considerations might have more weight.

48. Mr. FELSENFELD (United States of America) pointed out that some of the questions under discussion would also arise in connection with article 17. A form of words might possibly be found to cater for the point raised by the Mexican representative, but perhaps the best course would be to leave the second sentence of article 13(2) as it was.

49. Mr. GREGORY (United Kingdom) shared the point of view expressed by the Canadian representative. Article 13(1) was capable of applying to the beneficiary's bank in very limited circumstances, but article 13(2) should not so apply.

50. Mr. BOSSA (observer for Uganda) asked whether the originator's bank mentioned in the first sentence of article 13(1) and the receiving bank mentioned in the second sentence of article 13(2) were one and the same.

51. The CHAIRMAN pointed out that, under article 2(g), the term "receiving bank" included both the originator's bank and the beneficiary's bank.

52. He asked the Commission whether it accepted the suggestion to include a reference to the beneficiary's bank in the second sentence of article 13(2).

53. *The suggestion was rejected.*



## Summary record of the 460th meeting

Monday, 24 June 1991, at 2 p.m.

[A/CN.9/SR.460]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.10 p.m.*

**International Payments: draft Model Law on International Credit Transfers (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)**

### Article 13 (continued)

1. Ms. KOSKELO (observer for Finland), introducing her Government's proposal (A/CN.9/347, p. 25) to replace the second sentence of article 13(1) by the following words: "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", said that it was connected with her Government's suggestion concerning article 17(1). It should be made clear that the credit transfer was completed when the beneficiary's bank accepted a payment order to the benefit of the beneficiary designated in the originator's payment order. In other words, in the case of an erroneous execution by a bank in the transfer chain whereby the beneficiary who received the funds was not the beneficiary designated by the originator, the situation should be treated as one in which the transfer had not been properly completed and the provisions of article 13 should apply.
2. However, in her delegation's view, the money-back rule set out in article 13 should operate in such a way that the bank which had perpetrated the erroneous execution would be obliged to refund the money to the sender. That bank would not be entitled to any refund other than by way of recovery from the person who had been erroneously given the funds.
3. Mr. GREGORY (United Kingdom) said that the Finnish Government's proposal raised some tricky questions. It was necessary to distinguish between a situation in which the money involved passed through the hands of a person or entity other than a bank and that in which it passed through a bank.
4. If it passed through a bank which was not the beneficiary's bank and was then lost, the risk of the money-back guarantee seemed to rest with the last bank involved before the funds were lost, a bank which might have had no way of knowing that it was not the bank designated in the originator's payment order. In such a situation, it might be that some shift of the risk would be appropriate. On the other hand, he did not think that the Finnish proposal was the solution, because it prevented the bank which had made the mistake from ever obtaining a refund. That was clearly inappropriate because, if the next bank in the chain was able to refund the money, it should do so.
5. The Commission would appear to be introducing a further element of fault-based liability that was not covered by article 16, which applied only when the transfer had been completed. In that connection, it should not be forgotten that article 13 applied in cases where the transfer had not been completed.
6. Another situation that should be considered was one in which the funds, having reached the beneficiary's bank, were credited to the wrong account. That raised a very difficult question since, according to the Law, the acceptance of the order by the beneficiary's bank completed the transfer.

7. Mr. SCHNEIDER (Germany) said that there were a number of cases which were not covered by article 13. One such case was that of a payment order which was passed to a bank which refused to accept it. Another situation, where there was no money-back guarantee, was that of an originator who was seeking to recover his funds from a second or third intermediary bank.

8. Mr. ABASCAL ZAMORA (Mexico) said that the concern expressed by the Finnish delegation might be met by inserting a provision similar to that embodied in article 11(7) where, if the credit transfer had been completed but a receiving bank had executed a revoked payment order, the receiving bank had the right to recover from the beneficiary the amount of the credit transfer.

9. Mr. BURMAN (United States of America) said that the Model Law, which was a delicately balanced proposal where each article depended on the operation of others, worked under the general concept of the money-back guarantee. Consequently, where a transaction had not been completed, the funds were returned to the originator who then had an opportunity to initiate the transaction once again. The Commission could not possibly provide for every conceivable situation and he thought that it would be preferable to retain the original text.

10. In reply to a question by Mr. GREGORY (United Kingdom), Ms. KOSKELO (observer for Finland) said that the purpose of her Government's proposal was to determine which party within the credit transfer chain would have to bear the burden of recovering funds from the wrong beneficiary. According to the existing text, the bank that committed the erroneous execution would itself be entitled to a refund from its receiving bank and the burden would thus be borne by a bank which, under article 7(2), was innocent.

11. Mr. BURMAN (United States of America) informed the Commission that, with regard to netting schemes, his delegation and that of the United Kingdom were seeking to achieve an acceptable text, as the Chairman had asked them to do. It was still his delegation's conviction, however, that multilateral and some bilateral netting systems would be unable to work with a "skip" rule.

12. Mr. GREGORY (United Kingdom), having confirmed that his delegation and that of the United States were still trying to reach an accommodation on a "skip" rule text, said that the same argument applied to the refund under article 13 as to revocation under article 11 and there was no reason to use different language.

13. The CHAIRMAN said that there were similarities between the attitudes of members of the Commission to article 13 and article 11, as far as the United Kingdom proposal for the so-called "skip rule" was concerned. Having taken an indicative show of hands, he noted that, subject to any modification needed with regard to netting, the United Kingdom proposal was strongly supported.



14. Mr. SCHNEIDER (Germany) said there might be other ways of dealing with the problem which would arise in the absence of a skip rule, whereby the originator might have no means of getting his money back. He proposed the insertion in article 13(1) of the words: "If a credit transfer cannot be completed, the originator is entitled to the return of any funds which the intermediary bank has received and not paid in executing the payment order." That would deal with the problem of a lack of money-back guarantee where there were special circumstances.

15. Mr. VASSEUR (Banking Federation of the European Community) said that his Federation was concerned about a situation which, though rare, was not unimportant, namely, the case when a non-recoverable loss of funds occurred without the originator, his bank, the intermediary bank or the beneficiary's bank making any mistake whatsoever. Compensation would be available through SWIFT, to a limited extent only, but the originator's bank would remain obligated to the originator for a complete reimbursement of the funds. If the answer to his question lay in article 13, it was not apparent to him.

16. The CHAIRMAN said that, in a sense, the banks would surely be obligated.

17. Mr. VASSEUR (Banking Federation of the European Community) said that the originator's bank would be unable to recover the funds, owing to the limitation of liability, and would therefore be the loser. He suggested that the situation might be brought closer to that covered by the second sentence of article 13(2), the case in which the originator's bank had chosen the intermediary bank. A transfer order which was intended to go through the SWIFT network, with the originator's bank's knowledge, would carry some right to repayment.

18. The CHAIRMAN thought that that solution would be too favourable to the originator's bank. Unless there were very strong feelings among the members of the Commission in favour of the insertion of some such provision in the Model Law, he did not think it would be advisable, but a reference to the problem might be included in the Commission's report.

19. Mr. ABASCAL ZAMORA (Mexico) said that he was not altogether happy at the prospect of interpretations of the Law being consigned to a commentary, despite the undoubted usefulness of the Secretariat's comments (A/CN.9/346, pp. 74-75, paras. 19-22). There were many excellent reasons why the inclusion of a clause covering certain cases of exception in the text of the Model Law itself should be considered.

20. The CHAIRMAN noted, after a show of hands, that there was a substantial majority in favour of including a clause covering certain cases of exception. He took it, therefore, that the Commission approved, in principle, the inclusion of such a clause.

21. *It was so decided.*

22. Mr. GREGORY (United Kingdom) said, in connection with the point made by the representative for Germany and the wording he had suggested to give an originator a direct right of action, that the text for article 11 which his own delegation was discussing with the delegation of the United States did not appear to overlap with the German proposal. Success in the discussions therefore would not weaken the case for tackling that problem.

23. To his way of thinking, the money-back guarantee had always been regarded as additional to the ordinary rights of the originator to get his money back. It was not a substitute for any

restitutionary remedies which the originator might have, should he wish to go to the country concerned and pursue the bank involved. The money-back guarantee had been intended as an easier remedy, rather than an alternative one.

24. The sticking point was once again article 16(8), which purported not only to cover the remedies contained in that article for breach of provision but also to exclude all other remedies. It was important that, when the Commission came to consider that provision, it should not exclude ordinary restitutionary remedies, such as an originator might have against a bank in any particular country should he wish to go there in their pursuit.

25. While the Commission should be wary of giving any general right to the originator without considering very carefully what its nature would be, it was unclear whether the law of any particular country would confer on the originator anything more than a claim in damages. He might not be able to identify his money. He might only have a claim against the bank concerned. The matter required very careful thought.

26. Mr. FELSENFELD (United States of America) said he could not agree that the money-back guarantee was an addition to the rights otherwise existing under the law. To his mind, a right as fundamental to the working of the Model Law as the money-back guarantee was an independent right, separate from other rights, designed to be exercised on its own terms with all the benefits and supports and qualifications that the Model Law conferred. He agreed that article 16 might provide the opportunity to discuss the matter, which his delegation had not intended to raise. Once it had been raised, however, it ought to be settled.

#### Article 14

27. The CHAIRMAN said that the Government of Canada had proposed a drafting change to the article (A/CN.9/347, p. 12). If he heard no objection, he would take it that the Commission wished to submit that proposal to the Drafting Group.

28. *It was so decided.*

29. The CHAIRMAN said that the observer for Finland had suggested the insertion of a reference to the provision concerning charges (article 17(3)) so as to ensure its application.

30. The CHAIRMAN said that there was a close connection also between article 14 and article 7(2). Where correction for an underpayment was needed, no additional charge should be incurred. The Netherlands proposal that article 16(5) should be deleted also had a bearing on article 14.

31. Mr. GREGORY (United Kingdom) said it should be made clear that the meaning of article 17(3) was that a credit transfer was not to be regarded as completed if less than the right amount was transferred, except where the difference was due to charges.

32. Mr. FUJISHITA (Japan) said that his Government's proposed amendment of article 14 (A/CN.9/347, p. 38) was prompted by a similar concern regarding the partial completion of a credit transfer. The opening words of the article: "If the credit transfer is completed in accordance with article 17(1), . . ." were unsatisfactory in that they implied that the credit transfer had been completed and that, even if the final amount accepted by the beneficiary's bank was less than the amount ordered by the originator, the transfer would still be regarded as completed. There seemed to be no way in which article 13 could be brought to bear.



33. The point was a very important one which could lead to a loss of confidence in the original route of credit transfer without the possibility of obtaining refund of the missing part and trying another credit transfer by some other route.

34. Mr. CRAWFORD (Canada) said that his delegation found the reasoning behind the Japanese proposal (A/CN.9/347, p. 38) to modify article 14 and article 16(5) quite convincing and thus supported it. The proposal that they be deleted was going too far.

35. The CHAIRMAN said that, if article 14 were deleted, the effect would be that a receiving bank executing a payment order erroneously was under an obligation to issue a new payment order for the difference.

36. Mr. FELSENFELD (United States of America) said that the topic was a complex one that should not be tackled with undue haste. If article 14 was removed, it was not clear that it would be incumbent upon the bank that had made the erroneous transfer to provide the outstanding funds. At very least, there should be a provision stating that the funds should be made available within the original time period.

37. The CHAIRMAN said that it might be better to postpone further discussion of article 14 until a later stage of the session, in view of the fact that any decision would have implications for article 16(5).

38. For the sake of consistency, however, he suggested that the words "the credit transfer is completed in accordance with article 17(1), but" should be deleted.

39. *It was so decided.*

40. The CHAIRMAN informed the Commission that agreement had been reached on article 10(6), following consultation with the representative of Germany, and suggested that the Commission proceed to consider article 15, which was also the subject of a proposal for deletion. If it were deleted, article 11(7) could also be eliminated as falling outside the scope of the Model Law.

#### Article 15

41. Mr. GREGORY (United Kingdom) said that the issues raised by articles 14 and 15 were different. Article 15 covered the situation in which the beneficiary received more money than he should have, whereas the situation envisaged in article 14 was one in which the transfer had not been completed because the amount transferred was insufficient. It would be better to retain article 15, which was consonant with other references in the Model Law to cut-off of the acceptance by the beneficiary's bank.

42. Ms. KOSKELO (observer for Finland) said that article 15 was too narrow and should not cover solely the situation of overpayment. It should be extended to cover the case in which an erroneous execution by a bank had resulted in payment to the wrong person.

43. Mr. CRAWFORD (Canada) said that he agreed with the observer for Finland. Any proposal to delete article 15 must be carefully considered in the light of the provision in article 16(8).

44. Mr. BURMAN (United States of America) said that the fundamental issue was whether there could be partial completion, and that issue should be carefully considered in the context of article 17 and elsewhere. The deletion of any one article might have far-reaching implications for the text as a whole.

45. It might help if it were understood what the banking system could and could not do. If the originator owed the beneficiary a specific amount and sent that amount, but payment was received in a lesser amount, the Model Law stated that the beneficiary had received that lesser amount: the relationship between the originator and the beneficiary, who might decide to accept the lesser amount as full or partial payment of the obligation or to return that amount and retain the obligation, however, was of much wider scope and embraced the whole range of contractual obligations between originator and beneficiary.

46. The CHAIRMAN said that it was his understanding that, when a beneficiary's bank accepted the payment order, whether the amount was insufficient, correct, or an overpayment had been made, the credit transfer was regarded as complete: there was thus no question of partial completion. He suggested that article 15 should be retained in its existing form.

47. Mr. SCHNEIDER (Germany) said that the United Kingdom representative had drawn attention to the differences between articles 14 and 15. Article 15 raised important questions of principle in that a beneficiary might not be aware of an overpayment: for example, if there was an ongoing business relationship between the originator and the beneficiary, the latter might assume that there had been an advance payment for delivery of goods. The article should therefore include a provision stating that the beneficiary was obliged to repay only if he was aware of the overpayment and was thereby enriched without cause.

48. Mr. FELSENFELD (United States of America) said that the German representative had touched upon an extremely complex area of law. The issues of when an overpayment had occurred or not and when payment might be retained or not had no place in the Model Law. It would suffice to refer in article 15 to "remedies otherwise provided by law".

49. Mr. CRAWFORD (Canada) said that he was concerned at the differing treatment of articles 14 and 15. Deletion of the opening words of article 14 would give rise to the inference that an underpayment was not completion, an inference reinforced by the text of article 17(3). However, that inference was not in keeping with the principle accepted by the Commission and the Drafting Group should be asked to find a way of removing it.

50. Mr. GREGORY (United Kingdom) proposed, to deal with the point raised by the representative of Germany, that the wording of article 15 be amended to read "... it has such rights to recover from the beneficiary the difference between the amounts of the payment orders as may otherwise be provided by law" instead of "... as are otherwise provided by law".

51. *The United Kingdom amendment was adopted.*

52. Following an indicative show of hands, the CHAIRMAN said he noted that most members of the Commission were in favour of retaining the text of article 15 as amended. He took it, therefore, that the Commission wished to approve article 15, as amended.

53. *It was so decided.*

#### Article 11 (continued)

54. The CHAIRMAN invited the members of the Commission to consider article 11(7) and suggested that the United Kingdom amendment to article 15 should be applied to the last line of that paragraph, which would then read "... as may otherwise be provided by law".



55. *It was so decided.*

#### Article 12

56. The CHAIRMAN recalled that the United Kingdom Government had proposed (A/CN.9/347, p. 62) that the first line of article 12 be amended to read "Until the credit transfer is completed in accordance with article 17(1) . . .", instead of "If the credit transfer is not completed in accordance with article 17(1)".

57. The Government of Japan had proposed that the content of the cooperation should be further specified by including the words "in particular by offering and gathering necessary information such as the whereabouts of the funds" before the words "in completing the credit transfer" (A/CN.9/347, p. 37). It might be thought, however, that such action was already implicit in article 12.

58. The Government of Canada had proposed that article 12 be made a mandatory rule (A/CN.9/347, p. 12), but delegations were reluctant to make the article a heavy liability and, especially since article 7(2) was not mandatory, they might find the proposal hard to accept.

59. The Government of Canada had also proposed that the expression "the next receiving bank" in the third line of article 12 should be amended to read "its receiving bank" (A/CN.9/347, p. 11).

60. Mr. FUJISHITA (Japan) said that, in view of the Chairman's comment that the action requested by his Government under article 12 was already implicit, his delegation might be able to agree to the existing text if that understanding was confirmed.

61. Mr. FELSENFELD (United States of America) proposed that article 12 should be deleted. The text imposed on the banks an obligation of unknown scope. It was normal business practice for banks to assist in clearing up any imperfection in a credit transfer: the service they offered was part of the competitive process. However, the more a transfer cost a bank the more it would have to charge its customers. The obligation under article 12 was impossible to quantify or define and hence impossible to enforce.

62. Mr. LIM (Singapore) said he supported the Japanese proposal, but suggested that it be limited to assistance in the form of information. That might meet some of the United States concerns. In any case, with high-speed electronic systems, the gathering of information should not be a problem.

63. The CHAIRMAN pointed out that the Working Group had considered that the Model Law ought to refer to the kind of assistance mentioned in article 12, even if it was obvious. Moreover, no penalty was provided, since article 16(a) did not refer to a breach of article 12. That point might meet the concern of the United States representative.

64. Mr. DUCHEK (observer for Austria) said that the provision was too vague and there was no sanction if the obligation was not fulfilled. He therefore supported the proposal that article 12 be deleted.

65. Mr. RENGGER (Germany) said he thought that article 12 was essential and should be retained. Many intermediary banks were involved in transferring money and there were no contractual relations between an originator and the receiving banks further on in the chain. If the transfer was not completed, the originator still had to fulfil his obligation to the beneficiary and therefore needed the assistance of the banks involved, particularly in international transfers.

66. Following an indicative show of hands, the CHAIRMAN noted that there was a majority in favour of retaining article 12.

67. He asked whether the members of Commission agreed that the type of assistance proposed by the Government of Japan was implicit in the existing text.

68. Mr. FELSENFELD (United States of America) said that his delegation was unclear as to how such an understanding would be recorded. It would have to be made clear in some way or other that there would be no penalty for a breach of article 12.

*The meeting rose at 5.15 p.m.*

### Summary record of the 461st meeting

Tuesday, 25 June 1991, at 9.30 a.m.

[A/CN.9/SR.461]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 9.45 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

#### Article 12 (continued)

1. Mr. CONOBOY (United Kingdom), referring to his Government's proposal for an amendment to article 12 (A/CN.9/347, p. 62, para. 27), said that the article as drafted might imply that there would be a duty to assist only when the credit transfer mechanism broke down. Replacing the words "if the credit

transfer is not completed" by the words "until the credit transfer is completed" would make it clear that there was a continuous duty to assist which was distinct from the money-back guarantee.

2. Mr. ADEDIRAN (Nigeria) said that the proposed amendment might not cover a situation involving the recovery of money when a credit transfer had to be aborted.

3. The CHAIRMAN explained that article 12 concerned the duty of all parties to assist in completing a credit transfer.



4. Mr. DE BOER (Netherlands) supported the proposed amendment, since it was in keeping with the intention of the article.

5. *The proposal was adopted.*

6. The CHAIRMAN announced that the proposal made by Japan (A/CN.9/347, p. 37, para. 12) had been withdrawn on the understanding that its substance was implicit in the article as drafted.

7. Mr. FELSENFELD (United States of America) said he understood that article 12 was generally acceptable to the Commission. His delegation, however, objected to the article, on the ground that it imposed on each receiving bank an obligation to assist the originator and each subsequent sending bank, whereas it was normal banking practice for a receiving bank to assist only the bank that sent a transfer to it and the bank to which it in turn sent that transfer. The duty to assist should therefore be confined within those limits. There was also the question of the penalty to be imposed for violation of the obligation which the article laid down.

8. The CHAIRMAN said that the question of liability might be discussed under article 16.

9. Mr. FELSENFELD (United States of America) said that the principal point at issue was whether the obligation should exist only towards the party sending the transfer.

10. Mr. SCHNEIDER (Germany) said that the article as drafted left room for interpretation regarding the party to whom the duty was owed and his right to ask for assistance. That was also true in regard to liability for any legal costs which might arise.

11. Ms. GOLAN (observer for Israel) shared the United States view that the article should reflect normal banking practice and not impose new obligations on the parties. She suggested that the term "obligated" might be amended in such a way as to eliminate the implication that a contractual obligation existed.

12. Mr. FELSENFELD (United States of America) said that he would have difficulty in accepting the view expressed by the German representative, which seemed to indicate that a party would be obligated without the creation of an obligation.

13. The CHAIRMAN suggested that the wishes of the observer for Israel might be met if the provision referred to a duty instead of an obligation.

14. Mr. FELSENFELD (United States of America) welcomed that suggestion.

15. Mr. ERIKSSON (observer for Sweden) said that the article must take into account the interests of parties other than banks. The rule as it stood favoured the originator. He shared the United States view that it was necessary to define the consequences of a breach of the duty which the article laid down. He approved the text as it stood.

16. Mr. CRAWFORD (Canada) said that the differing approaches of the United States and the German delegations to the issue of the nature of the obligation might stem from differences between civil law and common law. Under civil law, the duty would be similar to a legal norm and therefore less onerous than in a common law jurisdiction, where it would be considered a statutory duty, the breach of which would be a tort.

17. In response to the suggestion made by the observer for Israel, he proposed that the words "obligated to assist" in the second line of the text should be replaced by the words "obligated to use its best efforts to assist". That change, he thought, would address the problem in terms of a norm rather than a legally enforceable duty and would suggest a reasonable content of the duty.

18. Mr. SOLIMAN (Egypt) said that it would be inappropriate for the article to refer to an obligation, particularly in view of the absence of an attendant penalty. He proposed that the provision should refer to cooperation for the purpose of assistance.

19. Mr. ABASCAL ZAMORA (Mexico) said he believed that the idea that a bank should use its best efforts to assist a party would not satisfy some delegations. Since sanctions were to be attached to many provisions of the draft, it was desirable to postpone consideration of the wording until sanctions were clearly defined under article 16. A difficulty in establishing some sanctions was due to the fact that the Model Law was based on fluctuating interests, which could pass from one party to another; no real parameters existed for assessing the duty to assist, for example.

20. The Commission should address the problem of the different interpretations which a civil law jurisdiction and a common law jurisdiction might place on article 12. In his view, article 12 stated who bore the obligation, so that the obligation would stem from the Model Law and not from a contract.

21. Mr. BONELL (observer for Italy) supported the Chairman's suggestion that the provision should refer to a duty to assist. It should be incorporated in the Model Law in that form. The interpretation of the duty should be left to the applicable law. It would be impractical for the article to attempt to identify all the possible beneficiaries of the duty, or to define in detail notions such as using best efforts.

22. Mr. KOMAROV (Union of Soviet Socialist Republics) said that article 12 was generally satisfactory. To some extent it reflected existing banking practice, since banks cooperated in an attempt to assist their customers when difficulties arose. Perhaps the title of the article or the way the obligation was described should be changed. It was necessary to balance a bank's obligations against the flexibility existing in current banking practice. The Canadian proposal concerned the criteria to be used in measuring the scope of the duty and it deserved consideration. Banks should be bound to assist parties to a reasonable extent within the normal range of banking practice.

23. Mr. BURMAN (United States of America) welcomed the approach taken by the representative of the Soviet Union, who had emphasized the cooperation which existed in the banking system. Unlike the representative of Italy, he himself thought that it was important for article 12 to define the obligations and beneficiaries involved. Assistance could comprise many services that might entail large amounts of money being spent on a credit transfer which was for a small amount. It would be unwise for the Model Law to create unlimited legal obligations in article 12 after having prescribed strictly limited obligations in respect of prior stages of a credit transfer.

24. The CHAIRMAN wondered whether the concerns of the delegation of the United States of America might be mitigated if it were understood that article 12 constituted a statutory obligation, not a contractual one. In that case, perhaps, liability for damages would be excluded by the provisions of article 16(8).



25. Mr. BURMAN (United States of America) said that when countries adopted the Model Law, they would do so on the advice of banking supervisors. The article under discussion would not be adopted if there was no legal penalty for a breach of the obligation which it laid down. First, however, it was necessary to define the nature of the obligation, and who was obligated to whom.

26. U NYI NYI THAN (observer for Myanmar) supported the proposal made by the representative of Canada. It represented a wise compromise in view of the fact that the Model Law was intended to cover banking world-wide.

27. Mr. ADEDIRAN (Nigeria) said that the Model Law should not impose obligations on banks that they would be unable to discharge. Thinking in terms of the Canadian proposal, he believed that for as long as the credit transfer was not completed, banks should be enjoined to use their best endeavours to assist in completing it. That would be the best outcome from the originator's point of view.

28. Mr. BONELL (observer for Italy) agreed with the United States delegation that a duty without a sanction might prove unacceptable. Although it was a somewhat unusual situation, there were precedents for it in international instruments. For example, the recently concluded United Nations Convention on the Liability of Operators of Transport Terminals in International Trade focused primarily on liability for loss or damage to goods. In addition, however, it laid down ancillary duties aimed at achieving a balance between the parties, such as the duty to assist in tracing lost goods. It had not been possible to define that duty in detail, but its inclusion in the Convention had nevertheless been felt to serve a useful purpose. He thought that in the present case the Canadian proposal to mention best efforts was a fair compromise.

29. Mr. BOSSA (observer for Uganda) said that the obligation to assist was already implicit in the various obligations existing between the parties under other articles of the Model Law. He therefore wondered if article 12 was really needed.

30. Mr. PARKER (observer for Australia) said that article 12 clearly defined the parties to whom and by whom a duty was owed, namely the originator, subsequent banks and the next receiving bank. To some extent, he shared the concerns of the United States delegation regarding the extent of the duty. In his view, the key to the provision lay in the words "in completing the credit transfer". The duty was thus limited to carrying out normal banking procedures. In order to make the scope of the obligation quite clear, that phrase might be expanded to read "in completing the banking procedures of the credit transfer".

31. The CHAIRMAN suggested that article 12 might be approved on the understanding that it laid down a statutory obligation, and that the following changes might be made to it in order to clarify the way in which the Commission understood it: first, the reference to an obligation to assist would be replaced by a reference to a duty to assist, thus attenuating the force of the requirement; secondly, the suggestion of the observer for Australia to refer explicitly to banking procedures would be implemented, thus limiting the scope of the duty.

32. Mr. BURMAN (United States of America) said that the Chairman's suggestion went a long way towards accommodating his delegation's concerns, but its basic objection to the article remained.

33. The CHAIRMAN invited the Commission to approve article 12 on the basis he had just suggested, with the wording

being left to an informal drafting group which would include the representative of the United States of America and the observer for Australia.

34. *It was so decided.*

*Article 10 (continued)*

*Article 10(1) (A/CN.9/XXIV/CRP.6)*

35. The CHAIRMAN invited the Commission to consider the proposal which Switzerland and the United States had made for article 10(1) in document A/CN.9/XXIV/CRP.6. The proposed wording was intended to give effect to the delicately balanced decision taken by the Commission at its 452nd meeting (A/CN.9/SR.452, para. 32) that while same-day execution of payment orders should be a basic principle of the Model Law, a day's grace might be accorded to banks unable to comply with that rule.

36. Mr. GRIFFITH (observer for Australia) submitted that the understanding which the Commission had reached would be reflected more accurately by words to the effect that the receiving bank was required to execute the payment order, if reasonably practicable to do so, on the business day it was received, or otherwise on the business day after receipt. In his view, the text under consideration gave the misleading impression that first-day execution was no more than an option.

37. The CHAIRMAN said that the Commission had been at great pains to avoid the use of terms, such as "reasonable", which could give rise to differences of interpretation or suggest a requirement of justification. His own understanding was that the Commission had agreed that while first-day execution should—as he had said—be the general rule, execution on the following day would be possible without sanctions. Perhaps the concerns of the observer for Australia might be met through the insertion of the words "in principle" after the words "payment order".

38. Mr. GRIFFITH (observer for Australia) said that he would prefer the insertion of the word "normally" at that point.

39. In response to a comment made by Mr. ABASCAL ZAMORA (Mexico), the CHAIRMAN said that any imprecision in the draft in regard to the use of the terms "banking day" and "business day" would have to be resolved by the Drafting Group.

40. Ms. KOSKELO (observer for Finland) suggested that the insertion in the text of the joint proposal of the word "feasible" after the words "if not" might meet the concern expressed by the observer for Australia.

41. Mr. VASSEUR (Banking Federation of the European Community) said that the Federation would be unwilling to endorse the Finnish suggestion, since to introduce the notion of feasibility would bring with it the need to consider where the burden of proof lay, as well as the risk of challenge or even litigation when first-day execution did not take place. His preference was for the text proposed by Switzerland and the United States of America.

42. Ms. JAMETTI GREINER (observer for Switzerland), supported by U NYI NYI THAN (observer for Myanmar), favoured the inclusion of a reference to principle rather than feasibility.

43. Mr. BOSSA (observer for Uganda) suggested that if the basic understanding was that the delay in execution should



under no circumstances exceed two days, the text might read: "The receiving bank is required to execute the payment order on the business day it is received but in any case not later than the following business day."

44. The CHAIRMAN asked whether, in the light of the discussion, the Commission could endorse the following wording: "The receiving bank is required to execute the payment order in principle on the business day it is received or, if not, at the latest on the business day after it is received, unless . . .".

45. Mr. CRAWFORD (Canada) wondered whether the principle itself might not be reinforced by making it the subject of a shorter sentence, which would be followed by a second sentence setting out the attendant liabilities or obligations.

46. The CHAIRMAN said that in the absence of any objection, he would take it that the Drafting Group might be entrusted with the preparation of a revised version of the joint proposal for article 10(1) in document A/CN.9/XXIV/CRP.6; and that at an appropriate place in the text, without any modification of the substance of the provision, the notion of principle might be inserted.

47. *It was so agreed.*

#### *Article 10(1)(bis) (A/CN.9/XXIV/CRP.6)*

48. The CHAIRMAN invited the Commission to consider the second part of the proposal in document A/CN.9/XXIV/CRP.6. It called for the draft to contain an article 10(1)(bis) according to which, irrespective of the day of execution of the payment order, value must be given as of the date of receipt of the order. He himself, in the interests of clarity, suggested that the final phrase of the proposed text might read: "... the receiving bank must account for value as of the date of receipt".

49. Mr. ABASCAL ZAMORA (Mexico) said that, at least in the Spanish version, the final part of the proposal was unintelligible. He asked whether it should not refer to interest rather than to value.

50. The CHAIRMAN said that the problem alluded to by the previous speaker was probably one of translation.

51. Mr. BERGSTEN (Secretary of the Commission) remarked that the point raised by the representative of Mexico had substantive connotations. The words "value" and "interest" were not simply interchangeable; for example, the question of reserve requirements might be involved.

52. Mr. MORAN BOVIO (Spain) agreed that the matter was more than one of mere drafting. He believed that he was not alone in wondering whether the provision for the establishment of value on the date of receipt was not related to the calculation of interest for the period which might elapse between receipt and transmission.

53. The CHAIRMAN said that the proposal was intended to ensure—no more and no less—that if the beneficiary's bank delayed executing a payment order until the day following receipt, the beneficiary would be credited as of the date of receipt. The question whether interest would accrue to the beneficiary would depend on the relationship between the beneficiary and the beneficiary's bank.

54. Mr. AL-NASSER (observer for Saudi Arabia) suggested, on the basis of the Arabic version, that a generally acceptable wording might be: "The receiving bank must execute the

payment order on the basis of its value on the date of receipt even if it does so on the day following receipt."

55. Mr. GRIFFITH (observer for Australia) asked whether the text before the Commission implied that one day's interest would be payable.

56. The CHAIRMAN said he believed that in ordinary cases that might be so.

57. Mr. GREGORY (United Kingdom) submitted that the reply to the question would depend on whether or not an interest-bearing account was involved.

58. Mr. GRIFFITH (observer for Australia) said it was his understanding that the Commission's original intention had been to provide for a default consequence for the day's delay; the provision would be largely meaningless if that consequence, in the form of an obligation to pay interest, arose only when an interest-bearing account was involved.

59. The CHAIRMAN said that there had been no question of imposing a penalty. It was simply the expectation of the Model Law that, since the subject-matter of the transfer had been received, it must be credited at its value on the day of receipt. One reason for that was to avoid difficulties which might arise from the dating of a cheque drawn by the beneficiary. The Model Law did not address the question of interest.

60. Mr. BERGSTEN (Secretary of the Commission) remarked that although article 10(1) now required the beneficiary's bank to execute a payment order by the day after receipt at the latest, he doubted whether that had been the Commission's specific intention. Article 9(1) stipulated that the beneficiary's bank must place the funds at the disposal of the beneficiary in accordance with certain conditions, but it said nothing about the time for doing so. That omission had of course been deliberate, because it was an essential part of the policy underlying the Model Law that it should not go into the relationship between the beneficiary's bank and the beneficiary. While that policy had been breached on a number of occasions, and for very good reasons, one of the questions deemed to lie completely outside the purview of the Model Law was that of the moment when the credit had to be placed at the disposal of the beneficiary: that was a matter which lay at the heart of the relationship between the beneficiary and the beneficiary's bank. Consequently, while agreeing in great measure with the Chairman's analysis of the words before the Commission, he could not concur with his conclusions as to what they were intended to convey.

#### *Article 6 (continued)*

#### *Article 6(3) (A/CN.9/XXIV/CRP.7)*

61. Ms. KOSKELO (observer for Finland) asked how the text proposed for article 6(3) would affect the provisions concerning deemed acceptance in article 6(2). What did the extra day allowed for giving notice of rejection imply for the benefit that a bank might derive from the "float"? If a bank knew that it would always benefit from the "float" it would probably be inclined to ignore article 10(1) and rely on the rules governing deemed acceptance.

62. Mr. GREGORY (United Kingdom) pointed out that the Drafting Group had decided that the opening words of article 6(2)(a) as reproduced in the Working Group's text (A/CN.9/344) should be amended to read: "when the time for giving notice of rejection under paragraph (3) has elapsed without notice having been given".



63. The question of "float" was a substantive issue which he believed related to article 10(1)(*bis*). It did perhaps require further consideration but it should not affect article 6(3).

64. Mr. CRAWFORD (Canada) said that the question of "float" was a complicated subject. The Commission should, he believed, focus on the one aspect of it which the Model Law should address, namely the time value of funds in the banking system which were known by that name. As he understood it, the Commission had decided that a bank should not be permitted to derive benefit from the "float" by delaying execution of a payment order. That was the only point the Commission should deal with; the question whether an account showed a credit or a debit balance or whether it was interest-bearing was irrelevant.

65. Ms. KOSKELO (observer for Finland) suggested that it might be advisable to include a new provision in article 10 stipulating that a payment order must be executed in the event of deemed acceptance, so as to prevent banks from drawing benefit from the extra day granted for execution.

66. Mr. GREGORY (United Kingdom) agreed.

67. The CHAIRMAN suggested that the Drafting Group might prepare a text for that purpose.

68. Mr. SCHNEIDER (Germany) said that the allocation of "float" was a very important question which affected not only article 10 but other parts of the Model Law—the provisions regarding rejection of payment orders, for example. He wondered whether the proposed new provision should not be a separate article rather than simply an addition to article 10.

69. The CHAIRMAN pointed out that some of the provisions of article 16 already related to "float" and that a new proposal for parts of that article had been put forward in document A/CN.9/XXIV/CRP.10.

70. Ms. KOSKELO (observer for Finland) said she believed that, as far as rejection of a payment order was concerned, the matter would be covered by article 13(1).

71. Mr. MORAN BOVIO (Spain) shared the views expressed by the German representative. It seemed to him that the whole question of float required further investigation.

72. Mr. SCHNEIDER (Germany) pointed out that article 13 referred to the originator's bank. He reiterated his view that it would be best to group all provisions concerning the allocation of "float" in a single article.

*The meeting rose at 12.45 p.m.*

### Summary record of the 462nd meeting

Tuesday, 25 June 1991, at 2 p.m.

[A/CN.9/SR.462]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 2.12 p.m.*

#### International Payments: draft Model Law on International Credit Transfers (*continued*) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

##### Article 12 (*continued*)

1. The CHAIRMAN said that the Australian delegation had provided a new wording for the last five words of the article, which was acceptable to the United States delegation. The paragraph would accordingly end with the words: "... in completing the banking procedures of the credit transfer."

2. If he heard no objection, he would take it that the Commission wished to approve article 12, as thus amended.

3. *It was so decided.*

##### Article 6 (*continued*)

##### Article 6(4) (*continued*) (A/CN.9/XXIV/CRP.7)

4. Mr. GREGORY (United Kingdom) said that the words "is cancelled", in the first line of the ad hoc drafting group's proposal (A/CN.9/XXIV/CRP.7), should be revised to read "ceases to have effect".

5. Mr. VASSEUR (Banking Federation of the European Community) said that, on the basis of the French version of the proposal, he could see no reason for the change.

6. The CHAIRMAN explained that, in other parts of the Model Law, reference was made to revocation and cancellation. The change was intended to avoid confusion.

7. Mr. FELSENFELD (United States of America) said that he had a small comment on the language of article 6(4), as it appeared in A/CN.9/XXIV/CRP.7. He understood that some further changes had been made by the ad hoc drafting group and would assume that they were being taken into account.

8. Mr. GREGORY (United Kingdom) said that, while the reference to the period being determined by law, agreement or rule of a fund's transfer system seemed to embody the Commission's thinking, the second sentence of the paragraph seemed to call for a policy decision by the Commission.

9. Mr. BERGSTEN (Secretary of the Commission) said that, when the words "before the expiry of any period determined by law" had been discussed, it had been assumed that no one knew of any law other than the Model Law and, possibly, article 4A of the Uniform Commercial Code which would cause the payment order to be cancelled after such a short period of time. If there was no such similar law, a statute of limitation or prescription would apply but the period would run not for days but for years. Variation by agreement was already dealt with in article 3.

10. It had been acknowledged in the drafting group that the question of the rule of a funds transfer system was somewhat different, but the group had not been sure exactly how it went



beyond an agreement. In any case, there had been a feeling that the presence of the words "law, agreement" etc. served no useful purpose. The drafting group had therefore agreed on some further changes, whereby the new proposed text would read "A payment order is cancelled if it is neither accepted nor rejected under this article on the fifth banking day before the close of business following the latest day the order was required to be executed." The text in question would shortly appear in document A/CN.9/XXIV/CRP.5/Add.2.

11. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve the text of article 6(4), as orally revised by the Secretary, on behalf of the drafting group.

12. *It was so decided.*

#### Article 7 (continued)

#### Article 7(5) (continued) (A/CN.9/XXIV/CRP.8)

13. Mr. GREGORY (United Kingdom) said that the ad hoc drafting group's discussions had not gone beyond the first sentence of the paragraph, since the remainder could not be finally drafted until points of policy had been resolved.

14. Mr. CRAWFORD (Canada) said he noted the use of the lengthy expression "the latest day the order was required to be executed . . ." in articles 3 and 4. He thought it would be needed again in article 7(5), since a reference merely to the time required by article 10 would be incomplete.

15. What the Commission would have to face was the fact that it had created a period during which execution, though proper, was not required unless the bank decided to accept the payment order. He wondered whether there would be any objection to asking the Drafting Group to find an expression such as "execution period", complete with a definition, to simplify the communication of a basically very simple idea.

16. Mr. GREGORY (United Kingdom) said he doubted whether the plenary meeting was the appropriate place to discuss such technical drafting questions. On the point raised by the Canadian representative, however, he pointed out that the expression in the third line of the proposed text: "time required under article 10" was a reference to article 10(2) and not to article 10(1).

17. Mr. SCHNEIDER (Germany) said he would like some clarification of the effect of the change made to article 7(5) on detection. In particular, he wished to know what would happen if a bank acted negligently and did not detect inconsistency.

18. The CHAIRMAN said that the change had come about because, when the notion of detection had been introduced by the delegation of the United Kingdom in article 7(3), subsequently deleted, the word "detects" was held to entail no obligation. The discussion and subsequent drafting had therefore proceeded on the basis that failure to detect was not negligence, and it had been agreed that the same technique should be used with regard to article 7(4) and (5).

19. He noted that there was general agreement on the first sentence of article 7(5), as drafted by the United Kingdom representative, and asked the Commission whether, since the first sentence of article 9(4) was substantially the same, he might take it that that, too, was approved.

20. *It was so decided.*

21. Mr. FELSENFELD (United States of America) said that the desire to accommodate varying views among the delegations on what the Law should provide had led to one compromise after another.

22. From the outset, his delegation had been concerned at a tendency to concentrate unduly on the concept of consumer-related and lower-speed transfers, entailing higher costs, rather than on the type of high-speed, low-cost, electronic transfers that had come into general use. It firmly believed that the burden on receiving banks should be kept as low as possible so as to enable them to execute high-speed, low-cost transfers for the small charges that had become so acceptable and agreeable to the business community. Every burden on the receiving bank necessarily slowed down transactions and increased costs.

23. The first sentence of article 7(5), as redrafted, placed an obligation on the receiving bank to give notice of an inconsistency if it detected one. That in itself was already a compromise but it was a compromise with which his delegation could live. It would not unduly upset high-speed transfers, although it would tend in that direction. Nevertheless, violation of the obligation to give notice carried a penalty, and he was sure that that would give rise to further discussion later on.

24. Subject to more thorough study, he thought agreement might be reached on the third and fourth sentences; the second sentence went too far, however, and was completely unacceptable to his delegation.

25. Mr. DE BOER (Netherlands) suggested that the objections of the United States delegation could be met by retaining the first sentence only. The aim should be to combine consistency with practicality. It should be remembered that an error, including a discrepancy, might be dealt with under article 4.

26. The CHAIRMAN said that the last sentence of article 7(5) was in keeping with a substantive decision of the Commission, which clearly indicated that the detection element would not extend to fraud and thus would take care also of the concern voiced by the representative of Germany.

27. Mr. CRAWFORD (Canada) said that, in effect, the second sentence of the paragraph allowed a person executing a mandate to choose which part of that mandate he would execute, namely, whether to pay the sum recorded in figures or in words, and thus to pay a greater or lesser amount. The sentence thus offered too little guidance, but he had difficulty in agreeing with the United States delegation that it should be deleted because of its unsuitability for high-speed transfers.

28. Mr. GREGORY (United Kingdom) said that the third and fourth sentences might be sufficient to take care of the problem.

29. Mr. SCHNEIDER (Germany) said that his delegation had a fundamental objection to the last sentence, which failed to distinguish between degrees of inconsistency, some of which might be glaring while others might be much harder to detect. The sentence should either be deleted or reformulated.

30. Mr. DUCHEK (observer for Austria) said that he understood the hesitation expressed by the representative of Germany and the arguments put forward by the Canadian representative. In his view, the current text of article 7(5) would create a very unsatisfactory regime.

31. The CHAIRMAN said that it had been agreed at a previous meeting not to touch upon the question of responsibility for detection. Article 7(5) related merely to the fact of the detection, not to the scale of the inconsistency.



32. Mr. FELSENFELD (United States of America) said that the proposed text of the last sentence of the article was of comparatively recent date, and its implications had not been considered in depth. He suggested that it should be deleted.

33. The CHAIRMAN suggested that the best solution might be to adopt article 7(5), as contained in document A/CN.9/XXIV/CRP.8, the second and fourth sentences being deleted.

34. *It was so decided.*

*Article 9 (continued)*

*Article 9(4) (continued) (A/CN.9/XXIV/CRP.9)*

35. Ms. KOSKELO (observer for Finland) said that her delegation had some difficulty with the last sentence of article 9(4) in the text proposed by the United Kingdom representative, since it was not consistent with paragraph 1 of the article, to which it referred. She accordingly suggested that it be deleted.

36. Mr. FELSENFELD (United States of America) and Mr. DE BOER (Netherlands) agreed with the suggestion by the observer for Finland that the last sentence of the paragraph should be deleted.

37. Mr. DUCHEK (observer for Austria) said that the need to make progress in adopting the draft articles should not preclude a thoroughgoing discussion of their substance, particularly since the Commission was unlikely to complete its work at the current session.

38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 9(4), as contained in document A/CN.9/XXIV/CRP.9, the last sentence being deleted.

39. *It was so decided.*

*Article 11 (continued)*

*Article 11(6)(bis) (continued)*

40. Mr. CONOBOY (United Kingdom) said that, with the help of the United States delegation, he had drafted a revision of the wording for a new article 11(6)(bis) originally proposed by his Government (A/CN.9/347, p. 61). The new paragraph would read:

"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 rules of a funds transfer system."

41. The proposed wording could apply equally well to article 13, perhaps with minor drafting changes to reflect the context.

42. Mr. SCHNEIDER (Germany) said he wondered why, in the United Kingdom proposal, the originator was not given a direct claim on the intermediary bank so that he would have the right to bring an action against the intermediary in cases of insolvency. Since all were agreed that the funds should go back to the originator, the latter should have a direct claim.

43. Another reason for including such a provision was to start the process of defining the term "deposit", in connection with the insurance deposit scheme, discussion of which would shortly begin in another forum.

44. Mr. ADEDIRAN (Nigeria) said he supported the German proposal.

45. Mr. FELSENFELD (United States of America) said he also supported that proposal. In a bankruptcy situation, a skip payment would be facilitated if there could be a direct claim by the originator.

46. The CHAIRMAN suggested that the representatives of Germany, the United States and the United Kingdom should be invited to draft a text for addition to the one orally proposed by the representative of the United Kingdom.

47. *It was so agreed.*

48. The CHAIRMAN invited comments on article 11(8). The Drafting Group should be asked to deal with the drafting proposals that had been made regarding that paragraph. Since, however, according to the definitions, "sender" included "originator", the words "or the originator" might be deleted.

49. Mr. BERGSTEN (Secretary of the Commission) said that, while it was true that the originator was a sender, the word "originator" in article 11(8) had a different connotation. If the sender involved was the sender between the second and third intermediary banks, the originator died before completion of the credit transfer, and all the banks implementing the credit transfer were agents or sub-agents of the originator, the agency would die when the principal died. The word "originator" should therefore be retained, since it would make it clear that death, bankruptcy or incapacity did not terminate any authority, however the relationship between an intermediary bank and the originator was characterized.

50. The CHAIRMAN withdrew his suggestion.

51. Mr. CRAWFORD (Canada) said that that interpretation would be reinforced by amending the second line of the paragraph to read "... operate to revoke a credit transfer or payment order".

52. Mr. GREGORY (United Kingdom) said he was not sure that the concept of revoking a credit transfer existed.

53. Mr. VASSEUR (Banking Federation of the European Community) said that the term "revoke" in paragraph 8 was an inappropriate one, since article 11 envisaged revocation as an initiative on the part of the sender. No initiative was involved in death, bankruptcy or incapacity, and paragraph 8 should therefore refer to "expiry".

54. Referring to the definition of the word "bankruptcy" in the second sentence of the paragraph, he suggested that, since entities other than individuals and companies could be declared bankrupt, the wording ought to be "The word 'bankruptcy' includes all forms of insolvency whether they affect legal or physical persons".

55. The CHAIRMAN said that he thought that the meaning of "revoke" was clear and that the first sentence of paragraph 8 did not need to be changed. The second point made by the observer for the Banking Federation of the European Community would be considered by the Drafting Group.

56. *Article 11(8) was approved, subject to possible amendment by the Drafting Group.*

57. The CHAIRMAN invited comments on article 11(9).



58. Ms. KOSKELO (observer for Finland) said she considered that the paragraph in question was too broadly worded. Its application should be limited to article 11(1) and (2).

59. Mr. CRAWFORD (Canada) said that the concept of branches as separate banks ought to apply to paragraphs 5 and 6 of the article also.

60. Mr. GREGORY (United Kingdom) said he fully agreed. He wondered, however, if the paragraph might not be acceptable as it stood on the understanding—already expressed—that the reference in the Model Law to branches and separate offices of a bank was not intended to convey any implication concerning the relationship between a branch and its head office, and that any question of financial liability that might exist between them was not of concern to the Model Law.

61. *Article 11(9) was approved.*

#### *Article 17*

62. The CHAIRMAN invited the members of the Commission to comment on paragraph 1 of article 17 and reminded them of the fact that the first sentence of the paragraph constituted the basis on which the Commission had discussed other issues.

63. The Commission would have to decide whether or not to retain the second sentence, which should be considered in the light of article 9(1).

64. Ms. KOSKELO (observer for Finland) said that it should be made clear in the first sentence that the transaction was completed when the beneficiary's bank accepted a payment order for the benefit of the beneficiary designated in the originator's payment order.

65. The CHAIRMAN recalled that, in the discussion on articles 13 and 14, he had indicated that the Commission would proceed on the assumption that, whether or not there was an error in transmission, the time of acceptance was when a certain sum was accepted by the beneficiary's bank.

66. Mr. ADEDIRAN (Nigeria) said he agreed with the observer for Finland. There were situations in which a credit transfer might have been completed in accordance with article 17(1), but was not completed from the point of view of the originator. Wording should therefore be included to make it clear that a transfer was not taken to be completed until it was completed in accordance with the content of the payment order sent by the originator.

67. Ms. KOSKELO (observer for Finland) said that her suggestion was designed for the situation in which, through some mistake during the credit transfer, the payment order which reached the beneficiary's bank indicated a beneficiary other than the one designated by the originator. In that case, the transfer should not be regarded as having been completed and article 13 should also apply.

68. Mr. LIM (Singapore) said that the word "completion" could mean different things to different people. He had initially thought that the word meant the discharge of the obligation. However, as things stood, he realized that it related only to the credit transfer itself and not to the discharge of the obligations of the parties in the credit transfer. That was a point that ought to be made clear in the article, lest it be thought that it also meant that all obligations had been discharged.

69. The CHAIRMAN said that paragraph 1 of article 17 was concerned with a credit transfer while paragraph 2 of the article referred to the discharge of an obligation.

70. Mr. YIN Tieou (China) said that a credit transfer originated with the originator and ended when the beneficiary received the funds. The wording of article 17(1) was not consistent with that definition, however, because it did not include the entire process. His delegation therefore supported the views of the representative of Nigeria and the observer for Finland.

71. Mr. AL-NASSER (observer for Saudi Arabia), referring to the point raised by the observer for Finland, said that, in his experience, a credit transfer was always made by name.

72. Mr. FELSENFELD (United States of America), referring to the Finnish observer's statement, said he agreed that, where the payment order accepted by the beneficiary's bank was not to the credit of the beneficiary designated by the originator, the transfer should not be regarded as complete.

73. With respect to the point made by the representative of Nigeria, he said that, if the payment order was for a lesser amount than that specified by the originator, the credit transfer should be regarded as complete to the extent of the payment. In that regard, a sentence could be included in paragraph 1 stating that a credit transfer was completed to the extent that payment had been made.

74. With regard to the statement by the representative of Singapore, he wished to point out that paragraph 1 dealt only with the completion by the banking system of the credit transfer. Paragraph 2 concerned the discharge of obligation.

75. In response to the point raised by the representative of Singapore, Mr. CRAWFORD (Canada) said that, according to the Secretariat's comments (A/CN.9/346, p. 90), the credit transfer was completed when the beneficiary's bank accepted the payment order. The concept of completion meant that the payment order had reached the proper place at the proper time, but not necessarily in the proper amount.

76. In order to make it clear that the payment order had reached the right place and was also in the proper amount, a phrase such as that appearing in article 7(2) "consistent with the contents of the payment order" might, perhaps, be included in the paragraph under consideration. It might also be possible to delete the second sentence of article 17(1), which had nothing to do with the issue of time.

77. Mr. ABASCAL ZAMORA (Mexico) said that the purpose of article 17 was to establish the moment at which the credit transfer was completed and the transfer process ended. There was no reason for confusion with regard to the discharge of obligation. Paragraph 2 made express reference to those cases where the credit transfer was for the purpose of discharging an obligation of the originator to the beneficiary that could be discharged by a credit transfer to the account indicated by the originator.

78. The applicable law determined the moment of payment, which was when the beneficiary's bank accepted the payment order. He therefore saw no need to introduce any substantive changes into the article, and thought that any difficulties could be dealt with by the Drafting Group.

79. Mr. AL-NASSER (observer for Saudi Arabia) said he thought that the point raised by the representative of Singapore could be met by replacing the second sentence of paragraph 1 by



the following text: "When the transfer has been completed to the beneficiary's bank, the latter is indebted to the beneficiary to the extent of the value of the payment accepted."

80. Mr. GREGORY (United Kingdom) said he was not certain that the Saudi Arabian suggestion did not introduce an entirely new concept into the article.

81. He had some misgivings about amending article 17, as suggested by the Finnish observer, because he was not sure how the change related to the concept of acceptance by the beneficiary's bank. In that connection, he said that the beneficiary's bank was obligated, under article 9(1), once a payment order received had been accepted, to place the funds at the disposal of the beneficiary while, under article 17(1), it became indebted to the beneficiary. Both those cases must, of course, refer to the right beneficiary, the one specified in the payment order.

82. Upon acceptance by the beneficiary's bank, as the Law currently stood, the beneficiary's bank then owed the money to the correct beneficiary and the ways in which the bank could accept the payment order were set out in articles 8(1)(b) and 8(1)(c). Neither of those provisions had anything to do with crediting an account or actually handling the money, elements that would have to follow acceptance.

83. If, after acceptance, the bank then credited the wrong beneficiary, the real beneficiary was entitled to the money under the law governing the relationship between the beneficiary and his bank. If the Commission said that the transfer was not

complete until the bank had actually credited the right beneficiary, that would give rise to difficulties with regard to other provisions of the Model Law, where reliance was placed on the concept of the transfer ending upon acceptance.

84. All in all, he thought that the Commission would have to be very careful if it decided to proceed along the lines suggested by the observer for Finland.

85. Mr. FELSENFELD (United States of America) said he thought that, as it was currently drafted, the Model Law was unworkable. It should be amended along the lines of the Nigerian and Finnish suggestions.

86. In the case of article 17, the provision would be greatly improved if it was decided to include wording to the effect that the beneficiary must be the beneficiary originally designated, and that the transfer was to the extent of the payment received.

87. With respect to the point raised by the representative of Singapore concerning the difficulties connected with the word "completion", he thought that, when paragraph 1 of article 17 was read in conjunction with paragraph 2, it became clear that it referred to the duties of the banking system and that discharge referred to quite another matter. However, it might be possible to meet the concern expressed by amending paragraph 1 to read: "A credit transfer is completed when the funds are placed at the disposal of the beneficiary."

*The meeting rose at 5.15 p.m.*

### Summary record (partial)\* of the 465th meeting

Friday, 28 June 1991, at 9.30 a.m.

[A/CN.9/SR.465\*\*]

Chairman: Mr. SONO (Japan)

*The meeting was called to order at 10.05 a.m.*

**International Payments: draft Model Law on International Credit Transfers (continued)** (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

*Report of the Drafting Group* (A/CN.9/XXIV/CRP.12)

1. The CHAIRMAN congratulated the Drafting Group on the excellent work it had done in reflecting the Commission's discussions and incorporating the relevant policy decisions in its report.

2. Of the eighteen articles presented in the draft Model Law, the Commission had completed its consideration of articles 1 to 15. It had held a preliminary discussion on article 17 and had referred frequently to article 16. He felt sure that the work done at the current session would lay a sound foundation for the adoption of the Model Law at the next session.

3. He believed that there was no need for the Commission to adopt the report of the Drafting Group article by article. He

suggested that it should simply take note of the report, mention that some technical adjustments might need to be made to it and, possibly, include the proposal concerning article 16 submitted by the United Kingdom and Finland in document A/CN.9/XXIV/CRP.10 in the report of the Commission for consideration at the next session.

4. Ms. JAMETTI GREINER (observer for Switzerland) said that, in general, she supported the Chairman's suggestion concerning the Drafting Group's report. She believed, however, that there were changes other than technical modifications that might be needed and that many of the points raised in document A/CN.9/XXIV/CRP.10 required debate.

5. The CHAIRMAN said that there was no reason why the Commission should not discuss points of substance at its following session. His suggestion that document A/CN.9/XXIV/CRP.10 be included in the report of the Commission was based on the belief that it would be unfortunate to lose sight of it.

6. Ms. JAMETTI GREINER (observer for Switzerland) said she was not certain that it was desirable to include that proposal, which concerned a crucial article of the Law, in the report of the Commission. She failed to see why it should be treated differently from other proposals which had not been discussed.

\*No summary record was prepared for the rest of the meeting.

\*\*No summary records were prepared for the 463rd and 464th meetings.



7. Mr. ABASCAL ZAMORA (Mexico) said he shared the misgivings of the previous speaker regarding the advisability of including the proposal in the report of the Commission, for that might suggest that the Commission approved it in principle. He saw no reason why its sponsors should not resubmit it to the Commission at the following session. His own delegation had also submitted a proposal which the Commission had been unable to discuss.

8. Mr. SOLIMAN (Egypt) said he thought that the Commission should take note of the Drafting Group's report and thank the Group for its excellent work.

9. Mr. DUCHEK (observer for Austria) said that, while he agreed with the previous speaker, he also believed that it would be advisable to include document A/CN.9/XXIV/CRP.10 in the report of the Commission.

10. Mr. RENGGER (Germany) said that, while supporting the Chairman's suggestion in general, he thought that, if the proposal by the United Kingdom and Finland was included in the report, the Mexican proposal should be included in it as well.

11. Mr. GRIFFITH (observer for Australia) suggested as an alternative that an amended version of document A/CN.9/XXIV/CRP.10 might be issued and made available to delegations before the next session of the Commission.

12. Ms. BUURE-HAGGLUND (observer for Finland) said she understood that, in general, the Commission agreed that the original text of article 16 was obsolete. It would seem that the only way of showing the degree of progress made in considering article 16 was to incorporate the text of document A/CN.9/XXIV/CRP.10 into the report of the Commission.

13. Mr. MORAN-BOVIO (Spain) said that it would hardly be logical to put all proposals, those that had been discussed and those that had not been discussed, on an equal footing. He therefore proposed that those that had not been discussed should be retained by the delegations that had submitted them and be presented to the next session.

14. Mr. FUJISHITA (Japan) said that it was not advisable to include proposals that had not been discussed in the report of the

current session. Furthermore, since several proposals had not been discussed, it would be invidious to single out any single one of them for such inclusion.

15. Mr. LIM (Singapore) said that the joint proposal of the United Kingdom and Finland should be included in the report of the Commission, with a statement that the Commission had not had time to discuss it. The proposals of other delegations, that were similarly pending, should also be incorporated.

16. Mr. BERGSTEN (Secretary of the Commission) said that a form of words had been prepared in advance by the Secretariat to take into account the eventuality that such a point might arise. It was contained in document A/CN.9/XXIV/CRP.1/Add.17, page 3, paragraph 11.

17. Mr. BURMAN (United States of America) said that, while he welcomed the Secretary's suggestion, he thought that a clear distinction should be made between those articles that had been discussed and those that had not been discussed.

18. Incidentally, instead of the revised text being presented in a separate annex, it should be presented together with the original text.

19. Mr. BERGSTEN (Secretary of the Commission) said that such a proposal would raise technical problems.

20. Mr. DUCHEK (observer for Austria) said that articles that had been discussed and those that had not been discussed could, perhaps, be incorporated in a single annex, with a clear indication of the distinction between them.

21. The CHAIRMAN asked the Commission whether it wished to indicate in its report that certain proposals concerning article 16 had not been discussed by the Commission due to lack of time; that indication, together with the proposed texts, would be designed as a purely factual statement of what had occurred during the session.

22. *It was so agreed.*

*The discussion covered in the summary record ended at 11.05 a.m.*

### III. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL: NOTE BY THE SECRETARIAT (A/CN.9/369)

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—Fundamentos de la responsabilidad / J. D. Ray; J. Roca Marcos, relator, p. 128-129.

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## IV. CHECK-LIST OF UNCITRAL DOCUMENTS

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A/CN.9/343	Report of the Working Group on the New International Economic Order on the work of its twelfth session	Part two, II, A
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A/CN.9/351	Training and assistance: note by the Secretariat	Part two, VII
A/CN.9/352	Current activities of international organizations related to harmonization and unification of international trade law: note by the Secretariat	Part two, V, A
A/CN.9/353	Status of conventions: note by the Secretariat	Part two, VI
A/CN.9/354	Bibliography of recent writings related to the work of UNCITRAL: note by the Secretariat	Reproduced in 1990 Yearbook, Part three, I



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A/CN.9/XXIV/CRP.2	Proposal of Finland and the United Kingdom of Great Britain and Northern Ireland: articles 2 and 2 <i>bis</i>	Not reproduced
A/CN.9/XXIV/CRP.3	Proposal of Ad Hoc Drafting Group of Finland, Singapore, the United Kingdom of Great Britain and Northern Ireland and the United States of America: article 1	Not reproduced
A/CN.9/XXIV/CRP.4	Text adopted by the Commission: article 2(n)	Not reproduced
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A/CN.9/XXIV/CRP.8	Proposal by the United Kingdom of Great Britain and Northern Ireland: article 7(5)	Not reproduced
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A/CN.9/XXIV/CRP.10	Proposal by the United Kingdom of Great Britain and Northern Ireland: article 16	Not reproduced
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**B. List of documents before the Working Group on International Payments at its twenty-first session**

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A/CN.9/WG.IV/WP.47	International credit transfers: proposal of the United States of America: note by the Secretariat	Part two, I, D, 2

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A/CN.9/WG.V/WP.28	Procurement: second draft of articles 1 to 35 of Model Law on Procurement: report of the Secretary-General	Part two, II, B, 2
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A/CN.9/WG.II/WP.71	Independent guarantees and stand-by letters of credit: discussion of further issues of a uniform law: conflict of laws and jurisdiction: note by the Secretariat	Part two, III, D, 2
<b>2. Restricted series</b>		
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## V. LIST OF UNCITRAL DOCUMENTS REPRODUCED IN THE PREVIOUS VOLUMES OF THE YEARBOOK

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  - (b) Working Group II: International Sale of Goods (1968 to 1978: first to eleventh session; International Contract Practices (1981 to 1990: fourteenth to twenty-third session);
  - (c) Working Group III: International Legislation on Shipping;
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